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January 14, 2019

Via E-Mail and U.S. Mail

Information Quality Guidelines Staff
Mail Code 2821T
U.S. Environmental Protection Agency Headquarters
1200 Pennsylvania Ave., NW
Washington, DC 20460

Re: Pebble Limited Partnership Submission in Support of Information Quality Act Request for Correction by the Competitive Enterprise Institute (RFC 19001)

On behalf of our client, the Pebble Limited Partnership ("PLP"), we write to you in support of the Competitive Enterprise Institute's ("CEI") November 14, 2018, Request for Correction or Withdrawal Regarding the Bristol Bay Watershed Assessment (RFC 19001) ("CEI Request"). For the reasons outlined below, PLP urges the U.S. Environmental Protection Agency ("EPA") to correct or withdraw the Bristol Bay Watershed Assessment ("BBWA")[1] for violation of the Information Quality Act ("IQA")[2] and the IQA's implementing guidelines issued by the Office of Management and Budget ("OMB")[3] and EPA.[4] EPA guidelines require the Agency to correct any published information that does not meet "basic standards of quality, including objectivity, utility, and integrity,"[5] and the BBWA falls well short of these standards.

PLP is an American partnership that has leased from the State of Alaska the rights to develop the Pebble Deposit, a copper-, gold-, and molybdenum-rich lode in southwest Alaska. In 2017, PLP submitted an application for a permit to construct and operate the Pebble Mine to the U.S. Army Corps of Engineers ("USACE"). PLP has invested hundreds of millions of

[1] EPA Region 10, *An Assessment of Potential Mining Impacts on Salmon Ecosystems of Bristol Bay, Alaska* (Jan. 2014), https://www.epa.gov/sites/production/files/2015-05/documents/bristol_bay_assessment_final_2014_vol1.pdf.

[2] 44 U.S.C. § 3516.

[3] Office of Management and Budget, Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies ("OMB Guidelines"), 67 Fed. Reg. 8452 (Feb. 22, 2002).

[4] Environmental Protection Agency, *Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by the Environmental Protection Agency*, https://www.epa.gov/sites/production/files/2017-03/documents/epa-info-quality-guidelines.pdf ("EPA Guidelines").

[5] *Id.* at 3.

dollars into geological, environmental, engineering, and other technical studies of the project over the course of several years. Although PLP's permit application is currently being processed, EPA has prevented USACE from issuing a permit by issuing a Clean Water Act Section 404(c) Proposed Determination, which, if finalized, effectively bans all development of the Pebble Deposit.[6] The Proposed Determination is based almost entirely on the BBWA, a study purporting to outline the effects of mining on the salmon fisheries of the Bristol Bay watershed through the evaluation of hypothetical mine designs.

The BBWA, however, was tainted with bias and predetermination, leading the Agency to commit several major errors and omit the best available information and science regarding the potential impact of the Pebble Mine. Thus, we respectfully urge EPA to grant CEI's petition to substantially withdraw the BBWA and disavow any reliance on that analysis, to comply with both the IQA and EPA's Guidelines. As CEI notes, to review the Pebble Mine, the Agency should participate in the Environmental Impact Statement ("EIS") process under the National Environmental Policy Act ("NEPA").[7]

I. Background

The Pebble Mine has the potential to create thousands of jobs in the Bristol Bay region of Alaska. For over a decade, PLP developed feasibility studies and various potential mine designs to support its eventual permit application. In 2014, however, EPA abandoned the traditional permitting process in favor of preemptively halting the development of the mine despite the fact that PLP *had not yet submitted a mining application*. Without the benefit of a permit application to analyze, EPA simply constructed dubious facts and banned all development based on assumptions developed for it by interested mining opponents. This distortion of the rule of law is a disgrace to the agency, its scientists, and the citizens of Alaska.

In the normal course, a proposed developer submits a Section 404 permit application to the Corps. Once the permit application is filed, NEPA requires the Corps to "take a hard look" at potential impacts of the development application and prepare an EIS.[8] 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.[9] 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

[6] EPA Region 10, *Proposed Determination of the U.S. Environmental Protection Agency Region 10 Pursuant to Section 404(c) of the Clean Water Act* (July 2014), https://www.epa.gov/sites/production/files/2014-07/documents/pebble_pd_071714_final.pdf ("Proposed Determination").

[7] U.S. Army Corps of Engineers, *Pebble Project EIS: Draft Scoping Report*, July 25, 2018, https://www.pebbleprojecteis.com.

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

[9] 16 U.S.C. §§ 1531-1544.

the permit.[10] 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 ignored the Clean Water Act permitting and NEPA processes and instead commissioned the BBWA in 2011, even though PLP had not yet submitted a permit application that the Agency could evaluate. Without the benefit of an application outlining the specific measures PLP would take to minimize environmental impacts, such as robust compensatory mitigation, the BBWA 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.[11] As described below, these flaws also violate EPA's IQA guidelines. Nonetheless, EPA issued a Proposed Determination under Section 404(c), announcing its intent to apply comprehensive mining restrictions to the Bristol Bay area, based almost entirely on this faulty Assessment.[12] Despite Pebble now having submitted a Section 404 permit application for consideration, EPA has refused to withdraw the BBWA or the Proposed Determination. While EPA's Proposed Determination remains pending, USACE may not issue PLP a Clean Water Act permit.[13]

II. The BBWA is Subject to the IQA and the Higher Standards for Highly Influential Scientific Assessments

Congress enacted the IQA to "ensur[e] and maximiz[e] the quality, objectivity, utility, and integrity of information (including statistical information) disseminated by Federal agencies," such as EPA.[14] The IQA required OMB to issue government-wide guidance, which each federal agency was to follow in issuance of its own guidelines. Thus, the purpose of the EPA Guidelines is to apply the OMB Guidelines to the Agency's particular circumstances, and to "establish administrative mechanisms allowing affected persons to seek and obtain correction of information . . . disseminated by the agency that does not comply with the [OMB] guidelines . . . ."[15]

The resulting IQA standards established by OMB impose both "substantive" and "presentation" requirements and set more rigorous standards for "influential scientific

[10] 40 C.F.R. § 1506.6.

[11] *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* 215, http://ofmpub.epa.gov/eims/eimscomm.getfile?p_download_id=522981 ("EPA Response to Peer Review Comments") (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").

[12] Proposed Determination at 2-11.

[13] *See* 33 C.F.R. 323.6(b); 40 C.F.R. 231(a)(2).

[14] *See* Pub. L. No. 106-554. The IQA was developed as a supplement to the Paperwork Reduction Act, 44 U.S.C. § 3501 et seq., which requires OMB, among other things, to "develop and oversee the implementation of policies, principles, standards, and guidelines to . . . . apply to Federal agency dissemination of public information."

[15] *Id.*

information," such as EPA assessments. EPA's IQA Guidelines expand on the OMB Guidelines in a number of ways, including by requiring scientific determinations to apply "careful consideration of all [relevant] information" under a weight-of-evidence approach.[16] Both the OMB and EPA Guidelines are binding on the Agency.[17]

A. The Base "Objectivity" and "Utility" Standards

The EPA Guidelines apply to "information" that EPA "disseminates" to the public.[18] For purposes of the EPA Guidelines, EPA "disseminates" information to the public "when EPA initiates or sponsors the distribution of information to the public."[19] "Information" in this context "generally includes any communication or representation of knowledge such as facts or data, in any medium or form."[20] The BBWA, as a publicly issued study performed by EPA, is thus subject to the EPA Guidelines.

The Guidelines require that information disseminated by EPA meet base standards of "objectivity" and "utility" to ensure that information is accurate, reliable, and unbiased. The base "objectivity" standard has both a "substantive" and "presentation" component. The substantive component requires that information be accurate, reliable, and unbiased and be generated by sound statistical and research methods. The utility component requires that information be useful for the intended users, including the public, and that it be presented in a clear, complete, accurate, and unbiased manner. Supporting data and potential sources of error also must be transparent so that the public can assess for itself the objectivity of the sources and resulting information.[21]

Significantly, EPA's Guidelines apply equally to information generated by contractors, "[s]ince EPA is responsible for managing the work assigned to contractors" and thus "has a relatively high degree of control over the quality of this information."[22] Contractors played a significant role in the drafting of the BBWA, and their work is thus also subject to EPA's Guidelines.

B. Heightened IQA Standards for Influential Scientific Information

In addition to these standards, EPA has previously acknowledged that the BBWA is also subject to the heightened and more rigorous objectivity standards applicable to Highly Influential

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[16] EPA Guidelines at 26.
[17] *See Prime Time Int'l Co. v. Vilsack*, 599 F.3d 678, 685 (D.C. Cir. 2010).
[18] EPA Guidelines at 15.
[19] *Id.*
[20] *Id.*
[21] *See, e.g.*, OMB, *Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies*, 67 F.R. 8451, § V.2 (Feb. 22, 2002) ("OMB Guidelines"); EPA Guidelines at 15.
[22] *Id.* at 6.

Scientific Assessments ("HISA").[23] When EPA disseminates influential scientific information regarding human health, safety, or environmental risk assessments, EPA must ensure that the "substance of the information is accurate, reliable and unbiased."[24] This means the Agency must use a weigh-of-the-evidence approach that considers "the best available science and supporting studies conducted in accordance with sound and objective scientific practices . . . ."[25]

III. The BBWA Must be Withdrawn Because its Design was Fundamentally Flawed and its Analysis is Demonstrably Inaccurate

A. The BBWA's Design was Not Objective

EPA's BBWA process and contents were tainted with bias from the beginning. The result is a document – and decision – that cannot pass IQA muster. To maximize objectivity, EPA's IQA guidelines require "disseminated information [to be] presented in an accurate, clear, complete, and unbiased manner, and as a matter of substance [be] accurate, reliable, and unbiased."[26] EPA's actions, and the resulting BBWA design, precluded any objectivity in the BBWA or Proposed Determination.

EPA's crafting of the BBWA is especially worthy of scrutiny given the document's status as a Highly Influential Scientific Assessment. Such assessments require a "higher degree of transparency about data and methods."[27] EPA decided to invoke its 404(c) authority *before* PLP had submitted a permit application and *before* EPA undertook any scientific analysis at all. But as the CEI Request describes, the history of the BBWA's development was plagued with a lack of transparency. Documents produced by EPA show that in late 2009, Phil North, an EPA Region 10 ecologist who would later become a technical lead for the BBWA, had already concluded that the Pebble mine should be vetoed before PLP submitted a permit application. And EPA officials testified that multiple leaders within Region 10 were also in favor of invoking 404(c) to block Pebble.[28] Indeed, internal deliberative documents reveal that in 2010, EPA "believe[d] that [the already available] 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

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[23] *See* Notice of the Peer Review Meeting for EPA's Draft Report Entitled *An Assessment of Potential Mining Impacts on Salmon Ecosystems of Bristol Bay, Alaska* (July 6, 2012), https://www.federalregister.gov/documents/2012/07/06/2012-16441/notice-of-the-peer-review-meeting-for-epas-draft-report-entitled-an-assessment-of-potential-mining.

[24] EPA Guidelines at 15.

[25] *Id.* at 22.

[26] *Id.* at 15.

[27] EPA Guidelines at 20.

[28] *See, e.g.*, Deposition of Michael Szerlog 76:23-77:18, *Pebble Ltd. P'ship v. EPA*, Case No. 3:14-cv-00171-HRH (D. Alaska Apr. 12, 2016) (admitting favoring using 404(c) on Pebble by 2010); Deposition of Phillip North 91:14-92:2, *Pebble Ltd. P'ship v. EPA*, Case No. 3:14-cv-00171-HRH (D. Alaska Mar. 30, 2016) (indicating that Richard Parkin began supporting using 404(c) on Pebble by 2009 or 2010).

determination does not seem necessary or a prudent use of anyone's resources."[29] Thus, rather than wait for a permit application, and evaluate that application using the comprehensive EIS process, EPA decided to conduct the BBWA.

Furthering this one-sided process, EPA appointed Richard Parkin to be the BBWA "team leader."[30] Parkin was not an objective leader; he had made his bias well known. Indeed, 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* [*an*] *as big or bigger factor*."[31] EPA also appointed Phil North to be the technical lead for the BBWA, despite his vocal criticisms of the Pebble Mine. 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."[32]

Parkin and North recruited like-minded authors. For example, Phil Brna, an FWS employee, co-authored a major appendix to the BBWA, despite previously expressing his excitement at the possibility of a Pebble veto, stating: "[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!"[33] Likewise, BBWA contractor Alan Boraas, who conducted tribal outreach for the BBWA and authored the appendix on Traditional Ecological Knowledge, drafted several anti-Pebble Op-Ed pieces, concluding that "indigenous resistance" would kill Pebble.[34] This predetermination on Boraas's part is especially troubling given that it was related to the very subject he was supposed to be studying. EPA's reliance on anti-mine contractors with an incentive to generate results unfavorable to Pebble violated the objectivity requirement of the EPA Guidelines, as well as EPA's Scientific Integrity Policy, which requires all employees, including scientists and managers, to "[a]void

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[29] 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*, App-95 (Oct. 6, 2015), http://files.cohengroup.net/Final/Final-Report-with-Appendices-compressed.pdf ("Cohen Report").

[30] U.S. House of Representatives Committee on Oversight and Government Reform, *The U.S. Environmental Protection Agency's Unprecedented 404(c) Action in Bristol Bay, Alaska* 5 (Nov. 4, 2015), https://republicans-oversight.house.gov/wp-content/uploads/2015/11/Bristol-Bay-Pebble-Mine-Staff-Findings-Nov-2015-Final.pdf ("House Oversight Report").

[31] United States House of Representatives Committee on Science, Space, and Technology, *The Pebble Promise in Bristol Bay: Assessing Potential Environmental Harm and Evaluating the Tactics of Pebble Limited Partnership's Plans to Build One of the World's Largest Open-Pit Copper and Gold Mines in Bristol Bay, Alaska* Supplemental Documents at 5 (Apr. 28, 2016) ("House Science Report").

[32] House Oversight Report. at 18.

[33] Cohen Report at 44.

[34] *Id.* at 51 n.328 (citing Alan Boraas, *Murkowski Risks Salmon for Gold Mine*, Anchorage Daily News (Dec. 1, 2005)).

conflicts of interest and ensure impartiality."[35]

The CEI Request rightfully highlights the work of Ann Maest as another example of the bias present in the BBWA process. Maest contributed numerous studies to the draft BBWA even though Maest admitted that in the course of the infamous *Chevron* environmental litigation in Ecuador she had ghostwritten another expert's scientific report, based on assumptions she knew to be inaccurate, and then commented on the report to give the appearance that the report was independent.[36] When Maest's wrongdoing in the Ecuadorian 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.[37]

As discussed more below, EPA also carefully curated other anti-mine studies for use in the BBWA. For example, EPA quietly peer reviewed seven studies prepared by paid critics of the Pebble Project so that the Agency might cite the studies in the BBWA. The peer reviewers roundly condemned the studies as insufficiently supported by scientific evidence, methodologically flawed, and biased. Despite this, EPA cited the studies throughout the BBWA, while largely ignoring Pebble's Environmental Baseline Document – a document comprising more than 25,000 pages of scientific information collected in the Pebble Project area over a period of several years at an estimated cost of over $100 million.[38]

The process designed by EPA also allowed scores of back-door meetings with anti-mine activists. Over the course of the BBWA process, EPA communicated hundreds of times with anti-Pebble campaign leaders and scientists to share campaign information, technical studies, and other intelligence relevant to EPA's 404(c) strategy.[39] For example, in April 2012, EPA 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.[40] And 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*.[41]

All of this led the House Committee on Oversight and Government Reform to conclude "that EPA employees had inappropriate contact with outside groups and failed to conduct an

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[35] EPA, *Scientific Integrity Policy* 3, https://www.epa.gov/sites/production/files/2014-02/documents/scientific_integrity_policy_2012.pdf.

[36] Witness Statement of Ann Maest ¶ 4, *Chevron Corp. v. Donziger*, Case No. 1:11-cv-00691-LAK, Dkt. 1007-1 (S.D.N.Y. Apr. 12, 2013).

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

[38] Cohen Report at 29-30.

[39] *Id.* at 33-34, App. C.

[40] *Id.* at App-17.

[41] *See generally id.* at App. C.

impartial, fact-based review of the proposed Pebble mine."[42] And former US Senator and Secretary of Defense William Cohen said his investigation "raise(s) serious concerns" on a number of issues, including "whether EPA orchestrated the process to reach a pre-determined outcome," whether it "had inappropriately close relationships with anti-mine advocates," and whether EPA was not candid about its decision-making process.[43]

B. The BBWA's Analysis is Demonstrably Inaccurate

1. EPA's Evaluation of Unrealistic Hypothetical Mine Scenarios Does Not Reflect Objective Scientific Practices

EPA's predetermined maneuvers led to a biased BBWA, lacking "the best available science and supporting studies conducted in accordance with sound and objective scientific practices," as the IQA requires.[44] Having no actual permit application to review, EPA invented three hypothetical mining scenarios to fit its goals, rather than, as the CEI Request aptly put it, "the real thing" from a permit application.[45]

For example, the BBWA's hypothetical mines all employ "conventional" mining practices.[46] PLP, however, has explicitly committed to mine construction adhering to "international best practice" standards.[47] 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. Despite this, EPA designed its hypothetical mines with relatively few conventional mitigation practices (that the Agency subsequently concluded to be inadequate). When PLP and others protested, EPA admitted that "mitigation measures could offset some of the stream and wetland losses" but then simply asserted, without analysis, that

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[42] Letter from House Oversight Committee to EPA Administrator McCarthy (Nov. 4, 2015), https://republicans-oversight.house.gov/wp-content/uploads/2015/11/2015-11-04-JC-CL-JJ-to-McCarthy-EPA-Bristol-Bay-due-11-18.pdf.

[43] Cohen Report at ES-8.

[44] EPA Guidelines at 22.

[45] The BBWA 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 makes clear, "[t]he 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* 60 (Feb. 17, 2011) ("NDM Preliminary Assessment"). And in other corporate filings, PLP 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 at 6 (filed Mar. 27, 2014).

[46] BBWA at ES-11-12.

[47] NDM Preliminary Assessment at 387.

there are "substantial challenges regarding the[ir] efficacy."[48] EPA then chose to punt on the issue, proclaiming that "any formal determinations regarding compensatory mitigation can only take place in the context of a regulatory action" and that the issue was "outside the scope of this assessment."[49] But when EPA quickly used the BBWA as its primary basis for the Proposed Determination, the Agency effectively sidestepped the entire mitigation inquiry.

Beyond these design flaws, 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 available streams.[50] 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 streamflow would involve a relatively *high* level of ecosystem protection, rather than finding a potentially adverse impact on the surrounding ecosystem.[51]

The CEI Request exposes the problems with basing a major decision on such hypothetical scenarios considering the BBWA itself even concedes that "[t]he scenarios are not mine plans: they 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."[52] And 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."[53]

CEI's concerns are not isolated; several peer reviewers and observers noted that the vast differences between EPA's hypothetical mine scenarios and an actual mine plan as part of a permit application rendered the BBWA's analysis useless. As one peer reviewer told EPA,

> [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***

[48] BBWA at ES-27.
[49] EPA Response to Peer Review Comments at 226.
[50] BBWA at 7-44.
[51] Letter from Pebble Limited Partnership to EPA 20 (Apr. 29, 2014), https://www.northerndynastyminerals.com/site/assets/files/4568/plp_response_to_final_bbwa_april2014.pdf.
[52] BBWA at 6-1.
[53] *Id.* at ES-10.

assessment, is questionable.[54]

The State of Alaska, which the CEI Request notes was "largely bypassed in this case," 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."[55] As the Alaska Attorney General summarized, "the watershed assessment, and now the proposed determination which relies on the assessment, draw speculative conclusions about potential impacts from a hypothetical mine."[56] The absence of a concrete proposal to assess also led USACE to the BBWA sidelines, as it was "unable to evaluate the impacts of potential discharges associated with the Pebble Deposit."[57]

In the end, EPA acknowledged more than 50 times that there were significant gaps in the BBWA that limited its utility.[58] For example, EPA admitted that the BBWA was not designed to "duplicate or replace a regulatory process [the NEPA Process];" that it did not include "an in-depth assessment of a specific mine;" that "mitigation to compensate for effects on aquatic resources that cannot be avoided or minimized by mine design and operation" was "beyond the scope of this assessment;" and that the BBWA failed to include "an economic or social cost-benefit analysis."[59]

Not surprisingly, many of the BBWA's peer reviewers agreed with EPA, noting that the BBWA lacked important information about the potential effects of mine development that must be examined during a more rigorous and comprehensive NEPA EIS process. For instance, peer reviewers noted that "[t]he resulting risk assessment can be at best characterized as preliminary, screening level, or conceptual. There are both technical and process issues that must be addressed before this risk assessment can be considered complete or of sufficient credibility to be the basis for a better understanding of the impacts of mining in the Bristol Bay watershed."[60] EPA did not address these criticisms, often noting that the reviewers' concerns were irrelevant

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[54] EPA, Final Peer Review Report, External Peer Review of EPA's Draft Document, *An Assessment of Potential Mining Impacts of Salmon Ecosystems of Bristol Bay, Alaska* 22 (Sept. 17, 2012), http://ofmpub.epa.gov/eims/eimscomm.getfile?p_download_id=522993 ("EPA Final Peer Review Report").

[55] Cohen Report at 60.

[56] *Id.* at 147 (citing Letter from Attorney General Michael Geraghty, et al., to Gina McCarthy, Administrator, EPA, and Dennis McLerran, Regional Administrator, EPA Region 10 (Sept. 19, 2014)).

[57] *Id.* at 68 (citing Letter from Col. Christopher Lestochi, Commander, the Corps' Alaska District, to Dennis McLerran, Regional Administrator, EPA Region 10 (Mar. 14, 2014)).

[58] *See Comments of the Pebble Limited Partnership on EPA Region 10's Proposed Determination Pursuant to Section 404(c) of the Clean Water Act Regarding the Pebble Deposit Area, Southwest Alaska* at Ex. 5, EPA Docket No. EPA-R10-OW-2014-0505 (Sept. 19, 2014).

[59] Cohen Report 85-86.

[60] EPA, Peer Review Follow-On Comments, *An Assessment of Potential Mining Impacts on Salmon Ecosystems of Bristol Bay, Alaska* 341 (2013), http://ofmpub.epa.gov/eims/eimscomm.getfile?p_download_id=522982 ("Peer Review Follow-On Comments").

since the BBWA is not a "decision document."[61] That changed, however, once EPA relied on the BBWA to form the basis of the Proposed Determination.

2. EPA Did Not Utilize the Weight-of-the-Evidence Approach

The CEI Request calls attention to the BBWA's failure to evaluate evidence tending to show that Pebble could be developed sustainably, in violation of IQA guidelines. For information disseminated to the public, especially in a HISA, the IQA requires a "weight-of-the-evidence" approach, which "generally considers all relevant information in an integrative assessment that takes into account the kinds of evidence available, the quality and quantity of the evidence, the strengths and limitations associated of each type of evidence, and explains how the various types of evidence fit together."[62] The refusal to incorporate any pro-mining information is especially troubling considering, as described above, EPA's analysis only included hypothetical mines of the Agency's own creation.

In particular, the BBWA wholly ignores PLP's Environmental Baseline Document ("EBD").[63] To create the EBD, PLP engaged over 100 scientists from more than 40 independent environmental consulting firms.[64] PLP spent more than $100 million and nearly seven years on the EBD, which comprised more than 25,000 pages of data in 53 chapters and seven appendices that offer in-depth analysis of the ecology of the Bristol Bay region.[65] This work was conducted to be subsequently included in the EIS, and such data is typically of high quality given the extensive scrutiny it faces under the EIS process. In 2011, PLP shared the full contents of the EBD with EPA.[66] But EPA has refused to incorporate the data into any of its work. Thus, much of "the best available science" is missing from the BBWA.

3. EPA Failed to Adhere to Its Peer Review Handbook

Rather than adding an objective lens to the BBWA, the Assessment's peer review process only solidified its bias. EPA's IQA guidelines incorporate the Agency's Peer Review Handbook.[67] By arbitrarily constraining reviewers and engaging in excessive contact with them, EPA repeatedly violated these policies.

For the peer review of the BBWA's first draft, conducted in August 2012, EPA imposed several conditions designed to limit public participation. EPA rendered the public testimony useless: the Agency limited public presentations to just three minutes and prohibited written submissions and visual aids.[68] EPA also violated its own guidelines by engaging in excessive contact with the peer reviewers. EPA's Peer Review Handbook prohibits "general contact and

[61] EPA Response to Peer Review Comments at 35.
[62] EPA Guidelines at 26 n.29.
[63] *See* Pebble Limited Partnership, Environmental Baseline Document, https://pebbleresearch.com/document/.
[64] Cohen Report at 29-30.
[65] *Id.*
[66] *Id.*
[67] EPA Guidelines at 11.
[68] EPA Final Peer Review Report at 3.

direction to the contractor's staff or peer reviewers."[69] But 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;[70]

- 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;[71] and

- 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."[72]

These "clarifications" were far more than "limited contacts." 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.

EPA's approach to the peer review of the second draft of the BBWA even more severely handcuffed the peer review panel. EPA limited this process to asking the peer reviewers of the first draft if the new second draft responded to the peer review comments from the first draft.[73] 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 and relied for the first time on the biased reports approved through the supplemental review process. Given these changes, 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.[74] And the Agency rushed the review, allowing the panel only enough time for "a single review of the report."[75]

Particularly problematic was a separate, unannounced round of peer review of the seven anti-Pebble studies (including two from Maest) added to the record, all originating from anti-mine activists and organizations. For example, in addition to Maest, EPA reviewed a study from Earthworks, an organization that has published on its website over a dozen articles hostile to the

[69] EPA, Peer Review Handbook § 3.5.3(b) (3d ed.) ("EPA Peer Review Handbook").
[70] EPA Final Peer Review Report at 3.
[71] *Id.* at 4.
[72] *Id.*
[73] EPA Response to Peer Review Comments at 340-41.
[74] EPA Peer Review Handbook § 3.3.1.
[75] Peer Review Follow-On Comments at 34-35.

Pebble Project.[76] 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."[77] Despite a limited peer review process, peer reviewers raised a number of objections to the contents and conclusions of these studies. For example, the criticism included:

- "[S]ome of the comments read like editorial opinions rather than reporting scientific results."[78]
- "I find the report, by its very nature, to be very biased."[79]
- "[This report] is clearly intended to convince the reader that the Pebble Mine should not be permitted to operate" and "lacks impartiality."[80]
- "[T]he writing and tone of the report suggests less than an objective approach."[81]
- "[S]ome of the language is a bit alarmist and not based on presented data."[82]

EPA's behavior during the peer review process would alert any objective observer to EPA's bias. The circumscribed parameters, the secretive proceedings, and the flouting of guidelines significantly undermine the credibility of the BBWA – and violates the IQA.

IV. Recommendations for Corrective Action

As the CEI Request concludes, EPA's data quality guidelines "are best served by EPA going back to participating in the process way it had done for decades."[83] The BBWA should

[76] Earthworks, https://earthworks.org/search-2/?fwp_search=pebble.

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

[78] EPA, Final Peer Review Summary Report: External Peer Review of Wobus et al., *Potential Hydrologic and Water Quality Alteration from Large-scale Mining of the Pebble Deposit in Bristol Bay, Alaska* 4 (Nov. 2, 2012), http://ofmpub.epa.gov/eims/eimscomm.getfile?p_download_id=513569 ("Wobus Review").

[79] EPA, Final Peer Review Summary Report of Kuipers et al., *Comparison of Predicted and Actual Water Quality at Hardrock Mines* and Earthworks 2012, *U.S. Copper Prophyry Mines Report* 20 (Nov. 15, 2012), http://ofmpub.epa.gov/eims/eimscomm.getfile?p_download_id=513568.

[80] EPA, Final Peer Review Summary Report of Chambers and Higman, *Long Term Risks of Tailing Dam Failure* and Levit and Chambers, *Comparison of the Pebble Mine with Other Large Hard Rock Mines* 20-21 (Dec. 30, 2012), http://ofmpub.epa.gov/eims/eimscomm.getfile?p_download_id=513570 ("Chambers Review").

[81] Wobus Review at 4.

[82] Chambers Review at 19.

[83] CEI Request at 10.

not be relied upon by the public, other governmental agencies, or EPA. Accordingly, PLP asks that EPA take the following steps to comply with the IQA:

1. Remove the BBWA from official publication and cease further distribution;

2. Withdraw the Proposed Determination because of its reliance on the BBWA, or remove any references or information obtained from the BBWA;

3. Rescind the BBWA and Proposed Determination's accompanying press releases and issue a statement posted on EPA's website that the BBWA and Proposed Determination have been withdrawn due to violations of the IQA.

Withdrawing the BBWA and Proposed Determination for their IQA violations does not in any way weaken EPA's authority to address concerns it may have with the Pebble Mine during the Clean Water Act permit application process. This option still gives EPA the opportunity to weigh in on PLP's permit application during the EIS process. And, unlike the BBWA, this process will be open and include input from USACE, other federal agencies, and the State of Alaska. An open, deliberate process evaluating the best available information can only further the policy goals of the IQA and of EPA in general.

For these reasons, PLP strongly urges EPA to grant the CEI Request and re-commit itself as an Agency to complying with the IQA in full moving forward.

Respectfully submitted,

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