



September 3, 2019

VIA ONLINE PORTAL

National FOIA Office  
Office of the General Counsel  
Environmental Protection Agency  
1200 Pennsylvania Avenue NW (2822T)  
Washington, DC 20460  
Via FOIA Online

**Re: Freedom of Information Act Request**

Dear FOIA Officer:

Pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, and the implementing regulations of the Environmental Protection Agency (EPA), 40 C.F.R. Part 2, American Oversight makes the following request for records.

The proposed copper and gold mine known as Pebble Mine in Alaska's Bristol Bay has long been opposed by fishermen, Alaska Natives, and environmentalists, as well as EPA itself.<sup>1</sup> "Building a big operation like Pebble [Mine] would destroy streams and wetlands, but the biggest threat [is] the catastrophic failure of the huge man-made reservoirs known as 'tailing ponds' where mining companies typically store toxic acids, metals and other mining wastes. If those were breached somehow, spawning streams would be widely polluted."<sup>2</sup> Extensive studies documenting the probable environmental harms that would result from the project led former EPA Administrator Gina McCarthy to declare in 2014 that EPA had "ample reason to believe that the Pebble Mine would likely have significant and irreversible negative impacts on the Bristol Bay watershed and its abundant salmon fisheries," preemptively vetoing the project.<sup>3</sup>

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<sup>1</sup> Yereth Rosen, *Controversial Alaska Gold-Copper Mine Moves Step Closer to Approval*, REUTERS (Feb. 20, 2019, 8:17 PM), <https://www.reuters.com/article/us-usa-alaska-mine/controversial-alaska-gold-copper-mine-moves-step-closer-to-approval-idUSKCN1QA041>.

<sup>2</sup> Editorial Board, *Trump to Miners, Loggers and Drillers: This Land Is Your Land*, N.Y. TIMES, Aug. 31, 2019, <https://www.nytimes.com/2019/08/31/opinion/trump-nature-minnesota-alaska.html>.

<sup>3</sup> Dan Vergano, *EPA Puts Pebble Mine on Hold*, NAT'L GEOGRAPHIC, Mar. 2, 2014, <https://www.nationalgeographic.com/news/2014/3/140228-epa-pebble-mine-decision-alaska-environment-science/>.



On June 26, 2019, President Trump met with Alaska Governor Mike Dunleavy aboard Air Force One. The next day, senior EPA officials reportedly informed staff scientists that EPA would no longer oppose the Pebble Mine proposal.<sup>4</sup> American Oversight submits this request to shed light on whether and to what extent outside entities exerted influence over EPA's reversal.

### **Requested Records**

American Oversight requests that the EPA produce the following records within twenty business days:

1. Any email communications (including emails, email attachments, and calendar invitations) and/or handwritten communications involving any person at the White House Office (including anyone with an email address ending in @who.eop.gov) regarding Pebble Mine.
2. Any email communications (including emails, email attachments, and calendar invitations) and/or handwritten communications with the office of Alaska Governor Mike Dunleavy regarding Pebble Mine.
3. To the extent not captured by Parts 1 and 2 of this request, any calendar entries reflecting meetings involving any person at the White House Office and/or Alaska Governor Mike Dunleavy regarding Pebble Mine.
4. Any email communications (including emails, email attachments, and calendar invitations) sent by any of the officials specified below to any email address ending in .com, .org, .edu, .net, or .mail regarding Pebble Mine.

In an effort to accommodate EPA and reduce the number of responsive records to be processed and produced, American Oversight has limited Part 4 of its request to emails sent by an EPA custodian. To be clear, however, American Oversight still requests that complete email chains be produced, displaying both the sent messages and the prior received messages in each email chain. This means, for example, that both the custodian's response to an email from a responsive email address and the initial received message are responsive to this request and should be produced.

This request includes all prior messages (whether incoming or outgoing) reflected in the responsive correspondence and any attachments thereto.

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<sup>4</sup> Scott Bronstein et al., *EPA Dropped Salmon Protection after Trump Met with Alaska Governor*, CNN, Aug. 9, 2019, <https://amp.cnn.com/cnn/2019/08/09/us/epa-alaska-pebble-mine-salmon-invs/index.html>.

American Oversight requests that EPA produce the responsive records of the following officials:

- a. Andrew Wheeler, Administrator
- b. Scott Pruitt, Former Administrator
- c. Chris Hladick, Regional Administrator for Region 10
- d. Henry Darwin, Acting Deputy Administrator
- e. Michael Abboud, Press Secretary
- f. Matthew Z. Leopold, General Counsel
- g. Ryan Jackson, Chief of Staff
- h. Kevin DeBell, Acting Deputy Chief of Staff
- i. Dave Ross, Assistant Administrator, Office of Water
- j. Joseph Brazauskas, Acting Associate Administrator, Office of Congressional and Intergovernmental Relations
- k. Tom Brennan, Acting Director of the Science Advisory Board Staff Office
- l. Anyone serving in the role of White House Liaison or White House Advisor (including deputies)

Please provide all responsive records from January 20, 2017, through the date the search is conducted.

### **Fee Waiver Request**

In accordance with 5 U.S.C. § 552(a)(4)(A)(iii) and your agency's regulations, American Oversight requests a waiver of fees associated with processing this request for records. The subject of this request concerns the operations of the federal government, and the disclosures will likely contribute to a better understanding of relevant government procedures by the general public in a significant way. Moreover, the request is primarily and fundamentally for non-commercial purposes.

American Oversight requests a waiver of fees because disclosure of the requested information is "in the public interest because it is likely to contribute significantly to public understanding of operations or activities of the government."<sup>5</sup> The public has a significant interest in ensuring transparency around EPA's reversal on the Pebble Mine permitting, especially considering the probable and irreversible environmental harms that would result from the mine.<sup>6</sup> Moreover, Administrator Wheeler has recused himself from the Pebble Mine permitting process,<sup>7</sup> heightening the importance of transparency into whether and with what parties he has communicated regarding the project. American Oversight is committed to transparency and makes the responses agencies provide to

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<sup>5</sup> 5 U.S.C. § 552(a)(4)(A)(iii).

<sup>6</sup> Editorial Board, *supra* note 2.

<sup>7</sup> Stephen Lee & Jennifer A. Dlouhy, *EPA Chief Wheeler Recuses Himself from Pebble Mine Decision*, BLOOMBERG ENVIRONMENT (Mar. 25, 2019, 3:00 PM), <https://news.bloombergenvironment.com/environment-and-energy/epa-chief-wheeler-recuses-himself-from-pebble-mine-decision-1>.

FOIA requests publicly available, and the public's understanding of the government's activities would be enhanced through American Oversight's analysis and publication of these records.

This request is primarily and fundamentally for non-commercial purposes.<sup>8</sup> As a 501(c)(3) nonprofit, American Oversight does not have a commercial purpose and the release of the information requested is not in American Oversight's financial interest. American Oversight's mission is to promote transparency in government, to educate the public about government activities, and to ensure the accountability of government officials. American Oversight uses the information gathered, and its analysis of it, to educate the public through reports, press releases, or other media. American Oversight also makes materials it gathers available on its public website and promotes their availability on social media platforms, such as Facebook and Twitter.<sup>9</sup>

American Oversight has also demonstrated its commitment to the public disclosure of documents and creation of editorial content through numerous substantive analyses posted to its website.<sup>10</sup> Examples reflecting this commitment to the public disclosure of documents and the creation of editorial content include the posting of records related to an ethics waiver received by a senior Department of Justice attorney and an analysis of what those records demonstrated regarding the Department's process for issuing such waivers;<sup>11</sup> posting records received as part of American Oversight's "Audit the Wall" project to gather and analyze information related to the administration's proposed construction of a barrier along the U.S.-Mexico border, and analyses of what those records reveal;<sup>12</sup> posting records regarding potential self-dealing at the Department of Housing &

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<sup>8</sup> See 5 U.S.C. § 552(a)(4)(A)(iii).

<sup>9</sup> American Oversight currently has approximately 12,250 page likes on Facebook and 54,500 followers on Twitter. American Oversight, FACEBOOK, <https://www.facebook.com/weareoversight/> (last visited Sept. 3, 2019); American Oversight (@weareoversight), TWITTER, <https://twitter.com/weareoversight> (last visited Sept. 3, 2019).

<sup>10</sup> News, AMERICAN OVERSIGHT, <https://www.americanoversight.org/blog>.

<sup>11</sup> *DOJ Records Relating to Solicitor General Noel Francisco's Recusal*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/document/doj-civil-division-response-noel-francisco-compliance>; *Francisco & the Travel Ban: What We Learned from the DOJ Documents*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/francisco-the-travel-ban-what-we-learned-from-the-doj-documents>.

<sup>12</sup> See generally *Audit the Wall*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/investigation/audit-the-wall>; see, e.g., *Border Wall Investigation Report: No Plans, No Funding, No Timeline, No Wall*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/border-wall-investigation-report-no-plans-no-funding-no-timeline-no-wall>.

Urban Development and related analysis;<sup>13</sup> posting records and analysis relating to the federal government's efforts to sell nuclear technology to Saudi Arabia;<sup>14</sup> and posting records and analysis regarding the Department of Justice's decision in response to demands from Congress to direct a U.S. Attorney to undertake a wide-ranging review and make recommendations regarding criminal investigations relating to the President's political opponents and allegations of misconduct by the Department of Justice itself and the Federal Bureau of Investigation.<sup>15</sup>

Accordingly, American Oversight qualifies for a fee waiver.

### **Guidance Regarding the Search & Processing of Requested Records**

In connection with its request for records, American Oversight provides the following guidance regarding the scope of the records sought and the search and processing of records:

- Please search all locations and systems likely to have responsive records, regardless of format, medium, or physical characteristics.
- Our request for records includes any attachments to those records or other materials enclosed with those records when they were previously transmitted. To the extent that an email is responsive to our request, our request includes all prior messages sent or received in that email chain, as well as any attachments to the email.
- Please search all relevant records or systems containing records regarding agency business. Do not exclude records regarding agency business contained in files, email accounts, or devices in the personal custody of your officials, such as personal email accounts or text messages. Records of official business conducted using unofficial systems or stored outside of official files are subject to the Federal Records Act and FOIA.<sup>16</sup> It is not adequate to rely on policies and procedures that require officials to move such information to official systems within a certain period of time; American Oversight has a right to records contained in those files

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<sup>13</sup> *Documents Reveal Ben Carson Jr.'s Attempts to Use His Influence at HUD to Help His Business*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/documents-reveal-ben-carson-jr-s-attempts-to-use-his-influence-at-hud-to-help-his-business>.

<sup>14</sup> *Investigating the Trump Administration's Efforts to Sell Nuclear Technology to Saudi Arabia*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/investigating-the-trump-administrations-efforts-to-sell-nuclear-technology-to-saudi-arabia>.

<sup>15</sup> *Sessions' Letter Shows DOJ Acted on Trump's Authoritarian Demand to Investigate Clinton*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/sessions-letter>.

<sup>16</sup> See *Competitive Enter. Inst. v. Office of Sci. & Tech. Policy*, 827 F.3d 145, 149–50 (D.C. Cir. 2016); cf. *Judicial Watch, Inc. v. Kerry*, 844 F.3d 952, 955–56 (D.C. Cir. 2016).

even if material has not yet been moved to official systems or if officials have, by intent or through negligence, failed to meet their obligations.<sup>17</sup>

- Please use all tools available to your agency to conduct a complete and efficient search for potentially responsive records. Agencies are subject to government-wide requirements to manage agency information electronically,<sup>18</sup> and many agencies have adopted the National Archives and Records Administration (NARA) Capstone program, or similar policies. These systems provide options for searching emails and other electronic records in a manner that is reasonably likely to be more complete than just searching individual custodian files. For example, a custodian may have deleted a responsive email from his or her email program, but your agency’s archiving tools may capture that email under Capstone. At the same time, custodian searches are still necessary; agencies may not have direct access to files stored in .PST files, outside of network drives, in paper format, or in personal email accounts.
- In the event some portions of the requested records are properly exempt from disclosure, please disclose any reasonably segregable non-exempt portions of the requested records. If a request is denied in whole, please state specifically why it is not reasonable to segregate portions of the record for release.
- Please take appropriate steps to ensure that records responsive to this request are not deleted by the agency before the completion of processing for this request. If records potentially responsive to this request are likely to be located on systems where they are subject to potential deletion, including on a scheduled basis, please take steps to prevent that deletion, including, as appropriate, by instituting a litigation hold on those records.

## **Conclusion**

If you have any questions regarding how to construe this request for records or believe that further discussions regarding search and processing would facilitate a more efficient production of records of interest to American Oversight, please do not hesitate to contact American Oversight to discuss this request. American Oversight welcomes an opportunity to discuss its request with you before you undertake your search or incur search or

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<sup>17</sup> See *Competitive Enter. Inst. v. Office of Sci. & Tech. Policy*, No. 14-cv-765, slip op. at 8 (D.D.C. Dec. 12, 2016).

<sup>18</sup> Presidential Memorandum—Managing Government Records, 76 Fed. Reg. 75,423 (Nov. 28, 2011), <https://obamawhitehouse.archives.gov/the-press-office/2011/11/28/presidential-memorandum-managing-government-records>; Office of Mgmt. & Budget, Exec. Office of the President, Memorandum for the Heads of Executive Departments & Independent Agencies, “Managing Government Records Directive,” M-12-18 (Aug. 24, 2012), <https://www.archives.gov/files/records-mgmt/m-12-18.pdf>.

duplication costs. By working together at the outset, American Oversight and your agency can decrease the likelihood of costly and time-consuming litigation in the future.

Where possible, please provide responsive material in an electronic format by email. Alternatively, please provide responsive material in native format or in PDF format on a USB drive. Please send any responsive material being sent by mail to American Oversight, 1030 15th Street NW, Suite B255, Washington, DC 20005. If it will accelerate release of responsive records to American Oversight, please also provide responsive material on a rolling basis.

We share a common mission to promote transparency in government. American Oversight looks forward to working with your agency on this request. If you do not understand any part of this request, please contact Hart Wood at [foia@americanoversight.org](mailto:foia@americanoversight.org) or 202.873.1743. Also, if American Oversight's request for a fee waiver is not granted in full, please contact us immediately upon making such a determination.

Sincerely,

A handwritten signature in blue ink, appearing to read "Austin R. Evers", with a long horizontal flourish extending to the left.

Austin R. Evers  
Executive Director  
American Oversight