

**Statement of
General Joseph W. Ralston**

before the

**Senate and House Resources Committees
Alaska State Legislature**

March 7, 2016

Good morning, Chairman Giessel, Chairmen Nageak and Talerico, and members of the Senate and House Resources Committees. Thank you for inviting me to testify on Secretary Cohen's independent review of EPA's decision-making process regarding potential mining in the Bristol Bay watershed.

Let me start by saying that I have been an Alaska resident since 1992 and spent several years at Elmendorf when I commanded the Alaskan Command during my career as an Air Force Officer. I fully understand and appreciate the complexities and the views within our State both pro and con regarding the Pebble Mine.

The Secretary's review is not about the Pebble Mine, but rather the actions of EPA as a federal agency. Secretary Cohen and I have spent most of our professional lives in service of our country. For the Secretary – as a Congressman, Senator and Secretary of the largest Department in the Executive Branch – and my own 38 years of service in the Air Force; we both feel very strongly that federal agencies have an

obligation to act in a fair manner. This is the only way they can maintain the trust of the American public.

I will summarize the basis under which the review was undertaken, the process used, and the findings.

Conditions of Acceptance

Secretary Cohen was first approached by Tom Collier and the Pebble Limited Partnership in Fall 2014. Pebble expressed concern about the fairness of EPA's decision-making process in connection with EPA's evaluation of potential mining in Bristol Bay and wanted an objective party to examine that concern.

After examining a wide range of documents, including those obtained under FOIA, the Secretary determined that sufficient and legitimate questions existed as to the fairness of EPA's process and agreed to undertake this review, assisted by his team at The Cohen Group and the law firm DLA Piper. One of the lead counselors on this review, Holly Butler, is here today.

The Secretary conditioned his acceptance on complete independence. The Pebble Limited Partnership had no ability to edit or censor his views. The conclusions he drew were his and his alone. The Pebble Limited Partnership compensated our team according to

commercially standard terms, and no portion of this compensation was contingent upon the result or content of the report.

The Secretary did not make a determination on whether a mine should be built – this is a question for engineers, scientists, and the State of Alaska. Nor did he comment on the legality of EPA’s preemptive use of Section 404(c) of the Clean Water Act – this is a question for the Courts and Congressional review.

Given his substantial Executive and Legislative experience, Secretary Cohen felt qualified and agreed to review the process by which EPA assessed, and proposed restrictions to reduce, the environmental risks associated with potential mining in the Bristol Bay watershed from the perspective of a Cabinet official.

Process of Review

The Cohen Group team had unfettered access to and conducted a thorough examination of the extensive written record of more than 42,000 documents produced by federal agencies in response to FOIA requests, including EPA, Fish and Wildlife Service, Army Corps of Engineers, and NOAA. We also reviewed documents from the State of Alaska, EPA’s own published record of its process, Congressional hearings, and the Pebble Partnership.

We welcomed the opportunity to speak with anyone who cared to share with us their perspective on this important topic, and we made every effort to seek out and speak with as many people representing as many different points of view as we could.

Over sixty people representing all points of view on EPA's actions – Pro, Against and Neutral – voluntarily spoke with the Secretary and our team. This included three former EPA Administrators and several former EPA Assistant Administrators for water from both Democratic and Republican Administrations, as well as members of Alaska Native Tribes from the Bristol Bay region, scientists (both opposed to and in support of the mine), former Alaska government officials, and representatives of the Pebble Partnership. We also visited the region, including the Pebble Deposit site.

EPA, through the Justice Department, declined Secretary Cohen's request to making current personnel available for interviews, citing ongoing Congressional and (at the time) the Inspector General inquiries and pending litigation. We recognized and can appreciate this decision.

Findings

The Pebble Deposit is a mineral deposit located in the Bristol Bay watershed. The deposit has been described by the Alaska Department of Natural Resources as one of the world's largest copper resources. It is located on lands owned by the State of Alaska, which have been

specifically designated for mineral exploration and development under an area plan for state lands.

The Bristol Bay watershed is largely undisturbed by significant development. The economy is dominated by commercial salmon fishing and features a Native Alaskan population that maintains a strong salmon-centered culture and subsistence-based lifestyle.

Thus any regulatory authority to be exercised requires the most fair and appropriate process, particularly as it interacts with the State of Alaska, the landowner in this case.

Here EPA did not employ the well-established Permit/NEPA process to evaluate potential development in the Bristol Bay watershed. Rather, EPA used Section 404(c) of the Clean Water Act to preemptively impose restrictions on potential mining in the area.

- Because, to date, the Pebble Partnership has not submitted a permit application, EPA relied on hypothetical scenarios for its Bristol Bay Watershed Assessment (“BBWA”) rather than the characteristics of a mine that is actually proposed to be built and maintained;
- EPA failed to address important considerations that would be included in the Permit/NEPA Process, including meaningful participation by the State of Alaska and other federal government

agencies, mitigation and controls as proposed by the developer, and an array of public interest factors;

- The Permit/NEPA Process has been used for decades and has been widely endorsed by environmental groups as being “Democratic at its core”;
- EPA relied upon the BBWA in its Proposed Determination but acknowledged that there were significant gaps in its assessment and that it was not designed to duplicate or replace the Permit/NEPA Process; and
- EPA’s unprecedented, preemptive use of Section 404(c) inhibited the involvement of two key participants: the State of Alaska and the Army Corps of Engineers.

These observations informed the Secretary’s conclusion that EPA’s application of Section 404(c) prior to the filing of a permit application was not fair to all stakeholders.

The fairest and most appropriate process to evaluate possible development in the Pebble Deposit Area would use the established regulatory Permit/NEPA Process to assess a mine permit application, rather than using an assessment based upon the hypothetical mining scenarios

described in the BBWA as the basis for imposing potentially prohibitive restrictions on future mines.

The Permit/NEPA Process is more comprehensive than the preemptive Section 404(c) process employed here. EPA conceded in comments to peer reviewers that there were gaps in its assessment that would be addressed during a Permit/NEPA Process.

Here, as the Agency acknowledges, EPA initiated Section 404(c) in an unprecedented manner. EPA's use of Section 404(c) before a permit application filing exacerbated the shortcomings of the BBWA noted by the State of Alaska, several peer reviewers, and the Pebble Partnership: most notably, the use of hypothetical assumptions that may not accurately or fairly represent an actual project; and the failure to take into account mitigation and control techniques required by the State or that a developer might propose. Stakeholders disagree about the legality of EPA's preemptive use of Section 404(c).

An environmental impact assessment is bound to provide more accurate information if it analyzes a mine that will be built in accordance with the developer's plans, rather than a hypothetical mine plan which even EPA acknowledges is likely to be different from a developer-submitted plan. This project is too important, for all stakeholders, to pilot a new, untested decision-making process. The fairest approach is

to use the well-established Permit/NEPA Process, and Secretary Cohen could find no valid reason why that process was not used.

During the course of his review, statements and actions of EPA personnel have raised questions about EPA's motives. Although Secretary Cohen found many troubling questions, he did not attempt to reach any conclusions on these issues and instead urged those with subpoena power to pursue this incomplete record.

The EPA Inspector General (IG) recently released a report of its investigation. The IG Report, however, addressed only one component of the broader process by which EPA determined it would propose restrictions on mining in the Pebble Deposit Area and did not address the fairness of EPA's novel application of Section 404(c).

As a result of this narrow scope, the IG Report did not provide any information that directly addresses Secretary Cohen's findings, including his central finding that the fairest and most appropriate process to evaluate any development in the Pebble Deposit Area would use the established regulatory Permit/NEPA Process to assess a mine permit application. The IG report left open many questions and presented an incomplete record in material aspects. Thus, we believe there remain troubling aspects that merit review by those who have the constituted responsibility take a deeper look – be it in Congress, the Courts, or the Administration.

This is not about Pro-Pebble or Anti-Pebble, but rather good governance and the actions of our federal agencies and processes by which they interact with their State partners and constituencies.

How EPA conducted the process to assess potential development and protect our fish and our environment here in Alaska is of vital importance to our State, region and country. Madame Chairman, Chairmen Nageak and Talerico, thank you again for providing me the opportunity to brief your respective Committees on the results of the Secretary's review on this important question.