



## Lead NEPA Story: Did Pebble ‘de-risk’ Alaska’s most controversial mine?

(Greenwire, 4/9/2019) Dylan Brown, E&E News Reporter

President Trump changed everything for the Pebble mine.

On Nov. 9, 2016, Pebble LP started crafting a new plan for mining one of the world's largest gold and copper deposits, buried beneath untouched southwestern Alaska tundra.

Lawsuits had to be settled, Obama-era EPA salmon protections put on ice, but for more than a year, Pebble CEO Tom Collier sifted through a decade of criticism. Hired in 2014 specifically for his permitting expertise, the former chief of staff to Clinton Interior Secretary Bruce Babbitt said he tried to pinpoint and address the main issues raised by commercial fishermen, Alaska Native tribes and environmentalists worried about salmon downstream in Bristol Bay.

When Pebble handed in a permit application to the Army Corps of Engineers in December 2017, Collier believed he had "de-risked" his project. "I thought I was throwing balls right at their catcher's mitt," he said.

Critics say he missed completely.

Opponents see Pebble's new smaller, shorter mining plan as a Trojan horse for a massive, century-long operation above the world's largest sockeye salmon fishery. They argue that if the size of the mine ultimately grows, then the initial judgments — whether it will harm Bristol Bay salmon or adequately prevent a spill of mine waste — are inadequate.

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## Clean Water Act: Trump to sign two energy orders

(Greenwire, 4/8/2019) Hannah Northey and Ariel Wittenberg, E&E News Reporters

President Trump will sign two executive orders Wednesday aimed at accelerating the permitting and approval of oil and gas pipelines, according to a senior White House official.

The orders are slated to be unveiled at the International Union of Operating Engineers' International Training and Education Center in Crosby, Texas, a training center for union engineers, according to the official.

The official said the two orders, which have been rumored to be in the works for weeks now, are aimed at expanding energy production and incentivizing private investment in energy infrastructure, streamlining permitting of projects, and further reducing regulations.

"The two Executive Orders the President will sign will help American energy companies avoid unnecessary red tape, allowing the U.S. to continue to be the undisputed global leader in crude oil and natural gas production for the foreseeable future," said the official.

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"Additionally, American families and businesses in states with energy restrictions will be able to access affordable and reliable domestic energy resources."

While details on the orders remain sparse, sources expect them to boost the approval of pipelines across the United States, curb state interference on water permitting and possibly include action on liquefied natural gas exports.

Energy sector leaders have urged the Trump administration to cut down on the time states have to review Clean Water Act permits for pipelines.

The law clearly grants states the right to "certify" that projects requiring such permits also comply with state water quality standards. So projects being permitted by the Army Corps of Engineers, EPA or the Federal Energy

Regulatory Commission also must be approved, denied or approved with state conditions.

Energy companies say states have too long to review those permits and have been active on this issue since New York and Washington state refused to permit a high-profile pipeline in 2016 and coal terminal in 2017, respectively.

Just last week, multiple state chambers of commerce wrote to EPA Administrator Andrew Wheeler asking him to "streamline the implementation" of Section 401 of the Clean Water Act "to ensure that the process aligns with Congress' intended statutory requirements."

States organizations, including the Western Governors' Association, are staunchly opposed to any effort to diminish their ability to approve or reject Clean Water Act permits.

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## **NEPA: Trump DOT acknowledges warming in report on Musk's 'loop'**

**(Greenwire, 4/18/2019) Maxine Joselow, E&E News reporter**

Transportation Secretary Elaine Chao rarely talks about climate change, but the National Environmental Policy Act has forced the department she leads to address the issue head on.

In a much-anticipated environmental assessment for Elon Musk's proposed "loop" project, which would connect Washington and Baltimore via an underground tunnel, the Department of Transportation acknowledged yesterday that human activity is warming the planet at an unprecedented rate.

"Global climate change concerns are focused on human activities that are increasing the atmospheric concentration of [greenhouse gases], thereby leading to an enhancement of the greenhouse effect and causing global warming," the 505-page document says.

"Principal GHGs include carbon dioxide (CO<sub>2</sub>), methane (CH<sub>4</sub>), nitrous oxide (N<sub>2</sub>O), O<sub>3</sub>, and water vapor," it says. "Of these gases, the

atmospheric concentrations of CO<sub>2</sub>, CH<sub>4</sub>, and N<sub>2</sub>O have been steadily increasing due to anthropogenic activity."

The document contrasts with Chao's public statements, which rarely mention warming. It also contrasts with the rhetoric of President Trump, who has called climate change a "hoax."

The assessment goes on to say that construction of the project — which would feature self-driving cars whipping through the tunnel at speeds of up to 150 mph — would result in an additional 108,000 metric tons of carbon dioxide entering the atmosphere but that emissions of criteria air pollutants would be negligible.

Most federal agencies, including the Interior Department and the Federal Energy Regulatory Commission, routinely include some degree of climate analysis in their NEPA reviews.

Scott Slesinger, legislative director at the Natural Resources Defense Council and an

expert on project permitting, said the Trump DOT likely recognized that NEPA requires agencies to look at climate considerations in their environmental reviews.

Recent court decisions have upheld that requirement. For instance, in *Center for Biological Diversity v. National Highway Traffic Safety Administration*, the 9th U.S. Circuit Court of Appeals found in 2007 that "the impact of greenhouse gas emissions is precisely the kind of cumulative impacts analysis that NEPA requires agencies to conduct."

"That provision doesn't surprise me," Slesinger said. "There are several court cases that make it clear that when you look at the environmental impact of a project, it includes the climate impact."

He added, "You can't say, 'We're going to do an environmental impact statement, but we're not going to look at climate.'"

Still, DOT's release of the assessment comes after Trump rescinded the Obama administration's guidance on how to consider greenhouse gases under NEPA. The White House Council on Environmental Quality is now looking to issue updated guidance and has

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submitted a draft to the Office of Information and Regulatory Affairs.

Asked for comment, CEQ spokesman Dan Schneider said in an email, "The guidance is still undergoing interagency review." He declined to speculate about the expected release date.

Musk, the billionaire inventor behind Tesla Inc. and the Boring Co., envisions the "loop" project as a set of parallel underground tunnels that would decrease urban congestion and pollution.

On its website, the Boring Co. says the tunnels would someday be compatible with Musk's grander vision for a "hyperloop," in which passengers would be transported in pressurized autonomous pods traveling at more than 600 mph.

DOT will take public comment on the environmental assessment for 45 days. After the comment period ends, the agency will decide whether to issue a more detailed environmental impact statement.

The draft EA may be viewed at <https://www.dcbaltimoreloop.com/DraftLoopEA.pdf>.

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## **Clean Water Act: EPA won't regulate pollution that moves through groundwater**

**(Greenwire, 4/16/2019) Ariel Wittenberg and Ellen M. Gilmer, E&E News reporters**

EPA won't regulate any pollution to surface waters that passes through groundwater.

The Clean Water Act regulates pollution to surface water and requires permits for so-called point-source discharges to them.

But questions have remained about whether the law regulates any pollution that ends up in surface waters, or only direct discharges.

EPA now says it's the latter.

"The agency concludes that the best, if not the only, reading of the Clean Water Act is that Congress intentionally chose to exclude all releases of pollutants to groundwater from the [point source] program, even where pollutants

are conveyed to jurisdictional surface waters via groundwater," the agency wrote in an interpretive statement posted online last night.

If pollution travels through groundwater, EPA says, it "breaks the causal chain" between a source of pollution and surface waters.

That could affect regulation of pollution from a variety of sources, including seepage from coal ash and manure management ponds, sewage collection systems, septic system discharges, and accidental spills and releases.

The guidance comes as the Supreme Court is preparing to hear arguments on the same issue.

But the memo contradicts arguments EPA and the Department of Justice made on the same case three years ago.

"The case law does not require the means by which the pollutant discharged from a point source reaches a water of the United States to be a point source," the agencies wrote in a brief to the 9th U.S. Circuit Court of Appeals in *County of Maui, Hawaii v. Hawai'i Wildlife Fund*.

That 2016 brief further concludes that while the Clean Water Act clearly does not regulate groundwater, the law does cover "the movement of pollutants to jurisdictional surface waters through groundwater with a direct hydrological connection."

"Such an addition of pollutants to navigable waters falls squarely within the Clean Water Act's scope," it says.

The 9th Circuit ultimately agreed with the agencies, as did the 4th U.S. Circuit Court of Appeals in a separate case.

The Supreme Court takes up the 9th Circuit case this fall.

EPA's memo also contradicts multiple regulations dating back to the 1990s related to specific sources of pollution, including those for combined animal feeding operations, and feedlots, which clarify that while groundwater pollution itself is not to be regulated, pollution that reaches surface water is.

Now, however, EPA argues that the Clean Water Act clearly does not extend to such pollution, and that arguments it made before the 9th Circuit "take insufficient account of the explicit treatment of groundwater in the Clean Water Act."

Because the Clean Water Act mentions groundwater only in reference to guidance and funding for states and because the act does not include groundwater in any of its regulatory sections, EPA now says "any circumstance in which a pollutant is released from a point source to groundwater is categorically excluded from the Clean Water Act's coverage."

"When analyzing the statute in a holistic fashion, Congress' intent becomes evident: Congress did not intend for the [point source] program to

address any pollutant discharges to groundwater, even where groundwater may be hydrologically connected to surface waters," EPA writes.

"While no single provision of the Clean Water Act expressly addressed whether pollutants discharged from a point source that reach jurisdictional surface waters through groundwater are subject to ... permitting requirements, when analyzing the statute in a holistic fashion, congressional intent becomes evident," the statement says.

Vermont Law School professor Pat Parenteau said he was surprised EPA didn't opt for a more nuanced approach.

"I thought they would tighten the direct hydrological connection [standard] with space and time," he said. "They could have layered that with lots of requirements that would have made it very difficult for these citizen suits to go forward."

Environmental groups acknowledge that the landmark environmental law does not regulate groundwater itself but say that's not the same as allowing pollution to reach surface water if it travels through groundwater.

They have argued in favor of regulating surface water pollution when it can be directly traced back to a point source, regardless of whether it first traveled through groundwater.

That's what happened in the *Maui* case, where environmentalists sued the county alleging a link between municipal wastewater injection wells and pollution that seeped through groundwater into the Pacific Ocean.

Earthjustice lawyer David Henkin, who represents the environmentalists in the case, slammed EPA's new interpretation as a political move.

"This notion that discharges that reach navigable waters via groundwater were not covered under the Clean Water Act is a total repudiation of four decades of consistent EPA positions," he told E&E News. "It just makes it clear that this is purely political and not based on any principal."

Southern Environmental Law Center attorney Frank Holleman said EPA's guidance is a handout to polluters, noting that it would

exclude discharges made even inches away from waterways if the pollution first traveled through groundwater.

"They are exempting major lakes and rivers from the Clean Water Act protections whenever a polluter doesn't extend their pipe all the way," he said.

He said it is "illogical" to exclude groundwater-to-surface-water pollution from regulation, saying that in some cases, the cause of pollution is "as easy to trace as pollution that falls through the air before landing in waterways."

EPA's arguments that it is merely adhering to the Clean Water Act don't hold water, Holleman said.

He noted that the list of examples of regulated point sources in the Clean Water Act itself includes sources like wells, combined animal feeding operations and rolling stock that do not discharge pollution directly into surface water.

"Obviously you don't put a well in a river; you put it in the ground nearby," he said. "But logical consistency, statutory language and protecting the nation's water resources are not the goals of this administration."

### **Supreme Court case looms**

Holleman said he hopes Supreme Court justices will see those inconsistencies when the high court considers the *Maui* case this fall.

Former EPA lawyer Kevin Minoli, now at the law firm Alston & Bird LLP, said EPA's interpretation might earn less deference in the Supreme Court case, given that the agency crafted it in response to litigation and without going through a full rulemaking process under the Administrative Procedure Act.

"All those things lessen its value in front of the Supreme Court," he said. "It may be different if this was a long-standing interpretation that was done through a notice-and-comment rulemaking under the APA. That's when you get into the world of deference. When it's developed during litigation, in response to litigation, it is not going to be generally as persuasive or influential to the court."

Minoli also said the policy falls far short of EPA's goal to clarify the issue because the new interpretation does not apply in areas where courts have already ruled otherwise. That includes the 9th and 4th circuits, which cover 14 states in the West and Mid-Atlantic regions.

"It perpetuates the uncertainty for years to come," he said. "It locks in, until the Supreme Court decides, differential treatment depending on what state you're in."

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## **NEPA: Feds to D.C. Circuit: Rethink ruling against Virginia power line**

**(Greenwire, 4/16/2019) Ellen M. Gilmer, E&E News reporter**

The Trump administration is urging federal judges to rethink their recent decision striking down a key permit for a transmission project across the James River in Virginia.

In a filing to the U.S. Court of Appeals for the District of Columbia Circuit yesterday, the Army Corps of Engineers warned of major disruptions if the Dominion Virginia Power-backed project loses its federal approval.

"[V]acating the permit would throw into doubt the status of the already-operational transmission line, which is presently serving critical energy-reliability needs," the agency told the D.C. Circuit.

In its own filing yesterday, Dominion said the court's action could threaten electric reliability for more than 600,000 people.

The scramble to preserve federal approval for the 17-mile transmission line comes after a

three-judge panel last month faulted the Army Corps for inadequate environmental review of the project, which crosses the James River near the historic English settlement of Jamestown.

The National Parks Conservation Association and National Trust for Historic Preservation sued over the project years ago.

The court's decision called for immediately canceling the federal permit and ordered the Army Corps to conduct an in-depth environmental impact statement.

It came just days after the years-in-the-making project officially started service, having survived earlier efforts by environmentalists to halt construction.

The ruling also sparked concern among project backers that the transmission towers would have to be torn down.

Yesterday's legal filings from the Army Corps and Dominion push the D.C. Circuit to amend its ruling to leave the permit intact while the Army Corps conducts additional environmental review.

They cite the Allied-Signal standard, a legal precedent dating back to a 1993 case that directs judges to consider two questions when deciding whether to scrap permits when an agency has erred in its decisionmaking process: Will the agency likely be able to support its original decision after correcting its errors? And will scrapping permits lead to disruptive consequences?

The Army Corps and Dominion say the answer to both questions in this case is yes.

"The potential for any interim disruption to NPCA and National Trust members' aesthetic enjoyment of the James River while the towers remain standing does not justify the high cost to the Hampton Roads public and the multi-state power grid of even the possibility of removing the greatly needed transmission line and towers," the Army Corps told the court.

"This is especially so," the agency added, "when there is a serious possibility that the line and towers may be validly authorized following remand."

Project opponents have vowed to push for removal of the towers.

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## **Lead NEPA Story** (continued from page 1)

Anti-mine advocates questioned every facet of "A New Path Forward" — the eight-page brochure Pebble mailed this year to every Alaskan. They've torn apart the Army Corps' draft environmental impact statement (DEIS).

"They are not telling the same thing to shareholders, to buyers, to investors that they are to regulators," said Rick Halford, a former Republican state legislator and bush pilot. "This is a flexible fantasy by a bunch of promoters that haven't got the money to finish anything off."

### **How big is the mine?**

Size was the "single biggest issue" Collier confronted.

Pebble describes the deposit as "the largest greenfield mineral resource in the world," but the plan submitted to the Army Corps would mine only 10% of 11 billion tons of ore.

According to the DEIS, the entire site — the open pit mine, waste storage areas, natural gas power plant and other facilities — would cover 12.6 square miles for 20 years. At that size, as Pebble likes to note, it would not be Alaska's largest mine.

It would still be bigger than the smallest scenario ruled out by EPA's proposed determination and Bristol Bay watershed assessment, but Pebble dismisses both as junk science.

The problem is Pebble, as proposed, is "almost certainly not economically feasible," according to Richard Borden, an independent environmental consultant who spent 23 years working for Rio Tinto PLC — one of the mining giants that have forsaken ownership stakes in Pebble project.

"These are approximate, back-of-the-envelope calculations, but the strategic implications for overall project economics are significant and will be extremely difficult to offset," Borden wrote in a March 28 letter to the Army Corps.

With the company yet to publish a preliminary economic assessment, Borden compared the 20-year mine plan in the DEIS to the closest proxy in Pebble's only public analysis to date, a 2011 report by Canadian consulting firm Wardrop.

Whereas Wardrop's 25-year mine plan expected to make \$3.8 billion, Borden says the current Pebble plan would lose \$3 billion.

The new, smaller environmental footprint, Borden said, means mining far less, lower-grade ore. As a result, he expects Pebble to produce half as much metal and \$15 billion less in profits.

Wardrop also underestimated construction costs, Borden said. The \$4.7 billion, 25-year estimate is more than \$1 billion less than comparable copper mines around the world and \$2 billion less than the nearby Donlin Gold mine in Alaska.

The savings are supposed to come from "strategic partnerships" with state and local entities on building a port, roads and the region's first power plant — "speculative" at best, Borden said.

To make money, Pebble appears to need to mine for more than 20 years — something the company readily concedes will probably happen.

"It would be unlikely that in the future someone wouldn't want to take some portion if not all of the rest of the ore out of the ground," Collier said.

Borden says that must be accounted for if the Army Corps is to select, as required, the "least environmentally damaging practicable alternative."

The DEIS includes only broad discussions of an "expanded development scenario" — a total of 78 years of mining and at least 98 years of ore and waste processing.

But Collier says critics are conceding that their problems are not with the current 20-year plan, which he asserts is financially viable on its own.

"If it wasn't economical, we wouldn't be taking it through permitting," he said.

Collier has declined to prove that, citing a Canadian securities law preventing the release of certain financial information.

"An economic analysis is not a required piece of the permitting puzzle, so we're focused on those things that are," he said.

Pebble has attacked Borden for doing his work on behalf of perennial Pebble foes the Natural Resources Defense Council.

But Borden said he initiated contact with NRDC and will not bill them for his work.

"He believes Pebble poses unique risks among all the mining projects in the world and Pebble is a black eye on the entire industry," NRDC Western Director Joel Reynolds said.

### **Can Pebble prevent damage to salmon?**

In its new plan, Pebble tried to quiet criticism by limiting the number of watersheds affected by the mine.

The DEIS notes about 43% of the proposed mine site — 3,458 acres — is wetlands or other waters. As planned, Pebble would permanently block three small tributaries, destroying 8 miles of salmon habitat in the North Fork Koktuli River watershed and roughly 1 mile in the South Fork Koktuli River watershed. Those drainages flow into the Nushagak River that feeds Bristol Bay nearly 200 miles downstream.

Avoided completely is the Upper Talarik Creek watershed, which flows into Iliamna Lake and the Kvichak River on its way to Bristol Bay. That drainage is home to more salmon and more of the sport fishermen among Pebble's most outspoken adversaries.

The DEIS does acknowledge an additional 35 miles of salmon habitat would be lost under the expanded mine scenario, including in Upper Talarik Creek. But for now, the only proposed mine features in the watershed would be a portion of the mine access road, natural gas pipeline and a treated-water discharge pipe.

Overall, because of limited habitat damage, the DEIS does not foresee Pebble having a lasting impact on Bristol Bay's fishing industry.

To prove that, Pebble says it has spent about \$150 million gathering data and counting fish for the past eight years.

But Daniel Schindler, University of Washington fisheries professor and a principal investigator for the university's Alaska Salmon Program, called the DEIS a "farce" and its habitat assessment survey "inappropriate" because its time frame fails to capture massive changes over decades.

Schindler said researchers have watched streams fluctuate from a few thousand fish to tens of thousands and vice versa since the university program was founded in 1946.

"This is one of the aspects of salmon habitat is it's continuously variant, and any short-term assessment of habitat quality will seriously misrepresent the long-term potential for that habitat," Schindler said.

Climate change will only increase that variation, but the DEIS assumes fisheries face no risks even if Pebble is not built. Schindler said the Army Corps' analysis is "distinctly inadequate."

### **What about mine waste?**

Another key update made by Pebble revolved around mine waste, or tailings.

Under the 20-year plan, waste will be placed into two tailings storage facilities where slurry is held back by massive earthen dams. The larger of the two, covering about 4.4 square miles, would hold bulk tailings. The other would be a fully lined, 1.7-square-mile facility for pyritic tailings, the variety that produce toxic acid mine drainage.

After mining is complete, the bulk facility will remain on the landscape, but all pyritic waste will be put back into the mine pit and gradually submerged in what will become a pit lake.

Collier calls the tailings dams "fail-safe."

The Army Corps acknowledges cleaning up spills in such a "remote, roadless area" would be "extremely difficult," but the DEIS did not analyze a major tailings dam failure, like the

high-profile 2014 collapse at the Mount Polley mine in British Columbia.

Pebble's bulk storage facility is 10 times larger than Mount Polley.

But "the probabilities of failure are very low," the DEIS said, citing studies of failures among the world's estimated 3,500 tailings dams from 1997 to 2007. The most cited example puts a given dam's chance of failure at 1 in 2,000 per year.

But Cameron Wobus, senior scientist at environmental consulting firm Lynker Technologies, noted that the Army Corps is assuming mining would stop after 20 years. The longer Pebble mines, the longer tailings will remain exposed and the higher the risk, Wobus said.

If the odds are 1 in 2,000, the 1% chance of a failure over 20 years becomes 5% over 100 years. Under the expanded mine scenario, Pebble would also add two more impoundments, one bulk and the other pyritic. Multiplied by tailings dams, the risk over 100 years is 20%.

"Are we OK with about a 1-in-5 probability of a tailings dam failing based on the numbers in the EIS?" Wobus said.

In partnership with advocacy group Commercial Fishermen for Bristol Bay, Wobus and a team of Lynker scientists constructed a hydrologic model of the impacts of a Pebble tailings dam failure based on publicly available data.

All model scenarios showed a breach sending tailings at least 50 miles downstream, which Wobus says illustrates why the DEIS must take a closer look at those risks.

Collier called Wobus' analysis "irrelevant."

Unlike the water-logged tailings at Mount Polley, Collier says, Pebble's bulk tailings will be a "great big pile of sand" as the design allows water to seep out of the facility where it is captured, treated and discharged.

He accused Wobus of intentionally misleading the public.

"That is fearmongering of the worst type," Collier said, drawing a connection between Wobus and his former colleague Ann Maest.



Pebble has long attacked Maest, who consulted on the Bristol Bay watershed assessment, for her discredited research as part of a massive lawsuit against oil company Chevron Corp. in Ecuador.

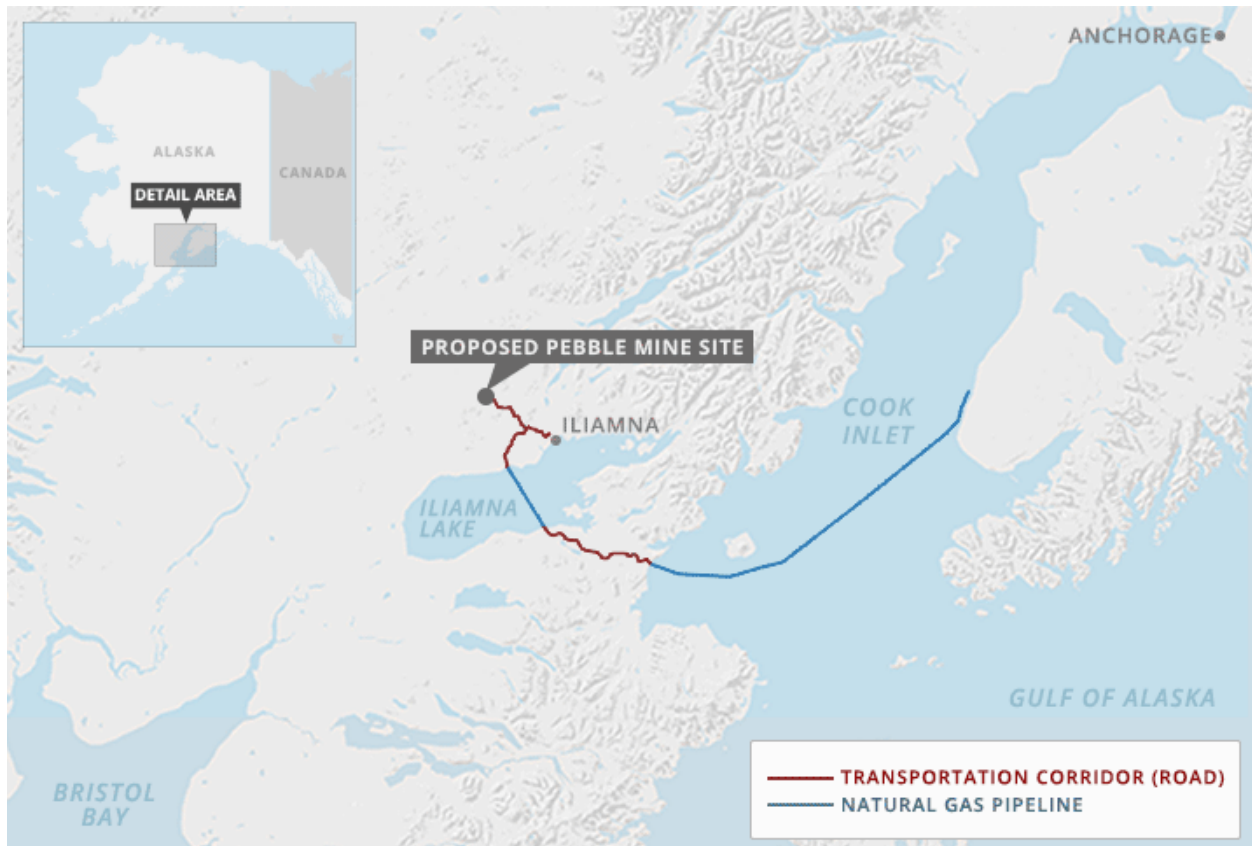
Wobus dismissed the "smear," saying he and Maest keep in touch but have not worked together since 2010. Even after Maest's troubles, Wobus said he was contracted on the federal Deepwater Horizon oil spill investigation, served as a Department of Justice expert witness, and consulted for federal agencies, states and investment firms.

"The only people that have ever questioned my credibility are Pebble and their associates," he said.

His problem with Pebble's tailings dam design is the design remains "conceptual." The dam's underdrains require more "site-specific" investigations and technical analysis.

"It's conceptual, but even in their conceptual figure the vast majority of those tailings are fully saturated with water," Wobus said.

The tailings dam, like much of the DEIS, Wobus said, is just "super vague."



Proposed Pebble Mine Site

Source: Claudine Hellmuth/E&E News; Map data: 2018©Google/SnazzyMaps

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