



**Analysis Of The Office Of The Inspector General's  
Report Concerning The United States Environmental  
Protection Agency's Assessment Of  
The Bristol Bay Watershed**

THE  
COHEN  
GROUP

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## **I. INTRODUCTION**

On October 6, 2015, I released the report of my independent review of the United States Environmental Protection Agency's actions in connection with its evaluation of potential mining in Alaska's Bristol Bay watershed (the "Cohen Report").<sup>1</sup> I concluded that "EPA's application of Section 404(c) prior to the filing of a permit application was not fair to all stakeholders" and raised a number of concerns about certain EPA statements and actions observed during my review that called into question the integrity of the process EPA used. I urged EPA's Inspector General ("IG") and Congress to continue to probe the underlying basis for the determination made by EPA. On January 13, 2016, the Office of the Inspector General released its report concerning whether EPA "adhered to laws, regulations, policies and procedures" in developing the Bristol Bay Watershed Assessment (the "BBWA").

On February 2, 2016, the Chairman of the United States House of Representatives Committee on Science, Space, and Technology asked me to provide my analysis regarding the IG Report and, in particular, to address the scope of the IG Report and any limitations on that scope; the areas requiring further review; and conclusions in the IG Report which may be diminished by countervailing facts. Assisted by my staff at The Cohen Group and the law firm DLA Piper LLP, I reviewed the IG Report and prepared these observations in response to the Chairman's request. This analysis is not exhaustive but identifies certain aspects of the IG Report which, in our view, raise additional questions and merit continued inquiry by Congress.

## **II. THE IG'S REPORT DOES NOT ADDRESS SECRETARY COHEN'S CONCLUSION THAT THE FAIREST PROCESS TO EVALUATE POSSIBLE DEVELOPMENT IN THE PEBBLE DEPOSIT AREA WOULD BE TO USE THE ESTABLISHED REGULATORY PERMIT/NEPA PROCESS**

In its review, the IG "sought to determine whether the EPA adhered to laws, regulations, policies and procedures in developing its assessment of potential mining impacts on ecosystems

in Bristol Bay, Alaska” with a focus on “the reason the EPA conducted the assessment and whether there was any evidence that the EPA conducted the assessment in a biased manner or it had a predetermined outcome,” as well as whether EPA followed policies and procedures applicable to the development of ecological risk assessments and their peer review.<sup>2</sup> This scope was consistent with its initial mandate outlined in May, 2014.<sup>3</sup>

The IG’s examination was narrower in scope than the review my team and I conducted and addressed only one component of the broader process by which EPA determined it would propose restrictions on mining in the Pebble Deposit Area.<sup>4</sup> The IG report did not address the fairness of EPA’s novel application of Section 404(c) and thus did not provide any information that directly addresses the Cohen Report’s findings. My central finding is that “[t]he 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.”<sup>5</sup> The IG did not address this finding.

### **III. THE SOURCES UTILIZED BY THE IG**

The IG reviewed a number of “criteria documents,” including the BBWA, the relevant Clean Water Act sections, ecological risk assessment guidance materials, peer review policies, information quality guidance, tribal policies and procedures, ethics and scientific integrity guidance, relevant prior OIG reports, testimony before House Committees, and materials from the Pebble Partnership.<sup>6</sup> The IG also interviewed EPA staff and managers, BBWA peer reviewers, Alaska Native tribal representatives and legal counsel for the Petitioning Tribes, members of the Intergovernmental Technical Team, the Alaska Attorney General and Assistant

Attorney General, and the Pebble Partnership's CEO.<sup>7</sup> However, the IG acknowledged certain "limitations" in its review.<sup>8</sup>

#### **A. Document Custodians for the IG Report**

The IG limited its review of email records to searches of three EPA custodians; namely Nancy Stoner (former acting Assistant Administrator for Water), Dennis McLerran (Region 10 Regional Administrator), and Phil North (a retired wetlands ecologist based in EPA Region 10's Alaska Operations Office, Aquatic Resources Unit). The collected documents included only "information available at the time of retrieval. If an employee had deleted emails prior to [the IG] retrieving the database, those deleted emails were not available."<sup>9</sup> There is no indication that the IG reviewed the email or electronic records of other EPA personnel involved in or knowledgeable of the BBWA or those likely to have been involved in the decision to invoke Section 404(c) in advance of the filing of a permit application, including, most notably, the emails of the EPA Administrator who had ultimate decision making authority.<sup>10</sup>

The IG acknowledged a gap in the records of one of its custodial sources—those of Phil North. As discussed at length in the Cohen Report, Mr. North was a central player in EPA's work relating to the Bristol Bay watershed. The IG did not have access to Mr. North's EPA work-related emails for a 25-month period that overlapped with the 52-month time period of the IG's document review or to Mr. North's personal email records.<sup>11</sup> There is little discussion in the IG Report about why there are 25 months of missing emails and what, if any, attempts were made to restore Mr. North's missing government records.

After discovering facts that suggested Mr. North had misused his position, the IG issued a subpoena to Mr. North's attorney, citing issues with locating Mr. North; Mr. North's counsel refused service of that subpoena.<sup>12</sup> As earlier reported, Mr. North appears to have left the United

States.<sup>13</sup> The IG Report does not explain what, if any, additional steps the IG took to locate Mr. North or secure an interview to address follow-up questions relating to possible misuse of his position.

There is no indication in the IG Report that the IG reviewed email records of any other federal agency personnel involved in the BBWA, such as personnel from FWS, USGS, and NOAA, who are credited as contributing to the BBWA's development.<sup>14</sup> There is also no indication that the IG spoke with or examined the records of USGS personnel or spoke with Corps personnel about its abstention from the BBWA process.<sup>15</sup>

#### **B. Timeframe of the IG's Email Review**

For reasons which the IG does not explain, the IG restricted its review of the three EPA custodians selected for email review to the timeframe of January 1, 2008 through May 18, 2012. This date restriction applies only to the IG's email review, not to the IG's overall document review of criteria documents or to the scope of its interviews. This time period does not date back to the beginning of EPA's work concerning mining in the Bristol Bay watershed.<sup>16</sup> Further, the time period of the IG's email review does not extend through the revision and issuance of the second draft BBWA, peer reviewer and public responses to the BBWA drafts, or issuance of the final BBWA in January 2014.

### **IV. THE SCOPE OF THE IG REPORT LEAVES UNADDRESSED SEVERAL ISSUES RAISED IN THE COHEN REPORT**

#### **A. Mr. North's "Possible Misuse of Position"**

The IG found sufficient evidence of "possible misuse of position" by Mr. North, addressing one concern raised in the Cohen Report.<sup>17</sup> This finding was supported by both Mr. North's supervisor and EPA's Senior Counsel for Ethics.<sup>18</sup> The IG based this finding on Mr. North's use of his personal email account to communicate with the attorney for certain

Alaska Native tribes (Geoffrey Y. Parker, Esq.) about their petition for Section 404(c) use and to supply edits to the petition, which were accepted and included in the final form of that document.<sup>19</sup> The IG stated that “Agency employees must remain impartial in dealings with outside parties, particularly those that are considering petitioning or have petitioned the [EPA] to take action on a matter.”<sup>20</sup> The IG was unable to conclusively determine whether Mr. North violated ethical standards as a result of its inability to obtain Mr. North’s complete records or thoroughly interview him. The gap in Mr. North’s records and his refusal to cooperate inhibited the IG from addressing the full scope of his role in the BBWA, the capacity in which he was acting, specific distinctions in his job duties, his boundaries for conferring with Alaska Native tribes, or potential bias or policy or procedure breaches.<sup>21</sup> The record remains incomplete on these issues.

## **B. Unaddressed Concerns**

My report detailed aspects of EPA’s work in connection with the BBWA, such as the robust public comments, community outreach efforts, aspects of the peer review proceedings, and the Pebble Partnership’s opportunities to provide input, which supported EPA’s claims that the BBWA resulted from a thorough and inclusive dialogue with all relevant constituencies.<sup>22</sup> The report, however, also identified a number of concerns as to the integrity of the process EPA used in evaluating potential mining in the Bristol Bay watershed, including the use of hypothetical mine characteristics in the BBWA, EPA’s communications with third parties and anti-mine advocates, and its refusal to accommodate various concerns raised by the State of Alaska.<sup>23</sup> These issues may or may not have been evaluated by the IG in its review but the IG Report’s silence as to these many facts relevant to the IG’s inquiry raises additional questions.

For example and as discussed above, the IG found that Mr. North possibly misused his position on at least one occasion: when collaborating with an outside attorney about the

petitioning tribes request for EPA to use its Section 404(c) authority.<sup>24</sup> The IG Report, however, did not address additional strategic communications among Mr. North, other EPA personnel, and third parties, including communications with the same outside attorney during the relevant timeframe about which Mr. North's supervisors were aware.<sup>25</sup> Nor did the IG Report discuss evidence that certain EPA personnel had potentially inappropriate relationships with anti-mine advocates.<sup>26</sup>

Moreover, the IG's nearly exclusive focus upon the BBWA did not address the issue that I deemed critical. The fundamental issue, as I see it, is whether the fairest process to determine whether to allow development is through the traditional permitting process employed since the enactment of the CWA, or the unprecedented assessment of a hypothetical mine, with assumptions constructed by EPA. This issue was not addressed by the IG and leaves the question of why EPA chose to use such a novel process for another forum.

### **C. EPA Statements Apparently Accepted by the IG Without Further Inquiry**

On several occasions in its report, the IG appears to have accepted as true certain representations of EPA without seeking confirmation from sources outside EPA. For example, EPA described the Wardrop Report as a "preliminary [mine] plan" and relied on it to establish its hypothetical mine scenarios.<sup>27</sup> The IG Report proffered the same description of the Wardrop Report, referring to it as "preliminary mine details" and a "mine plan."<sup>28</sup> However, Hassan Ghaffari, the lead author of the Wardrop Report, advised that:

the Wardrop Report was a preliminary assessment principally intended to advise potential investors of the baseline economic viability of a development opportunity. Mr. Ghaffari noted that his report was not a mine plan or sufficient for use as a permit application. The Pebble Partnership had not assembled the scientific data necessary for such a permit application as of the date of his report, and thus its scope did not approximate a permit application. Mr. Ghaffari said that EPA did not contact him about his report.<sup>29</sup>

Mr. Ghaffari is not identified in the IG Report or listed as someone the IG interviewed; nor is the Wardrop Report listed among the documents the IG reviewed.<sup>30</sup>

Second, it appears the IG accepted EPA's representation that EPA proceeded with its Section 404(c) action "in response to petitions from the public."<sup>31</sup> But EPA was not responding to an unsolicited petition. As the IG Report acknowledges, EPA personnel received and commented on a draft petition months in advance of its formal delivery, and EPA had been internally strategizing about a potential Section 404(c) action, with or without an assessment, long before it received the petition.<sup>32</sup>

Third, the IG wrote that, prior to making a Section 404(c) determination, "the EPA shall consult with the U.S. Army Corps of Engineers."<sup>33</sup> The IG apparently accepted EPA's representation that this prerequisite was fulfilled. But Corps documents strongly suggest that no such consultation occurred. On March 14, 2014, the Corps responded to EPA's notice of intent to proceed under 404(c) by stating, "the Corps has not received a permit application for this project and is therefore unable to evaluate the impacts of potential discharges associated with the Pebble deposit."<sup>34</sup> The Corps' response not only seems inconsistent with EPA's implicit representation, but also raises the question of how EPA was able to evaluate impacts that the Corps could not. The Corps' statements ultimately informed my own concerns about the unprecedented application of Section 404(c) (that is, the first time this statute was utilized prior to the filing of a permit application).<sup>35</sup> My concern is simply this: in a project of this importance, why would EPA use an untested process to make a policy decision prior to the filing of a permit application which would allow the relevant agencies to "evaluate the impacts of potential discharges." I suggest that further Congressional inquiry is warranted to understand



why EPA undertook this novel approach under these circumstances, and whether such approach is an appropriate exercise of executive branch decision making authority.

## **V. CONCLUSION**

In the course of my independent review, I observed a number of EPA statements and actions that were troubling and raised serious concerns as to whether EPA orchestrated the process to reach a predetermined outcome. However, in light of my lack of subpoena power, I allowed for the possibility that there may be benign explanations for these actions, and that EPA may be able to establish that its personnel's motivations were wholly consistent with the Agency's mission of preserving the environment. I urged the IG and Congress to continue to develop the record which might further illuminate EPA's motives. The IG has now published a report of its inquiry into why EPA conducted the BBWA and "whether the EPA adhered to laws, regulations, policies, and procedures in developing the [BBWA]" with a specific focus on whether EPA conducted the BBWA "in a biased manner or had predetermined its outcome."<sup>36</sup> As we have detailed above, the IG Report left many questions open, and the record remains incomplete in material aspects. Accordingly, I believe it remains important for the relevant Congressional committees with oversight responsibilities to continue their work. How EPA has conducted the process to assess the potential development of this important resource, and protect the environment in this critical area of Alaska, is of vital importance to the region, state, and the country.

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<sup>1</sup> Undefined terms and acronyms have the meaning attributed to them in the Cohen Report.

<sup>2</sup> IG Report at pp. 1, 4.

<sup>3</sup> Memorandum dated May 2, 2014 from Patrick Gilbride, Director of Science, Research, and Management Integrity Evaluations, to Nancy Stoner, *et al.* When it initiated its review, the IG requested from EPA an accounting of the costs associated with the BBWA. *Id.* at 2. The IG Report, however, does not address the financial resources expended to develop the BBWA, as initially contemplated.

<sup>4</sup> Secretary Cohen reviewed EPA's actions "leading up to its proposed determination to substantially restrict potential mining in the Pebble Deposit Area" with a focus on the fairness of EPA's decision-making process. Cohen Report at pp. ES-1, ES-2, 1-2. Many matters bearing on EPA's ultimate decision to propose restrictions on mining in the Pebble Deposit Area examined by Secretary Cohen fell outside the scope of the IG's review. Among other things, the IG does not address the author-admitted deficiencies in the BBWA or the link between the BBWA and the Proposed Determination. *See* Cohen Report at pp. 85-86 & 151 nn.524-29.

<sup>5</sup> Cohen Report at pp. ES-7, 82.

<sup>6</sup> IG Report at pp. 20-21, Appendix A.

<sup>7</sup> *Id.* at pp. 21-22, Appendix A.

<sup>8</sup> *Id.* at p. 5.

<sup>9</sup> *Id.* at p. 5 n.6.

<sup>10</sup> *See* Cohen Report at N-1 through N-4. For example, the IG did not retrieve emails for the following current and former EPA personnel: Susan Bromm, Director, EPA Office of Federal Activities; Mike Bussell, former Director, Office of Water and Watersheds, EPA Region 10; Michelle DePass, former Assistant Administrator, Office of International and Tribal Affairs, EPA; William ("Bill") Dunbar, Senior Policy Advisor, EPA Region 10; Sheila Eckman, former Bristol Bay Watershed Assessment Project Manager, Office of Ecosystems, Tribal and Public Affairs, EPA Region 10; Arvin Ganesan, former Deputy Chief of Staff for Policy, EPA; Palmer Hough, Environmental Scientist, Wetlands Division, EPA; Lisa Jackson, former EPA Administrator (2009-2013); Gina McCarthy, EPA Administrator (July 2013 – present); Patricia McGrath, former Mining Coordinator, EPA Region 10; Elizabeth McKenna, Assistant Regional Counsel, EPA Region 10; Richard ("Rick") Parkin, former EPA Region 10 Management Lead for the Bristol Bay project; Michelle Pirzadeh, Deputy Regional Administrator, EPA Region 10; Cara Steiner-Riley, Attorney, EPA Region 10; Robert ("Bob") Sussman, former Senior Policy Counsel to EPA Administrator (Feb. 2009 - July 2013), former Deputy Administrator (Mar. 1993 – Nov. 1994); and Michael Szerlog, Manager, Aquatic Resources Unit, EPA Region 10.

<sup>11</sup> IG Report at pp. 6, 15. Access to Mr. North's personal email is relevant because, as the IG Report notes, on occasion Mr. North used his personal email to conduct government business and did not forward all such correspondence to government servers.

<sup>12</sup> *Id.* at pp. 6, 17.

<sup>13</sup> Cohen Report at p. 148 n.486

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<sup>14</sup> EPA enlisted FWS and NOAA to support its use of Section 404(c) even before the BBWA was announced. *See* BBWA at pp. xxvi-xxvii (listing BBWA “Authors, Contributors, and Reviewers”); Cohen Report at Sections IV.D (NOAA) and IV.G (FWS). For example, Phil Brna (Fish and Wildlife Biologist, FWS, Anchorage, Alaska Field Office) and Doug Limpinsel (Marine Fisheries Biologist – Habitat Specialist, NOAA, National Marine Fisheries Service, Alaska Regional Office) were both named contributors to the BBWA who, prior to EPA announcing the BBWA, expressed in writing their understanding that EPA had decided to proceed with a Section 404(c) action and described their own actions to help EPA do so. *See, e.g.*, Cohen Report at pp. 44 & 120 nn.265-66, App-110 (“On September 23, 2010, Phil Brna, a fish and wildlife biologist with the FWS’ Anchorage Field Office, emailed his colleagues Frances Mann and Ann Rappoport with an update on ‘Pebble and 404c.’ Mr. Brna reported that he had ‘spoke[n] with Phil North. He has now briefed people in EPA all the way up to the assistant administrator. He believes EPA leaders have decided to proceed and they are just deciding when. They say in the next ‘couple of weeks’ but it will probably be after the November election.”); *id.* at pp. 44 & 120-21 nn.270-73, App-111-App-113 (“In preparation for an October 1, 2010 discussion, FWS staff in Alaska drafted a briefing document labeled ‘EPA to Seek Service Support When They Use Section 404(c) of the Clean Water Act.’ The stated purpose of the document is ‘[t]o inform Regional Office management about the status of the [EPA’s] involvement in the potential Pebble Mine development and EPA’s anticipated request for support from Region 7 of the U.S. Fish and Wildlife Service.’ The document further states that ‘[a]s of last week, it is our understanding that EPA has tentatively decided to initiate the 404(c) process but they have not yet determined when this will occur.’ Borrowing language related by Mr. Brna following his conversation with Mr. North, the document states that ‘[i]t is likely a final decision will be made after the November election.”); *id.* at pp. 41, 120 n.253, App-100-App-102 (“On August 30, 2010, Mr. Limpinsel reported to Mr. North that a NOAA director would brief the NOAA Alaska regional administrator and his deputy. Mr. Limpinsel further expressed that he or other NOAA personnel would ‘meet with EPA to discuss the issues and our concerns as well as the EPA Section 404c process’ and that he advised his director about NOAA’s potential role ‘in developing and drafting a Biological Assessment for a Sec 404c.’”).

<sup>15</sup> *See* IG Report, Appendix A.

<sup>16</sup> Documents discussed and made available in the Cohen Report indicate that EPA personnel, including some at “headquarters,” had discussed restricting or prohibiting development in the Pebble Deposit Area as early as 2005—five years before EPA announced its plan to conduct an assessment of the Bristol Bay watershed and approximately two and a half years before the period from which the IG reviewed EPA custodians’ records. Cohen Report at pp. 38 & 117 n.225, App-20.

<sup>17</sup> IG Report at p. 17; *see* Cohen Report at pp. 38-39, App-2, App-3.

<sup>18</sup> IG Report at pp. 15, 17.

<sup>19</sup> *Id.* at p. 15. While Mr. North forwarded some of his personal correspondence with Mr. Parker to his government email account, Mr. North did not forward “the email in which he provided edits to his EPA work email account.” *Id.* at pp. 15-16.

<sup>20</sup> IG Report at p. 17.

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<sup>21</sup> *See id.* at p. 16.

<sup>22</sup> *See* Cohen Report at pp. 32-35, 45-50, 52-55, 56-58.

<sup>23</sup> *See id.* at Section III.C and Appendix C (discussing evidence that certain EPA officials had inappropriately close relationships with anti-mine advocates); *id.* at pp. 50-51 & 124 nn.319-20, 323-26 (State of Alaska); *id.* at p. 64 (noting scientific criticisms of hypotheticals); Cohen Report at pp. 40, 57 (evolution of BBWA drafts and differing levels of peer review). *Compare* Cohen Report at pp. 61 & 141-42 nn.393-95 (noting interview with author of the Wardrop report, who advised that the Wardrop Report was a preliminary assessment principally intended to advise potential investors of the baseline economic viability of a development opportunity, not a mine plan or sufficient for use as a permit application), *with* IG Report at pp. 3, 9 (referring to the Wardrop Report as “preliminary mine details” and a “mine plan”). *Compare* Cohen Report at pp. 54-55, 91 & 131-132 nn.355 & 358-359, *with* IG Report at pp. 12-14 (peer review criticisms).

There is no indication that the IG subpoenaed or otherwise sought to speak with environmental non-governmental organizations or individuals alleged to have colluded with EPA in connection with the development of the BBWA and subsequent Section 404(c) action. *See* IG Report at p. 10; *see also* Cohen Report at Sections III.C, X.D.2.

<sup>24</sup> IG Report at p. 15; *see* Cohen Report at pp.38-39, App-2-App-3.

<sup>25</sup> Cohen Report at pp. 40-41, 119 nn.244-47; *see* Cohen Report at Appendix C; *see, e.g.*, Email from Geoffrey Parker, Esq., to Rick Parkin, EPA, and Palmer Hough, EPA (Feb. 14, 2012) (cc to Phil North, EPA) (attaching “a memo that recommends how to speed up the current process for the watershed assessment and any 404(c) determination”). For example, the Cohen Report observed that:

During the period that EPA Region 10 was developing the options paper, Mr. Parker, legal counsel to the Petitioning Tribes, sent an email to EPA Region 10 legal counsel and Mr. North with the subject line ‘options paper.’ The tribes’ counsel suggested that:

[o]ne option that EPA might consider is to commence a 404(c) process based on the 2006 applications [Northern Dynasty had filed with ADNR in connection with their exploration of the Pebble deposit]. \*\*\* EPA could ask the Pebble Partnership for any updated designs (even though they presumably might not be final), and proceed based on the 2006 applications and whatever [the Pebble Partnership] provides in the way of additional designs, if any.

Mr. Parker suggested this strategy was similar to a prior instance in which EPA acted under Section 404(c) and ‘has advantages in the event that [the Pebble Partnership] challenges any 404(c).’ Mr. Parker also sent to Mr. North (at his personal email address) a draft

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memorandum that he had prepared for his client Trout Unlimited, which presented a comparison of aspects of the Section 404(c) regulatory process and the NEPA process, believing it ‘may help.’

<sup>26</sup> See Cohen Report at Section III.C and Appendix C.

<sup>27</sup> BBWA at pp. ES-10, 6-20; See EPA, RESPONSE TO PUBLIC COMMENTS ON THE MAY 2012 DRAFT OF *AN ASSESSMENT OF POTENTIAL MINING IMPACTS ON SALMON ECOSYSTEMS OF BRISTOL BAY, ALASKA* 72 (2014).

<sup>28</sup> IG Report at pp. 3, 9.

<sup>29</sup> Cohen Report at pp. 61, 141-42 nn.393-95 (emphasis added).

<sup>30</sup> IG Report at pp. 20-22. The first section of the Wardrop Report states that the information it contains is “preliminary” and that the “Pebble Partnership continues to undertake detailed engineering studies and project planning toward the completion of a Prefeasibility Study for the Pebble Project . . . .” Wardrop Report at 1. Elsewhere, the Wardrop Report states that “the project description that the Pebble Partnership ultimately elects to submit for permitting under NEPA is likely to differ from the development cases presented in this document.” *Id.* at 471.

<sup>31</sup> IG Report at p. 9 (“The EPA also said this [Section 404(c)] action was in response to petitions from the public.”). EPA likewise represented in its public documents that it undertook the BBWA in response to petitions from federally recognized tribes and others. See Cohen Report at pp. 45, 91, 121 n.277, 153 n.549.

<sup>32</sup> IG Report at pp. 7, 11, 15; see Cohen Report at p. 91; see also *id.* at Sections IV.A. and V.A.

<sup>33</sup> IG Report at p. 3.

<sup>34</sup> Letter from Col. Christopher Lestochi, Commander, the Corps’ Alaska District, to Dennis McLerran, Regional Administrator, EPA Region 10 (Mar. 14, 2014), at 1.

<sup>35</sup> See Cohen Report at pp. 87-89.

<sup>36</sup> IG Report at p. 1.