



Via E-Mail

Information Quality Guidelines Staff  
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U.S. EPA  
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Washington, DC, 20460

**Re: Information Quality Act Request for Correction or Withdrawal Regarding the Bristol Bay Watershed Assessment**

I. Introduction

The Competitive Enterprise Institute submits this request for correction or withdrawal of information under the Information Quality Act,<sup>1</sup> as implemented through the Office of Management and Budget (OMB)<sup>2</sup> and the Environmental Protection Agency (EPA).<sup>3</sup>

Founded in 1984, the Competitive Enterprise Institute is a non-profit research and advocacy organization that focuses on federal regulatory policy from a pro-market perspective. We work to ensure that agency actions are rooted in statute and based on the best available evidence.

We respectfully petition EPA to either substantially correct or withdraw its 2014 Bristol Bay Watershed Assessment (BBWA)<sup>4</sup> and the proposed determination based upon it.<sup>5</sup> The BBWA fails the applicable standards of information quality. Its ongoing dissemination and use to effectively block the Pebble Mine project in Alaska is therefore in violation of the law.

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<sup>1</sup> Section 515(a) of the Treasury and General Government Appropriations Act for Fiscal Year 2001, P.L. 106-554; 44 U.S.C. section 3516.

<sup>2</sup> 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).

<sup>3</sup> Environmental Protection Agency, "Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by the Environmental Protection Agency," (Information Quality Guidelines), at <https://www.epa.gov/sites/production/files/2017-03/documents/epa-info-quality-guidelines.pdf>.

<sup>4</sup> Environmental Protection Agency, "An Assessment of Potential Mining Impacts on Salmon Ecosystems of Bristol Bay, Alaska, January 2014," (BBWA), at <https://cfpub.epa.gov/ncea/bristolbay/recordisplay.cfm?deid=253500>.

<sup>5</sup> Environmental Protection Agency, "Proposed Determination of the U.S. Environmental Protection Agency Region 10 Pursuant to Section 404(c) of the Clean Water Act, Pebble Deposit Area, Southwest Alaska," (Proposed Determination), at [https://www.epa.gov/sites/production/files/2014-07/documents/pebble\\_pd\\_071714\\_final.pdf](https://www.epa.gov/sites/production/files/2014-07/documents/pebble_pd_071714_final.pdf)

The BBWA was used in support of EPA’s proposed determination, which in practical effect serves as a preemptive veto of an Army Corps of Engineers’ permit under the Clean Water Act (CWA) for the Pebble Mine project. This unprecedented action—essentially rejecting a permit application prior to the permit being submitted—raises a number of legal questions, including potential violations of the Information Quality Act. As will be discussed in more detail below, this premature and speculative analysis, conducted by the agency before the relevant mine permit had been submitted and thus without knowledge of any specifics of the project being analyzed, is highly problematic under EPA’s Information Quality Guidelines. Further, the process by which the EPA initiated, compiled, and peer reviewed the BBWA contained numerous instances of bias that also fail to meet the agency’s guidelines.

For these reasons, EPA’s BBWA should, at the very least, be substantially corrected. Preferably, it should be withdrawn along with the proposed determination based upon it, and the agency should participate *de novo* in the far more rigorous and inclusive Environmental Impact Statement (EIS) process under the National Environmental Policy Act (NEPA), a process that is presently underway.<sup>6</sup>

## II. Background

### A. The Information Quality Act

Reflecting both the Information Quality Act and OMB guidelines, EPA’s Information Quality Guidelines require that “disseminated information should adhere to a basic standard of quality, including objectivity, utility, and integrity.”<sup>7</sup> The agency further explains that utility “refers to the usefulness of the information to the intended users,” and that objectivity “focuses on whether the disseminated information is being presented in an accurate, clear, complete, and unbiased manner, and as a matter of substance, is accurate, reliable, and unbiased.”<sup>8</sup> The BBWA must comply with these guidelines.

In addition, the BBWA must meet the “higher degree of quality” required for Highly Influential Scientific Assessments,<sup>9</sup> which the agency has agreed would apply to this document.<sup>10</sup> Thus, the agency’s guidelines also require that:

(A) The substance of the information is accurate, reliable and unbiased. This involves the use of:

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<sup>6</sup> U.S. Army Corps of Engineers, “Pebble Project EIS: Draft Scoping Report,” July 25, 2018, at

<https://www.pebbleprojecteis.com/>.

<sup>7</sup> Information Quality Guidelines, p. 3.

<sup>8</sup> *Ibid.*, p. 15.

<sup>9</sup> *Ibid.*, p. 20.

<sup>10</sup> 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, AK,” July 6, 2012, at <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>.

- (i) the best available science and supporting studies conducted in accordance with sound and objective scientific practices, including, when available, peer reviewed science and supporting studies; and
- (ii) data collected by accepted methods or best available methods (if the reliability of the method and the nature of the decision justifies the use of the data).<sup>11</sup>

In so doing, the agency must apply a “weight-of-evidence” approach to highly influential information, which “considers *all relevant information* and its quality, consistent with the level of effort and complexity of detail appropriate to a particular risk assessment” (emphasis added).<sup>12</sup>

EPA’s Information Quality Guidelines also incorporate the agency’s peer review requirements as set out in its Peer Review Handbook.<sup>13</sup> These apply to “major scientifically and technically based work products (including scientific, engineering, economic, or statistical documents) related to Agency decisions,”<sup>14</sup> such as the BBWA and proposed determination.

## B. The NEPA Process and the Pebble Mine

Section 404 of the CWA specifies that the Secretary of the Army is responsible for issuing any required permits to discharge dredged or fill material into navigable waters that are associated with a project.<sup>15</sup> This task is undertaken by the Army Corps of Engineers as part of the EIS compiled under NEPA. This process is highly exhaustive and inclusive, relying on an extensive project analysis that is reviewed by all interested parties through numerous public comment periods (and responses to comments) as well as public meetings.

As part of this process, the statute authorizes the EPA, pursuant to subsection 404(c), to deny any such permit for any area defined as a disposal site, based on criteria set out in statute.<sup>16</sup> It has long been understood that the 404 permit process, including the EPA’s permit veto authority, would be exercised concurrently with the larger NEPA process and not as something outside of it, and that the process would begin after a permit application had been submitted and end before the NEPA process is complete and a permit has been issued.

This decades-long practice was upset by the Obama administration EPA. In two instances, the agency effectively vetoed CWA permits independently of the NEPA process—one a prospective veto before the NEPA process had commenced and another after the NEPA process had been completed and the project approved.<sup>17</sup> In this petition, we will focus on the former—the case of the Pebble Mine.

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<sup>11</sup> Information Quality Guidelines, p. 22.

<sup>12</sup> *Ibid.*, p. 21.

<sup>13</sup> *Ibid.*, p. 11.

<sup>14</sup> *Ibid.*

<sup>15</sup> Clean Water Act, Section 404, at <https://www.law.cornell.edu/uscode/text/33/1344>.

<sup>16</sup> Environmental Protection Agency, Section 404 Permit Program, at <https://www.epa.gov/cwa-404/section-404-permit-program>.

<sup>17</sup> See, House Energy and Commerce Committee, “Major Projects Major Problems,” September 14, 2014, pp. 6-7, at <https://archives-energycommerce.house.gov/sites/republicans.energycommerce.house.gov/files/analysis/20140915MajorProjectsMajorProblems.pdf>.

The Pebble Mine has the potential to be America's largest new mine in decades, producing copper, molybdenum, and gold, creating thousands of jobs in an economically depressed area. It would be located in the Bristol Bay region in Alaska on land that has been granted by the federal government to the state of Alaska for the express purpose of mineral development. The project developer, Pebble Limited Partnership (PLP), was in the process of preparing a detailed permit application under CWA section 404 as part of the larger EIS process under NEPA.

### C. EPA's Proposed Determination

In a move EPA internally admitted has “never been done before in the history of the CWA,”<sup>18</sup> the agency issued a proposed determination that effectively vetoed any such permit before it had been submitted.<sup>19</sup> EPA's notice of proposed determination was based on the agency's BBWA. EPA has refused to withdraw the BBWA and proposed determination even though the actual permit application has now been filed and the conventional NEPA process is underway.

The BBWA violates the relevant federal standards for information quality. First and foremost, no analysis can meet these standards if conducted without knowing the details being analyzed. In this case, the BBWA focused on and then rejected three hypothetical mine scenarios—not the actual mine proposal, which did not yet exist. In addition, every step in the process of developing the BBWA was fraught with examples of the biases that the Information Quality Guidelines seek to prevent.

## III. The BBWA and Proposed Determination Violate the Information Quality Act

### A. EPA's Preemptive Analysis on Its Face Violates the Information Quality Provisions and Was Criticized by Key Participants

Because the Pebble Mine was subject to a preemptive veto, the analysis on which EPA relied was unavoidably deficient. No mine permit application had yet been submitted, so EPA was analyzing its own hypothetical mine scenarios without knowing the actual terms of the Pebble Mine proposal, including measures to mitigate potential environmental impacts.<sup>20</sup> Such a premature and speculative analysis cannot possibly comply with the Information Quality Guidelines, and in particular its requirement of utility as measured by the “usefulness of the

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<sup>18</sup> House Committee on Oversight and Government Reform (OGR), “The U.S. Environmental Protection Agency's Unprecedented 404(c) Action in Bristol Bay, Alaska,” (OGR Report), November 4, 2105, p. 5, at <https://oversight.house.gov/wp-content/uploads/2015/11/Bristol-Bay-Pebble-Mine-Staff-Findings-Nov-2015-Final.pdf>.

<sup>19</sup> See, 33 C.F.R. 323.6(b)

<sup>20</sup> EPA asserts that it has based two of these hypotheticals on preliminary PLP filings concerning the project. BBWA ES-10. However, in addition to being preliminary and possibly outdated, these documents also leave many details unaddressed, so the agency engaged in significant gap filling. For example, the agency assumes that conventional mining practices would be used rather than state-of-the art practices. BBWA ES-10-12.

information to the intended users.”<sup>21</sup> It also fails the test of being “accurate, reliable and unbiased,” and “the best available science,” as is required of highly influential information.<sup>22</sup>

Two of the agency’s three speculative mine scenarios were unrealistically massive—strawmen to be knocked down under the CWA’s requirements. The third scenario was more realistic but still very different than what PLP asserted it was planning to submit (and indeed quite different than the actual permit application that has since been submitted). The BBWA itself 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.” Further, the BBWA states 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.”<sup>23</sup> Essentially the EPA stacked the deck with hypothetical mine scenarios highly unlikely to get a permit. It was on these hypothetical mine scenarios that the BBWA was based.

One BBWA peer reviewer noted that “because of the hypothetical nature of the approach employed, the uncertainty associated with the assessment, and therefore the utility of the assessment, is questionable.”<sup>24</sup> Another said that “[t]here 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.”<sup>25</sup> Needless to say, an assessment replete with hypothetical and/or missing details fares poorly under the Information Quality Guidelines, particularly as it relates to being “accurate,” “reliable,” and “complete.”<sup>26</sup> It also falls well short in “the usefulness of the information to the intended users.”<sup>27</sup>

EPA staff assured these and other peer reviewers that the BBWA is “intended as a background scientific document rather than a decision document.”<sup>28</sup> Thus, the agency essentially conceded that the analysis was too premature and incomplete to be useful for decision-making purposes. Nonetheless, the agency engaged in bait and switch, allaying peer reviewer concerns about the utility of the BBWA by saying that it would not be a decision document but later using it for precisely that purpose.

The State of Alaska raised similar concerns. One state official noted in a letter that “if EPA deems a review under Section 404(c) of the Clean Water Act is needed, that review should be conducted in conjunction with a pending permit application where actual activities and potential disposal sites are clearly specified, not in the abstract as it will be in this assessment process.”<sup>29</sup> That same official later concluded that the BBWA “would have much more scientific

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<sup>21</sup> Information Quality Guidelines, p. 15.

<sup>22</sup> *Ibid.*, p. 22.

<sup>23</sup> BBWA, pp. 6-1.

<sup>24</sup> Environmental Protection Agency, “Final Peer Review Report: External Peer Review of EPA’s Draft Document,” (Final Peer Review Report), September 17, 2012, p. 22.

<sup>25</sup> Environmental Protection Agency, “Peer Review Follow-On Comments on the April 2013 Draft of An Assessment of Potential Mining Impacts on Salmon Ecosystems of Bristol Bay, Alaska, 2013,” p. 34.

<sup>26</sup> Information Quality Guidelines, p. 15.

<sup>27</sup> *Ibid.*

<sup>28</sup> Environmental Protection Agency, “Response to Peer Review Comments, May 2012 and April 2013 Drafts,” (Response to Peer Review Comments), p. 35.

<sup>29</sup> Letter from Tom Crafford, Director, Office of Project Management and Permitting, Alaska Department of Natural Resources, to Richard Parkin, EPA, Aug. 8, 2011.

credibility within the context of an actual defined proposal.”<sup>30</sup> The Alaska Attorney General and other state officials concluded that “the watershed assessment, and now the proposed determination which relies on the assessment, draw speculative conclusions about potential impacts from a hypothetical mine.”<sup>31</sup> Impacted state governments usually play a very important role contributing information to the project approval process, but Alaska was largely bypassed in this case.

The Army Corps of Engineers—statutorily the lead agency on CWA permits under section 404—flatly declined to participate in EPA’s process of developing the BBWA, informing the agency that “at this time, the Corps has not received a permit application for this project and is therefore unable to evaluate the impacts of potential discharges associated with the Pebble Deposit.”<sup>32</sup> The Corps further explained that it “has not yet begun the public interest review and evaluation process, and it would be premature to submit any information for the record at this time.”<sup>33</sup> It is unheard of for a *de facto* final decision to be made on such a project permit without participation from the Army Corps of Engineers.

Thus, several BBWA peer reviewers, the State of Alaska, and the Army Corps of Engineers all raised serious doubts about the utility of EPA’s premature and speculative exercise.

Beyond the potential for mischaracterization and exaggeration of the scope of the mine, the BBWA also failed to include the full range of mitigation measures that would have been specified in the permit application. An important component of the section 404 process is the use of mitigation measures, should a project pose a risk to the health of waters and ecosystems. Absent a permit application, the EPA had no idea what these mitigation measures might entail, so the agency simply assumed there were none beyond a relative few conventional ones that the agency concluded to be inadequate. One peer reviewer, while acknowledging potential adverse environmental impacts, noted that the BBWA “did not consider whether there are any methods that could effectively minimize, mitigate or compensate for these impacts.”<sup>34</sup> Once again, the use of assumptions in the place of actual data and analysis greatly undercuts the utility of the BBWA.

For its part, the EPA conceded that the BBWA did not include all such mitigation measures, stating that “any formal determinations regarding compensatory mitigation can only take place in the context of a regulatory action. The Bristol Bay Assessment is not a regulatory action, and thus a complete evaluation of compensatory mitigation is outside the scope of the assessment.”<sup>35</sup> Thus, the agency’s response to peer reviewer concerns about the adequacy of the mitigation discussion was to acknowledge serious gaps but promise that those gaps would be filled ahead of any “regulatory action.” This proved not to be the case as the BBWA became the primary document on which the agency’s action was based.

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<sup>30</sup> Letter from Tom Crafford, Director, Office of Project Management and Permitting, Alaska Department of Natural Resources, to EPA, (July 23, 2012).

<sup>31</sup> Letter from Alaska Attorney General Michael Geraghty, et al., to Gina McCarthy, Administrator, EPA, and Dennis McLerran, Regional Administrator, EPA Region 10, Sept. 19, 2014.

<sup>32</sup> Letter, Col. Christopher Lestochi, Commander, Army Corps of Engineers Alaska District, to Dennis McLerran, Regional Administrator, EPA Region 10, March 14, 2014.

<sup>33</sup> *Ibid.*

<sup>34</sup> Final Peer Review Report, p. 13.

<sup>35</sup> BBWA, Appendix J.

Coupled with EPA's equally pessimistic assumptions that a great deal of contaminants would escape from the mine, such as the assumption that fully 50 percent of waste rock leachates would enter nearby waters,<sup>36</sup> the EPA's built-in assumption of inadequate mitigation measures virtually sealed the fate of any agency 404(c) decision based upon the BBWA. But in so doing, EPA violated the requirements of the Information Quality Guidelines.

## B. The Process By Which the BBWA Was Developed Violates the Information Quality Guidelines

The fact that the BBWA was an analysis of agency-generated hypothetical mine scenarios, rather than the real thing as specified in a permit application, is reason enough for it to be suspect under the Information Quality Guidelines. Such hypotheticals may be justified when they are the "best available science," but in this case EPA has not explained why it could not have waited and reviewed the actual permit application and supporting documentation once it was filed. Timing issues notwithstanding, the biased process by which EPA developed the BBWA also gives reason to reject it, especially under the Information Quality Guideline's provisions regarding objectivity.

### 1. Bias Throughout the Process of Developing the BBWA

The bias against the mine was evident at the very outset of the process leading to the BBWA. A 2015 House Oversight and Government Reform Committee report uncovered numerous EPA documents and actions revealing a pre-determined goal of a 404(c) veto well before the commencement of the assessment.<sup>37</sup>

Several career staff, many of whom would later work on the BBWA, expressed a clear intent of stopping the mine and using 404(c) to do so. For example, EPA Region 10 employee Phil North, who later became a technical lead on the BBWA, expressed support for a mine veto beginning in 2009.<sup>38</sup> North communicated with several other EPA employees about using a preemptive veto under 404(c), frequently sending (as well as receiving) comments treating this option as a foregone conclusion.<sup>39</sup> This also included Richard Parkin, who would later become the BBWA team leader.<sup>40</sup>

The early-stage bias also extended to the 2010 petition from several Alaska tribes that initiated the 404(c) process and the BBWA. Documents clearly show active participation by North and other self-avowed Pebble critics within the agency, including agency help in drafting the petition.<sup>41</sup> Nonetheless, it was this petition that the agency relied upon as justification for moving forward with the assessment and doing so ahead of the actual mine permit application and standard NEPA review process. In effect, the agency was petitioning itself to unilaterally block the Pebble Mine and thus create the BBWA at issue here.

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<sup>36</sup> BBWA, p. ES-30.

<sup>37</sup> OGR Report, pp. 5-18

<sup>38</sup> OGR Report, pp. 7-8. The OGR Report notes that North was uncooperative with the Committee during its investigation and that the full extent of his actions in support of a preemptive section 404(c) veto is not known.

<sup>39</sup> OGR Report, pp. 7-8, 12-13, 18-19.

<sup>40</sup> OGR Report, p. 5.

<sup>41</sup> OGR Report, pp. 9-13.

There is also evidence that the agency started working on its response to the petition before the petition was even filed. This includes a paper discussing the agency's options to such a petition that was heavily slanted towards choosing the option of a 404(c) veto, including a Region 10 Aquatic Resources Unit suggestion that the mine "should be vetoed in the end."<sup>42</sup>

These and other early examples of bias led the Committee to conclude that "EPA planned to halt mining activity in Bristol Bay well before receiving petitions from local tribes," and that the agency "helped draft the tribal petition that the agency later claimed to have relied on."<sup>43</sup> The evidence of agency pre-determination before the BBWA process had begun raises serious doubts that the subsequent final product meets the definition of objectivity.

## 2. Selective Use of Inputs in Developing the BBWA

The EPA launched its scientific assessment in February of 2011 and with it the process of deciding which data to include and which to exclude. North and his EPA colleagues—whose documented anti-mine advocacy led the agency to this assessment—served as information gatekeepers. The non-EPA contributors were no less biased. Even those with stridently anti-mine positions were not disqualified from holding the pen, such as Alan Boraas, who authored an appendix to the BBWA despite having written op-eds with titles like "Murkowski Risks Salmon for Gold Mine," in which he suggested that the mine would result in "a little mercury in your wild salmon..."<sup>44</sup> Not surprisingly, nearly all of the information relied upon can be traced back to individuals and organizations opposed to the mine.

There was also bias in EPA outreach. Environmental groups and individuals opposed to the mine had substantial access to EPA officials and others involved in developing the BBWA, while mine officials and other potential supporters were largely excluded. Similarly, Alaskan tribes opposing the mine met with then-EPA Administrator Lisa Jackson while tribes supporting the mine were denied a similar meeting.<sup>45</sup>

Anti-mine groupthink was pervasive among the BBWA contributors, but perhaps the most troublesome example was Ann Maest, a mine critic who contributed multiple studies and repeatedly conferred with other contributors to the BBWA. Maest was forced to admit that she had engaged in multiple instances of fraud in her capacity as an expert witness in the case of *Donziger v. Chevron Corp*, in which Chevron was accused of causing large-scale environmental pollution at a facility in Ecuador.<sup>46</sup> In response, EPA staff excised all direct references to her work but did not attempt to remove her substantive contributions to the BBWA.<sup>47</sup>

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<sup>42</sup> Environmental Protection Agency, "Options for EPA Involvement In Mining Activity In The Bristol Bay Watershed," 2010, p. 7.

<sup>43</sup> OGR letter to EPA Administrator Gina McCarthy (OGR Letter), November 4, 2015, p. 2, <https://oversight.house.gov/wp-content/uploads/2015/11/2015-11-04-JC-CL-JJ-to-McCarthy-EPA-Bristol-Bay-due-11-18.pdf>.

<sup>44</sup> See Alan Boraas, "Murkowski Risks Salmon for Gold Mine," Anchorage Daily News, Dec. 1, 2005.

<sup>45</sup> OGR Report, p. 16.

<sup>46</sup> Witness Statement of Ann Maest, *Chevron Group v. Donziger*, Case No. 1:11-cv-00691-LAK, Dkt. 1007-1 (S.D.N.Y. Apr. 12, 2013).

<sup>47</sup> Response to Peer Review Comments, pp. 49-50.



As discussed previously, several reviewers had raised the issue of the hypothetical and speculative nature of the analysis and the inadequacies of the discussion about mitigation. The EPA did not address these concerns, except to say that the BBWA was not a decision document, and that the agency would address these and other outstanding issues in a future regulatory proceeding.<sup>48</sup> That did not turn out to be the case.

Conspicuously absent from consideration was the large body of work intended to be part of the exhaustive EIS process under NEPA conducted for PLP by a range of experts.<sup>49</sup> The EPA has not provided any justification why the agency excluded this data. While the Information Quality Act's focus is on preventing the use of poor quality data, agencies also thwart its goals by failing to use potentially good data, as appears to be the case here. Of course, this excluded data must meet the same information quality standards as any other relied upon by the EPA, but there is no indication that the agency made any determination that it did not. As a result of this exclusion, many important details about the mine were never considered by EPA staff in the development of the BBWA, such as the extensive analysis of potential environmental mitigation measures conducted by a number of consultants for PLP.<sup>50</sup>

Thus, at least some of the "best available science" was likely absent from the BBWA, and the record was far from "unbiased" and "complete." Further, given the requirement under the weight-of-evidence approach to consider "all relevant information," the EPA violated its information quality provisions applicable to highly influential information by categorically excluding this extensive analysis.

The one-sided nature of the inputs to the BBWA led the House Committee on Oversight and Government Reform to conclude that the EPA "failed to conduct an impartial, fact-based review of the proposed Pebble Mine..."<sup>51</sup>

### 3. Limited Peer Review throughout the BBWA Process

Throughout the development of the BBWA, the EPA engaged in a process it called peer review, but simply calling it that does not comply with EPA's Peer Review Handbook, which the agency incorporated into its Information Quality Guidelines.<sup>52</sup> At several stages, EPA staff limited opportunities for public participation, particularly after greatly expanding the BBWA draft midway through the process. EPA also improperly interfered with peer reviewers on numerous occasions,<sup>53</sup> which the agency itself documented in its Final Peer Review Report.<sup>54</sup>

Despite a limited peer review process, reviewers raised a number of objections. For example, one reviewer said that "some of the comments read like editorial opinions rather than

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<sup>48</sup> Response to Peer Review Comments, pp. 31, 35, 39, 47, 111, 114-115, 165.

<sup>49</sup> See, Pebble Limited Partnership, Environmental Baseline Document, <https://pebbleresearch.com/document/>

<sup>50</sup> PLP, "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," September 19, 2014, pp. 40-46.

<sup>51</sup> OGR Letter, p. 1,

<sup>52</sup> Information Quality Guidelines, p. 11.

<sup>53</sup> EPA Peer Review Handbook, 4<sup>th</sup> ed., 2015, at 86, at <https://www.epa.gov/osa/peer-review-handbook-4th-edition-2015>.

<sup>54</sup> Final Peer Review Report, pp. 3-4.

reporting scientific results.”<sup>55</sup> Another said “the report lacks impartiality.”<sup>56</sup> These and other peer reviewer concerns were largely dismissed by the agency.

#### IV. Recommendation of Corrective Action

For the reasons stated above, the BBWA is in need of numerous corrections, and the proposed determination should be revised to reflect the corrected BBWA. However, given the number and extent of Information Quality Guidelines failures, the best course of action would be for the EPA to withdraw the BBWA and proposed determination in their entirety and instead participate *de novo* in the ongoing Army Corps of Engineers-led EIS process under NEPA. In other words, the information quality provisions are best served by the EPA going back to participating in the process way it had done for decades.

This option still gives the EPA the opportunity to weigh in on the Pebble Mine, only this time the agency would have before it a specific permit application showing exactly the details of the proposed project, including mitigation measures. The EPA would also have the benefit of full participation from the Army Corps of Engineers, other federal agencies, the State of Alaska, and other interested parties who had limited or no input in the development of the BBWA. The agency would also have access to a much larger body of research and analysis from which to judge the project.

The State of Alaska, while describing EPA’s BBWA and proposed determination as “premature, speculative, without precedent, illegal in terms of both process and substance, and unnecessary,” stated that “a more appropriate alternative... would be to announce EPA’s concerns so they could inform the [NEPA] permitting process and wait to see if EPA’s concerns are adequately addressed through the permitting process, with due deference to the regulatory criteria, expertise, and experience of other agencies with jurisdiction in the specific subject matter.”<sup>57</sup>

Indeed, for purposes of the information quality requirements, the EIS process will be everything that the BBWA was not—a comprehensive, inclusive, and extensively vetted analysis of the Pebble Mine project as proposed. This option would also further the Competitive Enterprise Institute’s goal of federal agency actions rooted in the law and based on the best available evidence.

It is important to emphasize that in the course of the EIS process, the EPA would still have the opportunity to make its own determination under 404(c), but now that determination would be a well-informed one rather than one based on the speculative, premature, and likely-biased BBWA. Regardless of the outcome of this more rigorous and extensive permitting process, it would better comport with the Information Quality Act than the BBWA.

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<sup>55</sup> Environmental Protection Agency, “Final Peer Review Summary Report: External Peer Review of Wobus et. al,” 2012, p. 4.

<sup>56</sup> Environmental Protection Agency, “Final Peer Review Summary Report: External Peer Review of Chambers and Higman,” 2012, p. 16.

<sup>57</sup> Letter from Alaska Attorney General Michael Geraghty, to Dennis McLerran, Regional Administrator, EPA Region 10, April 29, 2014.

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*Ben Lieberman will also serve as an organizational point of contact for this request.*