



# PEBBLE VS THE EPA

# The Green “Magna Carta”



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### NEPA: The Magna Carta of Environmental Law



Posted July 26, 2013

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# How we got here

 INTERNAL DELIBERATIVE DOCUMENT OF THE U.S. ENVIRONMENTAL PROTECTION AGENCY  
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United States  
Environmental Protection  
Agency


## Proposed Pebble Mine Project Alaska

*Briefing for Administrator Lisa Jackson*



EPA Region 10  
Seattle, WA

January 13, 2010

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## Future Options

- Project-specific options to influence project:
  - Assign lead role in developing EIS
  - 404(c) veto either pre-emptive, during EIS, or after EIS
- Regulatory change that could influence project:
  - Change existing CWA 402/402 permitting framework that was upheld in the June 2009 Kensington Supreme Court decision (404 applies to discharge with the "effect of fill" notwithstanding otherwise applicable effluent limitation guidelines developed under CWA section 306).
  - EPA cross-office workgroup exploring options for improving CWA regulation of hard rock mining.

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# Current Activity

- EPA proposed determination
  - No decision on next step until Jan 2015
- Litigation
  - FOIA
  - Statute/Authority
  - Bias, predetermined outcome
- EPA Inspector General

# Fair & due process?

Draft – Deliberative Internal Deliberative Document of the U.S. Environmental Protection Agency 9/8/2010  
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Bristol Bay 404(c) Discussion Matrix HQ Briefing 9/08/2010		
I. Timing	Pros	Cons
A. During the permitting process	<ol style="list-style-type: none"> <li>1. Traditional process</li> <li>2. Permit and NEPA processes will generate considerable information informing the decision.</li> </ol>	<ol style="list-style-type: none"> <li>1. Proponents will have spent tens of millions of dollars.</li> <li>2. Little EPA involvement in determining information to be collected and analyzed.</li> <li>3. If EPA vetoes the resulting permit, only that project would be prohibited, potentially setting up subsequent rounds of permitting, vetoing, etc.</li> <li>4. Political backlash will be much worse after NEPA and 404 processes.</li> </ol>
B. Proactive before permit applications	<ol style="list-style-type: none"> <li>1. Preamble to the regulations expresses preference for advance 404(c) action.</li> <li>2. A proactive 404(c) will provide the regulated community clarity on what can and cannot be permitted allowing for more efficient and timely development of permitted projects.</li> <li>3. An advanced process can facilitate targeted information collection and better planning by project proponents.</li> <li>4. Promotes sustainability goals. Can serve as a model of proactive watershed planning for sustainability. Similar to "alternative futures" watershed planning being used in Region 10.</li> <li>5. Responsive to Tribal concerns.</li> </ol>	<ol style="list-style-type: none"> <li>1. Never been done before in the history of the CWA.</li> <li>2. Immediate political backlash from Alaska.</li> <li>3. Immediate dedication of resources, however, we would refocus work to address highest priority.</li> <li>4. Litigation risk.</li> </ol>

# Supports due process



*“...allowing a federal agency to cook up a decision to support a predetermined outcome in collaboration with a select group of interest groups while violating state sovereignty is a shortsighted position that will not stop there.*”

*My fellow columnist Welch may find Sullivan’s response on the Pebble mine to let the established process work to be “tiresome,” but that makes it no less correct.”*

- Alaska Journal of Commerce editorial, Oct 10 2014