

Committee on Natural Resources

Rob Bishop Chairman
Hearing Memorandum

June 20, 2016

To: All Natural Resources Committee Members

From: Majority Committee Staff—Sean Stewart (6-9837)

Hearing: Full Committee Oversight hearing titled: “*Investigating the Appropriate Role of the National Environmental Policy Act in the Permitting Process*”

The Committee on Natural Resources will hold an oversight hearing to hear testimony on the appropriate role of the National Environmental Policy Act (NEPA) in the permitting process on **June 22, 2016, at 10:00am in LHOB 1324**. This hearing will examine whether NEPA provides the best framework to evaluate and demonstrate compliance with other regulatory and statutory requirements.

Policy Overview

- Enacted in 1970, NEPA requires federal agencies to consider environmental impacts for any major federal action that affects the quality of the human environment.¹ Although no comprehensive data appears to be available government-wide, hundreds of environmental impact statements (EIS) and hundreds of thousands of other environmental assessments are conducted or are in process each year by federal agencies under NEPA.² These reviews can be very costly, time-consuming and ultimately, a magnet for litigation.
- Though the White House’s Council on Environmental Quality (CEQ) regulations require agencies to prepare NEPA Environmental Impact Statements “concurrently with and integrated with” all other environmental requirements,³ federal agencies, such as the U.S. Army Corps of Engineers (Corps) and the Environmental Protection Agency (EPA) are making permitting decisions *outside* of the process contemplated under NEPA.
- Some question whether NEPA as written provides the best process to evaluate environmental impacts and the best framework for demonstrating compliance with all other regulatory requirements when making permitting decisions. As the Committee explores broader NEPA review, it is important to evaluate the motives and authority of recent federal agency decision making which appears to circumvent the NEPA process.

¹ 42 U.S.C. § 4331.

² See: General Accounting Office Report 14-370 (2014) <http://www.gao.gov/assets/670/662546.pdf>

³ 40 C.F.R. § 1502.25.

Witnesses Invited

Mr. Roger R Martella, Jr.
Partner, Sidley Austin LLP
Washington, D.C.

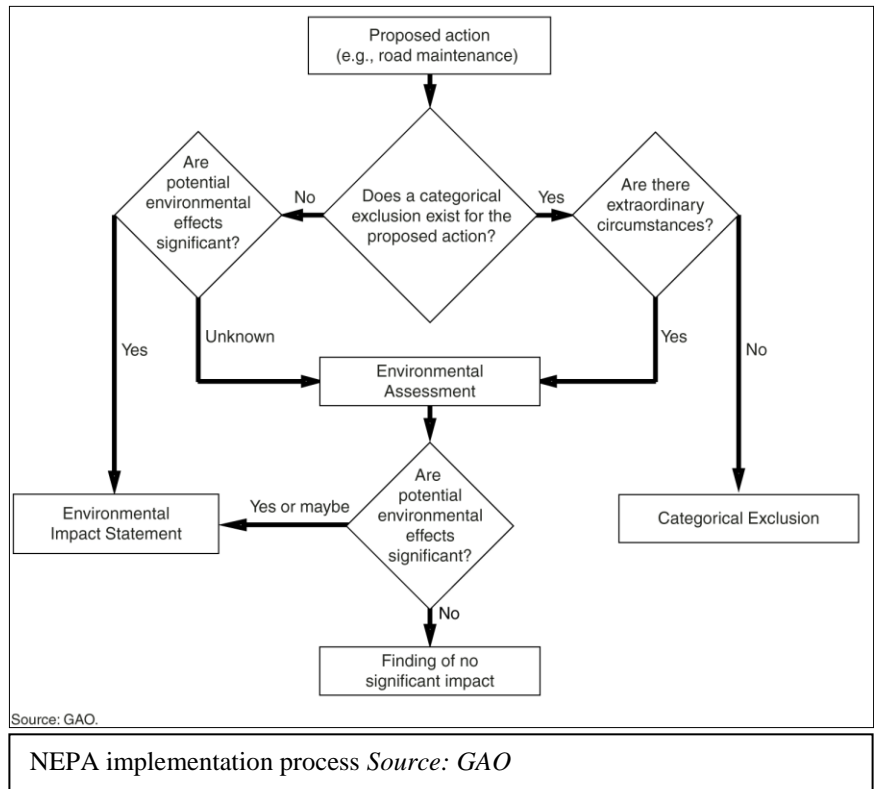
Mr. Lee Newgent
Executive Secretary
Washington State Building and Construction Trades Council
Tukwila, Washington

Mr. Tom Collier, CEO
Pebble Partnership
Anchorage, Alaska

Ms. Kimberly Williams
Executive Director
Nunamta Aulukestai
Dillingham, Alaska

Background

The National Environmental Policy Act of 1969 (NEPA) has been called the “Magna Carta” of environmental laws,⁴ ushering a wide range of environmental regulations and requirements since its enactment in 1970. Over the years, NEPA has been interpreted to require federal agencies to take a hard look at the environmental impacts on literally any action that has a federal nexus, including actions requiring a federal permit, license, or funding, such as, mining, grazing or timber activities on federal lands, oil and gas, dredging, highway construction, dam construction and licensing, to name just a few.



⁴ Council on Environmental Quality Executive Office of the President. “A Citizen’s Guide to the NEPA Having Your Voice Heard.” (Dec 2007), accessed at https://ceq.doe.gov/nepa/Citizens_Guide_Dec07.pdf.

Specifically, agencies must prepare a detailed document, referred to as an Environmental Impact Statement (EIS), for every federal action that significantly impacts the quality of the human environment.⁵ (see chart above)

CEQ regulations require that federal agencies prepare the EIS “concurrently with and integrated with” all other environmental requirements.⁶ Many complex actions require compliance with literally dozens of other federal, state, tribal, and local laws, and thus, the NEPA process is intended to act as an “umbrella” with the EIS forming the framework “to coordinate and demonstrate compliance with these requirements.”⁷ In addition, NEPA requires an open and transparent process that considers an array of interest factors and provides for public involvement for permitting decisions.

The NEPA process can be very expensive and time consuming for private entities seeking permits under the process. According to the U.S. General Accounting Office, the average time to complete an EIS under NEPA was over 4 ½ years.⁸ In addition, NEPA has become a magnet for litigation, with hundreds of NEPA-related lawsuits against the federal government filed or open each year.⁹

Recently, both the U.S. Army Corps of Engineers (Corps) and the Environmental Protection Agency (EPA) have made permitting decisions prior to the completion of NEPA reviews. In the EPA case, a decision to deny a permit was made even *before* the permit was filed. Denying a project outside of the NEPA process leads to a process far less robust, with far less transparency, less public involvement, and less cooperation among agencies while not providing any additional protection to the environment. It also raises questions of federal agencies’ authority to create a separate, arbitrary process and their motives relating to the specific proposed actions or projects.

The following describes two examples of federal agencies making permitting decisions outside of the NEPA process.

The Corps and Gateway Pacific

The Gateway Pacific Terminal (Gateway), proposed by Pacific International Holdings, LLC (PIH), is a proposed marine terminal that would accommodate bulk products such as low sulfur coal, wood biofuels, potash, and grain and corn products.¹⁰ The terminal, once built, would be located in Whatcom County, Washington in an area zoned for water-dependent heavy

⁵ 40 C.F.R. § 1502.

⁶ 40 C.F.R. § 1502.25

⁷ Linda Luther, *The National Environmental Policy Act: Background and Implementation* (CRS Report RL33152) (Washington, DC: Congressional Research Service, 2005), 28, <http://nationalaglawcenter.org/wp-content/uploads/assets/crs/RL33152.pdf>.

⁸ See p. 14, GAO Report: “National Environmental Policy Act: Little Information Exists on NEPA Analyses”

<http://www.gao.gov/assets/670/662546.pdf>

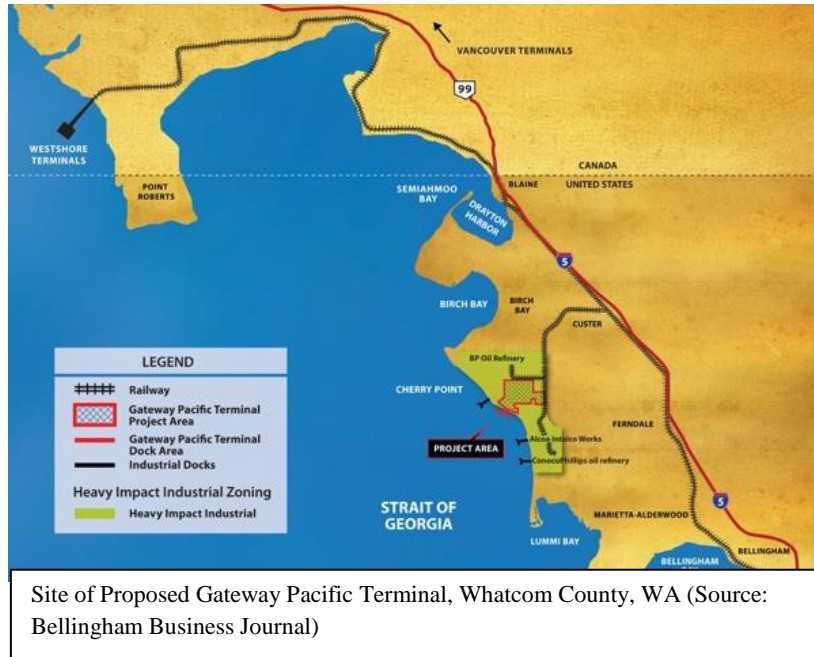
⁹ Though the GAO in a recent report found little agency litigation data, CEQ found at least 70 NEPA lawsuits filed against Department of the Interior agencies, NOAA, Forest Service, and U.S. Army Corps in FY 2013 alone. (See:

[https://ceq.doe.gov/legal_corner/docs/2013%20NEPA%20Litigation%20Survey%20\(without%20dispositions\).pdf](https://ceq.doe.gov/legal_corner/docs/2013%20NEPA%20Litigation%20Survey%20(without%20dispositions).pdf))

¹⁰ See Memorandum For Record, *U.S. Army Corps of Engineers Scope of Analysis and Extent of Impact Evaluation for National Environmental Policy Act Environmental Impact Statement*. CENWS-OD-RG (July 3 2013) available at <http://www.nws.usace.army.mil/Portals/27/docs/regulatory/News/SCOPEMFRGATEWAYBNSF.pdf>.

industry use.¹¹ According to proponents of the facility, 4,000 temporary construction jobs and roughly 1,000 permanent jobs would be created once the facility was constructed. The site would also generate over \$4 million in tax revenues annually. The project is supported by a variety of entities, including the Washington State Department of Agriculture and the Northwest Washington Central Labor Council. Under the proposal, some 75% of the site would remain in a natural buffer.¹² The proposed project would require a permit from the Corps.¹³

In its scoping memorandum, the Corps “determined that the... project... may have significant impacts and that issuance of... permits would be major Federal actions significantly



affecting the quality of the human environment and therefore requir[es]... preparation of an EIS to comply with NEPA.”¹⁴

The Corps also stated that the EIS would address compliance with other federal laws and responsibilities, including tribal treaty rights. “The EIS will identify all Tribes with Treaty Rights in the combined projects’ vicinity and analyze the potential impacts... For treaty fishing rights, the EIS will evaluate impacts to... access to usual and accustomed fishing grounds...”¹⁵

Work on the EIS began in 2014.¹⁶ However, in 2015, the Lummi Nation petitioned the Corps to dismiss the permit, stating that the project would have a greater than *de minimis*, or greater than trivial, impact on their usual and accustomed treaty fishing rights.¹⁷ Rather than examine the tribal treaty rights concurrently and integrated as part of the EIS as originally planned in the scoping memorandum¹⁸ and as required by CEQ regulations,¹⁹ the Corps agreed to evaluate the Lummi request independently of the NEPA review. The Corps reviewed

¹¹ *Id.*

¹² See: <http://createnwjobs.com/learn-more/get-the-facts/>

¹³ *Id.*

¹⁴ *Id.* at 2.

¹⁵ *Id.* at 14.

¹⁶ Department of Ecology State of Washington, Environmental Review Gateway Pacific Terminal at Cherry Point Proposal, available at <http://www.ecy.wa.gov/geographic/gatewaypacific/>.

¹⁷ See Press Release, US Army Corps of Engineers, Army Corps halts Gateway Pacific Terminal permitting process. Release no. 16-015 (May 9, 2016).

¹⁸ See Memorandum For Record, *U.S. Army Corps of Engineers Scope of Analysis and Extent of Impact Evaluation for National Environmental Policy Act Environmental Impact Statement* at 14. CENWS-OD-RG (July 3 2013). Available at <http://www.nws.usace.army.mil/Portals/27/docs/regulatory/News/SCOPEMFRGATEWAYBNSF.pdf>.

¹⁹ 40 C.F.R. § 1502.25, “To the fullest extent possible, agencies shall prepare draft environmental impact statements concurrently with and integrated with environmental impact analyses and related surveys and studies...”

documents submitted by both the Lummi Nation and the applicant and, on May 9, 2016, the Corps issued a final determination denying the project, stating it would have an impact on treaty rights and stated that “the project cannot be permitted by the Corps.”²⁰

EPA and Pebble Mine in Bristol Bay Watershed

Another project, the Pebble Mine, is located within the Pebble Deposit, a mineral deposit containing an estimated 80.6 billion pounds of copper, 5.6 billion pounds of molybdenum, and 107.4 million ounces of gold.²¹ The Pebble Deposit is largely located in the Bristol Bay Watershed in Alaska, home to one of the largest commercial sockeye salmon fisheries in the world. The land was given to Alaska through the Alaska Statehood Act, which also permitted the state to lease the mineral deposits within its own land. The majority of the land within the Bristol Bay Watershed has been permitted by Alaska specifically for mineral development.²²



Site of Pebble Mine
Source: Pebble Partnership

Pebble states that it anticipates 1,000 full-time jobs would be created for the mine’s first 25 years of production, as well as thousands of jobs during construction, and a significant boost to local and state tax revenues.²³

²⁰ See Press Release, US Army Corps of Engineers, Army Corps halts Gateway Pacific Terminal permitting process. Release no. 16-015 (May 9, 2016).

²¹ *Geology*, Pebble Limited Partnership, <http://www.pebblepartnership.com/geology.html> (last visit June 16, 2016).

²² Secretary William S. Cohen, The Cohen Group, DLA Piper LLP (US), *The Report of an Independent Review of the United States Environmental Protection Agency’s Actions In Connection with its Evaluation of Potential Mining in Alaska’s Bristol Bay Watershed* at 27 (Oct 6, 2015).

²³ <http://www.pebblepartnership.com/economics.html>

Under Section 404 of the Clean Water Act, the Corps has authority to issue permits needed for the Pebble Mine.²⁴ Traditionally, NEPA would provide the framework for the permitting process. Under the NEPA process, the Corps, as lead agency, would “coordinate with interested parties, including the project proponent, commission further appropriate studies, prepare an environmental assessment, consider beneficial effects of the proposed project, assess mitigation plans, and evaluate alternatives.”²⁵

The range of issues that the Corps would have to consider under NEPA would include “environmental effects and strategies to mitigate them; economic considerations; comments from relevant federal agencies such as impacts on endangered species and essential fish habitat, historic property matters; and the Clean Water Act 404(b)(1) guidelines.”²⁶ After a thorough examination of all of these factors, the Corps would then make a permitting decision.

Section 404 of the Clean Water Act also authorizes the EPA to “prohibit the specification... of any defined area as a disposal site...”²⁷ This authority allows them to veto a permit granted by the Corps. This has traditionally been done after a NEPA review. The EPA has promulgated a four-step process for exercising Section 404 authority:

Step 1 – Consultation period with U.S. Army Corps of Engineers and owners of site

Step 2 – Publication of Proposed Determination for public comment and one or more public hearings

Step 3 – Review of Public comments and development of Recommended Determination

Step 4 – Second consultation period with Corps and site owners followed by Final Determination²⁸

The Pebble Partnership owns the interest in the mineral claims that comprise the Pebble Deposit and began work on an environmental baseline study in 2004.²⁹ In 2011, before Pebble had filed an application for a permit, EPA announced it would conduct an assessment of the Bristol Bay Watershed outside of the NEPA Process.³⁰

In July 2014, after completing its Bristol Bay Watershed Assessment (BBWA), the EPA proceeded to issue a proposed determination, significantly restricting mining within the Bristol

²⁴ 33 U.S.C § 1344.

²⁵ Secretary William S. Cohen, The Cohen Group, DLA Piper LLP (US), *The Report of an Independent Review of the United States Environmental Protection Agency's Actions In Connection with its Evaluation of Potential Mining in Alaska's Bristol Bay Watershed* at 11 (Oct 6, 2015).

²⁶ *Id.* at 9.

²⁷ 33 U.S.C. §1344(c).

²⁸ Environmental Protection Agency. *Frequently Asked Questions*, accessed at <https://www.epa.gov/bristolbay/frequently-asked-questions-about-bristol-bay-404c-process>.

²⁹ Pebble Limited Partnership, *Pebble Project Environmental Baseline Document 2004-2008*, (2011), available at <https://pebblesearch.com/download/>.

³⁰ See Press Release, EPA, EPA Plans Scientific Assessment of Bristol Bay Watershed (Feb 7, 2011).

Bay Watershed and effectively precluding any future development on the Pebble mine.³¹ By electing to forgo the traditional NEPA process, the EPA did not have the benefit of a filed application to rely on and used a process far less robust than the NEPA process. The EPA has conceded that “[t]he permit and NEPA process could generate a great deal more detailed environmental information and analysis [than the Section 404(c) process] upon which to base a regulatory decision.”³² The EPA also noted that “there were gaps in its assessment that would be addressed during a Permit/NEPA Process.”³³

³¹ EPA, 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 6-9 (2014).

³² Secretary William S. Cohen, The Cohen Group, DLA Piper LLP (US), *The Report of an Independent Review of the United States Environmental Protection Agency’s Actions In Connection with its Evaluation of Potential Mining in Alaska’s Bristol Bay Watershed* at 84 (Oct 6, 2015).

³³ *Id.* at ES-8.