

U.S. HOUSE OF REPRESENTATIVES
COMMITTEE ON SCIENCE, SPACE, AND TECHNOLOGY

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November 29, 2012

The Honorable Lisa Jackson
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, DC 20004

Dear Administrator Jackson:

On November 9, 2012, the U.S. Environmental Protection Agency (EPA) publicly released the final External Peer Review Report on EPA's Draft Bristol Bay Watershed Assessment (DBBWA) titled, '*An Assessment of Potential Mining Impacts on Salmon Ecosystems of Bristol Bay, Alaska.*' The Peer Review Report reflects comments by the 12 independent experts who were selected as peer reviewers "to evaluate EPA's draft assessment and to provide a written review of the draft document (Volumes I-III) by responding to 14 Charge Questions put forth by EPA."¹

It is my understanding that EPA plans to respond to all comments in the Peer Review Report. However, during a staff briefing scheduled for the same day the report was released, EPA staff declined to provide a date or timeframe as to when it would respond to the comments, nor when it would finalize the DBBWA. EPA staff was also unable to provide a basic answer to the question of how much money the agency spent on producing the draft watershed assessment.

Moreover, during the staff briefing, no mention was made of any additional peer review, which is why I was surprised to read on the agency's website that:

EPA has decided to convene a group of qualified experts to review the revised draft assessment in light of the issues raised by the peer reviewers. The final Bristol Bay Assessment will reflect this further expert review...²

In other words, EPA will conduct a peer review of a peer-reviewed report. While thoroughness is important, I am worried that future peer reviews will ultimately suffer from the same fatal flaw as the original - they would be based on a *hypothetical* mining scenario. Beyond the

¹ Final Peer Review Report, External Peer Review of EPA's Draft Document, "*An Assessment of Potential Mining Impacts on Salmon Ecosystems of Bristol Bay, Alaska,*" September 17, 2012, available at: <http://www.epa.gov/ncea/pdfs/bristolbay/Final-Peer-Review-Report-Bristol-Bay.pdf>; (hereinafter Final Peer Review Report).

² U.S. EPA, Region 10: the Pacific Northwest, Bristol Bay Peer Review, available at: <http://yosemite.epa.gov/R10/ECOCOMM.NSF/bristol+bay/peerreview>.

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fundamental question of the need for and usefulness of a second peer review of a hypothetical mining scenario, the abrupt and unexplained announcement of the second panel raises concerns regarding the process through which EPA plans to establish and guide the panel. The original panelists were fairly balanced in terms of the points of view represented, resulting in constructive, valuable critiques of the draft assessment.

For example, criticisms of the draft assessment include the following comment from panelist Dr. William A. Stubblefield:

This document is somewhat unique, in that no actual mine has been proposed at the location and few site-or project-specific data are available. Therefore, no specific information about development plans and potential operational and closure activities associated with the mine are available. Rather, the 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.³

Another panelist, Dr. Dirk van Zyl, commented:

The biggest uncertainty/variability in the evaluation of a hypothetical project is associated with the potential range of design features, waste management options and operational details that could be included. This was completely overlooked in the analysis by assuming a specific design for the hypothetical mine. The failure likelihoods and consequences on salmonid fish are very dependent on the assumptions for the hypothetical mine. These uncertainties are neither clearly identified nor included in the evaluations. This is a major shortcoming of the present analysis.⁴

Further, it should be made clear that EPA was not asked to conduct a *watershed assessment under Section 104 of the Clean Water Act*. In fact, EPA received "requests in May of 2010 from nine tribes, two commercial fishing organizations, the Bristol Bay Native Corp. and others to initiate a Clean Water Act process that would prohibit or restrict discharges of dredged or fill materials associated with metallic sulfide mining in the Bristol Bay headwaters."⁵ Specifically, the Bristol Bay Native Corporation (BBNC) letter to EPA requested that EPA:

initiate a public administrative process to carefully tailor a prohibition of the discharge of dredged or fill material from the proposed Pebble mine, located on specific land owned

³ Final Peer Review Report, *supra*, note 1.

⁴ *Ibid.*

⁵ Margaret Bauman, "EPA Proceeds With Assessment of Pebble Mine's Impact on Bristol Bay Watershed," *Alaska Dispatch*, April 16, 2012, available at: <https://www.alaskadispatch.com/article/epa-proceeds-assessment-pebble-mines-impact-bristol-bay-watershed>; (hereinafter Bauman Article).

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by the State of Alaska at the headwaters of the Kvichak and Nushagak River drainages under Section 404 (c) of the Clean Water Act.⁶ (Emphasis added).

So, while EPA was asked to take preemptive action under Section 404 (c) of the Clean Water Act prior to any mining permit application, the agency elected not to take that route. Instead, EPA proceeded with a watershed assessment that “falls within the authorities provided in Section 104 of the Clean Water Act,”⁷ according to Dennis McLerran, EPA Administrator for Region 10.

I am troubled by EPA’s vagueness in explaining the purpose of the DBBWA, particularly since it appears as though the agency is positioning itself to use the document in any manner it sees fit in the future. Mr. McLerran sums up the situation quite well in saying that the draft assessment:

could be used in the permitting process or it could be used under section 404 of the Clean Water Act, which gives EPA ability to preemptively stop projects that would have ‘unacceptable, adverse’ impacts on watersheds.⁸

I do not understand the reason for spending scarce federal dollars on a document that the agency is unable to rationalize when it could, and should, wait for a real mine application, and then pursue the clearly defined state and federal process, which also involves other agencies such as the U.S. Army Corps of Engineers. It is difficult to view this draft watershed assessment as anything other than an attempt by EPA to create additional unnecessary regulatory hurdles.

I once again feel compelled to assert my concern that the basis of EPA’s document is a hypothetical mine scenario that has no connection to any mine application. Any future version of this assessment, regardless of the number of peer review processes it is subjected to, would ultimately still suffer from the same fundamental flaw - that the mine in this assessment does not exist.

As the CEO of Pebble has said, the DBBWA:

offered a project so fantastical it would never pass muster under in [*sic*] today’s permitting climate and is not something Pebble would proceed with. The assessment, he told the panel, has ‘no basis in reality in the 21st century.’⁹

⁶ BBNC Letter to EPA, “Re: Clean Water Act 404 (c) process to prohibit certain lands from use as a disposal site for dredged or fill material,” August 12, 2010.

⁷ Bauman Article, *supra*, note 4.

⁸ Alex DeMarban, “Pebble Mine: Hundreds Turn Out to Voice Support, Opposition of EPA Assessment,” *Alaska Dispatch*, June 4, 2012, available at: <http://www.alaskadispatch.com/article/pebble-mine-hundreds-turn-out-voice-support-opposition-epa-assessment?page=full>.

⁹ Jill Burke, “Scientists Hear From Alaskans on Controversial EPA Mine Assessment,” *Alaska Dispatch*, August 7, 2012, available at: <http://www.alaskadispatch.com/article/scientists-hear-alaskans-controversial-epa-mine-assessment?page=full>.

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Echoing his concerns, panelist David Atkins makes the following observation in the Final Peer Review Report:

Why does the assessment describe current 'good' and not 'best' practice? The rationale for this decision needs to be described. In addition, it is likely that anything other than 'best' practice would not be permitted in this context.¹⁰

As a Representative of the State of Georgia, I have no vested interest in this Alaskan project. In fact, as an avid sportsman and longtime life-member of Trout Unlimited, I share the concerns of those who wish to protect this unique ecosystem.

On the other hand, I am also the Chairman of the Investigations and Oversight Subcommittee, and as such, share the concerns of those who are unduly burdened by an agency's unnecessary regulatory hurdles. The U.S. EPA should not stack the deck in one party's favor. There is a federal and state system in place to handle mining scenarios such as that facing the Bristol Bay area.

Following the briefing your staff provided the Committee staff earlier this month on the DBBWA, there was a list of questions and items requested of your staff. I appreciate the initial, albeit partial, response I have received thus far, and look forward to receiving the remainder of my requested items as soon as possible, but no later than December 14, 2012. I am especially interested in your responses to the following questions by the above-mentioned deadline:

- 1) When will EPA respond to the issues raised in the Final Peer Review report dated September 17, 2012?
- 2) When will EPA publish the Final Bristol Bay Watershed Assessment?
- 3) How will the next peer review panel be selected?
 - a) What role will the public have in the selection process?
 - b) Will EPA use the existing contract, issue a new contract, or use a standing EPA peer review body like the Science Advisory Board?
 - c) How will EPA ensure the next peer review panel is independent and balanced in terms of points of view represented?
 - d) Will EPA ensure that selection and implementation of the panel conforms to the requirements of the Agency's Peer Review Handbook?

¹⁰ Final Peer Review Report, *supra*, note 1.

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- 4) How will the charge questions for the next group of peer review experts be selected, and what role will the public have in the selection of the next set of charge questions?
- 5) How much money has EPA spent so far on the draft Bristol Bay watershed assessment, and how much more does it anticipate will be spent on the final assessment? The reply to this question should include all costs EPA incurred, and expects to incur, related to the drafting of the Bristol Bay watershed assessment, the initial peer review, the follow-on peer review, as well as any other costs related to the watershed assessment.

Please feel free to contact me if you have any questions, or your staff may contact Raj Bharwani with the Investigations and Oversight Subcommittee at (202) 225-6371.

Sincerely,



Rep. Paul Broun, MD
Chairman
Subcommittee on Investigations
and Oversight

cc: Rep. Paul Tonko
Ranking Member
Subcommittee on Investigations
and Oversight