United States Senate

WASHINGTON, DC 20510

February 16, 2011

The Honorable Lisa Jackson
Administrator
Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

Dear Administrator Jackson:

I appreciated your call last week to let me know that the Environmental Protection Agency (EPA) would not act on a petition it has received to preemptively veto development in the Bristol Bay watershed, but instead undertake a formal scientific assessment of the watershed. As we discussed, while I do not object to the concept of the review, I want to take you up on your invitation to bring additional issues to your attention and obtain information that will help me fully understand what you are proposing.

Since the concept of Pebble Mine was first proposed, I have encouraged all stakeholders to withhold judgment until 1) a detailed plan is released for review and 2) we have received all relevant scientific analysis of that proposed plan and its impacts. A preemptive veto, just like a preemptive approval, would be based purely upon speculation and conjecture. It would deprive relevant government agencies and all stakeholders of the specifics needed to take an informed position. That would be an unacceptable outcome.

As the Bristol Bay watershed analysis proceeds, I urge you to commit to waiting until a permit application is filed and NEPA documentation is complete so you can have the benefit of that information, before you complete the watershed analysis and consider whether EPA should exercise its veto authority. Such a commitment would go a long way towards providing confidence that the EPA's work on this matter is not pre-judging any specific decision that may ultimately confront the agency.

On February 7, 2011, your staff provided mine with a three-page document summarizing how you plan to conduct a watershed assessment of the Bristol Bay area. That document calls for rapid completion of the watershed assessment within one year, but provides relatively little detail on how it will be conducted. In response to your offer, I am offering suggestions regarding clarification of the process EPA will follow and asking questions so that I may better understand what you propose to do.

Suggestions:

- The watershed assessment should comply with all requirements of the Administrative Procedure Act.
- EPA should, in addition to the Federal, State and Tribal organizations listed in the February 7th document, solicit input from, and take into account the views of, Mayor Alsworth, Governor Parnell, the Alaska Department of Fish & Game, the Alaska Department of Environmental Conservation, Alaskan Universities, Alaska Native

Corporations, interested non-governmental organizations, representatives of the Alaska fishing industry, the Pebble Partnership itself, and all local governments on the Alaska Peninsula and in the areas surrounding Bristol Bay.

- Given the complexity of the science and technology, the potential cost and economic implications of the impending decision, and the level of controversy of the issue, an extensive external peer review appears to be the right approach for the watershed assessment. The EPA's Peer Review Handbook also suggests that highly influential scientific assessments are expected to undergo external peer review.

  EPA should avail itself of external peer review mechanisms, such as: independent experts from outside the agency; an ad hoc panel of independent experts from outside the agency; a review by an established Federal Advisory Committee Act mechanism such as the Science Advisory Board; an agency-appointed special board or commission; and/or a review by the National Academy of Sciences.

- In addition to focusing on the "economic significance of the salmon resources", which are the chief economic and cultural drivers of the Bristol Bay area, the assessment should analyze the value of all natural resources in the Bristol Bay area that may be affected by the review and fully assess the current economic conditions in the Lake and Peninsula Borough (i.e. personal income, unemployment, cost of living, and other factors) that might better inform decisions about development proposals in the Bristol Bay region.

Questions:

- 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.

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

- 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?

- 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?

- 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?

- 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?

It is my hope that these suggestions are useful, and that answers to the questions above will provide a better indication of the direction the EPA is headed with this watershed assessment. This assessment must not be a check-the-box exercise that merely provides cover for the EPA to veto future permit applications, but a good faith effort to bring a scientific and unbiased assessment to inform a difficult decision.

My concerns over the "watershed assessment" in Bristol Bay are magnified by your agency's recent, retroactive veto of an already-approved permit in West Virginia. That action not only increased the number of times a CWA Section 404(c) veto had been undertaken to 14, but also greatly expanded the EPA's interpretation of its authorities under the CWA. The decision, made in an already-uncertain regulatory environment, was also inconsistent with President Obama's executive order of January 18, 2011, which stated, in part, that, "[o]ur regulatory system… must promote predictability and reduce uncertainty".

Both the now-exercised retroactive veto in West Virginia and the possibility of a preemptive veto in Alaska, or any other state, are unprecedented. When Congress believes that an agency's implementation of laws fails to adhere to the intent of the legislature, actions are often taken to clarify that intent. When exercising the authorities under Section 404(c) of the CWA or any other provision of law, I encourage you to bear in mind that these are all authorities provided by elected representatives in Congress, and their continued existence relies upon justifiable and measured usage.

Thank you for your attention to this matter.

Sincerely,

Lisa A. Murkowski