

---

# ENVIRONMENTAL LAW & PROPERTY RIGHTS

## CAN THE ENVIRONMENTAL PROTECTION AGENCY STOP THE PEBBLE MINE?

By Daniel A. Himebaugh

---

### Note from the Editor:

This article discusses whether the Environmental Protection Agency has the authority under the Clean Water Act to prohibit mining in Alaska's Bristol Bay watershed due to environmental concerns. As always, The Federalist Society takes no position on particular legal or public policy initiatives. Any expressions of opinion are those of the author. The Federalist Society seeks to foster further discussion and debate about the issues involved. To this end, we offer links below to different perspectives on the issue, and we invite responses from our audience. To join the debate, please e-mail us at [info@fed-soc.org](mailto:info@fed-soc.org).

### Related Links:

- Bristol Bay Assessment, Environmental Protection Agency: <http://www2.epa.gov/bristolbay>
  - EPA Study Confirms, Again, That Pebble Mine Will Threaten Bristol Bay, Natural Resources Defense Council: [http://switchboard.nrdc.org/blogs/tkiekow/epa\\_study\\_confirms\\_again\\_that.html](http://switchboard.nrdc.org/blogs/tkiekow/epa_study_confirms_again_that.html)
- 

### Introduction

Below the ground in Alaska's Bristol Bay watershed is a giant cache of copper, gold, and molybdenum, known as the Pebble deposit.<sup>1</sup> The Pebble Limited Partnership (Pebble) wants to mine it, but a vocal group of opponents, led by environmental organizations, wants to stop Pebble.<sup>2</sup> In response to petitions from Pebble's opponents, the Environmental Protection Agency (EPA) decided to develop an "assessment" of the Bristol Bay ecosystem.<sup>3</sup> The EPA says it is merely studying the general ways in which mining could potentially affect the extensive Bristol Bay salmon fishery.<sup>4</sup> But some observers are dubious about the EPA's assessment and predict that the agency will use it to support a preemptive "veto" of the Pebble mine.<sup>5</sup> The EPA denies that the assessment represents any kind of regulatory action against Pebble, but the agency is keeping open the option of deploying its administrative veto before Pebble applies for the permit it must obtain under Section 404 of the Clean Water Act to begin mining the Pebble deposit.<sup>6</sup>

Whether the EPA possesses the particular veto authority it asserts is an important question, and recent litigation challenging the EPA's authority to revoke Section 404 permits may leave that question open to interpretation.<sup>7</sup> Yet even if the EPA survives a legal challenge to its Clean Water Act authority to block the mine, basic principles of administrative law should counsel the agency to undertake a full evaluation of a specific mine proposal before rejecting development of the Pebble deposit.<sup>8</sup>

### I. BACKGROUND ON THE PEBBLE MINE

The Pebble deposit is one of the largest copper-gold deposits in the world.<sup>9</sup> Pebble estimates that mining the deposit would yield 80.6 billion pounds of copper, 5.6 billion pounds of molybdenum, and 307.4 million ounces of gold.<sup>10</sup>

Pebble explains that this would increase the nation's do-

mestic mineral supply at a time when demand for raw materials is on the rise, and that it would be a boon for the economy in Bristol Bay.<sup>11</sup> The mine will bring billions of dollars of investment to Alaska, says Pebble, and "has the potential to create more than 1,000 direct jobs for 25 years or longer."<sup>12</sup> Those jobs would be truly "local," unlike many commercial fishing jobs that are filled by people who do not reside in Alaska.<sup>13</sup> The Pebble mine would also provide much-needed work for members of local native communities living in the sparsely populated Bristol Bay region.<sup>14</sup>

While Pebble has not finalized its proposal, it understands that any mine it builds must be environmentally safe.<sup>15</sup> The facilities will have to be equipped for long-term reclamation, and Pebble acknowledges that it will need to ensure that the mine's tailings storage area will remain structurally sound long after the mine shuts down.<sup>16</sup>

So what's holding up the mine? The problem for Pebble is that it has been put in the crosshairs of an environmental resistance campaign. The mine's opponents are determined to make sure that the Pebble deposit remains untapped.<sup>17</sup> To that end, they are asking the EPA to invoke a provision of the Clean Water Act, known as Section 404(c), and pronounce that the area in which Pebble would presumably discharge mine waste is off-limits.<sup>18</sup> Such a declaration by the EPA would negate any opportunity for Pebble to obtain the Section 404 authorization it needs to operate the mine.

The EPA responded by producing a report called *An Assessment of Potential Mining Impacts on Salmon Ecosystems of Bristol Bay, Alaska (Assessment)*.<sup>19</sup> The *Assessment* outlines the hypothetical environmental effects of mining in the Bristol Bay watershed, primarily focusing on fisheries.<sup>20</sup> In its draft made available for public comment, the EPA told readers that the report "is not an assessment of a specific mine proposal for development."<sup>21</sup> The *Assessment*, however, concludes that the Pebble deposit is "the most likely site for near-term large-scale mining development in the region," and much of the agency's analysis seems designed to enable the agency to forecast the consequences of allowing the Pebble mine to be built.<sup>22</sup>

---

\* Daniel A. Himebaugh is an attorney with Pacific Legal Foundation's Northwest Center in Bellevue, Washington. He authored the Foundation's public comments in response to the EPA's draft Bristol Bay watershed assessment.



the EPA withdrew the specification of some of the streams as disposal sites, pursuant to Section 404(c).<sup>45</sup> The EPA's decision effectively revoked Mingo Logan's permit because it rendered unlawful the discharges which had previously been allowed under the permit.<sup>46</sup>

Mingo Logan brought suit on the ground that the EPA's Section 404(c) authority did not allow the agency to revoke a permit that had been lawfully issued by the Corps.<sup>47</sup> The district court concluded that the EPA's withdrawal of the specification of the streams as disposal sites exceeded the EPA's Section 404(c) authority, for several reasons that are relevant to Pebble.<sup>48</sup>

Using the familiar *Chevron* analysis, the district court first looked to whether Congress had unambiguously expressed its intent through the language of the Clean Water Act, and then evaluated whether the EPA's construction of that language was permissible.<sup>49</sup> The court began by explaining that the EPA plays only a minor role under Section 404 because Congress allocated primary permitting responsibility to the Corps.<sup>50</sup> The EPA argued that it does not matter that the Corps is the lead permitting agency because Section 404(c) allows the EPA to withdraw a Corps-specified disposal site "whenever" it determines that a discharge should not take place.<sup>51</sup> But the district court was not moved. The court cited the statutory text that allows the EPA to prohibit discharges only at "any defined area" specified by the Corps, and concluded that the Corps is responsible for specifying disposal areas through the permitting process before the EPA's Section 404(c) veto power applies.<sup>52</sup> The EPA, therefore, does not have a roving power under Section 404(c) to reject any disposal site at any time, said the district court. The EPA's Section 404(c) determinations must be made in relation to a permit application and after the Corps specifies which areas will be allowed for disposal of dredged and fill material.

The issue of timing under Section 404(c) is admittedly difficult to discern if that section is read in isolation, but the district court in *Mingo Logan* noted that any ambiguity in the statutory scheme dissipates when one remembers that the permitting process is at the heart of Section 404.<sup>53</sup> The court examined legislative history indicating that Congress intended the EPA to exercise its Section 404(c) authority only after an applicant submitted a permit setting forth the kind of material that would be disposed of, and only after the EPA evaluated whether that particular discharge would adversely affect municipal water supplies, fisheries, wildlife, or recreation areas.<sup>54</sup> Moreover, the court cited the Clean Water Act Senate Conference Committee Report, which remarked that "*the permit application transmitted [from the Corps] to the [EPA] Administrator for review will set forth both the site to be used and the content of the matter of the spoil to be disposed. The Conferees expect the Administrator to be expeditious in his determination as to whether a site is acceptable or if specific soil material can be disposed of at such site.*"<sup>55</sup> The logical conclusion to be drawn from the Committee Report is that Congress intended the EPA to apply Section 404(c) only in response to permit applications that set out the particular type and quantity of discharge, and the places where that discharge will occur.

The district court also held that, even if it were to apply *Chevron's* second step and defer to the EPA's interpretation of

Section 404(c), this would not disturb the court's conclusion that the EPA's power under that provision is more limited than the agency believes.<sup>56</sup> The court determined that construing Section 404(c) to grant the EPA power to revoke a permit that had been lawfully issued by the Corps would "sow a lack of certainty into a system that was expressly intended to provide finality."<sup>57</sup> The same problem would arise if a court ruled that Section 404(c) allows the EPA to reject potential disposal sites before reviewing project-specific permit applications. Allowing the EPA to lock out project proponents who have spent substantial amounts of time and money preparing to apply for a Section 404 permit would make future projects, like the Pebble mine, too risky for investment.

#### *B. The Court of Appeals Takes a Broad View of the EPA's Authority Under Section 404(c)*

In contrast to the district court, the Court of Appeals adopted a more sweeping construction of Section 404(c), particularly as it relates to the timing of the EPA's actions under that provision.<sup>58</sup> The appellate court specifically held that the EPA has "post-permit withdrawal authority," meaning that the agency may withdraw certain areas from specification as disposal sites even after the disposer has been operating under a permit that authorizes discharges in those areas.<sup>59</sup>

The Court of Appeals reasoned that Section 404(c) unambiguously expresses the intent of Congress, which the court read as imposing "no temporal limit" on the EPA's authority to withdraw the Corps' specification of a disposal site.<sup>60</sup> In fact, the court went further than allowing for withdrawal at any time; the court read Section 404(c) to "grant the [EPA] authority to *prohibit/deny/restrict/withdraw* a specification at *any* time."<sup>61</sup>

The court was also clear, however, that the EPA's decision to veto a discharge site is dependent on the agency making the required determination that the discharge will have "unacceptable adverse effect[s]."<sup>62</sup> Without such a determination, the EPA's decision would be unlawful. Moreover, any exercise of Section 404(c) authority is subject to review under the Administrative Procedure Act (APA), which means that the EPA will have to prove that its veto decision is defensible, based on the standard set out in Section 404(c).

In sum, while the *Mingo Logan* case does not present the same problem of pre-permit veto that Pebble might encounter, it does raise important questions about the EPA's Section 404(c) authority. Yet in the end it might not matter whether Section 404(c) allows for a pre-permit veto because, as the D.C. Circuit stated, the EPA's decisions to exercise its Section 404(c) authority are subject to APA review.<sup>63</sup>

#### IV. ADMINISTRATIVE LAW CONSIDERATIONS

Even if a court allowed the EPA to construe Section 404(c) as authorizing a pre-permit veto, the agency should wield that power very carefully. Administrative decisions about where certain dredged or fill materials may be placed should be based on actual, specific project proposals. This is because the EPA, like any government agency, runs the risk of engaging in arbitrary decision-making if it acts before acquiring all the information necessary to make a reasoned decision. An agency that lacks a concrete understanding of the scope of a

particular project will be unable to offer a rational explanation for why the project should or should not go forward, or under what conditions. “Driving blind” is not an advisable course of conduct for an agency because the APA requires agencies to “examine the relevant data and articulate a satisfactory explanation for . . . action[,] including a rational connection between the facts found and the choice made.”<sup>64</sup> Failure to do so is a surefire way for a government agency to end up on the wrong side of a court order.

More specifically, the idea that the EPA should evaluate mining impacts in Bristol Bay only in relation to individual project proposals is supportable because the EPA’s *Assessment* does not include all data necessary to determine whether mining in the region is or is not a good idea. One does not have to dig deep to discover that the *Assessment* is incomplete; even the Executive Summary lists several “uncertainties” that limit the document’s usefulness as a guide for evaluating the suitability of mining in Bristol Bay.<sup>65</sup> How the EPA would be able to determine whether the Pebble mine should be built based only on the *Assessment* is a mystery.

Finally, the EPA should remember that its actions will be subject to exacting judicial review, no matter what it chooses to do in regard to the Pebble mine. The APA requires a reviewing court to “immerse” itself in evidence for the purpose of conducting a “thorough, probing, and in-depth review.”<sup>66</sup> In view of the likelihood of judicial review in Pebble’s case, the EPA would be wise to consider that the Clean Water Act should not be construed as requiring the agency to make decisions that could stifle development merely for the sake of regulatory expedience. As the Supreme Court recently remarked, “[T]here is no reason to believe that the Clean Water Act was uniquely designed to enable the strong-arming of regulated parties,” especially in light of the APA, which “[repudiates the] principle that efficiency of regulation conquers all.”<sup>67</sup> Thus, even if the EPA has the judiciary’s blessing to engage in Section 404(c) pre-permit vetoes, the agency will not be able to escape the APA, which requires the EPA to support its decisions through reasoned evaluation of evidence and individual circumstances.

### Conclusion

Battle lines have formed in the fight over the Pebble mine, and the next move belongs to the EPA. The agency would do well to abandon any plans it may have for invoking Section 404(c) before Pebble applies for a permit because the agency risks exceeding its authority if it pushes ahead. There is a good chance that the scope of Section 404(c) will have to be worked out in court if the EPA determines, based on the *Assessment*, that the Pebble mine may not be permitted.

### Endnotes

1 The Pebble Partnership, *The Pebble Project 2-3*, <http://corporate.pebblepartnership.com> (last visited Apr. 5, 2013). The State of Alaska owns the land where the Pebble deposit is located; it is designated for mineral development. Pebble Limited Partnership, *Comments on the Draft Bristol Bay Ecosystem Assessment* 38. Molybdenum is a metal used frequently as an alloying agent. USGS, *Mineral Information, Molybdenum Statistics and Information*, <http://minerals.usgs.gov/minerals/pubs/commodity/molybdenum> (last visited Apr. 8, 2013).

2 Trout Unlimited, *Save Bristol Bay*, <http://www.savebristolbay.org> (last

visited Apr. 5, 2013).

3 EPA, *Bristol Bay, Why We’re Studying the Bristol Bay Watershed*,

<http://www2.epa.gov/bristolbay/why-were-studying-bristol-bay-watershed> (last visited Apr. 5, 2013).

4 *Id.*

5 THE WALL STREET JOURNAL, *The EPA’s Pebble Beaching*, Sept. 30, 2012.

6 EPA, *An Assessment of Potential Mining Impacts on Salmon Ecosystems of Bristol Bay, Alaska ES-1*; EPA, *Clean Water Act Section 404(c) “Veto Authority”*, <http://water.epa.gov/type/wetlands/outreach/upload/404c.pdf> (last visited Apr. 7, 2013) (“In effect, Section 404(c) authority may be exercised before a permit is applied for, while an application is pending, or after a permit has been issued.”). The EPA released a revised version of its watershed assessment in April, 2013. *Supra* n.3

7 *Infra* Part III.

8 *Infra* Part IV.

9 Northern Dynasty Minerals Ltd., *The Pebble Deposit*, <http://www.northern-dynastyminerals.com/ndm/Pebble.asp> (last visited Apr. 5, 2013).

10 The Pebble Partnership, *The Pebble Project 2-3*, <http://corporate.pebblepartnership.com> (last visited Apr. 5, 2013).

11 The Pebble Partnership, *Pebble’s Promise* 19-20, <http://corporate.pebblepartnership.com> (last visited Apr. 5, 2013); The Pebble Partnership, *People*, <http://www.pebblepartnership.com/people.html> (last visited Apr. 5, 2013).

12 The Pebble Partnership, *Pebble’s Promise* 6-7, <http://corporate.pebblepartnership.com> (last visited Apr. 5, 2013).

13 *Id.*

14 The Pebble Partnership, *People*, <http://www.pebblepartnership.com/people.html> (last visited Apr. 5, 2013).

15 The Pebble Partnership, *Environment*, <http://www.pebblepartnership.com/environment.html> (last visited Apr. 5, 2013).

16 The Pebble Partnership, *The Pebble Environment* 4-5, <http://corporate.pebblepartnership.com/publications> (last visited Apr. 8, 2013).

17 Natural Resources Defense Council, *Save BioGems, Stop the Pebble Mine*, <http://www.savebiogems.org/stop-pebble-mine> (last visited Apr. 5, 2013).

18 *Supra* note 3.

19 *Id.*

20 EPA, *An Assessment of Potential Mining Impacts on Salmon Ecosystem of Bristol Bay, Alaska* i.

21 *Id.*

22 *Id.* at ES-2.

23 EPA, *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 A-2-3*.

24 The Pebble Partnership, *Response to EPA*, <http://corporate.pebblepartnership.com/response-to-EPA> (last visited Apr. 5, 2013).

25 *Id.*

26 EPA, *Peer Review Process*, <http://www2.epa.gov/bristolbay/peer-review-process> (last visited Apr. 5, 2013). The EPA’s April, 2013, revised version incorporated peer reviewers’ comments. *Supra* n.3. The revised version was being reviewed by the peer reviewers at the time of this writing.

27 EPA, *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* ii.

28 *Supra* note 5.

29 Dorothy Kosich, Mineweb, *Has the EPA overstepped its bounds with Pebble Project assessment?*, May 21, 2012, <http://www.mineweb.com/mineweb/content/en/mineweb-political-economy?oid=151734&sn=Detail> (last visited Apr. 5, 2013).

30 33 U.S.C. § 1344(a).

31 Mingo Logan Coal. Co. v. EPA, 850 F. Supp. 2d 133, 142 (D.D.C. 2012), *rev'd*, Mingo Logan Coal Co. v. EPA, \_\_\_ F.3d \_\_\_ (D.C. Cir. 2013). “The Corps is assigned the authority to issue permits under 404(a); the Corps specifies the disposal sites under 404(b), but it must utilize jointly developed guidelines; and the EPA can veto a specification under 404(c), but only after consultation with the Corps.” Mingo Logan, 850 F. Supp. 2d at 149.

32 The Pebble Partnership, *Pebble’s Promise* 28-29, <http://corporate.pebblepartnership.com/publications> (last visited Apr. 8, 2013).

33 33 U.S.C. § 1344(a).

34 Coeur Alaska, Inc. v. Se. Alaska Conservation Council, 557 U.S. 261, 270 (2009); Kentuckians for the Commonwealth, Inc. v. Rivenburgh, 317 F.3d 425, 443 (4th Cir. 2003); Hill v. Boy, 144 F.3d 1446, 1448 n.5 (11th Cir. 1998); Holy Cross Wilderness Fund v. Madigan, 960 F.2d 1515, 1525 (10th Cir. 1992).

35 33 U.S.C. § 1344(c).

36 *Id.*; 40 C.F.R. § 231.2(e).

37 40 C.F.R. § 231.1(a).

38 Pebble’s comments to the *Assessment* note that the EPA has taken final action under Section 404(c) only thirteen times. Pebble Limited Partnership, *Comments on the Draft Bristol Bay Ecosystem Assessment* 46 n.192.

39 Coeur Alaska, 557 U.S. at 274 (describing EPA’s Section 404 responsibility as prohibiting “any decision by the Corps to issue a permit for a particular disposal site.”). The EPA would also be unable to determine in advance what steps the applicant would need to take in order to properly mitigate for environmental impacts. EPA, *Compensatory Mitigation*, [http://water.epa.gov/lawsregs/guidance/wetlands/wetlandmitigation\\_index.cfm](http://water.epa.gov/lawsregs/guidance/wetlands/wetlandmitigation_index.cfm) (last visited Apr. 8, 2013).

40 *Infra* Part III.

41 EPA, *Clean Water Act Section 404(c) “Veto Authority”*, <http://water.epa.gov/type/wetlands/outreach/upload/404c.pdf> (last visited Apr. 7, 2013).

42 Mingo Logan Coal. Co. v. EPA, 850 F. Supp. 2d 133 (D.D.C. 2012), *rev'd*, Mingo Logan Coal Co. v. EPA, \_\_\_ F.3d \_\_\_ (D.C. Cir. 2013).

43 Mingo Logan, 850 F. Supp. 2d at 133.

44 *Id.* at 133-34.

45 *Id.* at 134.

46 *Id.*

47 *Id.*

48 *Id.*

49 *Id.* at 138 (citing *Chevron, USA, Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984)).

50 Mingo Logan, 850 F. Supp. 2d at 146 (citing *Nat’l Mining Ass’n v. Jackson*, 816 F. Supp. 2d 37 (D.D.C. 2011)).

51 Mingo Logan, 850 F. Supp. 2d at 141.

52 *Id.* at 140-42.

53 *Id.* at 142.

54 *Id.* at 144-47.

55 *Id.* at 147 (quoting Senate Consideration of the Report of the Conference Committee, s. 2770, 93rd Cong., 1st Sess., Oct. 4, 1972, *reprinted in* 1 *Legislative History of the Water Pollution Control Act Amendments of 1972*, at 177 (1973)) (emphasis added).

56 Mingo Logan, 850 F. Supp. 2d at 151-53.

57 *Id.* at 152.

58 Mingo Logan, \_\_\_ F.3d \_\_\_ (D.C. Cir. 2013).

59 *Id.* at \_\_\_.

60 *Id.* at \_\_\_.

61 *Id.* at \_\_\_ (emphasis added).

62 *Id.* at \_\_\_.

63 *Id.* at \_\_\_.

64 *City of Alma v. United States*, 744 F. Supp. 1546, 1557 (S.D. Ga. 1990) (quoting *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983)).

65 For example, the *Assessment’s* Executive Summary exposes the following knowledge gaps: (1) consequences of the loss and degradation of habitat on fish populations could not be quantified because of the lack of quantitative information concerning salmonid populations in freshwater habitats; (2) standard leaching test data available to the EPA are uncertain predictors of the actual composition of leachates from tailings impoundments, tailings deposited in streams and floodplains, and waste rock piles; (3) capture efficiencies for leachates are uncertain; (4) the effects of tailings and product concentrate deposited in spawning and rearing habitat are uncertain; (5) the estimated annual probability of tailings dam failure is uncertain; (6) the proportion of tailings that would spill in the event of a dam failure is uncertain; and (7) the long-term fate of spilled tailings in the event of a dam failure could not be quantified. EPA, *An Assessment of Potential Mining Impacts on Salmon Ecosystems of Bristol Bay, Alaska, Executive Summary* 28-29 (Apr. 2013).

66 *City of Alma*, 744 F. Supp. at 1557 (quoting *Ethyl Corp. v. EPA*, 541 F.2d 1, 36 (D.C. Cir. 1976), and *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415 (1971)).

67 *Sackett v. EPA*, 132 S. Ct. 1367, 1374 (2012).

