

• ALASKA

EPA effort to stop Pebble draws fire

Republican lawmakers criticize biased, politically motivated tactics supporting environmental agency's bid to veto Pebble permits

By SHANE LASLEY
Mining News

The U.S. Environmental Protection Agency said its Bristol Bay assessment provides evidence that the Pebble copper project is too big and the Bristol Bay watershed is too special to risk the outcome of a state and federal permitting process.

To circumvent permitting under the National Environmental Policy Act, a rigorous permitting regime over which EPA holds great sway, the environmental regulator Feb. 28 initiated a review under Section 404(c) of the federal Clean Water Act to determine whether it can justify a pre-emptive veto of the permits needed to develop a mine at Pebble.

"Today, EPA is taking a significant step forward in our efforts to ensure the world's most productive salmon fishery is safe from the risks it faces from what could be one of the largest mines on Earth," EPA Administrator Gina McCarthy proclaimed during a Feb. 28 briefing coinciding with the announcement that her agency has initiated a CWA Section 404(c) review of the potential Pebble Mine.

EPA's decision to initiate the review comes on the heels of the completion of its "Bristol Bay Assessment," a study aimed at determining the effects developing a mine at Pebble would have on the fish resources near the enormous copper-gold-molybdenum deposit.

To complete the assessment, EPA

loosely designed a hypothetical Pebble Mine and then determined that its model would damage Bristol Bay's world-class salmon fishery.

"Extensive existing data, including information that was collected as part of EPA's three-year scientific assessment, provided ample reasons for EPA to believe that a mine of the size and scope of the Pebble Mine would have significant and irreversible negative impacts on the Bristol Bay watershed and its salmon-bearing waters," McCarthy told reporters.

The Pebble Limited Partnership – an Alaska-based subsidiary of Northern Dynasty Minerals Ltd. created to develop a long-life mine at Pebble – contends that EPA had a predetermined outcome in mind for assessment and worked hand-in-hand with anti-Pebble advocates in reaching the foregone conclusion.

"The steps taken by the EPA to date have gone well outside of its normal practice, have been biased throughout, and have been unduly influenced by environmental advocacy organizations," said Tom Collier, who was appointed CEO of the Pebble Partnership in early February.

More time

With EPA working under the assumption that a mine at Pebble would damage



GINA MCCARTHY

the Bristol Bay watershed, the Pebble Partnership enters the 404(c) review process in the position of guilty until proven innocent. To avert prohibitive restrictions or an outright ban on the permits need to develop the world-class copper deposit, the project developer, State of Alaska and U.S. Army Corps of Engineers are tasked with convincing the federal environmental agency that a mine at Pebble could be developed and operated in a manner that would protect the streams and rivers around the project area and the fish that depend on them.

"The first step in this process is to reach out to the state, to the mining companies and to the (U.S.) Army Corps (of Engineers); and to ask them what other information they want to provide," McCarthy explained.

This initial consultation phase was originally slated for 15 days, but EPA anticipated that more time would be needed.

Alaska asked the federal agency to delay the 404(c) review process "until permit applications for an actual mine project are submitted and thorough reviews by state and federal regulatory agencies are completed."

Alaska Attorney General Michael Geraghty, who penned the request to table the review, explained that a review of Pebble's actual mine plan is the only way

for the state and federal agencies to know whether the envisioned effects on the Bristol Bay watershed would be avoided or mitigated by the mining plan engineered by the Pebble Partnership.

"When a company applies for a state permit it kicks off a process. We're not even at that stage yet. However, the EPA is stepping in and saying we want to influence this before a public permitting process can begin," Alaska Gov. Sean Parnell commented on EPA's decision to initiate the CWA 404(c) review.

EPA, however, has decided not to wait for permit applications. Instead, the agency has given Alaska and the Pebble Partnership until April 29 "to provide information relevant to the 404(c) process and to demonstrate to EPA that no unacceptable adverse effects to aquatic resources would result from mining the Pebble deposit or that actions could be taken to prevent unacceptable adverse effects to waters from such mining."

"Terrible precedent"

Alaska gets a seat at the 404(c) review table because Pebble – and its estimated 80.6 billion pounds of copper, 107.4 million ounces of gold and 5.6 billion pounds of molybdenum – is situated on state land.

"The only reason the State of Alaska is

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allowed an opportunity to comment on today's notice of intent is because the state owns the land on which EPA proposes to take action," Geraghty wrote.

A number of Alaska lawmakers consider EPA's aggressive attempt to judge Pebble prior to permitting process as an act of federal overreach into state interests.

"This decision isn't just about one project; this decision is about our ability as a state to develop our resources. If the EPA is successful in using the Clean Water Act to pre-empt development in Alaska, I have no doubt this will set a precedent for future actions against resource development in the Lower 48," said Sen. Cathy Giessel, R-Anchorage, chair of the Senate Resources committee.

"Remember this proposed project is on our state land."

Republican lawmakers on Capitol Hill agree that EPA's actions at Pebble could have far reaching implications.

"If EPA's action today in effect pre-judges this project, the process EPA has outlined could establish a terrible precedent that only further detracts from investors' willingness to bring capital and jobs to Alaska. It will also open the door to preemptive vetoes on this and other projects, putting development on all of our state's lands – and both public and private lands across the nation – at risk," Sen. Lisa Murkowski, R-Alaska, responded to the initiation of the 404(c) review.

"Talk about a disincentive to invest in America, we are seeing EPA resort to a

ridiculous level of allowing political prejudices determine how the agency handles permitting," said U.S. Sen. David Vitter, R-Louisiana, top Republican on the Environment and Public Works Committee. "When it comes to the Pebble Mine, EPA has shown that they are willing to disregard due process and lawfully established permitting procedures to ensure the failure of any project like this. EPA's desperate attempt to kill a potential mine should signal a major red flag to businesses."

In a news conference that coincided with announcing the Pebble 404(c) review, EPA repeatedly told journalists that its actions to potentially prohibit the development of the Pebble Mine should not be construed as a larger policy shift for the agency.

"No one should read into this action any change to mining permit processes, either contemplated or underway, in any other location," said McCarthy. "This is a unique mine in a very unique place."

"EPA's decision to use section 404(c) of the Clean Water Act in Bristol Bay for the Pebble Mine prospect has no impact on other mine projects around the country or elsewhere in Alaska," EPA Region 10 Administrator Dennis McLerran reiterated.

Murkowski is not convinced that, if the precedent is set, EPA would not be tempted to use it again to stop other projects it deems unfit.

"If this action is allowed to stand, where will the next 'unique' circumstance arise," queried Alaska's senior senator. "EPA's actions here could have potentially widespread consequences for any development project, including airports and



SEN. LISA MURKOWSKI

other infrastructure, anywhere in the nation."

Foregone determination

In addition to concerns that a pre-emptive denial of permits to develop Pebble could result in providing EPA unbridled power to prevent development, questions are arising as to methods used to conduct the study the environmental agency says justifies the launch of the CWA 404(c) review process.

Northern Dynasty said it found evidence of EPA working inappropriately close with anti-Pebble environmental non-governmental organizations in the preparation of the Bristol Bay Assessment.

The Pebble owner said reams of documents that it obtained with U.S. Freedom of Information Act requests provide evidence of this collusion. The company has forwarded this information to the EPA Office of Inspector General, calling on the independent watchdog within the federal agency to investigate the assessment.

Republicans in Washington D.C. are echoing Northern Dynasty's call for an investigation into allegations of political motivation and unfair bias in setting the scene for a CWA 404(c) ban on permits needed to develop Pebble.

U.S. House Oversight and Government Reform Committee Chairman Darrell Issa, R-Calif., contends that the Bristol Bay assessment was an exercise aimed at supporting a foregone determination to thwart the Pebble Partnership's plans to apply for permits.

"EPA's actions regarding the pre-emptive use of Clean Water Act section 404(c) are unprecedented and appear to rest upon an evaluation written with a predetermined conclusion of invoking a pre-emptive 404(c) veto of the Pebble Project," Issa and Reps. Jim Jordan, R-Ohio, and James Lankford, R-Okla., penned in a March 14 letter to EPA Inspector General Arthur Elkins Jr.

The House Oversight committee is not resting its case solely on the merits of an internal EPA investigation. On Mar. 20, Issa subpoenaed McCarthy for documents and communications relating to the proposed Pebble Project, including any action under section 404(c).

Documents already obtained by the House Oversight members seem to validate allegations that EPA was considering the potential of testing its supposed 404(c) authority a year before the Bristol Bay

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—U.S. Sen. David Vitter, R-La.

assessment was launched.

One such document brought to light by the House watchdog is an internal EPA worksheet listing the pros and cons of a proactive 404(c) review of Pebble versus letting the project go into permitting.

The top drawback listed in the column of this 2010 "discussion matrix" was that a proactive 404(c) determination had "never been done before in the history of the CWA."

The agency listed political backlash from Alaska and litigation risks as other potential negative outcomes of attempting to use 404(c) to stop Pebble prior to permitting.

Though EPA is adamant that the actions it is taking at Pebble would not change how it regulates mining, advance 404(c) action at Pebble serving "as a model of proactive watershed planning for sustainability" was listed as a pro on the agency's talking point document.

A January 2010 briefing for former EPA Administrator Lisa Jackson, another EPA document already in the hands of House Oversight, appears to show that EPA was considering a pre-emptive 404(c) veto of Pebble at that time. This appears to come several months prior to requests for such actions by Bristol Bay Native groups, which has been an impetus for the agency to conduct the study from the start.

A third document produced by the oversight committee is a December 2010 request for funds to "initiate the process and publish a CWA 404(c) 'veto' action for the proposed permit for the Pebble gold mine in Bristol Bay.

In making the request for 2011 funds, the EPA wrote, "While resorting to exercising EPA's 404(c) authority is rare (only 12 actions since 1981), the Bristol Bay case represents a clear and important need to do so given the nature and extent of the adverse impacts coupled with the immense quality and vulnerability of the fisheries resource."

Not the end of the road

Notwithstanding the allegations of a predetermined outcome and unfair bias by the EPA, the Pebble Partnership believes it can get beyond the CWA 404(c) process and into permitting.

"We remain confident in our project and our position. We will continue to state our case with the EPA as we work through their process," said Pebble CEO Collier.

For its part, the EPA has left the door for permitting Pebble slightly ajar – informing journalists that the CWA Section 404(c) review, which involves four steps and typically takes about a year to complete, could be cut short if the Pebble Partnership and state convinces the environmental agency that the enormous copper project should be allowed to enter permitting.

"Based on the input EPA receives during any of these steps, including information received during step one, the agency could decide that further review under section 404(c) is no longer necessary," McLerran explains.



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Former U.S. Interior Chief of Staff Collier takes helm at Pebble

Northern Dynasty Minerals Ltd. has tapped the expertise of former United States Department of Interior Chief of Staff Thomas C. (Tom) Collier to serve as chief executive officer of the Pebble Limited Partnership.

Collier has spent four decades as a regulatory attorney in Washington D.C., a tenure in which he has specialized in guiding companies through the federal environmental permitting process and Section 404 wetlands permits in particular, a critical permit overseen under the U.S. Clean Water Act by the U.S. Army Corps of Engineers.

“Resolving complex, challenging and controversial development projects has been the major focus of my career for the past several decades, so I welcome the challenge of serving as Pebble CEO,” said Collier, who assumed the chief executive position in February. “I will immediately focus my energies on preparing the strategy and scientific resources necessary to secure federal and state permits for the construction and operation of a modern, long-life mine at Pebble in the years ahead.”

Collier, a partner in the Washington D.C.-based law firm Steptoe & Johnson, has served as senior external counsel to Northern Dynasty since 2011.

Former Pebble CEO John Shively has transitioned to chairman of its board of directors, a move that allows him to be a part of the strategic leadership team for advancing the world-class copper-gold-molybdenum project in Southwest Alaska.

“This is a complex project and to successfully advance it will take several phases. I have been working with Tom for the past two years on the many issues presented by the EPA’s flawed Bristol Bay report and have found his strategic guidance very helpful on this issue and others associated with the complexities of federal permitting for the project. Our goal in the year ahead is to focus on advancing the project and to initiate permitting. This is another step along that road, and I remain committed to this important project for Alaska’s future,” Shively said of the Feb. 3 management change.

Collier said retaining Shively’s knowledge of Alaska and its regulatory system, as well as his passion for advancing opportunities for Alaska Natives was a key requirement for him accepting the top executive position.

“We remain confident in our project and our position. We will continue to state our case with the EPA as we work through their process.” —Pebble Partnership CEO Tom Collier

“It is extremely important to me in accepting this role to have John in a strategic leadership capacity so we can move this project forward,” said Collier. “John has overseen the tremendous engineering and environmental work to

design a mine that can protect the critical salmon fishery in Bristol Bay, and we both believe a mine can be built that will meet the high expectations Alaskans have for development. I look forward to advancing this important work.”

Based on his industry experience, as well as his time serving as chief of staff for Bruce Babbitt at the U.S. Department of the Interior, Collier has developed extensive knowledge of and networks within key federal regulatory agencies – including the Army Corps and EPA.

Shively noted that Collier is no stranger to Alaska. Over the course of his 40-year career at Steptoe and Johnson, the regulatory attorney has represented several Alaska-based clients – including Alyeska Pipeline Service Co., during its reauthorization of the Trans-Alaska Pipeline System, and Conoco Phillips, during development of the Alpine oil field and CD-5 project on Alaska’s North Slope.

“From my experience, I have developed three key principles that I believe are essential to resolving the kind of environmental controversy we see at Pebble,” Collier said. “First, natural resource development and environmental protection can and do co-exist; second, science is the key to resolving such controversies; and third, the NEPA-required EIS (Environmental Impact Statement) process is the best way to resolve scientific disagreements. I am bringing these lessons and my extensive experience with the section 404 permitting process to Pebble, and I’m confident that this great project will be permitted and built in Alaska.”

With the new leadership in place, Northern Dynasty Minerals is looking ahead to a time the world-class copper-gold-molybdenum project can be judged by the rigid standards of the National Environmental Policy Act.

“We look forward with great enthusiasm to the next major milestones for this project – announcing a new major funding partner and initiating project permitting under NEPA,” added Northern Dynasty’s Thiessen.

—SHANE LASLEY



TOM COLLIER

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“It is a significant decision to launch this process but it is not the end of the road,” EPA Administrator McCarthy added.

Northern Dynasty hopes the road leads through a permitting process that allows the company to make a case for a world-class Pebble copper mine that safeguards the integrity of the Bristol Bay salmon fishery.

“The U.S. and Alaska have among the most stringent environmental laws for the

protection of fish and water in the world, and the Environmental Impact Statement process under NEPA is the gold standard for ensuring that major project developments receive comprehensive, transparent and science-based assessment,” Northern Dynasty President and CEO Ron Thiessen added. “Given that, along with the global significance of the Pebble deposit and the inherent, well-documented limitations of the Bristol Bay Assessment study, including those acknowledged by EPA itself, we continue to have every confidence that final decisions about Pebble will be made in the future following a comprehensive NEPA/EIS permitting process.” ●

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