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

MAY 1 7 2012

THE ADMINISTRATOR

The Honorable Lisa A. Murkowski
United States Senate
Washington, D.C. 20510–0203

Dear Senator Murkowski:

Thank you for your April 18, 2012, letter requesting additional clarification about the U.S.. Environmental Protection Agency's (EPA) Bristol Bay watershed assessment. I appreciate the opportunity to respond to your letter.

As detailed in my letter of March 21, 2012, EPA undertook this assessment after numerous native villages and other organizations in Alaska and elsewhere raised concern about potential environmental, water quality, fisheries and associated economic and subsistence impacts from proposed large-scale mining development in the Bristol Bay watershed. Clean Water Act Sections 104(a) and (b) clearly provide the Agency with the authority to study the resources of the Bristol Bay watershed, evaluate the effect of pollution from large scale mining development on those resources, and make such an assessment available to the public. Although these groups requested that EPA use its authority under Section 404(c) of the Clean Water Act, others argued that any action should be based on submission and review of a particularized permit application.

EPA decided it was premature to make any decision on the use of Section 404(c). Instead, the Agency opted to undertake a scientific assessment to obtain a more informed basis for future decision making. The EPA is conducting this assessment in coordination with federal agencies, tribal organizations, and the public. We have also consulted with the State of Alaska. We intend to make our draft available for public comment and are convening a peer review panel to provide us with independent scientific feedback. Our goal is the finalization of a robust, technically sound assessment. Only upon its completion will the Agency examine regulatory options, including application of 404(c), if appropriate. We will be happy to brief you and your staff on the draft assessment and its implications when it is released.

Your letter raises an important question about the precedential effect of a hypothetical EPA section 404(c) review of mining in Bristol Bay on other future development activities in the Bristol Bay watershed. Before turning to this issue, I want to be clear that the focus of our assessment is on the environmental and water quality impacts from discharges of dredged or fill material associated with large-scale mining in the watershed. The assessment does not address impacts associated with other development activities, such as construction of an airfield, which have a wholly different environmental footprint from large-scale mining Since this assessment focuses only on the impacts of large-scale mining projects to the Bristol Bay watershed, use of the assessment in support or in opposition to other types of wetland fill activities is not appropriate. Therefore, we would not expect the assessment to play

EPA-7609-0007444_00001

a significant role should controversy arise about possible regulation of development activities unrelated to large-scale mining.

While your question is hypothetical, and EPA has no plans to use 404(c) authority unless justified by the full technical assessment, let me also assure you that we have a broad range of discretion in our use of the 404(c) authority. A final 404(c) action in Bristol Bay prohibiting or restricting large scale mining activities would not affect other development in the watershed. CWA section 404(c) authorizes the EPA to prohibit or restrict discharges in a defined area of the waters of the United States when those discharges are determined to have unacceptable adverse environmental or water quality impacts. Discharges associated with activities outside the focus of a particular Section 404(c) decision are not prohibited or restricted by EPA's action. As a result, if EPA were to prohibit or restrict certain discharges from large-scale mineral development at Bristol Bay, this action would not preclude other development or infrastructure such as airport construction that had less damaging impacts.

Historic application of this authority demonstrates that we have used it sparingly and only for severe and widespread impacts on ecological resources that we felt justified protection of these resources. I am unaware of any case where our decision to use 404(c) in one situation was interpreted to compel its use in a different set of factual circumstances.

Impacts from the discharge of dredged or fill material vary significantly depending on the location, scale, and duration of the activity associated with the discharge. The impacts from using clean fill material to build a private boat dock are not the same, for example, as impacts from placing contaminated fill material to construct a large solid waste landfill. EPA carefully considers these distinctions in its review under Section 404 to ensure that our actions protect against unacceptable adverse impacts to public health and the environment while assuring that environmentally responsible development may proceed.

Preparation of this letter was coordinated within the EPA's Office of General Counsel and with the Department of Justice. I hope it responds effectively to your questions. Please contact me if you have any additional questions regarding EPA's Bristol Bay watershed assessment or your staff may contact Arvin Ganesan, Associate Administrator for Congressional and Intergovernmental Relations, at 202-564-5200.

Sincerely,

Lisa P. Jackson
Administrator