

EPA's Preemptive Alaska Study Spells Trouble For Mining Cos.

By **Sean McLernon**

Law360, New York (June 19, 2013, 9:06 PM ET) -- In a major departure from its standard development review process, the U.S. Environmental Protection Agency is conducting a hypothetical study examining the environmental consequences of mining activity in Alaska outside the context of a specific permit application, raising industry concerns that the agency will start striking down projects before they're actually proposed.

Anglo American PLC and Northern Dynasty Minerals Ltd. have sharply criticized the EPA over a draft report finding that mining development in the Bristol Bay region could cause serious environmental harm and disrupt aquatic life. The report examined a hypothetical mining project in the area before the companies had had a chance to submit a development plan for their Pebble Mine project.

By dispensing such a sharp critique of any mining project in the region, the EPA is doing an end run around its typical process for evaluating proposals, Holland & Knight LLP partner Lawrence R. Liebesman said.

"If I were a mining company, I would be concerned," Liebesman said. "The EPA has a time-honored process it uses looking at a specific proposal before a final decision is made, before going to the nuclear option of a veto."

The EPA has issued a total of 12 or so project vetoes under its Clean Water Act authority, only using the measure as a last resort, according to Liebesman, who worked for more than a decade as a U.S. Department of Justice senior trial attorney and defended a project-specific EPA veto of a mall development project.

That could change if the EPA decides to factor in hypothetical scenarios like the one it is using for the Bristol Bay report. According to Mayer Brown LLP partner Kevin L. Shaw, the EPA seems willing to provide groups that oppose mining an opportunity to team with sympathetic regulators to kill potential projects.

"The EPA is not in the business of promoting mining by any means, and this administration has had a very anti-mining approach," Shaw said. "That's what you would expect out of the EPA. But I think what is alarming the mining community here is that it seems like the EPA is going out of their way to reject a project."

The EPA decided to conduct a preemptive assessment of the Bristol Bay area beginning in May of 2010 at the request of native tribes in the area. Two years later, it published a draft report concluding that mining activities could wipe out up to 90 miles of streams and 4,800 acres of wetlands, and alter streamflow in a watershed that contains about 46 percent of the world's wild sockeye salmon.

The report, which is open for public comment until June 30 and will be finalized by the agency at some point after that, was lambasted earlier this month by Northern Dynasty for what it saw as a clear bias against mineral exploration.

The EPA has said that the report is not tethered to the Pebble Mine specifically, but was rather an analysis of the impacts of "reasonably foreseeable mining activities" on the region's watersheds, which generated \$480 million for the local economy in 2009.

According to former EPA regional administrator Charles S. Warren, who currently chairs Levin Naftalis & Frankel LLP's environmental group, environmental sensitivity about the "last wilderness" of Alaska could play a role in the EPA's decision to crack down on potential mining activities.

"They are basically sending a message, saying this is something that has to be protected and we think certain activities are incompatible uses," Warren said.

Liebesman said it looked as though the EPA would use it as a tool to evaluate projects in advance.

"They seem to be identifying highly sensitive areas based on scenarios that seem to be out of context with specific projects, potentially suggesting that the horse is out of the barn and they would use the document to prejudge a project," Liebesman said.

This could signal a broader effort to restrain mining development in other places around the country, according to Jones Day LLP partner Kevin P. Holewinski, who coordinates the firm's environmental health and safety practice. The EPA has already stepped in and revoked a permit issued to an Arch Coal Inc. subsidiary at a West Virginia mining site, citing new information revealing downstream water quality issues that the permit did not adequately address.

The D.C. Circuit upheld the EPA's decision in April, ruling that the agency possesses "broad veto power" extending beyond issuing the permit. Holewinski, who also spent seven years working as a DOJ trial attorney, said the EPA could try to use that decision to justify vetoing a permit before fully considering a specific development plan.

Any decision to veto a permit in advance could lead to the agency blocking off entire sections of the country if it conducts similar studies elsewhere, according to Kirkland & Ellis LLP partner and former assistant EPA administrator Granta Y. Nakayama. But until that happens, it's hard to criticize the EPA for taking a closer look at environmental consequences of mining in Alaska he said.

"You can't fault the agency for studying watershed impacts," Nakayama said. "How can you say that studying something is bad?"

And developing a general body of technical information could even lead to more efficiency in the permitting process, Nakayama said, pointing to similar standards for nuclear power plants.

"The agency wouldn't have to start from scratch," Nakayama said. "Generic assessments were pushed by the nuclear industry in that case. This approach by the EPA could have the same effect."

But Holewinski said it was concerning that the EPA is reaching conclusions about the Bristol Bay site without consulting the U.S. Army Corps of Engineers, which he said has primary authority on dredge and fill issued under the Clean Water Act.

“I think its an unfortunate development because everything is intended to strike a balance and the only way to strike a balance here is to look at data from an actual permit application rather than a hypothetical scenario,” he said.

Whatever the final outcome of the Bristol Bay report, however, it will be challenged in court, according to Holewinski.

“At the end of the day, this is all going to come to a head once the EPA issues this document in final form,” he said. “The owners will seek review of that, and some appellate court will sort it out.”

--Editing by Elizabeth Bowen and Chris Yates.

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