

United States Senate

COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS

WASHINGTON, DC 20510-6175

BETTINA POIRIER, MAJORITY STAFF DIRECTOR
ZAK BAIG, REPUBLICAN STAFF DIRECTOR

June 11, 2013

Mr. Ken Kopocis
Senior Policy Advisor
U.S. Environmental Protection Agency
Office of Water
1200 Pennsylvania Ave, NW
Washington, D.C. 20460

Dear Mr. Kopocis:

Given your nomination to become the Environmental Protection Agency's (EPA) Assistant Administrator for the Office of Water, we are interested in your views regarding the EPA's administration of the Clean Water Act (CWA).

EPA's revised draft report, *An Assessment of Potential Mining Impacts on Salmon Ecosystem of Bristol Bay, Alaska* (Assessment), is of particular interest.¹ The nominal purposes assigned to the Assessment are to "provide a characterization of the biological and mineral resources of the Bristol Bay watershed, increase understanding of the potential impacts of large-scale mining on the region's fish resources, and inform future governmental decisions."² However, our understanding is that EPA's true focus in preparing the Assessment is to predetermine the fate of the potential Pebble Mine project.

EPA prepared the latest version of the Assessment after peer reviewers sharply criticized the agency's May 2012 initial draft due to its unfounded assumptions and faulty analyses.³ Yet the Assessment in its current form remains flawed, as it relies on six biased reports authored by Pebble Mine opponents.⁴ Accordingly, there is serious reason to question EPA's commitment to fairness, transparency, and scientific rigor in drafting the Assessment.

Notwithstanding these important concerns, a threshold question remains unanswered: **What harm would result from EPA allowing Pebble Mine proponents to actually apply for a Clean Water Act permit before commenting on potential mining impacts, instead of the**

¹ U.S. Environmental Protection Agency, *An Assessment of Potential Mining Impacts on Salmon Ecosystems of Bristol Bay, Alaska* (EPA 910-R-12-004Ba-c, April 2013), available at <http://cfpub.epa.gov/ncea/bristolbay/recordisplay.cfm?deid=242810> (last visited June 11, 2013).

² Notice of Public Comment Period, 78 Fed. Reg. 25266 (April 30, 2013).

³ See Versar, Inc., *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* (Sept. 17, 2012).

⁴ See Letter from John Shively, Chief Executive Officer, Pebble Partnership to the Honorable Bob Perciasepe and Regional Administrator Dennis J. McClerran, available at http://www.eenews.net/assets/2013/05/24/document_daily_03.pdf. See also Michael Bastach, *Critics Attack EPA Over 'Biased' Pebble Mine Assessment*, DAILY CALLER (May 28, 2013), <http://dailycaller.com/2013/05/28/critics-attack-epa-over-biased-pebble-mine-assessment>.

agency speculatively opining on hypothetical scenarios? Stated differently, given that EPA can reach a full and accurate understanding of the Pebble Mine project only after a permit is sought, why is EPA devoting its limited resources to the Assessment?

We raise this issue in light of the regulatory prejudice the Assessment causes Pebble Mine proponents and because EPA's previous attempts to justify the Assessment were incomplete and evasive. Consider, for example, Associate Administrator Arvin Ganesan's non-response in April 2013 to the following question from Senator Vitter and Senator Wicker:

Question: Does EPA believe that environmental damage will accrue to the Bristol Bay Watershed simply by allowing the sponsors of the project to apply to the [Army Corps of Engineers] for a [CWA section] 404 permit? If so, please explain the environmental impact that EPA anticipates will accrue to the Bristol Bay watershed between the time that EPA conducts its watershed assessment and the time that the sponsors of Pebble Mine would otherwise submit their application to the Corps for review?

Response: The EPA has not taken any action that would prevent applicants from seeking permits from the Corps of Engineers for proposed discharges to waters in the Bristol Bay watershed, including mining related discharges. The Bristol Bay Watershed Assessment will enable the agency, its federal and state partners, and other stakeholders of potential environmental impacts of these large-scale mining activities on the Bristol Bay watershed.⁵

In response to a question from Senator Vitter regarding her nomination as EPA Administrator, Gina McCarthy also failed to explain why EPA could not wait until a CWA permit application has been submitted:

Question: EPA has full authority under the well-established Sec. 404 process to review any future application to make a determination as to whether or not there will be any of the unacceptable adverse effects listed in CWA Sec. 404(c) at the disposal sites being considered by the U.S. Army Corps of Engineers, including unacceptable adverse impacts to fishery areas and wildlife. Why, then is EPA using its limited resources to conduct a watershed assessment on a hypothetical mine scenario that even EPA's scientific review panel found did not accurately reflect the conditions of a real mine, rather than allow the companies that have invested millions of dollars to submit their proposal which EPA could then review?

⁵ Letter from Arvin Ganesan, Associate Administrator, Environmental Protection Agency Office of Congressional and Intergovernmental Relations, to Senator David Vitter (April 9, 2013).

Response: I understand that EPA is currently undertaking a peer reviewed study of the potential impacts of large scale mining on the Bristol Bay Watershed. I understand that the need to ensure that the Agency is spending the taxpayer's money wisely. If I'm confirmed, I will review the study carefully. I understand that the Agency has already undertaken one expert peer review, and has begun a second round of review of the revised draft. I believe that sound science is crucial for all the work that EPA does, and incorporating peer review helps to address such technical issues. I understand that the Agency has publicly stated that no regulatory decision would be made until the science is fully understood, and that it is premature for speculation on economic impact.⁶

EPA's refusal to answer the above questions in a straightforward manner suggests that the agency feels the Assessment is a necessary predicate for a future "preemptive veto" of the Pebble Mine project. This is a dangerous and unprecedented tactic that would allow EPA to jeopardize the project even before a CWA permit application has been submitted.

It is essential that EPA honestly justify its Assessment *now* before devoting further resources to this effort. Therefore, we reiterate the question: Has EPA identified a specific harm that will occur if Pebble Mine is allowed to submit a CWA permit application? If no specific harm has been identified, why is EPA dedicating precious and scarce resources to speculation on potential mining impacts to the Bristol Bay watershed? We look forward to your response no later than June 25, 2013.

If you have questions regarding this request, please feel free to have your staff contact Brandon Middleton with the Senate Committee on Environment and Public Works at (202) 224-6176.

Sincerely,



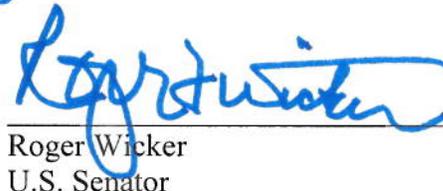
David Vitter
U.S. Senator



John Barrasso
U.S. Senator



Mike Crapo
U.S. Senator



Roger Wicker
U.S. Senator

⁶ Gina McCarthy's Responses to Senator David Vitter's Questions for the Record, EPA Administrator Confirmation Hearing, Environment and Public Works Committee, *available at* http://www.epw.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore_id=9a1465d3-1490-4788-95d0-7d178b3dc320 (last visited June 4, 2013).

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A handwritten signature in blue ink that reads "John Boozman". The signature is written in a cursive style with a large, prominent "J" and "B".

John Boozman
U.S. Senator