UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

MAR 21 2011

OFFICE OF
WATER

The Honorable Lisa A. Murkowski
United States Senate
Washington, D.C. 20510

Dear Senator Murkowski:

Thank you for your letter of February 16, 2011, to Administrator Lisa P. Jackson concerning the Environmental Protection Agency's (EPA) recent announcement to initiate a watershed assessment of the Bristol Bay, Alaska. As the senior policy manager of EPA's national water program, I appreciate the opportunity to respond to your letter.

Your letter focuses on EPA's proposed Bristol Bay assessment, provides a number of recommendations for the assessment, and raises a set of specific questions. In response, we are providing background information regarding the assessment and an answer to each of the questions in your letter. I want to emphasize EPA's commitment to work with our federal, state, and tribal partners to proceed with an unbiased and transparent public process supported by the best available scientific information. We look forward to keeping you personally informed as this assessment moves ahead.

During the last year, a number of tribes, tribal entities and other groups in southwest Alaska requested that EPA initiate review of metallic sulfide mining in the Bristol Bay watershed utilizing our authorities pursuant to Section 404(c) of the Clean Water Act. Other Alaska tribes, tribal entities and groups have requested that we not take action under Section 404(c) and instead use the standard Clean Water Act permitting process to evaluate proposed mining operations in the Bristol Bay watershed. I believe the conclusion common to both sets of requests is the strong belief that effective protection of Bristol Bay is vitally important to the health and sustainability of the area's valuable commercial and subsistence salmon fisheries. We believe that an effective and timely Bristol Bay assessment involving a broad range of stakeholders and the public is responsive to these requests and will provide needed information and data to inform future decisions.

In response to these requests, EPA announced on February 7, 2011, its decision to initiate a Bristol Bay watershed assessment. This assessment will characterize the potential risks of large-scale development on the Bay's water quality and salmon fishery, and evaluate measures to protect the watershed to ensure the sustainability of the fishery. While the Bristol Bay watershed is comprised of seven drainages, the Kvichak and Nushagak watersheds are the principal drainages with lands open to large-scale development. EPA's analysis, therefore, will focus primarily on those two watersheds. We will conduct the assessment in an open, public format and in close coordination with federal, state, and tribal organizations. This assessment will

identify options available to provide appropriate protection for waters in Bristol Bay and the salmon fishery which depends on clean water and a healthy watershed.

We appreciate and will give full consideration to your specific recommendations regarding the:

- Need for extensive coordination of the assessment with state, tribal, and local governments, Alaskan Universities, Alaska Native Tribal Corporations, interested non-governmental organizations, representatives of the Alaska fishing industry, the Pebble Partnership and others;
- Need for thorough peer review of the assessment, consistent with the policies established in EPA's Peer Review Handbook; and
- Scope of the assessment's economic evaluation.

I hope my letter and enclosed detailed responses effectively address the questions in your letter. In light of the concerns that have been raised to EPA, I want to reassure you that we will conduct an open and scientifically based assessment built upon participation by other federal and state agencies, local tribal governments, and the public. I look forward to informing you of progress on this assessment as we move ahead.

Again, thank you for your letter. If you have further questions, please contact me or your staff may call Denis Borum in EPA's Office of Congressional and Intergovernmental Relations at (202) 564-4836.

Sincerely,

Nancy K. Stoner
Acting Assistant Administrator

Enclosure

ENCLOSURE: Responses to Specific Questions

1. **If the EPA has conducted a "watershed assessment" before, would you provide copies of the assessments and the statutory authorities under which they were conducted? If not, please provide a description of the statutory authorities for this assessment.**

   The mission of the EPA is to protect human health and the environment. As such, evaluating the environmental impacts of different actions is a central role and function of the agency. EPA has conducted environmental assessments that evaluate the impacts of past actions or estimate the potential impacts of future actions. Below is a list of several recent examples of such assessments. (Please note that some of these assessments are currently in draft form and under review.)

   - U.S. EPA. Predicting Future Introductions of Non-indigenous Species to the Great Lakes (Final Report). U.S. Environmental Protection Agency, Washington, DC, EPA/600/R-08/066F, 2008. (http://cfpub.epa.gov/ncea/cfm/recordisplay.cfm?deid=190305)
   - U.S. EPA. Climate Change and Aquatic Invasive Species (Final Report). U.S. Environmental Protection Agency, Washington, DC, EPA/600/R-08/014, 2008. (http://cfpub.epa.gov/ncea/cfm/recordisplay.cfm?deid=188305)
   - U.S. EPA. A Framework for Categorizing the Relative Vulnerability of Threatened and Endangered Species to Climate Change (External Review Draft). U.S. Environmental Protection Agency, Washington, DC, EPA/600/R-09/011, 2009. (http://cfpub.epa.gov/ncea/cfm/recordisplay.cfm?deid=203743)
   - U.S. EPA. The Effects of Mountaintop Mines and Valley Fills on Aquatic Ecosystems of the Central Appalachian Coalfields (External Review Draft). U.S. Environmental Protection Agency, Washington, DC, EPA/600/R-09/138A, 2010. (http://cfpub.epa.gov/ncea/cfm/recordisplay.cfm?deid=215267)
   - U.S EPA. Clinch and Powell Valley Watershed Ecological Risk Assessment. U.S. Environmental Protection Agency, Office of Research and Development, National Center for Environmental Assessment, Washington Office, Washington, DC, EPA/600/R-01/050, 2002. (http://cfpub.epa.gov/ncea/cfm/recordisplay.cfm?deid=15219).
   - U.S. EPA. Ecological Risk Assessment for the Middle Snake River, Idaho. U.S. Environmental Protection Agency, Office of Research and Development, National Center for Environmental Assessment, Washington Office, Washington, DC, EPA/600/R-01/017, 2002. (http://cfpub.epa.gov/ncea/cfm/recordisplay.cfm?deid=29097&partner=ORD-NCEA).
   - U.S. EPA. Waquoit Bay Watershed Ecological Risk Assessment: the Effect of Land-Derived Nitrogen Loads on Estuarine Eutrophication. U.S. Environmental Protection Agency, Office of Research and Development, National Center for Environmental Assessment, Washington Office, Washington, DC, 600/R-02/079, 2002. (http://cfpub.epa.gov/ncea/cfm/recordisplay.cfm?deid=15221).

EPA's Bristol Bay assessment, focusing primarily on the Kvichak and Nushagak watersheds, will characterize the risks of large-scale development on the Bay's water quality and salmon fishery, and evaluate measures to protect the watersheds and ensure the sustainability of the fishery. EPA is conducting this assessment under our Clean Water Act Section 104 authorities described below. The objective of the Clean Water Act is to restore and maintain the chemical, physical, and biological integrity of the nation's waters. Toward achievement of that objective, Section 104(a) directs EPA to establish national programs for the prevention, reduction, and elimination of pollution and as part of such programs directs EPA to:

> "(1) in cooperation with other federal, state, and local agencies, conduct and promote the coordination and acceleration of, research, investigations, experiments, training, demonstrations, surveys, and studies relating to the causes, effects, extent, prevention, reduction, and elimination of pollution;
> "(2) encourage, cooperate with, and render technical services to pollution control agencies and other appropriate public or private agencies, institutions, and organizations, and individuals, including the general public, in the conduct of activities referred to in paragraph (1) of this subsection;
> (3) conduct, in cooperation with State water pollution agencies and other interested agencies, organizations and persons, public investigations concerning the pollution of any navigable waters, and report on the results of such investigations..."

Section 104(b) further states that in carrying out these provisions, EPA's Administrator is authorized to:

> "(1) collect and make available, through publications and other appropriate means, the results of and other information, including appropriate recommendations by [her] him in connection therewith, pertaining to such research and other activities referred to in paragraph (1) of subsection (a);
> "(2) cooperate with other Federal departments and agencies, State water pollution control agencies, interstate agencies, other public and private agencies, institutions, organizations, industries involved, and individuals, in the preparation and conduct of such research and other activities referred to in paragraph (1) of subsection (a)..."

2. Will the conclusions reached by the "watershed assessment," or actions taken pursuant to it, be subject to judicial or administrative review?

EPA's "Outline of the Development of EPA's Bristol Bay Watershed Assessment" briefly describes the process EPA intends to use to better understand the aquatic resources at issue, and to evaluate potential impacts to those resources from large scale development activities, such as mineral mining. We hope to work with our federal, state, and tribal partners, and the public, to use this information to identify options for improving protection for Bristol Bay fisheries and the waters on which these fisheries rely. The watershed assessment or publication of such an assessment is, itself, not a final agency action and therefore not subject to judicial or administrative review. Should EPA

proceed as a result of the recommendations identified in the assessment to take some final agency action, such action may be subject to review. Our goal, however, is to work with interested federal, state, and tribal groups, and the public, to prepare recommendations that would be broadly supported.

3. **Should a veto be exercised preemptively within the Bristol Bay watershed – not in relation to an application to undertake specific development in the area – could that decision be interpreted by courts or future administrations to extend more broadly to all future development proposals (e.g., an airstrip, fish-processing plant, refinery, hospital, school, museum) that may require a dredge or fill disposal site?**

   EPA's assessment is not a regulatory action. This assessment will help inform consideration of options for improving protection of the Bristol Bay watershed. EPA has made no decision at this time to proceed with a CWA section 404(c) review in Bristol Bay. As a result, we are not prepared to speculate regarding the scope of any action taken under this authority.

4. **It seems that a preemptive veto could set a number of highly-problematic precedents. For example, the Bureau of Land Management, the U.S. Forest Service, and other federal agencies have historically been tasked with land planning decisions on federal acreage. Similarly, state lands are managed by analogous entities. Should the EPA issue a preemptive veto of an entire area which, in this case, consists largely of state lands, those aforementioned agencies would no longer be able to plan for multiple-use activities, but instead be subjected to preemptive yes-or-no decisions from the EPA under whatever speculative assumptions regarding development the EPA may choose to adopt.**

   Has the EPA considered the precedents that would be set by a preemptive veto? Has the EPA consulted relevant federal and state agencies regarding such a course of action? Could third-party litigants cite the veto as precedent in opposing other projects within the watershed?

   EPA has not made any decision regarding whether or not to initiate an advance 404(c) action at this time. As we have emphasized, we have instead chosen to work with our federal, state, and tribal partners, and the public, to assess the resources in Bristol Bay and identify options for improving protections for fisheries in the Bay that depend so significantly on clean water and a healthy watershed. We look forward to working with federal agencies, corresponding state agencies, tribes, and others to take advantage of their experience and information to support the Bristol Bay assessment. As part of the assessment process, EPA will collaborate with an extensive list of federal, state, tribal, and local government agencies and organizations; the public; private interests such as mining project proponents; and others with an interest in Bristol Bay. EPA's assessment process is being conducted in an open and transparent manner to allow the issues you have raised to be effectively raised and discussed. This information and public discussion will help inform decisions following completion of the study.

5. **In response to the petition received by the EPA to preemptively veto development in the Bristol Bay area under Section 404(c) of the CWA, were responses other than the conduct of a watershed assessment considered by the EPA? Specifically, did the agency consider simply informing the petitioners of the need to wait until an actual permit application had been received for consideration under the CWA, the National Environmental Policy Act, and other relevant statutes? Conversely, did the EPA consider issuing a preemptive veto in response to the petition?**

   As previously noted, in 2010, a number of tribes, tribal entities and other groups in Southwest Alaska requested that EPA initiate review of metallic sulfide mining in the Bristol Bay watershed utilizing our authorities pursuant to Section 404(c) of the Clean Water Act. Other Alaska tribes, tribal entities and groups requested that we let the typical permitting process for mines run its course. EPA considered a number of options, including the two you note above, and relevant information before determining that the best option at this point, given the available information, is the assessment that we have chosen to conduct.

6. **Because primary authority over fill decisions rests with the Army Corps of Engineers, and because EPA has rarely exercised veto authority over Corps approvals, what deficiency does EPA forecast with what would presumably be the Corps' work on any proposed fill application, to such extent that EPA feels compelled to conduct this analysis in advance of any such work?**

   EPA works very closely with the U.S. Army Corps of Engineers in implementing our joint responsibilities under Section 404 of the Clean Water Act. EPA has a great deal of respect for the work that the Corps does in administering the Section 404 permitting program. The fact that EPA has rarely exercised its authority under Section 404(c) to question the Corps' permit decisions speaks to the effective level of coordination and cooperation between the two agencies. The assessment that EPA is undertaking is to develop information to respond to requests from tribes and other groups in the State.