

# Deposition of Phil North

(preliminary transcript)

A. I think it's my duty as a federal employee, when someone comes to me and they want help petitioning the government, it's my duty to give them feedback and help them on that.

## Code of the Federal Regulations 33CFR 323.6(b)

The Corps will not issue a permit where the regional administrator of EPA has notified the district engineer and applicant in writing ... that he intends to issue a public notice of a proposed determination to prohibit or withdraw the specification, or to deny, restrict or withdraw the use for specification ...

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(preliminary transcript)

**Q** And let's take a look at Exhibit 13 here. **You wrote to Jeff Parker. I quote, "I keep trying to include ecological impacts, but if they make the sentences awkward then delete." What exactly did you mean by that?**

**A** Well, there was that one that one suggestion of including ecological effects, not just commercial and subsistence fishing. So that's I think that's I mean, this is a long time ago, so I don't remember specifically, but I assume that's what I was talking about.

**Q** **And did you feel that would strengthen the petition letter?**

**A** **Yes** [emphasis added].

**Q** And in your opinion, did the petition letter that Jeff Parker sent to EPA on behalf of his clients, did that change the perspective of people at the EPA?

**A** The letter?

**Q** Yes.

**A** Yes. Yes, I believe so.

# Deposition of Phil North

(preliminary transcript)

Q Was the impending 2012 presidential elections something that you ever discussed with regard to the Pebble Mine situation?

A With?

Q Did you sorry. Did you discuss it internally at EPA?

A I believe that we were aware of it and and yes, we probably discussed that that could change the landscape of what we were doing.

Q Were you attempting to finish what I presume was the draft watershed assessment at that point before the presidential elections?

A I would have to say that at say, between Palmer Hough and I, we probably discussed that that would be a good idea, but I would also have to say that I don't think EPA no, EPA was not trying to finish it before that time frame. At least not that I'm aware of.

Q And do you recall if you discussed the impending presidential election with Jeff Parker?

A I don't doubt that we talked about it. As I said, and I'll probably say more again, he called me quite often and talked to me about lots of things, and this certainly would have been something that he would have been thinking about and brought up.

**From:** [Katherine Carscallen](#)  
**To:** [Tim Bristol](#)  
**Cc:** [Brian Kraft](#); [Shoren Brown](#); [Scott Hed](#); [Elizabeth Dubovsky](#); [Kate Miller](#); [Lesely Rogers](#); [Lindsey Bloom](#); [melanie.brown](#); [Nelli Williams](#); [Rick Halford](#); [Wayne Nastri](#); [Tim Bristol](#)  
**Subject:** Re: Could you..  
**Date:** Tuesday, February 22, 2011 4:26:58 PM  
**Attachments:** [Ekwok Notes.doc](#)  
[ATT12806444.htm](#)

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tim, i went over most of this on the call this morning, but if you want to take a look and probably help shoren in on whatever I missed?

Internal Trout Unlimited Email

Date: February 22, 2011

Subject: Re: Could you...

Attached: Ekwok Notes.doc

### Ekwok Notes

#### **Richard Parkins - Reviewed Outline with Tribes -**

Clarified what 'build a common understanding of potential impacts to BB's salmon fishery....' means. - get an idea from all 'stake holders' if this is 1. Really a 'world class fishery' and 2. Put at unacceptable risk by proposed mineral developments - are these risks mitigateable?

Stressed that while a 404c determination would be based on science - politics are as big or bigger factor

Asked if people would support any gold/copper mine in the region, if it could be shown that the mine would be developed without harm to the fishery - Directed @ BBNC. (Teal explained - BBNC is supportive of some mines, but with a risk threshold which Pebble surpasses)

Explained the possibility of a determination that would Restrict vs. Prohibit development.

#### Outlined what public meetings will look like:

Best time to be in region: Late May. Aug 1-20<sup>th</sup> First week in September.

October/November.

Parkins gave the impression that Late summer would be the most likely time for first round of meetings.

Considering 4 Meeting locations: Anchorage/Dillingham/Illiamna/King Salmon -locations chosen geographically & meeting facilities.

--Tribes stressed that EPA should choose another village- New Stuyahok or Nondalton were strongly suggested.

Asked what the best method to contact tribes or update them through the website

Stressed that while a 404c determination would be based on science - politics are as big or bigger factor.

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Q. As you stated before, you had formulated your opinion on whether EPA should use Section 404(c) for the Pebble mine before a scientific document was prepared by the EPA; right?

A. Yes.

EPA-BBL-4866

Mary Thiesing/R10/USEPA/US  
12/16/2009 07:06 PM  
To: Phil North, Michael Szerlog  
cc  
bcc  
Subject: Re: Pebble

Phil,

I agree with you on practically everything, but especially on the need for ARU to lead the discussion. We have the authority to stop this project, and may consider exercising that authority; consequently, we should be the ones to shape the discussion. However, I also think, as you rightly pointed out, that we need to approach this as a team effort, even within ARU. As project lead, you will get asked to brief people on a moment's notice, and just pulling together the briefing packages will be daunting and often happen without a lot of warning. I definitely think we need to start gathering information right now and continue to do so as the project gains momentum. I think what we have to do is approach it as though there will be a 404(c), and we don't need to wait for a new RA to do that; however, we will be getting one very quickly, and there will be no 404(c) without the RA's complete, total, and most importantly, continued buy-in. We can be prepared to give the RA a suggested direction when he/she comes on board. This thing will be developing for years, and we aren't likely to get RA support or HQ support for a pre-emptive 404(c) on a project this big before the information is developed. The other thing is--and I have seen this happen with my own eyes--is that you have to keep doing a gut check, especially with HQ, because support waxes and wanes depending on the administration, which session of Congress, whether it's an election year, etc. The best thing you can do is 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.

So, while you aren't going to get commitments on a 404(c) right now, you are absolutely right in that we need to build our information "war chest". You did a fantastic job (I thought) in blocking out a very persuasive set of arguments on this. To flesh them out, I would recommend the following:

1. Don't base your arguments on impacts 200 or more years out. A political appointee will make the decision, and they are only interested in what's happening now that they can see, touch, etc. All that a court has to hear is that the project proponent will take every possible precaution to protect the environment and they think that the government is being unreasonable in insisting it's not enough. What would be helpful is to identify mines of the same type, and preferably, by the same project proponent, that have had adverse environmental effects that weren't addressed by the permit or that happened anyway. Lists 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 what the risk of irreversible jeopardy really is, rather than just getting bought off by the industry.

2. That being said, I think we still want the persuasive hydrology and geology data to show potential effects, if it can be assembled, including earthquake risk in real time.

3. Pictures of the endangered species are useful, but don't go more than one slide on the subject. Get a dollar amount on the value of the fishery as well as the number of people it employs and the portion of the world's catch it reopresents (I think you said 43% for the state? How much of it comes from Bristol Bay?)

By the way--keep this under your hat, because I wasn't authorized to make it public and I am not sure who knows yet--but Region 3 is doing a 404(c) on that mountaintop mining project. I believe the PD will hit the Federal Register in January.

Mary Anne  
Phil North  
Hi Michael, I learned from the Mining Team meet... 12/16/2009 03:33:01 PM  
Phil North/R10/USEPA/US

From: Mary Thiesing

To: Phil North

Date: December 16, 2009

Subject: Re: Pebble

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; however, we will be getting one very quickly, and there will be no 404(c) without the RA's complete, total, and most importantly, continued buy-in.

The best thing you can do is [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.

Lists 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.

Bristol Bay Proposal  
Initiate a 404 (c) Process  
(Option 3 – August 23, 2010 Options Paper)  
August 27, 2010

*"We can not solve our problems with the same thinking we used when we created them".*  
Albert Einstein

Short Process Description:

- RA notifies the District Engineer:
  1. that he intends to issue a public notice, pursuant to Section 404(c) of the CWA, of a proposed determination to prohibit or restrict a defined area in the Bristol Bay Watershed for disposal of dredged or fill material; and
  2. that he intends to engage in an open public process lasting 12 to 18 months to inform his final determination whether to issue the public notice.
  
- Region notifies the public and government entities, through mailings, public notices and the EPA web page that:
  - Tribes, a native corporation and Trout Unlimited have requested that EPA begin a public process to investigate a 404 (c) prohibition or restriction of mining projects in the Bristol Bay watershed.
  - Sufficient information exists to meet the regulatory threshold that "unacceptable adverse effects" to the Bristol Bay fishery and ecosystem could result from disposal of dredged or fill material for a major mining project.
  - This process does not represent a judgment that discharge of dredged or fill material will result in unacceptable adverse impacts; it means that the Regional Administrator believes that the issue should be explored.
  - Region 10 will engage the public, government and non-government expertise, and state and federal regulatory agencies in an open process leading to a decision in 12 to 18 months whether to issue the public notice proposing to prohibit or restrict disposal of dredged or fill material.
  
- Short description of the public process:
  - Develop the process around three questions:
    1. Is the Bristol Bay fishery the one of a kind, world class fishery that it is depicted to be?
    2. Given the nature of ore deposits in the water shed, state-of-the-art mining practices and the hydrology and geology of the watershed, is there substantial risk of unacceptable adverse impacts (population level impacts) to the fishery that call for restrictions or even prohibition of the disposal of dredged or fill material?



- PRIVILEGE CLAIMS NOT WAIVED FOR ANY OTHER PURPOSE
3. If warranted by the answers to 1 and 2 above, what restrictions would reduce or eliminate the risk of unacceptable adverse impacts?
- Create a steering committee consisting of EPA, NMFS, USGS, FWS, ADNR, AF&G, ADEC and two Tribal Government representatives. The PLP and other Tribal Government representatives will be invited to attend steering committee meetings and provide information but not to participate in decision making. The committee will attempt to reach consensus but if unable to do so, EPA will be the decision maker. The committee will perform the following tasks:
    - Determine what information is needed to answer the fundamental questions.
    - Pool the information at their disposal and determine appropriate sources of missing information.
    - Analyze the information and draft responses to the fundamental questions.
    - Participate in public meetings addressing each of the fundamental questions.
  - Three public meetings will be held in Anchorage and 3 public meeting will be held in the Bristol Bay Watershed (a total of 6) to explain the steering committee's preliminary findings under each question and take public input.
  - A summary of each public meeting will be developed and made available via the web page.
  - The steering committee may create fact sheets and mailings as its work progresses to keep the public informed.
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  - EPA will enter into IAGs and contracts as appropriate for assistance in collecting and evaluating information and possibly for assistance with public meetings and information dissemination.

Two Key Questions for EPA at this point:

1. Why would we do this to ourselves: Throw ourselves into a political firestorm, with the resource shortages we already face and the possibility of litigation?

Short answer:

Because of the resource. This is truly a world class fishery. There is probably no other resource in the United States that compares to this one in ecological and economic value. Think of a huge open pit mine and tailings reservoir proposed for Yellowstone National Park. That would rival this situation in many ways but wouldn't have the potential off site and world wide impacts of this proposal.

Think of a huge open pit mine and tailings reservoir proposed for Yellowstone National Park. That would rival this situation in many ways but wouldn't have the potential off site and world wide impacts of this proposal.

2. What is to be gained by doing this now rather than waiting for the NEPA and 404 processes to run their courses?

Short answer:

The project proponents will have spent tens of millions of dollars by the time the NEPA and 404 processes are completed, perhaps without even investigating the options and proposals that agencies would think likely to reduce or eliminate unacceptable adverse impacts.

An EPA solo adverse decision after 3 years of spin doctoring, one-sided information releases, and lack of commitment to a process by the state is the worst way to go about this.

EPA starts in a neutral position, without making a judgment, and begins a collaborative process, leading to a judgment.

In the preamble to the regulations EPA expressed its preference for taking advance 404(c) action. For example, "...EPA recognizes that where possible it is much preferable to exercise this authority before the Corps or State has issued a permit, and before the permit holder has begun operations,"

An open, advanced process can facilitate planning by the project proponent and allow more efficient and timely development of permissible projects.

Because this is the new face of EPA: open, collaborative, promoting the discussion on environmentalism before a decision is made.

This project epitomizes such EPA priorities as the discussion on environmentalism, environmental justice, sustainability, protect America's waters, etc.

Thoughts on the down side:

Regarding the political backlash:

The political backlash will be much worse if we wait through the NEPA and 404 processes. That will be the backlash against a renegade, unreasonable agency that is going counter to all the evidence of a long, expensive, fair process to permit projects. We have always had a terrible time reversing the spin that is put on such an action.

We will be more successful controlling the spin on a proactive action. We are doing due diligence. We are facilitating a process that can control undue expense for the project proponent and allow for efficient and timely permissible projects.

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PRIVILEGE CLAIMS NOT WAIVED FOR ANY OTHER PURPOSE

EPA-BBL-6438

David Evans/DC/USEPA/US

To Palmer Hough

08/25/2010 12:50 PM

cc Brian Frazer

bcc

Subject \*Confidential: Fw: Fw: \*\*\* Confidential \*\*\* Not for distribution  
\*\*\* Re: Bristol Bay Options Paper

Palmer,

Here's a juicy one, right up your alley.

Hoping we can meet to discuss your thoughts tomorrow afternoon - I'll be out root-canalizing Friday am.

Dave

David Evans, Director  
Wetlands Division  
Office of Wetlands, Oceans and Watersheds  
(202) 566-0535

----- Forwarded by David Evans/DC/USEPA/US on 08/25/2010 12:49 PM -----

From: Richard Parkin/R10/USEPA/US  
To: David Evans/DC/USEPA/US@EPA, Brian Frazer/DC/USEPA/US@EPA  
Cc: Michael Szerlog/R10/USEPA/US@EPA, Phil North/R10/USEPA/US@EPA  
Date: 08/25/2010 11:38 AM  
Subject: \*Confidential: Fw: \*\*\* Confidential \*\*\* Not for distribution \*\*\* Re: Bristol Bay Options Paper

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Hi Dave and Brian, I have a meeting scheduled for Friday afternoon with the RA, DRA, and other Senior managers on Bristol Bay. Below is a draft of how I want to sell an advanced 404(c) process to them. It is undergoing editing as we speak but is close enough hopefully for you guys to see what I have in mind and whether it will fly for a 404(c) process. What I have developed is how I envision we would engage the public and stakeholders from the time that the 15 day notice is given up to a decision whether to proceed with a public hearing on restrictions or not. Hope that is clear. I would really like to hear your thoughts by Friday morning and if you are thinking "No no you have this all wrong" I would like to hear that right away. Thanks for your help. If you keep going down the email chain you will find an options paper that the RA has already been briefed on.

Rick Parkin  
U.S. EPA, Region 10  
(206) 553-8574

----- Forwarded by Richard Parkin/R10/USEPA/US on 08/25/2010 08:30 AM -----

From: Richard Parkin/R10/USEPA/US  
To: Phil North/R10/USEPA/US@EPA, Patricia McGrath/R10/USEPA/US@EPA, Michael Szerlog/R10/USEPA/US@EPA, Mary Thiesing/R10/USEPA/US@EPA, Cara Steiner-Riley/R10/USEPA/US@EPA  
Cc: Richard Parkin/R10/USEPA/US@EPA, Christine Reichgott/R10/USEPA/US@EPA, Michael Szerlog/R10/USEPA/US@EPA, Sally Thomas/R10/USEPA/US@EPA, Jeff Philip/R10/USEPA/US@EPA, Wenona Wilson/R10/USEPA/US@EPA, Linda Anderson-Carnahan/R10/USEPA/US@EPA, Katherine Brown/R10/USEPA/US@EPA  
Date: 08/24/2010 04:15 PM  
Subject: \*\*\* Confidential \*\*\* Not for distribution \*\*\* Re: Bristol Bay Options Paper

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The attachment below is a first draft of the pitch I will make to Dennis et al. I included Phil's attachment also for those of you who haven't seen it. I am viewing it as a background piece but in my pitch I am going right to a recommendation for option 3. The vision for the process forward that I put in here is probably

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not exactly what we will end up with but I wanted to give them a concrete vision of how this could be  
successfully handled. Everything is fair game for comment. I would like to hear back from you tomorrow  
so I can finalize it and send it to Dennis, Mike B. Marcia and Michelle on Thursday. Thanks



Bristol Bay Proposal.doc

Rick Parkin  
U.S. EPA, Region 10  
(206) 553-8574

Phil North

Rick, For purposes of your discussions this wee...

08/23/2010 06:09:53 PM

From: Phil North/R10/USEPA/US  
To: Richard Parkin/R10/USEPA/US@EPA  
Cc: Michael Szerlog/R10/USEPA/US@EPA, Mary Thiesing/R10/USEPA/US@EPA, Cara  
Steiner-Riley/R10/USEPA/US@EPA, Patricia McGrath/R10/USEPA/US@EPA  
Date: 08/23/2010 06:09 PM  
Subject: Bristol Bay Options Paper

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Rick,  
For purposes of your discussions this week and in light of recent events, here is the options paper that  
Mary Anne and I modified and finalized today.



Bristol Bay Options Paper 8-23-10 final.doc

Phillip North  
Environmental Protection Agency  
Kenai River Center  
514 Funny River Road  
Soldotna, Alaska 99669  
(907) 714-2483  
fax 260-5992  
north.phil@epa.gov

"To protect your rivers, protect your mountains."

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There is no question that if we could see the future and see that a 404(c) action should be initiated that now, in advance, is the time to do it, from the political backlash standpoint.

Regarding resources:

As an agency we strive to put our resources on the highest human health and ecological risks. This project qualifies on both counts. The risks to the people, the communities, the fishery and the ecosystem are immense and potentially forever. Few localized industrial impacts carry the risks of mining in Bristol Bay. Compare it to the OCS oil and gas industry off the North Slope. Such activity poses great risks to the people, resources and ecology of that Region. But when a well is exhausted, the risk ends. You cap it and walk away. The risk in Bristol Bay from large acidified tailings reservoirs will never end.

We always find a way to muster resources for important work:

- Hurricane Katrina
- The Bold
- Yakima Groundwater
- Move and Space Action Teams
- Swift Creek Asbestos issue
- Puget Sound Grant reviews
- etc

Regarding litigation:

Just because we are sued doesn't mean we are wrong.

It is much better to be sued for proactive, bold steps to protect the environment than for doing nothing, which is usually the case.

Risk of litigation is simply an argument to do the job right the first time.

#### Comments from Headquarters

Politically the climate is right.

If we are going to end up pushing a 404(c), an advance action is the way to go.

Clear signals from the Administrator of a willingness to hear from Region 10.

Region 10 needs to make a clear recommendation soon.

Full support from the Wetlands Division.



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## **Options for EPA Involvement in Mining Activity in the Bristol Bay Watershed**

### **I. Issue:**

Bristol Bay in southwest Alaska is arguably the most important watershed in the world for wild salmon. It produces 8% of the world's Pacific Salmon, all of them wild fish. The Nushagak River and Kvichak River watersheds, which are tributaries to Bristol Bay, produce 50% of these fish by themselves. Bristol Bay has the largest sockeye salmon fishery in the world for commercial, subsistence, and recreational fishing. The Yupik Alaska Native culture is a salmon-based subsistence culture that has been supported by these fish throughout the region for thousands of years. The estimated sustainable value of the fishery is approximately \$500 million per year in today's dollars<sup>1,2</sup>. These salmon also provide critical support to both the terrestrial ecosystems of the watersheds and the marine ecosystems of the North Pacific Ocean<sup>3</sup>.

There is a very large copper, molybdenum and gold sulfide ore deposit located at the headwaters of the Kaktuli River and Upper Talarik Creek of the Nushagak and Kvichak watersheds. A mining company (Pebble Limited Partnership, (PLP)) has developed draft mine plans and has provided other information that indicates that if this large ore deposit is developed, it could be one of the largest mines in the world with a measured and indicated gross value of \$300 billion and a similar quantity of reserves inferred<sup>4</sup>. If fully developed it would be 6 to 10 times larger than the Bingham Canyon Mine in Utah, self-reported to be the largest man made excavation on earth<sup>5</sup>. Although PLP has not yet submitted permit applications for developing the ore deposit, based on information they have provided, mining activity at this location would comprise: 1) an excavation with a surface foot print up to 6 square miles and extraction up to a mile deep, 2) a mill site, 3) transportation-related infrastructure, and 4) 4 to 10+ billion tons of waste stored in impoundments. Thousands of acres of wetlands and tens of miles of streams could be permanently lost during construction of a mine. Pollution from operations following construction could potentially include pipeline spills of metals concentrate, seepage from tailings impoundments, acid drainage from waste rock dumps and the mine pit, acid-generating dust and road runoff. All of these sources, if not adequately managed, could impact nearby salmon bearing waters during the effective mine life, which could be 50 to 100+ years. There is also the possibility of shipping-related spills of metals concentrate into marine waters. In the long term, the open pit mine and large waste disposal facilities would need to be maintained in perpetuity at the top of these ecologically unique watersheds.

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<sup>1</sup> Duffield, J.W. et al. 2007. Economics of Wild Salmon Ecosystems: Bristol Bay, Alaska. USDA Forest Service Proceedings RMRS-P-49.

<sup>2</sup> Alaska Department of Fish and Game. 2009. 2009 Bristol Bay Salmon Season Summary. Alaska Department of Fish and Game, Anchorage, Alaska.

<sup>3</sup> National Oceanographic and Atmospheric Administration, Alaska Fisheries Science Center, Seattle, Washington, personal communications with Dr. Sarah Gaichas and Dr. Kerim Aydin by Phil North, March 1, 2010.

<sup>4</sup> Based on metals prices found on line at <http://www.metalprices.com/> on August 7, 2010 and metal quantities listed on the Pebble Limited Partnership web site on May 11, 2010, <http://www.pebblepartnership.com/>.

<sup>5</sup> Kennecott Utah Copper web site last accessed May 12, 2010, <http://www.kennecott.com/visitors-center/>

**CONFIDENTIAL ATTORNEY-CLIENT WORK PRODUCT – NOT SUBJECT TO  
RELEASE UNDER FOIA – DELIBERATIVE PROCESS - PREDECISIONAL**

Additional proposals for developing mineral deposits similar to Pebble appear likely in the near future. Exploration on the Kahiltna Terrane, of which Bristol Bay is a part, has increased as a result of the Pebble discovery<sup>6</sup>. The claim block owned by PLP includes two “high priority targets” to the southwest of the Pebble deposit but within the magnetic anomaly that led to the discovery of Pebble<sup>7</sup>. Exploration has begun on Groundhog Mountain just north of the Pebble deposit<sup>8</sup> and on claims adjacent to PLP’s to the southwest<sup>9</sup>. Mining geologists have now described an ancient mineralized volcanic caldera wholly within the Bristol Bay drainage, of which the Pebble site is the southeast quarter<sup>10</sup>. Exploration is proceeding for copper sulfide deposits around this caldera. Pebble appears to be the first of multiple sulfide deposit mining prospects in the Nushagak and Kvichak watersheds.

Based on information from PLP, other mining sources and EPA’s review of existing literature and reports, EPA Region 10, Aquatic Resources Unit believes that:

- 1) Bristol Bay, its watersheds, and aquatic resources are irreplaceable natural and economically essential resources that can provide benefits to countless generations to come; and
- 2) Large-scale filling of wetlands and stream channels that support the salmon resources of Bristol Bay and the development of mines, with associated infrastructure, acid generating mine pits, waste rock and tailings ponds, pose significant and unacceptable risks of damage to this unique and essential resource.

As a result, EPA Region 10, Aquatics Resources Unit, staff have identified the Nushagak and Kvichak watersheds of Bristol Bay as candidates for a Section 404(c) prohibition or restriction under the Clean Water Act. In addition, six Alaskan tribes, the Bristol Bay Native Corporation, the Bristol Bay Native Association and two commercial fishing associations have requested that EPA use its authority under Section 404(c) to protect these unique resources.

Under Section 404(c) of the Clean Water Act, EPA is authorized “to prohibit the specification (including the withdrawal of specification) of any defined area as a disposal site, and [the Administrator] is authorized to deny or restrict the use of any defined area for specification (including the withdrawal of specification) as a disposal site, whenever he determines, after notice and opportunity for public hearings, that the discharge of such materials into such area will have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational areas....The Administrator shall set forth in writing and make public his findings and his reasons for making any determination under this subsection.”<sup>11</sup>Historically, EPA has generally waited until a permit application was pending before it made 404(c) determinations. However, that is neither a

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<sup>6</sup> Lasely, Shane. 2010. Mining News: Explorers descend on the Kahiltna Terrane. North of 60 Mining News, Vol. 15, No. 26. Week of June 27, 2010.

<sup>7</sup> Northern Dynasty Minerals, Ltd. Web site accessed on July 9, 2010: [http://www.northerndynastyminerals.com/ndm/PD\\_EL.asp](http://www.northerndynastyminerals.com/ndm/PD_EL.asp)

<sup>8</sup> Alaska Public Radio web site accessed on June 9, 2010: <http://aprn.org/2010/06/08/mining-company-explores-groundhog-mountain/>

<sup>9</sup> See footnote 6

<sup>10</sup> Mining News. 2008. Mining News: Junior seeks JV partner for SW claims. North of 60 Mining, Vol. 13, No. 17. Week of April 27, 2008.

<sup>11</sup> 33 U.S.C. § 1344(c)

PRIVILEGE CLAIMS NOT WAIVED FOR ANY OTHER PURPOSE

requirement nor an intent of the process. EPA can make such a determination before any application is submitted<sup>12</sup>. In fact, the preamble to the 404(c) regulations states a clear preference for making a 404(c) determination in advance of a permit<sup>13</sup>.

If EPA determines, given the information it has at hand, that there is “likely to be” an unacceptable adverse impact to the aquatic ecosystem, then EPA’s regulations allow EPA to proceed under Section 404(c) without the permit or NEPA process<sup>14</sup>. Therefore, EPA could choose to “*prohibit* the designation of an area as a disposal site” for any purpose, or it could *restrict* the use of an area as a disposal site for a particular purpose such as the large scale mining of sulfide ores, or it could *restrict* the use of an area as a disposal site by placing conditions on disposal, location, volume, etc., that will adequately prevent unacceptable adverse impacts to the resource. On the other hand, if EPA concludes, based on all available information, that there are levels of activity which could be sustained in these watersheds without unacceptable adverse impacts to the aquatic ecosystem, then a permit application or applications could proceed under §404, with attendant review under NEPA.

Prohibition or restriction under 404(c) could be comprise any of a number of strategies for responding to specific risks. The prohibition or restriction could be:

- Geographically based, e.g., all watersheds surrounding ore body
- Activity-based, e.g., discharges resulting from sulfide ore mining, or based on type of mine
- Threshold-based, e.g., limit on volume of discharge, or on sulfide content of waste, etc.
- Could be combination of any of the above
- Any threshold-based action requires identification of a “safe” threshold

Tribal consultation and public involvement will help to define the nature and scope of a prohibition or restriction.

At this time we identify two options for action currently available to EPA. The pros and cons and the projected resource needs of each option are listed below.

## II. Options:

### 1. No action in response to Tribal and others’ request for a 404(c)

EPA would participate in the permit and NEPA process for each mine as applications are submitted, followed by a 404(q) and 404(c) determination if appropriate. EPA would be addressing potential environmental impacts individually as projects are proposed.

#### A. Process:

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<sup>12</sup> 40 C.F.R. Part 231.1

<sup>13</sup> Federal Register Vol. 44, No 196, Pages 58076 through 58082, Tuesday, October 9, 1979, Preamble to the final rule: Denial or Restriction of Disposal sites; Section 404(c) Procedures.

<sup>14</sup> 40 C.F.R. Part 231.2(e)

- a) Evaluate Clean Water Act (CWA) Section 404 permit applications
- Pebble Limited Partnership has said that they expect to submit CWA Section 404 permit applications in 2012.
  - Permit applications from other sites would follow on individual project schedules in the years to come.
  - 404 permits are required from the Army Corps of Engineers for each project.
  - EPA's role would be to review each project and comment on its compliance with the 404(b)(1) Guidelines
  - Potential outcomes include:
    1. Provide recommendations on avoidance, minimization and compensatory mitigation for fill discharges.
    2. Include "elevation language" in our comments on the permit public notice that reserves our "rights" to elevate disagreements to higher authority than the Alaska District (404(q)); possibly elevate the permit decision.
    3. Use our 404(c) authority to withdraw ("veto") the Corps' 404 permit.
- b) Participate in NEPA Environmental Impact Statement (EIS) development
- EPA's role is to review and comment on the technical merit of the EIS and compliance with NEPA regulations.
    1. EPA could be a co-lead with the Corps, but this is less likely since EPA has no specific permit authority.
  - EPA would rate the project according to the quality of the EIS and the environmental impact of the project.
  - EPA could rate the project environmentally unacceptable and recommend that no action be taken. EPA would have the option of elevating the Corps' NEPA decision to the Council on Environmental Quality.

Pros:

- The permit and NEPA processes could generate a great deal more detailed environmental information and analysis upon which to base a decision.
- Support for a 404(c) position from other agencies and the public may increase as more information is made available about the project and potential impacts. It should be noted, however, that substantial support already exists.

Cons:

- Each permit and NEPA process would likely take several years to complete.
- To negotiate the regulatory process a great deal of human and other resources will be required by all parties involved for each permit.
- PLP would likely spend tens of millions of dollars on necessary environmental studies.

- We can anticipate that significant Region 10 ARU, ORC, OEA and ERSMU FTE would have to be assigned to this unusually large and complex initial project for an extended review period.
- EPA Region 10 Aquatic Resources Unit believes that there is already sufficient information to make a recommendation that the Nushagak and Kvichak River watersheds should be restricted for discharge of dredged or fill material.
- The 404 permit process and NEPA process do not address watershed issues, but are specific to a single project. If the record, when developed, indicates that there are no practicable precautions or practices for ore development which will adequately protect the resources, the only mechanism which will protect them on a watershed basis is 404(c).

Estimated Resources Needs: We estimate that the project team (up to six staff) would be engaged for several years for each proposed mine, to a greater and lesser extent over that time. One each of ERSMU and ARU staff would be involved to a substantial extent over most of that time. Other team members with special technical expertise would be involved as the expertise was needed (weeks at a time).

## **2. Initiate 404(c) process (“Intent to Issue Notice of Proposed Determination”)**

EPA would address the protection of aquatic resources in the Nushagak and Kvichak watersheds as opposed to restricting individual mining operations. While it would address the mining of sulfide deposits, it may also address other development. We would address all issues in a single comprehensive and pro-active action.

### A. Process:

- a) Send “15 day” letter to Corps of Engineers stating that EPA is considering invoking Section 404(c) of the Clean Water Act.
- b) Initiate discussions with PLP about the risk of adverse effects on the Nushagak and Kvichak watersheds and fisheries. Solicit information from them that would rebut our conclusions.
- c) Initiate government to government consultation with Nushagak and Kvichak tribes about the nature and scope of a 404(c).
- d) Dedicate staff and contractor time to compile existing information on the Bristol Bay watershed and information relevant to sulfide-ore mining, and to identify any additional analyses that might be needed.
- e) Engage USGS to assist in the analysis of geochemical, hydrogeologic and seismic information existing for the Bristol Bay area.

- f) Engage NOAA to assist in the analysis of climate information for Bristol Bay and fisheries and other relevant information for Bristol Bay and associated waters (Bering Sea and North Pacific).
- g) Develop a formal impacts evaluation for mining in the Bristol Bay watershed.
- h) Have ORC evaluate the potential for a “takings” claim and assist in evaluating restricted areas or activities.
- i) Develop options for appropriate restrictions on discharges from mining and other activities that would be permissible within Bristol Bay watershed.

Pros:

- Pro-active protection of Bristol Bay aquatic resources for subsistence, commercial, recreational and broad ecological purposes.
- Achieves goals identified in preamble to 404(c) regs: i.e., it facilitates planning by developers and industry, eliminates waste of resources on projects that will likely be restricted at the end of a more extensive process and facilitates comprehensive protection of aquatic resources.
- Positively responsive to tribal governments to whom we have a trust responsibility.
- Agencies throughout the federal, state and tribal governments would be relieved of the burden of staffing the long term effort of NEPA, Section 7 consultation, and 404 review and various state laws and programs.
- PLP or any other project proponent could avoid spending tens of millions of dollars on a project EPA ARU program staff believe should be withdrawn in the end.
- EPA resources required for relatively shorter period of time.

Cons:

- Will generate an immediate political backlash by the State of Alaska and mining interests.
- EPA will become the target of litigation from the State of Alaska, PLP (or another project proponent), and others once the 404(c) is completed.
- Requires dedication of substantial EPA resources for the next 1 to 2 years.

Estimated Resource Needs: We estimate that 2 FTEs would be required for 1 to 2 years, plus others with specific expertise at specific times (weeks at a time). Will likely require a request of resources from headquarters.

# Deposition of Phil North

(preliminary transcript)

Q. And I have just a few seconds here. So I just want to be very clear. The work that NatureServe had already been doing, as you've stated to build the record for a 404(c) action, that work just became part of the watershed assessment?

A. That's correct.

Q. And money was added onto the contract and everything else that was needed to facilitate that?

A. Right.



# Deposition of Phil North

(preliminary transcript)

Q. And did you ever try to convince anyone else at the EPA that the agency should use Section 404(c) authority with regards to the Pebble project?

A. Well, what do you mean by "anyone else"? I mean I don't deal with everybody in the agency.

Q. Right. Do you specifically recall trying to persuade someone to that particular sentiment?

A. Well, I think it was my job to brief them and to inform people about the issue, and then it was really strictly up to them to decide whether they agreed or not. I felt that we should use 404(c), and I made that case.

Q. Did you present the other part of the case, which, presumably, is not to use the 404(c) process?

A. Well, actually, now that you mention that, I believe in the option paper it talked about the other about not using 404(c) and what that entailed. But I don't think it was necessarily my job to say well, **I mean I had come to the conclusion that this was an authority that we had and we should do so. So I don't think I presented, you know, say, "Well, here's the option. The other options is to wait for the permitting process to go" --**

[Mr. North's COUNSEL]: Keep your voice up.

THE WITNESS: -- **you know, "to go forward and to work under that." I don't think -- that was not what I was presenting** [emphasis added].

# Deposition of Phil North

(preliminary transcript)

Q. Okay. One of the issues that I think has come up in the PLP litigation is the utilization of a personal E mail address to sometimes communicate while you were working from home. Did you do that on occasion when you worked from home?

A. Yes.

Q. And why did you do that?

A. I'm going to give two reasons. One is because the EPA system didn't work very well. And so in order to communicate with people by E mail, I had to use my home E mail.  
**The other reason is because there was no reason not to. I mean nobody ever said, "Don't use your home E mail," and sometimes I was sending things off to other EPA employees' home E mail if they were working at home, just because it was convenient and there was no reason not to do that [emphasis added].**