***Examining The Facts*: A Response to the U.S. Environmental Protection Agency's (EPA) Office of Inspector General Report Regarding EPA's Bristol Bay Watershed Assessment**

Executive Summary

On January 13, 2016, the Office of Inspector General ("OIG") of the U.S Environmental Protection Agency ("EPA") published its report (the "OIG Report" or "Report") on the federal agency's actions with respect to Alaska's Pebble Project – a proposal to develop a globally significant deposit of copper, gold, molybdenum and other strategic metals into a modern, long-life mine.

The OIG's review was prompted by a request from the Pebble Limited Partnership ("PLP"), the State of Alaska and other parties to investigate allegations of bias, pre-determination of outcomes, inappropriate collusion with special interest groups and other process abuses with respect to EPA's Bristol Bay Watershed Assessment ("BBWA") study and subsequent regulatory action to pre-emptively veto the Pebble Project under Section 404(c) of the Clean Water Act. While acknowledging significant 'scope limitations' in its review and subsequent report, the OIG concluded that: "*we found no evidence of bias in how the EPA conducted its assessment of the Bristol Bay watershed, or that the EPA pre-determined the assessment outcome*," but that an EPA Region 10 employee may have been guilty of *"a possible misuse of position*."

Several previous investigations of EPA conduct at Pebble contradict the OIG Report. The US Congress' House Committee on Oversight and Government Reform found "*that EPA employees had inappropriate contact with outside groups and failed to conduct an impartial, fact-based review of the proposed Pebble mine*." Former US Senator and Secretary of Defense William Cohen said his investigation "*raise(s) serious concerns as to whether EPA orchestrated the process to reach a pre-determined outcome; had inappropriately close relationships with anti-mine advocates; and was candid about its decision-making process*."

It is PLP's view that the OIG investigation into EPA misconduct at Pebble, and its findings as presented in the OIG Report, was so narrow as to materially distort the reality of the agency's actions. Further, it is PLP's view that the 'possible misuse of position' cited by the OIG with respect to an EPA employee in Alaska underestimates the seriousness of the agency's misconduct, and limits accountability for this misconduct to a single individual despite evidence that senior EPA staff at both Region 10 and headquarters in Washington DC were aware of and complicit in inappropriate activities.

The report that follows provides documented evidence to support the Pebble Partnership's view.

***

<u>Narrow Scope of OIG Investigation</u>

A cursory review of the scope of the OIG investigation demonstrates why it was unable to expose EPA misconduct with respect to the BBWA and subsequent efforts to veto the Pebble Project.

- Despite more than 100 EPA employees playing a role in the agency's efforts to pre-emptively veto Pebble, the OIG only reviewed emails for three EPA officials. Despite the close collaboration of dozens of anti-mine activists in EPA's actions at Pebble, the OIG only reviewed emails from one anti-mine activist.

- While the EPA's BBWA study process was initiated in February 2011 and concluded in January 2014, and the agency's CWA 404(c) veto was initiated in February 2014 and suspended in November 2014 following a preliminary injunction issued by a federal court judge, the OIG only reviewed EPA emails through May 2012. During the 2½ years of activity unexamined by the OIG, EPA issued two more versions of the BBWA including its final report, conducted multiple disputed peer review processes, and initiated a pre-emptive CWA 404(c) veto of the Pebble Project.

- One of the EPA officials whose email was reviewed was found to have no emails available for a 25-month period of time within the OIG's already limited 52-month window of investigation.

- The OIG's protocol for retrieving and reviewing relevant emails was flawed. The OIG did not seek to recover any emails that the three identified EPA officials may have deleted prior to the onset of its investigation, despite having the capability to do so. Rather than review all retrieved emails, the OIG utilized undisclosed search terms to further narrow its review. Finally, the OIG did not seek records from the private email accounts of EPA officials, despite evidence that officials used private email accounts to conduct government business, against all federal employee protocols.

- Despite its wide-ranging investigative authority, the OIG issued just one subpoena with respect to its Pebble review. That subpoena, issued to counsel for a former EPA official who played a central role in the BBWA study and for whom 25 months of email records are missing, was summarily ignored. Meanwhile, the OIG did not see fit to subpoena records or testimony from any of the anti-mine activists known to have collaborated closely with EPA in its efforts to veto Pebble.

Narrow Scope of OIG Findings

In seeking an OIG investigation of EPA actions at Pebble, PLP reviewed more than 50,000 documents received via Freedom of Information Act ("FOIA") requests, and submitted a total of 19 letters spanning 214 pages and appending nearly 600 exhibits. These submissions addressed a wide range of concerns about EPA actions, presented corresponding evidence, and called upon the OIG to utilize its subpoena powers and other authority to more fully investigate EPA actions at Pebble.

While the OIG Report finds no evidence of bias or predetermination of outcomes with respect to the BBWA, it provides no findings at all on a large number of other important matters. Nor does the OIG Report comment on the evidence provided by PLP in raising its concerns. Among the important issues raised by PLP that are wholly ignored by the OIG Report:

- that EPA had been actively considering a pre-emptive veto of the Pebble Project for several years before receiving a petition from six federally recognized tribes to take such action. Despite these facts, and the fact that EPA helped prepare the tribal petition, the federal agency continues to this day to cite the tribal petition as the sole catalyst for its actions at Pebble;

- that EPA actively involved outside special interests (anti-mine activists) in preparing an internal agency document – an Options Paper – to guide federal-decision making at Pebble;

- that EPA actively and intensively collaborated with outside special interests (anti-mine activists) over a period of years to develop the political strategy, the legal/policy strategy and the scientific record necessary to veto the Pebble Project;

- that EPA lobbied other federal agencies to support a pre-emptive veto of the Pebble Project;

- that EPA knowingly selected authors and contributors for the BBWA study who were not objective and who, in some cases, openly expressed their opposition to development at Pebble;

- that the senior EPA official leading the BBWA study was personally opposed to development at Pebble, and admitted at the outset of the study process that " politics are as big or bigger factor" than science in pursuing a pre-emptive 404(c) veto;

- that EPA secretly peer reviewed studies prepared by anti-mine activists and prominently cited them throughout the BBWA, despite the significant concerns expressed by peer reviewers;

- that EPA failed to peer review the robust environmental studies prepared by PLP, and generally ignored these studies (the most comprehensive scientific record available in the study region) in its BBWA;

- that EPA lied to the Pebble Partnership, to the State of Alaska and to scientific peer reviewers as to whether the BBWA would be used as a basis for regulatory action at Pebble;

- that EPA developed and reviewed hypothetical mine scenarios in the BBWA that: do not employ modern mining practices and technologies; are fundamentally un-permittable under US and Alaska law; were designed to demonstrate 'unacceptable adverse effects' and thereby justify a pre-emptive veto of the Pebble Project;

- that EPA relied upon Ann Maest, a scientist who has admitted to intentional and serious wrongdoing in connection with environmental litigation in the past, as a central figure in devising the BBWA;

- that EPA regularly met with and accepted scientific and other input from anti-mine activists outside of BBWA comment windows, while refusing to do so with groups and individuals supportive of the Pebble Project;

- that EPA officials intentionally sought to shield documents and email communication from FOIA requests;

- that EPA may have violated the Anti-Lobbying Act by utilizing anti-mine activists to lobby in support of a CWA 404(c) pre-emptive veto of the Pebble Project.

'*Possible misuse of position'* finding understates EPA misconduct and complicity of senior officials

The OIG Report found one instance of 'possible misuse of position' with respect to the actions of Philip North, a now retired EPA Region 10 official who served as technical lead for the BBWA and was a central figure in the agency's consideration of a 404(c) veto. This finding is in relation to North's use of a private email account in 2011 to coordinate with an anti-mine activist in the preparation of a tribal petition – the petition that has since been cited by EPA as the sole catalyst for its BBWA study and pre-emptive 404(c) regulatory action.

The OIG Report found that North acted alone in this collusion, and that the "e*mployee's supervisor told us that he was not aware that the employee had taken such an action*." However, the OIG fails to note the many other substantive interactions North had with anti-mine activists or the extent to which this collusion was known throughout the agency.

For instance:

- evidence shows North collaborated with anti-mine activists on numerous occasions, including to draft internal EPA policy documents and to develop the federal agency's strategy to pre-emptively veto Pebble;

- evidence shows that at least six EPA employees knew about the improper collusion between North and anti-mine activists. As early as 2010, at least two EPA employees alerted senior EPA staff and an EPA attorney about these inappropriate contacts, but no corrective action was taken;

- in 2013, North retired from EPA and subsequently left the country with his young family, twice cancelling agreed upon dates to provide testimony to Congressional committees. North's legal counsel refused to accept a subpoena issued by the OIG on his behalf;

- Phil North is far from the only EPA official for whom existing evidence demonstrates close collaboration with anti-mine activists in advancing the agency's plans to pre-emptively veto the Pebble Project.

***

The EPA Office of Inspector General's review and findings of agency actions with

respect to Alaska's Pebble Project are so narrow as to materially distort the true story of what happened.

US Congress has authority to provide oversight for inspectors general where an inspector general fails to uncover or report clear misconduct on the part of an agency. The Pebble Partnership continues its outreach to several Congressional committees on this matter, and remains confident that its concern about bias, pre-determination of outcomes and inappropriate collusion with special interest groups with respect to EPA's BBWA study and CWA 404(c) veto process will ultimately be addressed.

***Examining The Facts*: A Response to the U.S. Environmental Protection Agency's Office of Inspector General Report Regarding EPA's Bristol Bay Watershed Assessment**[*]

INTRODUCTION

After a deeply flawed and overly narrow investigation, on January 13, 2016, the U.S. Environmental Protection Agency's ("EPA") Office of Inspector General ("OIG") issued a report absolving the Agency of wrongdoing with respect to its "scientific" assessment of mining in the Bristol Bay watershed and the Agency's proposed veto of the Pebble Limited Partnership's ("PLP") planned mining project (the "OIG Report" or "Report").[1] For the reasons discussed below, the Report is deeply deficient, reflecting a superficial whitewash of the Agency's conduct in this matter.

The very scope of the investigation shows that the OIG would not be able to expose the Agency's misconduct. The Report makes clear that the OIG limited its review of emails to records from *only four people* (one non-EPA employee and three EPA employees), even though *more than 100* EPA employees, and countless outsiders, were involved with the Agency's consideration of PLP's proposed mining project.

Moreover, the OIG refused to review any emails after May 2012 even though the Agency's assessment was not completed until nearly *two years later*. During these two years, the Agency issued two more versions of the report, including its final assessment, and several related peer review documents. It is hard to understand how the OIG could properly evaluate "any indication of bias during the assessment" or whether EPA "predetermined the outcome of the assessment,"[2] when it ignored emails from two of the three years that the Agency was conducting the assessment.

The OIG Report also fails to mention, much less consider, the overwhelming evidence of bias and predetermination that infected EPA's assessment. For example, the Report acknowledges that EPA's "technical lead" for the assessment may have misused his position by colluding with an anti-mine activist to petition the Agency to investigate PLP's proposed mining project. However, the Report understates the significance of this finding. The OIG's finding shows that EPA, through one of its employees in collusion with an interested stakeholder, effectively *petitioned itself* to initiate a preemptive veto. The OIG does not even comment on this point.

The report is also silent on the other instances of collusion between this same EPA employee and anti-mine activist. The evidence reveals that these two individuals also collaborated on an "options paper" that was supposed to be an internal agency document evaluating EPA's process for vetoing the PLP mining project. And the Report fails to disclose that these same two individuals also concocted the strategy that EPA ultimately adopted in

---

[*] Copies of any documents referenced in this report will be provided upon request.

[1] EPA Office of Inspector General, *EPA's Bristol Bay Watershed Assessment: Obtainable Records Show EPA Followed Required Procedures Without Bias or Predetermination, but a Possible Misuse of Position Noted*, Report No. 16-P-0082 (Jan. 13, 2016) ("OIG Report").

[2] OIG Report at 5.

conducting its assessment. This collaboration was not a secret within the Agency – the evidence shows that at least nine EPA employees knew about the improper collaboration between the EPA employee and outside anti-mine activist and as early as 2010 at least two EPA employees alerted senior EPA staff and an EPA attorney. In the face of all this, the Agency did nothing. Now the OIG has followed suit.

But there is more. The OIG Report's myopic focus on only *one* instance of collusion between *one* EPA employee and *one* anti-mine activist distorts reality. In reality, *numerous* EPA employees colluded with *numerous* anti-mine activists on *numerous* issues, including scientific analyses, legal analyses, overall Agency strategy, and political outreach.

And even EPA's own conduct evidences bias and predetermination. For example, the OIG never addresses PLP's concerns about the selection of authors and contributors for the assessment – primarily EPA and other federal agency staff that had previously expressed their anti-Pebble bias and anti-mine activists who for months prior to the assessment's announcement had been sharing biased science with EPA. With the decks stacked so heavily against any mining proposal, it is no surprise that the assessment was riddled with flaws, including the use of hypothetical mine scenarios that do not reflect modern mining practices and peer review irregularities.

The OIG report ignores all of this evidence. Congress can and has rectified this kind of problem in the past. Congress has frequently exercised its responsibility to provide oversight for inspectors general. For example, in 2014 when the OIG for the Department of Veterans Affairs cleared the Department of responsibility for its scandalous mistreatment of veterans under its care, the House Veterans Committee responded with an investigation that uncovered rampant misconduct. Inspectors general function as a first line of defense against corruption and mismanagement within the government. But they are not the last bastion, and where an inspector general fails to uncover or report clear misconduct on the part of an agency, Congress has the power and mandate to step in. As with the VA scandal, here EPA's OIG has failed properly to scrutinize the Agency under its purview, and its Report is woefully inadequate.

The OIG failed to conduct an adequate investigation of EPA's conduct; its failures include (i) that it designed its investigation in a way that it could not and did not uncover evidence of bias and predetermination, (ii) that it ignored key evidence presented to it concerning bias, predetermination, and the assessment's flaws, and (iii) that it did not use the full scope of its authority to investigate the issues presented here.

BACKGROUND

The Pebble Deposit, located in Southwest Alaska, is one of the world's largest deposits of copper, gold, and molybdenum. In 2001, Northern Dynasty Minerals ("NDM"), the owner of PLP, acquired mineral claims in the area surrounding the Pebble Deposit. PLP had intended to develop the Pebble Mine. But EPA has thwarted its plans.

EPA abandoned the traditional permitting process in favor of preemptively halting the development of the mine despite the fact that PLP *has not yet submitted a mining application*. In the normal course, a proposed developer submits a Section 404 Clean Water Act permit

application to the U.S. Army Corps of Engineers ("Corps"). Once the permit application is filed, the National Environmental Policy Act ("NEPA") requires the Corps to "take a hard look" at potential impacts of the development application and prepare an Environmental Impact Statement ("EIS").[3] EISs are most often developed by expert third-party consultants who are entirely independent from project proponents or other stakeholder interests. Digging even deeper than the contents of the application, an EIS includes consultation with other federal agencies, a review of, among other things, social and economic impacts (including employment effects, energy costs, tax payments, and land development), and mitigation opportunities.[4] NEPA also requires significant public involvement, including Federal Register notice, public comment periods, and public meetings. The Corps must release a response to the public comments before issuing the final decision on the permit.[5] This regulatory scheme devised by Congress contemplates that *all of this* will occur *before* EPA exercises its authority to veto a project.

Despite this clear statutory mandate and the benefits of following it, EPA circumvented the Clean Water Act permitting and NEPA processes by preemptively invoking Section 404(c) of the Clean Water Act to veto any realistic PLP effort to develop the Pebble Deposit. And it decided to invoke its 404(c) authority *before* PLP had submitted a permit application and *before* it undertook any scientific analysis at all.

To reach its goal of killing the Pebble mine, EPA commissioned a watershed assessment of the Bristol Bay region – the Bristol Bay Watershed Assessment ("BBWA" or "Assessment"). The Assessment, the final draft of which was released in January 2014,[6] examines the effects of hypothetical mining scenarios on salmon fisheries. Without the benefit of an application outlining the specific measures PLP would take to minimize environmental impacts, the Assessment is woefully inadequate to form the basis of a regulatory decision. Indeed, numerous peer reviewers seriously criticized the Assessment and the "science" underlying its conclusions, pointing out that it provided an insufficient basis for regulatory decision-making.[7] Undaunted, EPA announced its intention to proceed preemptively with comprehensive mining restrictions on the basis of this faulty Assessment.[8]

---

[3] *See Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989).

[4] 16 U.S.C. §§ 1531-1544.

[5] 40 C.F.R. § 1506.6.

[6] EPA Region 10, *An Assessment of Potential Mining Impacts on Salmon Ecosystems of Bristol Bay, Alaska* (Jan. 2014) ("BBWA").

[7] *See, e.g.*, EPA, Response to Peer Review Comments on the May 2012 and April 2013 Drafts of *An Assessment of Potential Mining Impacts on Salmon Ecosystems of Bristol Bay, Alaska* ("EPA Response to Peer Review Comments") at 215 (stating that some of the conclusions were "not appropriate for a document that is intended to provide a scientific and technical foundation for future decision making").

[8] EPA Region 10, *Proposed Determination of the U.S. Environmental Protection Agency Region 10 Pursuant to Section 404(c) of the Clean Water Act- Pebble Deposit Area, Southwest Alaska* (July 2014) ("Proposed Determination") at 2-11 (announcing decision to proceed under Section 404(c) based largely on the BBWA).

EPA's progress was thwarted, however. In September 2014, PLP sued EPA alleging the Agency violated the Federal Advisory Committee Act, a statute designed to ensure that special interests do not hijack agency decision-making processes to produce biased studies and that the Government consults with interested parties in an open, transparent and even-handed manner.[9] In November 2014, PLP sought and obtained a preliminary injunction preventing EPA from taking any further action to veto the project until it adjudicates the merits of the case.[10]

EPA has recognized that its actions run counter to the Clean Water Act and NEPA processes, conceding that its preemptive veto had "[n]ever been done before in the history of the [Clean Water Act]."[11] Thus, the evidence shows that EPA exercised authority it *did not* have, based on science that *does not* meet any objective standard, to effect a goal that *does not* have a proper purpose.

This unprecedented conduct has caused several congressional committees to investigate EPA's actions with respect to the Pebble Mine, with one committee already concluding that "EPA's use of a preemptive veto was unprecedented and without a legal basis."[12] In its scathing report, the House Oversight Committee found evidence "that the EPA employees working on the BBWA assessment were never interested in conducting an objective review of all the studies on the impact of the proposed mine."[13] The Committee's report chronicled EPA employee Phil North's role in colluding with environmental activists to conjure a contrived petition for 404(c) action.[14] The report dispels EPA's repeated contention that North acted alone, finding that managers not only were aware of his conduct but actually aided and abetted his actions.[15] Indeed, the Committee found that a senior EPA official "wanted to 'routinely' mark emails about the 404(c) petitions as privileged so they would not be released to" the public under the Freedom of Information Act ("FOIA").[16] Describing this course of action as "an unprecedented change in

---

[9] *Pebble Ltd. P'ship v. U.S. EPA*, Civil Action No. 3:14-cv-00171-HRH (D. Alaska filed Sept. 3, 2014).

[10] In June 2015, the Court denied EPA's motion to dismiss the case, finding that Pebble had sufficiently alleged its claims, including making specific allegations of work by the various alleged advisory committees in drafting memoranda for the EPA, attending meetings that the EPA called and chaired, and providing advice and recommendations to the EPA. *See* Order, *Pebble Ltd. P'ship v. U.S. EPA*, Civil Action No. 3:14-cv-00171-HRH (D. Alaska June 5, 2015), ECF No. 128.

[11] EPA, *09/08/10 Bristol Bay 404(c) Discussion Matrix-HQ Briefing* ("Discussion Matrix").

[12] Staff of H. Comm. on Oversight & Gov't Reform, 114th Cong., *The U.S. Environmental Protection Agency's Unprecedented 404(c) Action in Bristol Bay, Alaska* (2015) ("House Oversight Report).

[13] *Id.* at 18.

[14] House Oversight Report at 8-13.

[15] *Id.* at 13-15.

[16] *Id.* A District of Alaska judge recently found that, indeed, EPA has been over withholding documents based on the deliberative process privilege in an action brought by PLP against EPA alleging the Agency has violated FOIA. *See* Order, *Pebble Limited Partnership v. U.S. EPA*, Civil Action No. 3:14-cv-00199-HRH (D. Alaska Jan. 12, 2016), ECF No. 71.

the agency's process for regulating resource and development projects," the House Oversight Committee called on EPA to "cease all preemptive 404(c) activity" to allow for the normal permitting process to take place.[17]

The Committee's findings are consistent with the comprehensive findings of an evaluation conducted by former Secretary of Defense William S. Cohen. Secretary Cohen, a 24-year member of Congress who served as a Republican in both the House and Senate and as Secretary of Defense under President Bill Clinton, undertook an independent review of EPA's actions in connection with its blocking of PLP's proposed mining project. Secretary Cohen observed that "[t]he statements and actions of EPA personnel . . . raise serious concerns as to whether EPA orchestrated the process to reach a predetermined outcome."[18] The Report highlights the "troubling gaps in the documents EPA has produced in response to Freedom of Information Act requests," and called on the EPA OIG to investigate "EPA's motives and better determine whether EPA has met its core obligations of government service and accountability."[19] In releasing its report, the OIG has failed on both fronts, instead whitewashing incontrovertible evidence of Agency bias and misconduct.

THE OIG EVALUATION AND REPORT

In January 2014, concerned by EPA's conduct, NDM sent a letter to EPA's OIG, requesting an investigation into whether EPA's decision to conduct the BBWA was driven by bias and a predetermined outcome, as well as whether the Assessment violated EPA scientific quality and peer review policies.

The State of Alaska also requested that the OIG investigate evidence that EPA "employees collaborated with non-governmental organizations opposed to the Pebble project to devise an analytical process to culminate in EPA's preemptive veto."[20] Alaska Attorney General Michael Geraghty decried the "chilling effect" that EPA's "unprecedented action" was having on the Alaskan economy, imploring the OIG to "commence an immediate investigation."[21]

In May 2014, the OIG began its review of EPA's actions.[22] To assist the OIG, PLP reviewed more than 50,000 documents and, through counsel, sent to the OIG 19 letters, spanning a total of 214 pages and including 570 exhibits. These letters covered a range of topics, including: collusion between EPA employees and anti-mine activists to devise and execute a strategy to preemptively block the PLP project, EPA's reliance on anti-mine activists and biased scholars to prepare the scientifically flawed BBWA, and flaws in the design of the BBWA and

---

[17] House Oversight Report at 19.

[18] The Cohen Group, *Report of An 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* (Oct. 6, 2015) ("Cohen Report") at 8.

[19] *Id.* at 9.

[20] Letter from Michael C. Geraghty, Attorney Gen., State of Alaska, to Arthur A. Elkins, Jr., Inspector Gen., EPA (Feb. 3, 2014) ("AK AG Letter") at 2.

[21] *Id.* at 3.

[22] OIG Report at 4.

peer review process.

Despite all of the evidence presented, the OIG chose to ignore serious claims of misconduct and instead focus on only a small sliver of what was presented. The OIG "sought to determine whether the EPA conducted the assessment in a biased manner; predetermined the outcome; and followed policies and procedures for ecological risk assessment, peer review and information quality."[23] The OIG acknowledges that there were "scope limitations" in its evaluation, noting EPA "was unable to provide all government emails for [a] government employee" and it was "unable to obtain additional personal emails for" the same employee.[24] This employee, Phil North, was an EPA technical lead for the BBWA and a key player in EPA's consideration of a veto of the PLP mining project.

The Report is also subject to a number of other scope limitations. To evaluate EPA's conduct, the OIG searched the email databases of only three EPA employees, and only for email exchanged before May 2012.[25] These email databases were not complete – any emails deleted prior to the OIG retrieving the database were not recovered or reviewed.[26] Moreover, for those emails that were available on the database, the OIG used search terms to find relevant records, rather than review all emails collected.[27] The Report does not disclose the search terms used, so their efficacy cannot be evaluated. Finally, while the OIG acknowledges that EPA provided it access to emails collected in response to various FOIA requests, the OIG did not perform a detailed review of these emails.[28] Given all of these limitations, the OIG acknowledged that its report and conclusions were subject to "scope limitations."[29] That is, other evidence not reviewed by OIG might (and does) contradict OIG's conclusions.

Based only on the "available information," the Report finds "no evidence of bias or a predetermined outcome."[30] It reaches this conclusion while admitting that it found evidence that EPA was considering initiating a 404(c) veto as early as 2010, before PLP had submitted any permit application and before any scientific analysis had been conducted.[31] And it reaches this conclusion despite uncovering the shocking fact that EPA Region 10 employee and BBWA technical lead, Phil North, used his personal email address to collude with an anti-mine activist to draft the very petition that EPA used as its public justification for conducting the BBWA and initiating the 404(c) process.[32] While the OIG acknowledges these two key pieces of evidence that betray clear bias and predetermination, it does not disclose the existence of dozens of other emails that demonstrate bias and determination. This evidence is discussed below.

---

[23] OIG Report, "At a Glance".
[24] *Id.*
[25] OIG Report at 5.
[26] *Id.* at 5-6.
[27] *Id.* at 5 n.6.
[28] *Id.*
[29] OIG Report, "At a Glance".
[30] *Id.*
[31] OIG Report at 8.
[32] *Id.* at 15-17.

Finally, the OIG Report concludes that the BBWA complies with EPA's requirements for risk assessment, peer review, and information quality.[33] It does so based on a superficial examination of the Assessment. The Report does not mention, or evaluate, evidence showing that the BBWA was designed to reach conclusions that would support EPA's decision to veto the proposed PLP mining project. This includes EPA's decision to cherry-pick the BBWA's authors and contributors so that the very same anti-mine activists that had been working with EPA for months prior to the Assessment would import their anti-mine opinions into the final Assessment. The OIG's evaluation simply compares the final Assessment to EPA policies without examining EPA's conduct to ensure the Assessment supported its desired outcome. These and other deficiencies with the Report are examined in detail below.

OIG REPORT DEFICIENCIES

I. The Scope of the OIG Investigation was Designed to Avoid Finding or Discussing Evidence of Wrongdoing

It is an understatement to say that the OIG's investigation was narrow. The OIG:

- Reviewed emails for only three EPA employees;
- Did not review all emails for these three EPA employees, choosing instead to search for emails using undisclosed search terms;
- Declined to examine email after May 2012, even though the BBWA was not completed until two years later;
- Made no effort to recover deleted emails;
- Failed to review available evidence from EPA's FOIA productions;
- Failed to subpoena the records of anti-mine activists that worked closely with the Agency to veto PLP's proposed mining project; and
- Declined to search for or review personal email from EPA employees, even though there is a disturbing pattern of EPA employees using their personal email for official business.

The limited nature of the OIG's investigation raises serious questions as to whether its evaluation was designed to exclude possible evidence of bias and predetermination so that it could absolve the Agency of wrongdoing. These limitations are discussed in more detail below.

Failure to Search and Review Available Evidence. By its own admission, the OIG collected emails from only three EPA employees – Dennis McLerran (the Regional Administrator for Region 10); Nancy Stoner (Deputy Assistant Administrator for Water); and

[33] *Id.* at Appendix B.

Phil North (Region 10 ecologist and BBWA team leader).[34] And it only collected email from one non-EPA employee – Jeff Parker, an anti-mine activist and attorney who worked with Phil North to draft a petition from six Alaska native Tribes to EPA (the "Tribal Petition").[35] Thus, the OIG reviewed emails of only ***four people***.

But over ***100*** EPA employees were involved in the BBWA and EPA's consideration of a preemptive veto. And dozens more people worked with EPA on these endeavors as EPA contractors. And even dozens more people from other agencies and environmental groups colluded with EPA to ensure the Agency had the resources it needed to justify its veto. In the face of this, the OIG's decision to limit its investigation to emails from three EPA employees and one individual from outside the Agency is patently indefensible.

But the OIG did not stop there. To further ensure that it would not find evidence of wrongdoing, the OIG limited its review of emails it obtained.[36] The OIG used search terms to select an even smaller universe of documents to review.[37] The OIG Report does not disclose these search terms, thus ensuring that the public cannot evaluate whether the chosen terms were actually meant to uncover evidence of bias and predetermination.

The OIG also elected to limit its review to the period between 2008 and May 2012,[38] even though the final BBWA – the very document the OIG was tasked with evaluating – was issued two years later in January *2014*. In the period between May 2012 and January 2014, EPA (i) conducted a peer review evaluating the first draft of the BBWA, (ii) issued a revised draft of the BBWA, (iii) conducted a secret, supplemental review of seven studies prepared by environmental activists and paid critics of the Pebble Project so they could be cited as key sources in the BBWA, (iv) conducted a follow-on peer review of the second draft of the BBWA, (v) issued the final BBWA, and (vi) issued its Proposed Determination to restrict development in the Bristol Bay Watershed.[39] The OIG, by its own admission, did not evaluate *any* emails surrounding these key developments. Nevertheless, it purports to find no bias in EPA's conduct or predetermination concerning these very developments – the BBWA and its use as the basis for initiating a 404(c) process. Without reviewing evidence during two of the three years during which EPA conducted the BBWA, the OIG's conclusion is simply untenable.

Moreover, the OIG Report acknowledges that the OIG made no effort to recover deleted email. The OIG admits that the email databases it obtained only "included information available at the time of retrieval."[40] That is, "[i]f an employee had deleted emails prior to our retrieving

---

[34] *Id.* at 5.

[35] As the OIG acknowledges, this very petition was the purported basis for EPA's investigation of the proposed PLP mine. We now know that "basis" was nothing more than window dressing for a decision EPA had already reached months, if not years, prior.

[36] *Id.* at 5 n.6.

[37] *Id.*

[38] *Id.* at 5.

[39] *Id.* at 9.

[40] *Id.* at 5 n. 6.

the database, those deleted email were not available."[41] This statement is misleading. EPA, and the OIG, have the capability to recover deleted email if they so choose. The OIG inexplicably chose not to exercise that capability here.

The OIG also had the capability to review additional EPA email produced by the Agency to the OIG.[42] EPA "provided [the OIG] access to emails collected in response to [FOIA] and congressional requests."[43] The OIG did "not perform a detailed review of these emails."[44] Instead, it claims it "searched for information as needed."[45] The OIG Report does not elaborate further. It does not disclose the volume of FOIA records reviewed. And it does not disclose what, if any, searches it conducted.

Put simply, the OIG offers no explanation for its decision to arbitrarily narrow its evaluation. We do know, however, that after limiting its search by people, terms, and years, the OIG reviewed only 8,352 emails.[46] In contrast, PLP (without subpoena power or other authorities vested in the OIG) has already reviewed over 50,000 records, and it continues to review thousands more every month. While the OIG had at least the same number of records available to it for review (and could have obtained even more had it exercised its investigatory powers), it chose not to review them and it chooses not to disclose the reason it failed to review them.

Failure to Subpoena Key Records. The OIG indefensibly failed to exercise the broad investigative authority available to it under the Inspector General Act of 1978. Under the Act, the OIG has the power – and with it, a corresponding responsibility – to subpoena records from parties outside the agency when necessary to perform its watchdog role.[47] This authority is recognized by the courts. For instance, the United States District Court for the District of Columbia recently upheld issuance of a subpoena to a third party, stating, "[the Inspector General Act] does not purport to identify and it does not limit the set of individuals or entities to whom a subpoena may be issued; the only requirement is that the information sought be necessary for the OIG to perform its statutorily assigned duties."[48] The OIG, without any explanation, chose *not* to exercise this authority here.

In letter after letter, PLP informed the OIG of EPA's extensive and improper collusion with anti-mine activists. PLP identified numerous individuals working closely with EPA to

---

[41] *Id.*
[42] *Id.* at 5 n. 6.
[43] *Id.* at 5.
[44] *Id.*
[45] *Id.*
[46] *Id.* at 5.
[47] 5 U.S.C. app. 3 § 6(a)(4).
[48] *United States v. Inst. for College Access & Success*, 27 F. Supp. 3d 106, 112 (D.D.C. 2014); *see also* Michael R. Bromwich, *Running Special Investigations: The Inspector General Model*, 86 Geo. L.J. 2027, 2036 (1998) ("OIGs have the statutory right to use administrative subpoenas *duces tecum* to obtain documents and other evidence from individuals and entities outside their agencies.").

obtain a veto of PLP's planned mining project. And PLP attached exhibit after exhibit, documenting this collusion. PLP also explained to the OIG that some of the most damning evidence came not from EPA, but rather from the files of the anti-mine activists themselves. For instance, when PLP subpoenaed a lobbying firm that once employed anti-mine activist Wayne Nastri, PLP uncovered meeting notes showing that a senior Agency official had admitted that politics, rather than science, were driving EPA's veto decision.[49] While PLP sent this, and other documents, to the OIG, it chose not to pursue its own subpoenas of such individuals. Nor did it acknowledge any of this evidence of bias in its Report.

Had the OIG fully investigated the events and communications surrounding EPA's assertion of 404(c) authority, it would have discovered a web of improper exchanges between EPA employees and anti-mine activists fixated on derailing any conceivable PLP project. These communications will be discussed in great detail later on in this letter.

Failure to Obtain Personal Email Concerning Official EPA Business. The OIG Report acknowledges that Region 10 employee Phil North may have violated federal law and Agency policy when he "used his personal, nongovernmental email to review and provide comments" to anti-mine activist and lawyer Jeff Parker, on the Tribal Petition for a 404(c) action. [50] But the OIG understates the significance of this discovery, claiming it could not determine if North collaborated with Parker in his personal or official capacity.[51] The suggestion that North's conduct would not be a misuse of his position if he were acting in his personal capacity is astonishing.

As explained in Section II, North and Parker colluded to draft a petition on the issue that North had been pursuing for years prior – a preemptive veto of the PLP mine. North, recognizing that EPA would only be spurred into immediate action if he generated outside pressure from stakeholders, found a willing ally in Jeff Parker. Together the two concocted a strategy that began with the Tribal Petition. With that petition in hand, North had all the political cover he needed to push aggressively his proposed preemptive veto of the PLP mine through the highest levels within the Agency – and he succeeded. This conduct would not have been any less improper if North had done it in his "personal" capacity – federal government employees are prohibited from taking actions that create the appearance that they are violating the law or ethical standards.[52]

The fact that North and Parker's collusion occurred over North's personal, rather than work, email, does not absolve North. To the contrary, this fact only bolsters the claim that EPA worked behind the scenes in a secret collaboration with anti-mine activists to further their ultimate goal of vetoing the project. Rather than condemning this conduct, the OIG lets EPA off the hook with a mild scolding, simply recommending that the Agency issue a memo to Region

[49] 2/22/2011 Carscallen Email to Bristol et al.; "Ekwok Notes" (attachment to 2/22/2011 Carscallen Email to Bristol et al.).

[50] OIG Report at 15.

[51] *Id.* at 16.

[52] *Id.*

10 staff regarding unethical conduct and add some information to employee training modules.[53]

Phil North's personal email use was not an isolated incident, for North or the Agency. Far from it. This pervasive disregard of law, rule, and regulation is common throughout the Agency, and extended all the way to the top. High-level Agency personnel communicated with environmental activists such as Sierra Club leaders when drafting greenhouse gas regulations.[54] There as here, an official "used [a] personal email address to send sensitive information that he wanted to shield from public view."[55] And former EPA Administrator Lisa Jackson routinely used personal email and text messaging for EPA business and even admitted to deleting messages occasionally without forwarding them to her official account.[56] These problems were previously brought to the OIG's attention and the OIG determined "[t]he EPA lacks internal controls to ensure the identification and preservation of records when using private and alias email accounts for conducting government business."[57] Then, just as now, the OIG recommended additional policies, recordkeeping, and training. But the problem of personal email use persists.

Despite this clear pattern of disregard for the law and stated Agency policy, the OIG refused to dig any further or reprimand the Agency appropriately. Indeed, the OIG selectively collected the records of just *one* anti-mine activist. If it had any real desire to uncover the contents of EPA emails sent over personal email accounts concerning the PLP project, it could have subpoenaed a number of other anti-mine activists and reviewed their communications with the Agency. It chose not to.

The obvious implication of the OIG's decision is that the Agency will continue to use personal email to conduct official business that it wants shielded from public scrutiny.[58]

II. The OIG Ignored Substantial Evidence of EPA Collusion with Anti-Mine Activists

To avoid reaching an undesirable conclusion, the OIG Report focuses on a single email

---

[53] *Id.* at 17-18.

[54] *See* Lachlan Markay, *Top EPA Official Used Personal Email Address to Solicit Green Group's Input*, Wash. Free Beacon (June 22, 2015), http://freebeacon.com/issues/top-epa-official-used-personal-email-address-to-solicit-green-groups-input/.

[55] *Id.*

[56] Mem. Op. at 19, *Landmark Legal Found. v. EPA*, (D.D.C. Mar. 2, 2015), ECF No. 69 (Administrator Jackson admitting that she deleted at least one personal email message without forwarding to EPA account).

[57] EPA OIG, *Congressionally Requested Inquiry Into the EPA's Use of Private and Alias Email Accounts*, Report No. 13-P-0433 at 5 (Sept. 26, 2013).

[58] Even when EPA employees do use their official government email, the Agency has taken extraordinary steps to shield their conduct from public view. As the House Oversight Committee has already found, a senior EPA official "wanted to 'routinely' mark emails about the 404(c) petitions as privileged so they would not be released to" the public under FOIA. If the Agency is able to shield its communications by using both personal email and marking emails as deliberative, open government will cease to exist. House Oversight Report at 15.

exchange between Phil North and Jeff Parker, while both understating the implications of that exchange and hiding the existence of many other collusive exchanges. The evidence detailed below paints a much less innocent picture than the OIG would like. It shows that North and Parker collaborated on much more than just the Tribal Petition. In fact, the two worked together to draft Agency policy documents and to craft the Agency's veto strategy. And North and Parker were not the only individuals conspiring to achieve a veto – for years EPA Region 10 and Headquarters worked together with anti-mine activists to reach their mutual goal. This evidence, ignored by the OIG, proves that North's "misuse of position" was not isolated to one instance or one EPA employee. Dozens of Agency employees, fueled by bias and motivated to satisfy senior officials that had long ago decided to pursue a veto, misused their positions by working too closely with interested stakeholders in that pursuit.

A. The OIG Report Greatly Understates EPA's Improper Collusion With Parker

The OIG Report establishes, in fact, that North helped Parker petition the Agency to initiate a veto. In particular, it finds that "[p]rior to six federally recognized tribes submitting their petition to the EPA on May 21, 2010, an attorney representing the tribes sent a draft version of the petition, along with other documents, to [Phil North's] personal email, and asked him to review it."[59] The Report also finds that North "replied using his personal email saying he would look it over."[60] And later, North, "using his personal email," "replied to [Parker] with suggested edits to the tribes' CWA Section 404(c) petition letter."[61] North made several edits, including suggesting that Parker add "language on ecological effects not directly related to fisheries."[62] North's edits were included in the final petition.[63] Indeed, the House Oversight Committee found that "with respect to North's comment, the final version of the letter cited seventeen ecological impacts, up from the eight cited in the draft that North reviewed."[64]

Given these uncontroverted facts, the OIG had no choice but to admit that North "used his personal nongovernmental email to review and provide comments on a draft CWA Section 404(c) petition from tribes before they submitted it to the EPA."[65] Nevertheless, the OIG grossly understates the seriousness of this finding, calling it only a "possible" misuse of North's position. The OIG fails to acknowledge that the Agency repeatedly touted the Tribal Petition as the very basis for initiating its preemptive Section 404(c) process,[66] despite having actively been considering this unprecedented action internally for at least a number of years. Thus, the Agency (via North) *petitioned itself* to initiate a preemptive veto. It is inconceivable that an adequate study by the OIG would end up remaining nearly silent on this issue. The potential consequences of this are severe: any agency looking to create public momentum for an

[59] OIG Report at 15.
[60] *Id.*
[61] *Id.*
[62] *Id.*
[63] *Id.*
[64] House Oversight Report at 10.
[65] OIG Report at 15.
[66] *Id.* at 17.

unprecedented policy can now allow an employee to work with an interested stakeholder and draft a petition for action on that policy.

Parker's Contributions to the "Options Paper." Not only does the OIG understate the significance of North and Parker's collusion on the Tribal Petition, but it also completely ignores evidence showing that the pair colluded on other key documents.

For example, at the very same time that North and Parker were revising the Tribal Petition, the two worked together on an EPA policy document that laid out EPA's options for vetoing the PLP project (the "Options Paper").[67] EPA emails show that *before the Tribal Petition was submitted*, EPA was internally circulating a draft of the Options Paper.[68] And by May 18, 2010, EPA had already scheduled a briefing of Region 10 Administrator Dennis McLerran on EPA's options under Section 404(c).[69] Thus, EPA was colluding with a special interest activist on an internal Agency decision document concerning a preemptive veto *well before the Tribal petition was received by the Agency*.

Just as North helped Parker with the Tribal Petition, Parker helped North with the Options Paper. The day before EPA circulated what was purported to be a "final" draft of the Options Paper,[70] Parker sent an email to Region 10 counsel Cara Steiner-Riley and North with the subject "options paper."[71] In that email, Parker suggested proceeding with a 404(c) veto by using a water rights application submitted by NDM to the State of Alaska in 2006.[72] North then forwarded Parker's email and a link to supporting materials to Michael Szerlog, a Region 10 manager, telling Szerlog that the idea "seems worth considering."[73] In fact, as the House Oversight Committee found, "[t]he Bristol Bay Watershed Assessment eventually relied on this data to contemplate the Pebble Mine risk analysis."[74]

This was not the only one of Parker's ideas to make it into the Options Paper. Parker sent a second idea for the Options Paper to North on June 29, 2010.[75] The email offered North "an idea," and Parker attached a document that said: "You could separate options into 'procedural' options and 'substantive' options. This identifies a 'substantive' option."[76] Below that was a grid, outlining options for a Section 404(c) veto based on geographic areas and specific activities.[77] The next day, North circulated the Options Paper, which included a notation to address Parker's suggestion, stating EPA should conduct "further legal analysis on identifying

---

[67] 7/1/2010 McGrath Email to North forwarding Bristol Bay Options Paper ("Options Paper").
[68] *Id.*
[69] *See* 05/12/2010 North Email to Szerlog; 05/18/2010 Szerlog Email to North.
[70] 06/30/2010 North Email.
[71] 6/29/2010 Parker Email to Steiner-Riley.
[72] *Id.*
[73] 06/29/2010 North Email to Szerlog.
[74] House Oversight Report at 12.
[75] 06/29/2010 Parker Email to North with attachment.
[76] *Id.* at 2.
[77] *Id.*

appropriate restricted areas and activities."[78] These emails leave little doubt that EPA officials were working extensively and secretly with Parker to orchestrate EPA's plan to shut down the PLP mine.

Other Examples of Parker's Influence. Parker's inappropriate influence over EPA's actions went beyond coordinating the Tribal Petition and the Options Paper. Indeed, Parker helped craft the very strategy the Agency eventually adopted.

Throughout 2009 and early 2010, EPA's veto strategy focused on PLP and restricting its development of the Pebble Deposit. But in June 2010, North and Parker shifted the framework for discussion. The two discussed ideas for "a broad approach to 404(c)" that would "separate it from the Pebble project" and support EPA's desire to "use[] 404(c) before applications."[79] Their emails reflect a high level of strategic coordination: "***What you and I are thinking*** fits with a positive, protective purpose of 404(c), in contrast to a means to prohibit a mine. The latter is simply a by-product of these deposits being in the wrong place."[80]

It did not take long for EPA to adopt the "broad approach" that North and Parker had developed. In September 2010, Michael Szerlog (North's supervisor and manager of Region 10's Aquatic Resources Unit) emailed Palmer Hough (EPA Office of Water), telling him that North had developed "a really good approach that focuses on the entire region looking at streams and wetlands.[81] Szerlog, and eventually all of EPA, recognized that EPA's 404(c) strategy "cannot be about the mine. It has to be about the resource."[82] This was because "[i]f it's about the mine, then we need to wait until we receive an application to begin to talk about 404C."[83] But EPA did not want to wait for PLP to submit an application. So it adopted North and Parker's "broad approach," which would "use[] [404(c)] … as a protection tool, to determine what types of fill would be allowed and what types or volumes would be prohibited that would not result in an unacceptable adverse impact" to the resources of Bristol Bay.[84]

Other examples of collusion with Parker abound. On September 12, 2011, for example, Parker drafted a memorandum for Hough and North on the specific steps EPA should take to make a Section 404(c) veto endure through future administrations.[85] Later that same month, Parker sent a draft version of a memorandum to Hough, asking for assistance on the document's

---

[78] *Compare* Options Paper at 3 (noting "further legal analysis on identifying appropriate restricted areas and activities" was needed) *with* 06/29/2010 North Email to Szerlog at 2 (suggesting restrictions by geographic area and activities).

[79] 6/10/2010 Parker Email to North.

[80] *Id.* (emphasis added).

[81] 9/29/2010 Hough Email to Szerlog.

[82] *Id.*

[83] *Id.*

[84] *Id.*

[85] 9/12/2011 Memorandum from Parker to Hough. The opening line of this memorandum, "[t]hank you for asking for my thoughts," indicates that Hough solicited the research.

contents.[86] While EPA recognized that its close relationship with Parker was inappropriate, as discussed in the next section, it did not take any action to curtail the relationship, acting only to conceal it.

Widespread Awareness of Parker's Inappropriate Access. The OIG Report's finding that "[North's] supervisor was unaware that [North] reviewed" the Tribal Petition[87] falters when compared to the trove of evidence showing many in EPA were aware that North and Parker were exchanging information about the petition and EPA strategy.

Indeed, the House Oversight Committee, after reviewing this evidence, concluded that many people at EPA knew that Parker and North were working closely on the petition, stating "those contacts were fairly well known within EPA."[88] The Committee focused in particular on a November 2010 email exchange. Those emails show that three months before EPA announced that it would undertake the BBWA, Parker called EPA's Palmer Hough, telling him that the Agency should initiate the Section 404(c) action now rather than waiting "several months to complete ***the planned analysis*** and public outreach."[89] This caused EPA's Christopher Hunter to ask North, Hough, and Szerlog (North's supposedly "unaware" supervisor): "any explanation on how he knew about it?"[90] Despite Hunter alerting his colleagues that Parker clearly knew too much, EPA did nothing to shut off Parker's access. The BBWA was supposed to be a secret, but this exchange about Parker proves that it was not.

EPA ignored many other signs that Parker was receiving inside information, including from Richard Parkin, Director, Office of Ecosystems, Tribal and Public Affairs at EPA Region 10 and future BBWA team leader. The month following Hunter's email, Parker's access to the Agency surfaced again. As the House Oversight Committee found, on December 22, 2010, Region 10 attorney Keith Cohon "sent an email stating his concern that Parkin and North may have colluded with Parker and his clients to push the preemptive 404(c) petition, that North fed Parker internal EPA information, and that North provided legal analysis for Parker's clients."[91] Moreover, as the Committee found, Cohon's email alerted EPA that Parker was "getting second hand ***info from Phil about what Rick is saying in internal e-mail messages***."[92] Thus, EPA knew without a shadow of a doubt that Parker was receiving information "internal" to the Agency.

North was not the only EPA employee sharing "internal" information with Parker, as the OIG Report would suggest. Seven months after North retired from EPA in 2013, Parkin emailed Sheila Eckman, Elizabeth McKenna, Cara Steiner-Riley, and Dennis McLerran, telling them that Parker called him after having heard that EPA was "considering taking an approach that

---

[86] 9/22/2011 Parker Email to Hough.
[87] OIG Report at 16.
[88] House Oversight Report at 15.
[89] 11/4/2010 Hunter Email to Hough (emphasis added).
[90] *Id.*
[91] House Oversight Report at 12-13; 12/29/2010 North Email to Parkin and Cohon.
[92] House Oversight Report at 15.

addresses only Pebble."[93] Evidently, this piece of information was also supposed to be a secret, causing Parkin to remark that Parker "seems to hear far more than he should."[94]

All of this evidence demonstrates that EPA's collusion with Parker extended far beyond the "possible misuse" of a single EPA position. Not only was Parker taking his cues from several people within the Agency, but the problem lasted several years and caught the attention of at least Regional Administrator Dennis McLerran as well as other key figures, including Richard Parkin, Christopher Hunter, Sheila Eckman, Palmer Hough, Michael Szerlog, Cara Steiner-Riley, Keith Cohon, and Elizabeth McKenna. Though these officials' refusal to address the wrongdoing was damaging enough to EPA's credibility, the OIG's refusal to confront it is plainly inexcusable.

B. The OIG Report Completely Disregards Extensive Collusion with Numerous Anti-Mine Activists

The OIG Report's silence on the many instances of EPA collusion with other anti-mine activists calls into serious question the usefulness of the OIG's efforts to unearth misconduct. While there are many examples of EPA's bias and predetermination, some of the most striking examples come in the months leading up to the Assessment's announcement. In those months before the BBWA's public launch, EPA not only tipped off several anti-mine activists that the BBWA was forthcoming, but it also solicited their scientific data, policy suggestions, and briefings. Had the OIG looked at the copious communications, planning documents, and data exchanges between EPA and the anti-mine activists during this period, the Report would have uncovered a secret, coordinated effort to block the PLP mining project well before EPA had conducted any scientific analysis.

A particularly glaring example comes from EPA's work with several of these activists to incorporate into the BBWA a Bristol Bay ecological risk assessment prepared by The Nature Conservancy ("TNC Risk Assessment"). In 2010, EPA obtained the TNC Risk Assessment, which predictably takes an extreme and negative view of the PLP planned mining project, focusing on "the high likelihood of acid mine drainage"[95] and other worst-case scenarios, while ignoring the economic potential of a mine. Though this obvious bias weakens the TNC Risk Assessment's scientific value, it only increased its value to EPA.

EPA repeatedly requested background, briefings, and more information on the TNC Risk Assessment so it could use it as the basis for the Agency's own analysis. For example, in the fall of 2010, months before EPA's February 2011 announcement of the BBWA process, Palmer Hough emailed Shoren Brown, head of Trout Unlimited, an anti-mine special interest group, to schedule a briefing, saying, "I think it would be very helpful to have reps from TNC walk us through its October 2010 [Bristol Bay] Risk Assessment and to hear an update on any literature

[93] 11/26/2013 Steiner-Riley Email to Parkin et al.

[94] *Id.*

[95] Ecology and Environment, Inc., *An Assessment of Ecological Risk to Wild Salmon Systems from large-scale Mining in the Nushagak and Kvichak Watersheds of the Bristol Bay Basins* at 132 (2010).

compilations that your coalition is working on."[96] And at the same time EPA began taking steps to acquire data from TNC in preparation for the BBWA.[97]

Brown accepted Hough's invitation for a briefing, and on December 17, 2010, TNC presented to officials from Region 10 and EPA Headquarters an "Overview of The Nature Conservancy's Research and Field Studies in Bristol Bay."[98] By this time, EPA was letting the anti-mine community know that the BBWA was in the works.[99] (The same information was not shared with PLP or the public.) And EPA even invited to participate in the December 2010 TNC briefing a subcontractor hired to work on the BBWA – all before it had announced the launch of the BBWA and informed PLP or the public.[100]

Three days after the meeting, apparently impressed with the TNC Risk Assessment, North emailed another contractor hired to work on the BBWA, telling him "TNC has spatial data that they are willing to share."[101] North then invited the contractor to a meeting with TNC to discuss the spatial data. Thus, over a month and a half before the BBWA was announced, EPA had its BBWA contractors meet with anti-mine groups to understand TNC's Risk Assessment and use the underlying data.

Following the briefing, EPA invited Brown and his cohorts from various environmental groups to brief EPA Headquarters about the TNC Risk Assessment.[102] Thus, on January 27, 2011, at least seven anti-mine scientists and activists met with ***17 EPA officials***.[103] More than half of these officials contributed to the BBWA or its development, including authoring several portions of the Assessment. The planning documents for this meeting make its purpose clear: The anti-mine activists would offer their "science work in support of EPA" and "summarize the TNC risk assessment ***and how it supports 404c.***"[104]

It is clear that this meeting was not simply a listening session for EPA. Meeting notes from one anti-mine activist reveal that the Agency tasked the activists with several follow-up items. In particular, EPA asked that they provide the Agency with "[v]ulnerability points/counterarguments to the literature," including "the 'holes' that the other side may poke,"

---

[96] 11/4/2010 Hough Email to Brown.

[97] 11/17/2010 North Email to Augustine ("Attached is a description of data owned by The Nature Conservancy that they are willing to share with us. We would like to have all of this information available to us if possible.");12/8/2010 Augustine Email to North (" I would like to set up a call with someone from your shop, the TNC folks, Michaels [Szerlog] and I to discuss their data and how we might acquire it.").

[98] 12/15/2010 North Email to Steiner-Riley.

[99] 12/10/2010 North Email to Brown; 12/20/2010 North Email to Chambers.

[100] 12/10/2010 North Email to Brown.

[101] 12/21/2012 Kittel Email to North.

[102] 1/7/2011 Brown Email to Bristol et al.

[103] 1/27/2011 Sign-in Sheet, Bristol Bay Briefing at EPA Headquarters.

[104] 12/7/2010 Brown Email to Kiekow et al. (emphasis added); 1/26/2011 Palmer Email to Frazer et al.

so that EPA could be "fully prepared."[105] EPA also asked that it be kept up to date with "the ongoing and important work/studies that may be completed in the next year which may be helpful to EPA."[106] EPA even suggested that TNC undertake a "high visibility peer review" for the risk assessment.[107]

Following the January meeting, EPA arranged two more discussions covering the TNC Risk Assessment. First, EPA arranged for these anti-mine scientists to meet with Region 10 officials to present to them the same material provided to Headquarters in the January meeting.[108] Second, and perhaps more significantly, EPA invited several anti-mine scientists from TNC plus two EPA contractors that were hired to work on the BBWA to participate in a webinar on February 18, 2011, a mere 11 days after the BBWA was announced, to discuss "scenario building."[109] Specifically, the purpose of the webinar was for "the EPA ORD folks to get acquainted with the TNC report, see the presentation and ask questions about how the scenario presented by assembled [*sic*], what other scenarios might be possible and what data might be available. **We anticipate that this will the [sic] first in a series of calls to discuss scenario building in Bristol Bay."**[110] Thus, just as EPA was launching the BBWA, EPA and its BBWA contractors were meeting with TNC representatives to craft "scenarios" for mine discharges, one of the key issues addressed in the BBWA.

TNC would later go on to brag about its role in spurring the Agency into action, announcing that TNC's Risk Assessment "played a central role in galvanizing action by" EPA and noting that "EPA announced their intention to launch the Bristol Bay Watershed Assessment in February 2011, only one week after [TNC] made a series of presentations of the risk assessment to EPA …."[111] Significantly, TNC made clear that its "***science work is flowing directly into EPA's assessment of mining risk***."[112] This was not mere puffery. PLP has uncovered dozens of emails showing that EPA requested from TNC, and other groups, scientific data and analysis during its preparation of the BBWA.

Though the meetings and communications in the lead-up to the BBWA's public announcement represent an extreme and inappropriate level of collaboration with only one interested party in a regulatory process, they were in fact par for the course for EPA in its treatment of PLP. The critical January 2011 planning meeting is just one example, but there are several other instances of collusion and predetermination that somehow escaped the OIG's review, including:

- In June 2010, Regional Administrator Dennis McLerran received a briefing from several anti-mine scientists discussing a rationale for a pre-emptive Section 404(c)

---

[105] 1/31/2011 Kiekow Email to Brown et al.
[106] *Id.*
[107] *Id.*
[108] 2/22/2011 Dunbar Email to Parkin et al.
[109] 2/8/2011 North Email to Albert et al.
[110] 2/8/2011 North Email to Albert; 2/9/2011 North Email to Albert et al.
[111] 3/1/2013 Letter from R. Hagenstein to S. Rudolph.
[112] *Id.* at 6.

veto and lobbying efforts to build public support.[113]

- In September 2010, EPA and Trout Unlimited coordinated their responses to Alaska Governor Sean Parnell's public letter critical of EPA's Pebble predetermination.[114]

- In April 2012, EPA again hosted several anti-mine scientists with the purpose of "coordinat[ing] science research related to the fisheries of Bristol Bay and their relation to the" BBWA.[115] In the follow-up to this meeting, the scientists prepared detailed critiques of PLP's environmental data for EPA's use.[116]

- EPA invited anti-mine lobbyist Wayne Nastri to discuss strategies related to the publication of the BBWA *each time a draft of the Assessment was released*.[117]

Rather than address this improper and unfair collaboration, the OIG Report simply ignores it, in an unacceptable abdication of responsibility – if the OIG truly intended to investigate bias it had to examine the issue of collusion. The entire BBWA process, infected as it was with collusion, constitutes the very waste, fraud, and abuse that necessitate the existence of inspectors general. A sincere investigation – not a window-dressed, myopic report – is necessary.

III. The OIG Completely Disregards Evidence of EPA's Bias and Predetermination

The OIG Report claims it could find "no evidence" of bias or predetermination but ignores every piece of documentary evidence PLP presented establishing both predetermination and bias. While the evidence is too substantial to examine in full, this letter highlights key EPA policy documents that – when considered together and alongside contemporaneous emails – establish that EPA had decided to veto the project well before the BBWA. The only outstanding question was what avenue the Agency would pursue to meet its objective. Thus, the issue was *when* to veto, not *whether* to veto. The OIG conveniently ignores this evidence.

Policy Documents. The OIG Report narrowly addresses EPA's three "options" for handling the proposed PLP project without actually discussing the "Options Paper" in which the Agency's strategy is detailed. This omission is not surprising given the Agency's admissions in that document.

The Options Paper, which was drafted *before* the Tribal Petition, contains striking admissions evidencing a consensus within EPA and other key federal agencies to block the PLP mine. These admissions include:

- "Region 10's Aquatic Resources Unit (ARU) believes ***that [the existing]***

[113] Agenda for Trout Unlimited Meeting with US EPA Region 10.
[114] 9/30/2010 Brown Email to Hough; 9/30/2010 Hough Email to Brown.
[115] 4/1/2012 Snyder Email to Hough.
[116] 5/23/2012 Hough Email to Smith.
[117] 3/6/2012 Nastri Email to Hough; 3/19/2013 Maddox Email to Frithsen; Meeting Request with Regional Administrator McLerran, Sept. 26, 2013.

information, as it relates to Bristol Bay and its watersheds, is sufficient to make a 404(c) determination now" and that "[w]aiting to make the determination does not seem necessary or a prudent use of anyone's resources."

- It also describes the Pebble Project as "a ***project EPA ARU program staff believe should be vetoed in the end***."

- "NMFS [National Marine Fisheries Service], NPS [National Park Service] and FWS [Fish and Wildlife Service] staff in Alaska have unofficially endorsed EPA initiating a 404(c) action."[118]

The OIG ignores the Options Paper and the statements contained within it.

It also ignores other policy documents drafted in the fall of 2010 that confirm EPA's view that the PLP project "should be vetoed in the end."[119] For example, the OIG Report contains no discussion of a September 8, 2010, EPA discussion matrix evaluating the Agency's use of a preemptive 404(c) veto.[120] In that document, EPA discusses the possible risks of a preemptive veto, including the fact that it had "never before been done in the history" of the Clean Water Act, thus giving rise to "[l]itigation risk."[121] But EPA had a plan to reduce this risk, noting that the preemptive approach would be more likely to succeed if some public consultation process were implemented to "deflect political backlash" and "derail opposition."[122] The remainder of the matrix lays out the timing and process alternatives for achieving EPA's goals of a preemptive 404(c) veto.

Additionally, while the OIG Report briefly touches on another Fall 2010 EPA policy document – the FY 2011 budget – in a footnote, it quickly dispenses with it, claiming that the "OW [Office of Water] technical lead" told the OIG that "at the time the budget document was developed, the agency had not yet decided how it would proceed" and that the budget was not used to request funds.[123] Taking the "OW technical lead" at their word, the OIG Report does not examine the budget any further, even though EPA has not produced any alternative budget submitted that year and even though both the Options Paper and the Discussion Matrix reflect the same conclusion embodied in the budget – *i.e.* that the mine would be vetoed.

Had the OIG examined the budget, it would have found that the document included a request for funds for fiscal year 2011 to initiate its Section 404(c) process, describing its efforts as being on the "fast track."[124] In particular, EPA prepared a request for funding to "[i]nitiate the process and publish a CWA 404(c) 'veto' action for the proposed permit for the Pebble gold

[118] Options Paper at 3, 7, 8 (emphasis added).
[119] *Id.* at 7.
[120] Discussion Matrix.
[121] *Id.*
[122] *Id.*
[123] OIG Report at 8 n.7.
[124] Proposed EPA Budget for 2011.

mine . . . ."[125] Moreover, the OIG does not address several statements in the budget evidencing EPA's prejudgment. For example, the document states that "Region 10 believes that additional information gathering and analysis must be completed in order to support a decision to formally initiate . . . 404(c)."[126] And the document, prepared before the BBWA process or any scientific inquiry had begun, argues at length that there is a "clear and important need" to exercise Section 404(c) to stop the Pebble Project.[127]

These documents establish that EPA Region 10 had decided to veto the Pebble Mine by mid-2010, and well before the BBWA or any permit application. The entire BBWA process was merely a pretext to develop a record that, in the eyes of the uninformed, could be viewed as a justification for a decision that EPA had, in fact, already made. EPA's pre-determination compromised the quality and objectivity of its science and wasted taxpayer money. The OIG Report did not mention this evidence.

Email Admissions. EPA's 2010 policy documents leave little doubt as to EPA's intentions, but these policy documents are not the only evidence of bias or predetermination. PLP provided the OIG with emails it had obtained through FOIA requests and litigation that leave no doubt that EPA intended to veto the PLP project by any means necessary.

As early as August 17, 2009, North, the person EPA would appoint as a BBWA technical lead, wrote to other EPA officials concerning the agenda for EPA's annual mining retreat. North wrote: "As you know, I feel that both of these projects [the Chuitna and Pebble mines] merit consideration of a 404C veto. We will discuss this from a technical perspective and staff perspective at these meetings."[128] A week later, an EPA email confirmed that the agenda for the retreat would include a presentation by North regarding 404 issues, including discussions of EPA's position, action in response to the position and timelines, schedules, and next steps.[129] As the House Oversight Committee found, North's "presentation outlined his intent to advocate for a preemptive veto before PLP submitted a permit application. Moreover, the presentation included numerous pre-determined conclusions about the potential adverse effects of the project."[130]

In December 2009, before any Tribal Petition had been filed, the 404(c) issue had become significant enough inside the Agency "that then-EPA Administrator Lisa Jackson requested a staff briefing on Pebble Mine."[131] When North learned of this briefing, he emailed others at EPA, saying: "We should begin to identify the information needed for a review or [*sic*] 404C and begin to collect that information. Of course, as demonstrated in the presentation, I have already started this process as part of my day-to-day duties."[132] Region 10 showed interest

[125] *Id.*
[126] *Id.*
[127] *Id.*
[128] 8/17/2009 North Email to Szerlog.
[129] 8/24/2009 Shaw Email to Edmond et al.
[130] House Oversight Report at 7.
[131] *Id.*
[132] 12/16/2009 Thiesing Email to North.

in North's plan, with one EPA employee, Mary Thiesing, suggesting they "approach it as though there will be a 404(c), and we don't need to wait for a new [Regional Administrator] to do that …."[133] Thiesing also wrote: "The best thing you can do si [*sic*] build a HUGE record, so that if political pressure causes HQ to withdraw support, you have a big public record which still spells out the facts."[134] In light of this, she suggested that North begin to compile "[l]ists of impacts, and especially, pictures where 'despite industry best efforts', they trashed the surrounding environment and left a cleanup to the government. This is especially significant because we will need to do tribal outreach, and they need to understand where the risk of irreversible jeopardy really is, rather than just getting bought off by industry."[135] North acted on her suggestions.

Then in January 2010, Region 10 presented its PLP mine briefing to Administrator Jackson. That briefing twice raised the possibility of a preemptive 404(c) veto of the PLP mine.[136] By March, North was emailing anti-mine activist Carol Ann Woody and attaching an "outline for preliminary ecological assessment of the Pebble copper mine."[137] North wrote:

> I have not fleshed this out at all. As you may be able to see, the document I am developing is focused on the ecological consequences of various mine failure scenarios from leaky tailings impoundments to catastrophic failure and AMD. I will also cover the direct losses from simply building such a facility in this location. I don't need to demonstrate that various pollutants are bad for fish.
>
> Anything you can offer that will keep me from blind literature allies, will be appreciated.[138]

Thus, at least two months before the Tribal Petition and one year before EPA announced the BBWA, North was outlining the contents of the BBWA with an avowed anti-Pebble scientist from outside the Agency.

And two months later, the same month that EPA received the Tribal Petition, EPA was already creating the Options Paper, as discussed above. Significantly, North emailed EPA staff, admitting: "The draft option paper has two options 1) wait for the permit/NEPA process and 2) do the analysis now, then decide how to proceed. ***It seems that nobody disagrees with the likelihood of a 404(c). Within Region 10 we seem to only disagree on the process for getting there***."[139]

---

[133] *Id.*

[134] *Id.*

[135] *Id.*

[136] Briefing for Administrator Lisa Jackson, *Proposed Pebble Mine Project Alaska* (Jan. 13, 2010).

[137] 3/10/2010 Woody Email to North.

[138] *Id.*

[139] 5/20/2010 North Email to Szerlog.

The Options Paper underwent several changes. But three months after North's email, Richard Parkin, the future BBWA team leader, confirmed that EPA wanted to immediately veto the mine. In an August 25, 2010, email exchange among EPA staff discussing the Options Paper, Parkin tells his colleagues that in his briefing to Regional Administrator McLerran, "I am viewing [the Options Paper] as a background piece but in my pitch ***I am going right back to a recommendation for option 3***."[140] Based on the July 1, 2010, draft of the Options Paper,[141] Option 3 is: "Initiate 404(c) process – Intent to Issue Notice of Proposed Determination."[142] These emails show that while the Agency laid out other options for the record, the ultimate outcome was never in doubt – EPA would veto any proposed mine.

This view was commonly known at EPA *and* at other federal agencies. In September 2010, Phil Brna, an employee from the U.S. Fish and Wildlife Service ("FWS"), emailed his colleagues regarding "Pebble and 404c," stating, "I spoke 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***."[143] Brna added his own personal view, telling them "[t]his is going to happen and it's going to get bloody. I am looking forward to it!"[144]

A week later, another FWS employee circulated a briefing paper entitled, "EPA to Seek Service ***When*** They Use Section 404(c) of the Clean Water Act." The paper states:

> The US Environmental Protection Agency (EPA) is seeking Service support ***as they initiate a formal process to issue a determination that the waters of the US, including wetlands, within the potential pebble Mine action are unsuitable for the placement or fill material***. This action would be conducted under the authority of Section 404(c) of the Clean Water Act (CWA), and would effectively prevent the project from receiving the necessary federal permits to develop a mine in the Nushagak and Kvichak watersheds.[145]

Later that same month, yet another FWS employee wrote to his colleagues about a briefing EPA would give FWS to discuss the details of the "404(c) action."[146] The email explains that EPA's

---

[140] 8/25/2010 Szerlog Email to Parkin.

[141] EPA has yet to produce any version of the Options Paper to PLP, whether through FOIR or litigation. PLP obtained the July 1, 2010 Options Paper through a FOIA request directed at the National Park Service. Had that agency never released the document, PLP would still be unaware of its contents.

[142] Options Paper at 6.

[143] 9/23/2010 Brna Email to Mann.

[144] *Id.*

[145] EPA, *EPA to Seek Service Support When They Use Section 404(c) of the Clean Water Act* (2010).

[146] 10/20/2010 Mann Email to Kohout et al.

briefing would discuss "the EPA criteria for taking the 404(c) action."[147] The purpose of the briefing was to obtain "a statement of support from [FWS officials] as to the merits of the 404(c) action. This is their time to tell a convincing story about why 404(c) action would be appropriate."[148] This email, like the rest, demonstrates that EPA had already made its decision to issue a veto but needed to obtain political support from other federal agencies.

Having generated enough momentum behind their plan, on October 28, 2010, EPA staff circulated a presentation for then-Administrator Lisa Jackson regarding the Pebble mine project. The purpose of the presentation was "to recommend an advance 404(c) process and receive Administrator Jackson's input and approval."[149] This "recommendation" was made despite the fact that the Agency had not yet conducted a shred of scientific analysis.

All of these emails contradict the OIG's conclusion that there was "no evidence" of bias or predetermination. They establish that before EPA received the Tribal Petition, its personnel had already decided to go forward. The fact that the OIG came to its conclusion without discussing, or even citing, a single one of these emails demonstrates how shallow and inadequate its investigation was.

IV. Taking EPA at its Word, the OIG Fails to Examine Deficiencies in the BBWA

The OIG did not engage in a meaningful review of the BBWA, choosing instead to take EPA at its word every time the Agency claimed it acted properly, even when the evidence showed otherwise. While the BBWA and the process leading to its preparation were riddled with flaws, a few examples are sufficient to illustrate the reach of EPA's anti-mine bias. First, EPA ensured that the BBWA's "scientific" analysis would show the "unacceptable adverse effect" required to issue a 404(c) veto by placing responsibility for the analysis in the hands of EPA officials and outsiders who had previously expressed a desire to kill any proposed PLP mining project. Second, unencumbered by any PLP permit application, EPA designed "hypothetical" mine scenarios that used outdated mining practices and then evaluated whether it would cause adverse environmental impacts. Third, EPA manipulated the entire peer review process to curb criticism of the BBWA and EPA's hypothetical mine scenarios. Finally, EPA stifled criticism by PLP, peer reviewers, and the public by claiming the BBWA was not a "decision document" and ignoring significant criticisms as "beyond the scope of this assessment." These and other errors in the Assessment demonstrate that EPA was not concerned with reaching the right answer, only the answer that was right for itself – that the proposed mine would have "unacceptable adverse effects."

Bias. The OIG Report's failure to find "evidence of bias in how the EPA conducted the [BBWA]" is astonishing given how deeply EPA's bias permeated and infected the entire BBWA process. To minimize the "[l]itigation risk" the Agency identified in its Discussion Matrix,[150] EPA announced on February 7, 2011, that it would conduct a scientific analysis of the Bristol

[147] *Id.*
[148] *Id.*
[149] 12/28/2010 Szerlog Email to Stern et al.
[150] Discussion Matrix.

Bay watershed.[151] Just as the Agency's Discussion Matrix set out, this "information gathering and analysis [had to] be completed in order to support a decision to formally initiate . . . 404(c)."[152] With this objective in mind, EPA took all necessary steps to ensure the BBWA delivered the necessary analysis to "support" EPA's decision to initiate a 404(c) veto.

The Agency began by putting the right EPA leaders in place. For example, the Agency appointed Richard Parkin to be the BBWA team leader.[153] Parkin was not an objective and disinterested leader. He had made his bias well known. Indeed, Parkin was the same EPA official who months earlier told his colleagues that he would recommend to Regional Administrator McLerran that the EPA pursue "option 3," *i.e.* that the Agency immediately initiate a preemptive veto, without any scientific analysis.[154] While the Agency opted to conduct the BBWA rather than immediately veto the project, it put Parkin in charge of the BBWA process to steer it in the right direction. Parkin did not bother to hide his opinion. In February 2011, as EPA was rolling out the BBWA, Parkin met with members of an Alaska Native Tribe and admitted to them that "while a 404c determination would be based on science – ***politics are as big or bigger factor***."[155] The OIG refused to subpoena the records or review the emails that would have uncovered this obvious bias.

Parkin may have failed to convince the Agency to pursue an immediate preemptive veto, but he succeeded in ensuring that the BBWA's "science" suited his ultimate goal of vetoing the PLP mining project. As BBWA team leader, Parkin led a group of scientific contributors that included Phil North. North's bias has been documented above. Despite this bias, EPA gave him a central role in the BBWA, appointing him as a "technical lead."[156] North's BBWA responsibilities were myriad: North drafted the BBWA section describing the fictional mine on which other authors relied to fabricate an environmental disaster scenario; revised the other authors' portions of the BBWA; coordinated inter-agency communications regarding Pebble, tying together the efforts of several other federal agencies; and participated on the editorial team responsible for finalizing the BBWA.[157] As North himself explained to other U.S. government officials, he was "the lead of the technical team for Bristol Bay" and "the final editor [of the BBWA] once this whole thing is put together …"[158] His contribution was so significant that he told people that the entire BBWA process was "running him ragged," leaving him no "time to work on anything else."[159]

With Parkin and North in charge, EPA had no trouble stacking the decks against PLP by using authors and contributors who were publicly and vehemently anti-mine. The OIG Report

---

[151] OIG Report at 8.

[152] Proposed EPA Budget for 2011.

[153] 2/15/11 Holsman Email to Jensen.

[154] 8/25/2010 Szerlog Email to Parkin; Options Paper.

[155] 2/22/2011 Carscallen Email to Bristol et al.; "Ekwok Notes" (attachment to 2/22/2011 Carscallen Email to Bristol et al.).

[156] 2/14/2011 North email to Nitczynski and Owens.

[157] 10/24/2012 North Email to Szerlog; 10/18/2012 Frithsen email to North.

[158] 2/14/2011 North email to Nitczynski and Owens; 10/24/2012 North Email to Szerlog.

[159] 10/18/2012 North Email to Chu; 10/5/2010 North Email to Szerlog.

fails to examine how the selection of the following authors and contributors evidence EPA's bias and predetermination:

- FWS's Phil Brna was selected by EPA to contribute to the Assessment, despite, or because of, his long-standing opposition to the mine. As early as 2004, Brna provided a "heads up" to his FWS colleagues that Northern Dynasty was planning a series of technical review meetings on the proposed project, saying "[w]ho wants to play?" Brna apparently relished the possibility of a Pebble veto: "[t]his [*i.e.*, a decision barring Pebble] is going to happen and it's going to get bloody. I am looking forward to it!" Notwithstanding the ferocity of his biases, EPA assigned Brna the task of co-authoring Appendix C to the BBWA.[160]

- Alan Boraas, a professor at Kenai Peninsula College and outspoken Pebble critic, was recruited to author Appendix D on Traditional Ecological Knowledge. Before being retained to work on the BBWA, Boraas had written vehemently anti-Pebble op-ed pieces for Alaska newspapers. In one December 2005 piece, Boraas stated that the Pebble Project is acceptable "[i]f you don't mind a few floaters in your salmon streams and a little mercury in your wild salmon."[161] He also opined that Native Alaskans living near the Pebble deposit – the very people whose opinions he would later be asked to analyze for the BBWA – had already decided against the Project.[162] North and others at EPA were aware of Boraas' op-ed pieces as early as April 2011 but apparently did not seek his removal from the BBWA team despite requests to do so by PLP and some Native entities.[163]

- Ann Maest, a scientist with Stratus Consulting who had admitted to falsifying reports in environmental litigation in Ecuador,[164] met many times with EPA officials and authored several reports relied on by EPA for early drafts of the BBWA. When Maest's wrongdoing in the Ecuadoran litigation came to light, EPA formally removed references to her work from the text of the BBWA. But EPA did not disavow the work of the other scientists who had worked closely or had given presentations with Maest and whose objectivity was also clearly in question. Nor is there evidence that EPA made any effort to remove Maest's contributions to the BBWA other than to remove direct citations to her work.[165]

- Thomas Quinn, a fisheries professor at the University of Washington, was also a contributor to the BBWA despite his zealous anti-Pebble opinions. After a

[160] 9/1/04 Brna Email to Rappoport et al.; 09/23/10 Brna email to Mann.

[161] Alan Boraas, *Murkowski Risks Salmon For Gold Mine*, Anchorage Daily News (Dec. 1, 2005).

[162] Alan Boraas, *Pebble Mine Partnership Raises Fears*, Anchorage Daily News (Apr. 14, 2007).

[163] 04/07/11 North Email to Parker; 04/05/11 North Email to Steiner-Riley et al.

[164] Witness Statement of Ann Maest, *Chevron Corp. v. Donziger*, Case No. 1:11-cv-00691-LAK (S.D.N.Y. Apr. 12, 2013).

[165] EPA, Response to Peer Review Comments at 49-50.

> contentious February 2011 meeting, Dr. Quinn felt it necessary to apologize to Parkin for rude comments he had made to mining proponents and admitted to Parkin that "I guess you can tell that I feel strongly about this." Despite these "strong" anti-mine opinions, EPA relied on Dr. Quinn's work and cited him more than a dozen times in the final Assessment.[166]

Thus, EPA ensured that the BBWA would reach the Agency's desired outcome of showing adverse environmental impacts by putting responsibility for the Assessment in the hands of North, Parkin, and like-minded authors and contributors. Instead of being developed by an objective third-party contractor, as an EIS would be under NEPA, the BBWA was conceived and implemented by individuals who were united in their goal of stopping the PLP mine project. The OIG does not acknowledge or comment upon any of this evidence of bias.

Hypothetical Mine Scenarios. The OIG Report likewise ignores how the BBWA's analysis of its mining scenarios shows that EPA only wanted to use the Assessment to create the "unacceptable adverse impacts" necessary to support a 404(c) veto. EPA designed these mining scenarios without having an actual permit application from PLP to review.[167] The Assessment acknowledges that the scenarios "are not based on a specific mine permit application and are not intended to be the detailed plans by which the components of a mine would be designed."[168] In fact, EPA admitted that"[t]he exact details of any future mine plan for the Pebble deposit or for other deposits in the watershed will differ from our mine scenarios."[169] The OIG Report does not even mention this issue.

However, several peer reviewers and observers noted that the vast differences between the hypothetical mine scenarios and an actual mine plan submitted as part of a permit application rendered EPA's analysis useless. As one peer reviewer told EPA,

---

[166] 02/28/11 Quinn Email to Parkin; 03/04/11 North Email to Schindler; 10/13/11 North email to Schindler.

[167] The BBWA disingenuously states that two of the mine scenarios that EPA created and evaluated are based on "preliminary mine details put forth in Northern Dynasty Minerals' Preliminary Assessment of the Pebble Mine." BBWA at 6-1. The BBWA fails, however, to disclose that the Preliminary Assessment evaluated the *economic* potential of the Pebble deposit. It did not, as EPA suggests, include a detailed *engineering* analysis of any proposed development, and it accordingly lacks information on strategies and technologies for managing environmental effects.

Moreover, as the Preliminary Assessment forecasts, "The project description that the Pebble Partnership ultimately elects to submit for permitting under NEPA may vary in a number of ways." Northern Dynasty Minerals Ltd., *Preliminary Assessment of the Pebble Project, Southwest Alaska* (Feb. 17, 2011) ("NDM Preliminary Assessment") at 60. And in other corporate filings, PLP has noted that the 2011 document "may have limited going-forward relevance at this time." Northern Dynasty Minerals, Ltd., *Management Discussion and Analysis, Year Ended December 31, 2013*, Form 40-F (filed March 27, 2014) at 6.

[168] BBWA at 6-1.

[169] *Id.* at ES-10.

> [T]he authors have attempted to develop a hypothetical mine and attempted to assess possible environmental effects associated with mine development, operation, and closure. Although interesting, the potential reality of the assessment is somewhat questionable. It is also unclear why EPA undertook this evaluation, given that a more realistic assessment could probably have been conducted once an actual mine was proposed and greater detail about operational parameters available. … Unfortunately, ***because of the hypothetical nature of the approach employed, the uncertainty associated with the assessment, and therefore the utility of the assessment, is questionable***.[170]

The State of Alaska concurred with this observation, concluding that the hypothetical mine scenarios "do not represent the only options and outcomes that could apply to a mine in the Bristol Bay area."[171] EPA ignored this advice, and the OIG Report likewise overlooks this critical evidence of predetermination.

The OIG also ignored the fact that EPA's focus on its own hypothetical mine scenarios also led the BBWA to several inaccurate conclusions. First, the BBWA arbitrarily assumes that the mine would employ "conventional" mining practices.[172] PLP, however, has explicitly committed to mine construction adhering to "international best practice" standards.[173] International best practice for a mine as large as the proposed PLP project would include methods for preventing, mitigating, and (when necessary) compensating for environmental impacts. The BBWA dismisses the role of compensatory mitigation, admitting that "mitigation measures could offset some of the stream and wetland losses" but vaguely asserting that there are "substantial challenges regarding the[ir] efficacy."[174] EPA recognized this weakness but failed to address it, choosing instead to point out that the permitting process could evaluate compensatory mitigation and claiming that this was "outside the scope of this assessment."[175]

Second, EPA used its hypothetical mine scenarios to construct equally hypothetical environmental impacts. For example, the BBWA assumes that a mine would release surplus water into only two of three streams.[176] This is a wholly arbitrary assumption and one that would not be allowed by state or federal regulatory agencies. But EPA chose to adopt this approach so that the Assessment would overstate the impact on downstream aquatic habitats. If, instead, EPA had chosen to assume that surplus water would have been released into all three steams in equal amounts, it would have concluded, for each hypothetical mine scenario, that the change in

---

[170] EPA, *Final Peer Review Report-External Peer Review of EPA's Draft Documents- As Assessment of Potential Mining Impacts of Salmon Ecosystems of Bristol Bay, Alaska* at 22 (Sept. 17, 2012) ("Final Peer Review Report").

[171] 7/23/2012 Letter from Crafford to Jackson and McLerran at 3.

[172] BBWA at ES-11-12.

[173] NDM Preliminary Assessment at 387.

[174] BBWA at ES-27.

[175] EPA Response to Peer Review Comments at 226.

[176] BBWA at 7-44.

streamflow would involve a relatively *high* level of ecosystem protection, rather than finding a potentially adverse impact on the surrounding ecosystem.[177] Although PLP presented this evidence to the OIG, it ignored it. It also ignored the many other examples PLP provided, demonstrating that EPA designed its hypothetical mine scenarios to fail.

Thus, the BBWA designed a mine to fail. EPA fashioned the engineering details and the environmental impacts in order to support its goal to block the PLP project, but the OIG refused to consider this as evidence of bias or predetermination.

Peer Review. The OIG Report disregards several examples of how EPA used the BBWA's peer review process to stifle opportunities for criticism, violating Agency policy and best practice. In particular, the Report misrepresents the peer review of the BBWA's first draft, glosses over the fact that EPA conducted a supplemental review of heavily biased anti-mine studies *in secret* (which review did not comply with EPA's own internal requirements for peer reviews), and completely ignores the shortcomings of the peer review of the BBWA's second draft.

First Draft Peer Review

For the peer review of the BBWA's first draft, conducted in August 2012, EPA imposed several conditions designed to limit public participation. Though the OIG Report states that EPA "invited the public to provide oral testimony during the first day" of a three-day panel meeting,[178] the Report does not mention how EPA rendered such testimony useless: The Agency limited public presentations to just three minutes and prohibited written submissions and visual aids.[179] EPA also violated its own guidelines by engaging in excessive contact with the peer reviewers. EPA's Peer Review Handbook prohibits "general contact and direction to the contractor's staff or peer reviewers."[180] Though the OIG Report claims that reviewers had "no or very limited contact with the EPA,"[181] the Agency's own Peer Review Report reveals that EPA had numerous, substantive discussions with peer reviewers during the supposedly "closed" panel session on the third day:

- When a peer reviewer raised with EPA "the lack of clarity in the draft document's purpose, scope, and intended audience," EPA informed the panel about the Tribal Petition and outlined EPA's options for exercising a Section 404(c) veto;[182]

- When a peer reviewer asked if the BBWA should be "interpreted as a framework, decision-support document, or a risk assessment," EPA explained to them that the BBWA was not a decision document;[183] and

[177] 4/29/2014 Pebble Ltd. P'ship's Comments to EPA's 2/28/2014 Letter at 20.
[178] OIG Report at 12.
[179] EPA Final Peer Review Report at 3.
[180] EPA, Peer Review Handbook § 3.5.3(b) (3d ed.) ("EPA Peer Review Handbook").
[181] OIG Report at 13.
[182] EPA Final Peer Review Report at 3.
[183] *Id.* at 4.

- When peer reviewers questioned the use of the BBWA, EPA explained to them how the BBWA would inform the Agency's options while "also educating and focusing stakeholders by characterizing various stressors and potential risks."[184]

These "clarifications" were far more than the "limited contacts" the OIG Report discusses. Rather, EPA's substantive comments to the peer reviewers minimized the BBWA's impact by characterizing it as non-decisional so that the Assessment would not have to meet the more rigorous standards the peer reviewers would have applied to regulatory decisions. This was improper. Notwithstanding the serious problems with EPA's peer review of the first draft BBWA, the Agency's compliance with its own peer review guidelines deteriorated substantially in subsequent years as it moved forward to complete the BBWA.

Supplemental Review of Anti-Mine Studies

EPA compounded this error when the Agency conducted a clandestine supplemental review before releasing the second draft of the BBWA. In November and December 2012, EPA arranged for a review of seven vehemently anti-mine reports so that the Agency could incorporate the propaganda into subsequent BBWA drafts. The OIG Report simply states that "EPA identified [the seven studies] as relevant and potentially useful to the assessment,"[185] ignoring that EPA never publicized these reviews and clearly chose these reports because the authors were avowed Pebble opponents. For example, Ann Maest authored two of the reports and, as described above, repeatedly presented her anti-Pebble findings to EPA and admitted to falsifying environmental reports in the *Chevron* litigation. Earthworks, an anti-mine environmental group and report author, lists on its website over a dozen articles hostile to the Pebble Project.[186] And the remaining authors were affiliated with the Center for Science in Public Participation, an organization committed "to convince[ing] EPA to invoke its power under section 404(c) of the Clean Water Act to veto the Pebble Project because it would have an 'unacceptable adverse effect' on fisheries resources in the Bristol Bay Region."[187] It is no coincidence that EPA chose studies from these authors, and not others.

The bias of these authors, and their resulting reports, was evident not just to PLP, but also to the reviewers. The supplemental review reports included the following findings (among many others):

- "I find the report, by its very nature, to be very biased."[188]

---

[184] *Id.*

[185] OIG Report at 12.

[186] Earthworks, *Content Tagged with "Pebble Mine"*, http://www.earthworksaction.org/tags/tag_entries/tag/pebble%20mine/P3.

[187] Center for Science in Public Participation, *Projects*, http://www.csp2.org/projects.

[188] *Final Peer Review Summary Report: External Peer Review of Kuipers et al. 2006 (Comparison of Predicted and Actual Water Quality at Hardrock Mines) and Earthworks 2012 (U.S. Copper Prophyry Mines Report)* at 20 (Nov. 15, 2012).

- "[This report] is clearly intended to convince the reader that the Pebble Mine should not be permitted to operate" and "lacks impartiality."[189]

- "[T]he writing and tone of the report suggests less than an objective approach."[190]

- "[S]ome of the comments read like editorial opinions rather than reporting scientific results."[191]

- "[S]ome of the language is a bit alarmist and not based on presented data."[192]

Despite the scathing criticism, EPA based the second draft of the BBWA on these reports and only omitted references to the two Maest-authored reports when Maest became embroiled in public controversy regarding her misconduct in Ecuador. That EPA conducted this review in secret and then ignored the contents of the review shows that the Agency never intended an open, objective, and science-based process. EPA only intended to include as much anti-mine literature as possible in the BBWA.

Second Draft Peer Review

It only gets worse. The OIG Report completely overlooks the flaws in the peer review of the second draft of the BBWA. EPA limited this process to asking the peer reviewers of the first draft if the new Assessment responded to their own peer review comments from the first draft – not the comments of all peer reviewers.[193] However, the second draft of the BBWA was in effect an entirely new document with little similarity to the first draft. The text ballooned from 371 pages to 618 pages, included new and greatly expanded appendices, and relied for the first time on the biased reports approved through the supplemental review process. Given these changes and these new additions, the second draft of the BBWA should have been subject to a full peer review, not an abbreviated, incremental one. Finally, this peer review, like the first, arbitrarily limited opportunities for criticism. EPA held no public meeting, in violation of the Agency's Peer Review Handbook.[194] And the Agency rushed the review. As one peer reviewer expressed, EPA allowed the panel only enough time for "a single review of the report, *i.e.* contractual time constraints were such that [he] could not afford a second review of the

[189] *Final Peer Review Summary Report: External Peer Review of Chambers and Higman 2011 (Long Term Risks of Tailing Dam Failure) and Levit and Chambers 2012 (Comparison of the Pebble Mine with Other Large Hard Rock Mines)* at 20-21 (Dec. 30, 2012) ("Chambers Review").

[190] *Final Peer Review Summary Report: External Peer Review of Wobus et al 2012: Potential Hydrologic and Water Quality Alteration from Large-scale Mining of the Pebble Deposit in Bristol Bay, Alaska*, at 4 (Nov. 2, 2012).

[191] *Id.* at 5.

[192] Chambers Review at 19.

[193] EPA Response to Peer Review Comments at 340-41.

[194] EPA Peer Review Handbook § 3.3.1.

report."[195] This led him to conclude that it was "possible that there are other errors remaining in the report" and he "recommended that after making these corrections and edits that EPA subject the report again to a rigorous independent review."[196]

EPA's behavior during the peer review process should have alerted the OIG to EPA's bias. The circumscribed parameters, the secretive proceedings, and the flouting of guidelines significantly undermine the credibility of the BBWA. For the OIG to ignore these flaws completely undermines the credibility of the Report.

Decisional Document. The OIG Report ignores EPA's own statements about the BBWA and the limitations of its scientific analysis. While the Report states that "[a]ccording to the EPA," the BBWA would "provide a base of information for any agency decision on whether to use CWA Section 404(c), either immediately or in the future," this is contrary to what EPA told PLP, the peer reviewers, and the public during the BBWA process.[197]

PLP presented evidence to the OIG showing that EPA repeatedly downplayed the significance of the BBWA so that it could ignore PLP and external peer reviewers' criticisms of the Assessment. This became more than evident when, less than six weeks after the final BBWA report was released, EPA reversed course and relied on this very Assessment to initiate the 404(c) process.

From the very start of the BBWA process, EPA repeatedly denied that the BBWA would be used "to make a decision under [its] section 404(c) authority."[198] This refrain became even more common as EPA responded to criticisms of the BBWA's peer reviewers. When external reviewers complained that the BBWA overlooked groundwater interactions, mitigation, risk management, and properly quantified fisheries impacts, EPA replied that these concerns were "beyond the scope of this assessment."[199] Ultimately, EPA used this phrase 67 times in its responses to peer reviewers' comments. Over and over, EPA told reviewers:

- the BBWA was "intended as a background scientific document rather than a decision document;"[200]

- the BBWA "itself [was] not decisional, and that it [would] not be the only source of information to inform future decision making;"[201] and

- certain alternative outcome analyses were not "feasible or appropriate" because

---

[195] EPA, *Peer Review Follow-On Comments on the April 2013 Draft of An Assessment of Potential Mining Impacts on Salmon Ecosystems of Bristol Bay, Alaska*, Comments from Reviewer Steve Buckley, at 34-35.

[196] *Id.*

[197] OIG Report at 8.

[198] 3/30/2011 McLerran Letter to Shively.

[199] EPA Response to Peer Review Comments at 31, 45, 47, 76.

[200] *Id.* at 35.

[201] Final Peer Review Report at 4.

the BBWA was "not a decision document."[202]

Thus, the Agency used this conception of a "background" or non-decisional document as a tool to deflect legitimate criticism.

Once the BBWA was complete, however, EPA reversed its position and relied on the BBWA as the main basis for a preemptive 404(c) veto. Its Proposed Determination treats the BBWA as authoritative. Indeed, EPA treated the BBWA as "establish[ing]" facts rather than suggesting them, and it largely ignored the doubts of peer reviewers.[203] EPA then cited the BBWA to justify its conclusions regarding habitat losses, stream losses, the risk of accidents and failures, and many other key variables.[204] There is no suggestion in the Proposed Determination that the BBWA was not a "decision document" or that future studies were required for the EPA to block the project.

In the end, EPA cut off important debates by falsely assuring outsiders that it would consider their concerns in future studies. This resulted in a biased scientific assessment that exaggerated the dangers associated with EPA's hypothetical mine scenarios. Despite this, the Agency relied on this very study in its Notice of Proposed Determination to veto the mine. Significantly, and contrary to EPA's earlier representations, the Notice did *not* suggest that any further study was necessary to reach its final decision. As with all the other evidence of bias in the conduct of the BBWA and EPA's 404(c) decision process, the OIG ignored the obvious implications of EPA's conduct.

CONCLUSION

As this letter demonstrates, the OIG's Report is riddled with glaring weaknesses, from understating the impacts of its own findings about North and Parker, to ignoring PLP's evidence of bias and predetermination. In the end, these errors compel the conclusion that the OIG did not undertake a critical evaluation of EPA's conduct. Accordingly, the OIG study is of no use in determining whether the Agency's actions treated PLP fairly and in accordance with law and regulations.

---

[202] EPA Response to Peer Review Comments at 39.
[203] Proposed Determination at ES-3.
[204] *See, e.g.*, Proposed Determination at ES-4.