

**Statement of  
Secretary William S. Cohen**

**before the**

**Committee on Science, Space and Technology  
U.S. House of Representatives**

**November 5, 2015**

Good morning, Chairman Smith, Ranking Member Johnson, and distinguished Members and staff of the Committee. Thank you for inviting me to present my views on my recently completed independent review of the EPA's decision-making process regarding potential mining in southwest Alaska's Bristol Bay watershed. This issue has raised important questions of Congressional intent and the EPA's decision making process that are fully worthy of Congressional oversight.

Protection of the environment is a responsibility that I take very seriously. Like Senator Muskie, the primary sponsor of the Clean Water Act, I represented Maine in Congress. Being from Maine, the balance between protecting the environment and permitting responsible development received considerable attention during my years as a member of the House and Senate. And, as the Chairman or Ranking

Member of the Subcommittee on Oversight of Government

Management, part of the Senate Governmental Affairs Committee, for my 18 years in the Senate, I focused much time and energy, as you are doing now, on seeking to ensure that the Executive Branch agencies operated in a fair and responsible manner.

In the fall of 2014, I was approached by the Pebble Partnership to review EPA's actions in connection with its evaluation of potential mining in southwest Alaska's Bristol Bay watershed. The Pebble Partnership holds mineral claims to lands owned by the State of Alaska in the Bristol Bay watershed. This area contains one of the largest known undeveloped copper deposits in the world, and the Pebble Partnership has been exploring the development of a mine there for more than a decade. The area, which is nearly pristine and sparsely populated, is also home to one of the most prolific salmon runs in the world. The commercial salmon industry dominates the private sector economy of the Bristol Bay region, and Alaska Natives who reside there have maintained a salmon-centered culture and subsistence-based lifestyle for

thousands of years. In July 2014, EPA proposed substantial limits on development in the Pebble Deposit Area.

The Pebble Partnership has expressed concern about the fairness of EPA's decision-making process and wanted an objective party to examine that concern. The Pebble Partnership asked me to review EPA's actions through the lens of how Cabinet-level agencies should make decisions on important public policy questions, given my experience in both the Legislative and Executive branches of government. I agreed to undertake a review of EPA's actions, assisted by my staff at The Cohen Group and the law firm DLA Piper. The lead counsel on the review, Charles Scheeler, is joining me here today. I advised the Pebble Partnership that I would not try to determine whether a mine should be built; such a determination would require engineering and scientific expertise beyond my capabilities. Nor would I comment on the legality of EPA's preemptive use of Section 404(c); that is a question for the courts. Let me emphasize this point, as it has been mischaracterized in several opinion pieces about my report. My report draws no conclusions as to the legality of EPA's actions – one way or

the other. But I did feel qualified to review the process by which EPA assessed, and proposed restrictions to reduce, the environmental risks associated with potential mining in the Bristol Bay watershed.

I undertook the review on conditions of complete independence. I followed the facts wherever they led, and the conclusions I drew were mine alone. The Pebble Partnership had no rights to edit or censor my views. The Partnership compensated my team according to commercially standard terms, and no portion of our compensation was contingent upon the result of the review or the content of the report.

To produce the most thorough and balanced review, we interviewed more than 60 people, including three former EPA administrators. The people interviewed represented all points of view on EPA's actions (EPA declined my request to make current personnel available for interviews, citing ongoing Congressional and Inspector General inquiries and pending litigation.) We reviewed thousands of documents from EPA, other federal agencies, the State of Alaska, Congressional committees, the Pebble Partnership, and other sources. The decision about whether mining should occur in this area, as well as

the process of making such a decision, has been highly controversial and has generated intense passions on all sides. The controversy has prompted an Inspector General's investigation, this and other Congressional hearings, and substantial litigation.

I will submit my Executive Summary and my full report for the Committee's hearing record, but here is a synopsis of what I found during the review:

- The issue of whether mining should occur in the Bristol Bay watershed is of the utmost importance to the State of Alaska's environment, economy, people, and fish and wildlife;
- Because, to date, the Pebble Partnership has not submitted a permit application, EPA relied on hypothetical scenarios for its Bristol Bay Watershed Assessment ("BBWA") rather than the characteristics of a mine that is actually proposed to be built and maintained;
- EPA failed to address important considerations that would be included in the Permit/NEPA Process, including meaningful participation by other state and federal government agencies, mitigation and controls as proposed by the developer, and an array of public interest factors;
- The Permit/NEPA Process has been used for decades and has been widely endorsed by environmental groups;
- EPA relied upon the BBWA in its Proposed Determination but acknowledged that there were significant gaps in its assessment

and that it was not designed to duplicate or replace the Permit/NEPA Process; and

- EPA's unprecedented, preemptive use of Section 404(c) inhibited the involvement of two key participants: the Army Corps of Engineers and the State of Alaska.

These observations informed my conclusion that EPA's application of Section 404(c) prior to the filing of a permit application was not fair to all stakeholders. I found that:

**The fairest and most appropriate process to evaluate possible development in the Pebble Deposit Area would use the established regulatory Permit/NEPA Process to assess a mine permit application, rather than using an assessment based upon the hypothetical mining scenarios described in the BBWA as the basis for imposing potentially prohibitive restrictions on future mines.**

The Permit/NEPA Process is more comprehensive than the preemptive Section 404(c) process employed here. EPA conceded in comments to peer reviewers that there were gaps in its assessment that would be addressed during a Permit/NEPA Process.

Here, as the Agency acknowledges, EPA initiated Section 404(c) in an unprecedented manner. EPA's use of Section 404(c) before a permit filing exacerbated the shortcomings of the BBWA noted by

several peer reviewers, the State of Alaska, and the Pebble Partnership: most notably, the use of hypothetical assumptions that may not accurately or fairly represent an actual project; and the failure to take into account mitigation and control techniques a developer might propose. Stakeholders disagree about the legality of EPA's preemptive use of Section 404(c).

An environmental impact assessment is bound to provide more accurate information if it analyzes a mine that will be built in accordance with the developer's plans, rather than a hypothetical mine plan which even EPA acknowledges is likely to be different from a developer-submitted plan. This project is too important, for all stakeholders, to pilot a new, untested decision-making process. The fairest approach is to use the well-established Permit/NEPA Process, and I could find no valid reason why that process was not used.

During the course of my review, certain statements and actions by EPA personnel raised questions about the integrity of the process EPA used here:

- Was the process orchestrated to reach a predetermined outcome?

- Had there been inappropriately close relationships with anti-mine advocates that influenced EPA's process?
- Was EPA candid about its decision-making process?

Our team looked at all of the information available to date relating to these issues.

I believe the information unearthed to date raises serious questions about EPA's actions and merits a careful investigation by those who have the subpoena power necessary to develop a complete record. Government oversight by the proper authorities must play an active role in ensuring that agencies do not engage in preordained decision-making. Thus, I urge the Congress to continue to explore these questions, which might further illuminate EPA's motives and better determine whether EPA met its core obligations of government service and accountability.

I also urge policymakers to consider requiring the use of the Permit/NEPA Process. This process, which entails compliance with NEPA and other regulatory requirements, an environmental impact statement, and input from EPA, other relevant agencies, and the State of Alaska, will supply the gaps in information which the BBWA left



outstanding. This decision is too important to be made with anything less than the best and most comprehensive information available.

Congress also may wish to review EPA's apparent effort to use Section 404(c) to accomplish national watershed planning. EPA personnel stated in a document prepared for a briefing of the Administrator that a Section 404(c) action could "serve as a model of proactive watershed planning." If it is EPA's intention to establish such a "model," legislative oversight may be appropriate to assess whether such action is within EPA's mandate and the implications of such a policy.

Mr. Chairman, thank you for providing me the opportunity to brief the Committee on the results of my independent review on this important question.