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September 17, 2013

Chairman Paul Broun, M.D.
U.S. House of Representatives
Committee on Science, Space, and Technology
Subcommittee on Oversight
2321 Rayburn House Office Building
Washington, DC 20515-6301

Re: Responses to Questions for the Record and Transcript Edits Regarding the Subcommittee's August 1, 2013 hearing titled, "EPA's Bristol Bay Watershed Assessment - A Factual Review of a Hypothetical Scenario."

Dear Chairman Broun:

As requested in your September 3, 2013 letter, the following are my responses to the Questions for the Record submitted to me regarding the Subcommittee's August 1, 2013 at the hearing titled, "EPA's Bristol Bay Watershed Assessment - A Factual Review of a Hypothetical Scenario." Also attached are several pages of the transcript containing typographical and transcription corrections I would suggest.

Questions submitted by Chairman Paul Broun

Question 1: What is the EPA's role in the NEPA process and how much weight does its influence carry - more or less than other involved parties?

Response 1: EPA has two different roles in the NEPA process. First, it has the same role as all other agencies, in that the action agency asks it for, and it typically provides, comments on the Draft and Final EISes as to subjects on which it has particular expertise and/or interest. Given its regulatory mission, those comments often cover a wide range of the EIS's impact analysis. EPA's comments are usually given significant credence by the action agency and third parties.

In addition, EPA has a unique role in the NEPA process. Congress has required that EPA review and comment on the environmental impacts of all major federal actions and, if it determines that the environmental impacts of any action is unsatisfactory, it is to refer the matter to the Council on Environmental Quality (CEQ). As a result, EPA receives a copy of

every DEIS and it comments on both the environmental impacts of the project and the adequacy of the DEIS, assigning the DEIS a grade in both categories.

Question 2: Generally speaking, how long does the NEPA process typically take and how does that contrast with the length of time it took EPA to release the first draft of the Bristol Bay Watershed assessment?

Response 2: The time to comply with NEPA can vary widely. This is true even ignoring the shorter methods of complying with NEPA – identifying Categorical Exclusions (CatExes) or issuing Environmental Assessments (EAs) coupled with Findings of No Significant Impact (FONSIs). That being said, a "typical" Environmental Impact Statement (EIS) process takes approximately 18-30 months from start to finish. It is not unusual, however, for the process to extend beyond this period.

Question 3: What advantages are there to conducting a watershed assessment prior to an actual permit being submitted through the NEPA process?

Response 3: There are a few advantages, but they are limited. To the extent that that the Assessment provides baseline information on certain resources, it provides some analysis which would need to be undertaken in the EIS. It is likely that a good bit of the baseline information may translate, but it is less clear exactly how much of the impact analysis would.

Information on the baseline – the current status of the resources in the area – will have to be prepared for an EIS. Thus, to the extent that EPA has already prepared it, it could be used for the EIS. It is possible, depending on the scope and timing of the application that even this information will need to be supplemented. That being said, much of the baseline information gathered for and presented in the Assessment would likely be of use for EIS baseline purposes.

It is less clear how much of the Assessment's impact analysis would be useful for purposes of an eventual EIS's impact analysis, even for the limited resources studied in the Assessment. That is largely the result of the avoidance, minimization and mitigation measures that will be incorporated into the project. If such measures are sufficiently different from the hypothetical scenarios described in the Assessment, some degree – perhaps even a large degree - of the impact information in the Assessment will likely not be useable in the EIS. The reason is that impact assessment varies widely with the extent of the impacts. Impacts are not always linear and relatively small changes can sometimes make significant differences. Similarly, EPA consistently allows projects to go forward after the project proponent makes relatively small, incremental reductions in impacts. This is because

a large percentage of the avoidance and minimization EPA thought was necessary had already been accomplished – it just wanted to see an incremental additional effort.

Other than this, there is limited advantage to undertaking a watershed assessment before starting the NEPA process, at least for purposes of the NEPA process.

Question 3a: Can an assessment be used to supplement future reviews if it was completed prior to a permit being submitted?

Response 3a: The response to this question is included in my response to question 3a. In short, it is possible that it might be used to do so, particularly for the baseline information. It is less certain how much the impact analysis will translate. It depends, among other things, on the scope of the eventual permit application and the time of the delay between the watershed assessment and the NEPA assessment,

Question 3b: In contrast, are there any disadvantages to performing an assessment before a permit or plan is submitted?

Response 3b: The primary disadvantage is the expense of the study.

Question 4: Besides mines, what kinds of development proposals require dredge or fill permits, and is the EPA typically involved in such projects?

Response 4: Almost all development proposals require a wetland permit of some kind – everything from individual and multi-family housing, commercial developments and highways, to schools, office buildings, pipelines, and schools. Many are addressed through streamlined "nationwide permits" which authorize certain limited impacts in advance, so long as certain conditions are met. Others require project-specific individual permits.

EPA is involved in both types of permits, but more involved in individual permits. EPA can be heavily involved in individual permitting and ultimately has what is essentially veto authority over the permitting process.

Question 5: Many individuals and groups have expressed concerns that the EPA may invoke authorities within section 404(c) of the Clean Water Act to preemptively veto any mining proposals in Bristol Bay before developers even file a permit application. Should EPA embark upon such a course of action, could that automatically prevent projects such as hospitals and schools from being built in that area?

Response 5: It is possible that it could, yes. On its face, the law states that "[t]he [EPA] Administrator is authorized to prohibit the specification (including the withdrawal of specification) of any defined area as a disposal site. . . " In the absence of a particular permit, based on this language, it appears that EPA might have to completely prohibit the use of a "defined area" for disposal; she or he might not be authorized to prohibit it for just one (or one type of) use.

Question 6: A preemptive veto by EPA would mean eliminating the U.S. Army Corps of Engineers from the process. Has there ever been any guidance from Congress suggesting such an act to be an appropriate interpretation of implementing Section 404 of the Clean Water Act?

Response 6: I have not previously researched whether these is any Congressional guidance on this question.

Question 7: Please find attached a letter to the Committee from Mr. Thomas Yocom, who served as National Wetlands Expert for the EPA from 1984 until 2005. Mr. Yocom's letter includes comments on portions of your testimony for the August 1, 2013 hearing. Do you have any response to his comments?

Response 7: I appreciate Mr. Yocom taking the time to provide such a lengthy analysis to the Subcommittee. A good deal of his analysis addresses the propriety of EPA's potential use of a prospective Clean Water Act § 404(c) veto, a subject on which I was not asked to testify. Similarly, Mr. Yocom has interpreted certain subcommittee statements made during the hearing "to suggest that EPA's use of its authority under Section 404(c) of the Clean Water Act denies due process to potential permit applicants that would be otherwise afforded them under NEPA" or otherwise "short-circuit the environmental review process." p. 2. I did not make any such statements, but nevertheless note that some of Mr. Yocom's responses to this perceived concern are not entirely accurate.[1]

For example, Mr. Yocom describes the 404(c) regulations under 40 C.F.R. 231.1 *et seq*. as "very much like a permit process." p. 2. To the contrary, while the regulations do

[1] I also did not suggest, as Mr. Yocom indicates "that a 404(c) action by EPA could fail to fully assess all of the potential impacts of a mining project because the 404(c) process would have a narrower focus." p. 4. My testimony addressed only EPA's Clean Water Act Section 104 watershed study, not a potential 404(c) veto. That being said, I do believe that the factors established by Congress for the EPA to properly take a 404(c) action are more limited than those required for a proper NEPA analysis. Mr. Yocom's comments appear to agree. See pages 4-5, comparing his eight 404(c) factors with my 20 NEPA factors.

establish a fair bit of process, including an opportunity for public notice and comment, they differ significantly from the permit process. Under the permit process, the project proponent submits an application specifying its proposal and its avoidance, minimization and mitigation measures. For large projects, the process then often involves a great deal of back-and-forth discussion where the Corps and/or EPA express their approval or disapproval of certain aspects of those measures; for portions which meet agency disapproval, the project proponent typically modifies them, sometimes numerous times, as needed to eventually satisfy the Agencies' concerns. For major projects which may significantly affect the environment, it also includes an Environmental Impact Statement analyzing all of the impacts of and alternatives to the project, including to the approximately 20 resources I noted in my written comments.

In the case of a prospective veto, the 404(c) process need not include any of these things. The regulations require that the general public be notified and allowed to comment on EPA's proposed veto, but they do not require that EPA interact with the project proponent. In some cases, like for the Pebble mine, there is not even a requirement that EPA contact the project proponent. This is because the regulations require EPA to notify ". . . the owner of record of the site, and the applicant, if any." 40 C.F.R. § 231.3(a)(1). In the case of a prospective veto, there is no applicant yet, so no requirement exists to notify the project proponent unless it also owns the property. In the case of the Pebble mine, the state owns the property, so the regulations do not require EPA to even notify the project proponents.

Mr. Yocom's recitation on page 3 of the notification requirements and the "additional opportunities [for the project proponent] to take corrective action" may exist for contemporaneous vetoes, but they do not for prospective ones. Similarly, his identification of situations where "EPA withdrew its 404(c) recommendation when project sponsors were able to modify their proposals in order to avoid impacts that EPA considered to be potentially unacceptably adverse" (p. 3), again, is only relevant if there is a proposal to modify. In the case of a prospective veto, there is, by definition, no proposal.[2]

The 404(c) process is also unlike the full permitting process in that a much more narrow range of factors are analyzed. Under the statute, EPA may

[2] Of course, the project proponent can provide general comments on EPA's proposal, just like any other member of the public, but this is much different from engaging in a constructive, interactive dialogue with the agency. Indeed, the 404(c) regulations only require EPA to provide public notice and an opportunity to comment – they do not require EPA to respond to those comments. Thus, in the case of a prospective veto, there is no requirement that EPA ever respond to, let alone interact with, the project proponent.

> prohibit the specification. . . of any defined area as a disposal site. . . whenever he determines. . . that the discharge of such materials in to such area will have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational areas.

33 U.S.C. § 1344(c). The regulations define "unacceptable adverse impact" to mean

> impact on an aquatic or wetland ecosystem which is likely to result in significant degradation of municipal water supplies (including surface or ground water) or significant loss of or damage to fisheries, shellfishing, or wildlife habitat or recreation areas.

40 C.F.R. § 231.2(e). Thus, under the regulations, EPA could veto a project based solely on its potential significant damage to recreation areas; it would never need to examine the other 19 resources which would be analyzed under NEPA.

Mr. Yocom hypothesizes that an EPA 404(c) analysis "would likely consider other impacts insofar as identifying the least damaging practicable alternative." p. 5, referring to the "LEDPA." I do not believe that such an analysis would be possible, at least as envisioned under the law, without a permit application. For EPA to undertake such an analysis without a permit application would require it to hypothesize what alternative would be the LEDPA analysis only to deem it insufficient. The LEDPA process, like the judicial adversarial one, is most effective when two different points of view are engaged.[3]

Finally, in response to Mr. Yocom's statement that, in the other 13 vetoes EPA has issued, there is no restriction on all discharges of dredged or fill material but instead project specific limitations (p. 4), I note that all of those projects involve permits which had already been sought, so they offered EPA a simple way to identify the prohibited specification - by referencing the fill sought by the permit applicant.

The remainder of Mr. Yocom's comments are essentially directed at the concept that "[i]t is reasonable and appropriate for the federal government to act proactively when there is

[3] To the extent that Mr. Yocom suggests that certain portions of the 404(c) analysis would be more expansive than that of the NEPA analysis, those analyses are not foreclosed if EPA and the Corps follow the NEPA process. To the contrary, NEPA compliance alone is insufficient to support the issuance of a permit - the Corps would still need to complete the 404 process, and EPA would have an opportunity for its 404(c) analysis (and veto, if it wished) at that time. Thus, those more expansive alternatives would still be reviewed even without a prospective 404(c) veto.

clear evidence that a proposed project will not comply with federal regulations" (p. 3) and that the potential Pebble Mine is one such situation.

As to the former (whether it is "appropriate" "to act proactively when there is clear evidence that a proposed project will not comply with federal regulations"), there is little, if any, harm in allowing the process to move forward.[4] It is entirely funded by the project proponent. The government's only investment is the time and salaries of the government employees overseeing the process.[5] As to any potential environmental harm, NEPA is the cornerstone of the environmental review process, frequently cited by project proponents as mandatory before decision affecting the environment should be allowed to proceed. There is no environmental harm at all in allowing it to proceed in any particular situation.

As to the latter, (whether Pebble Mine is a situation where the government should act prospectively), I am fairly unfamiliar with the potential Pebble Mine project and so not in a good position to opine on the potential for any such mine to operate without conflict with the 404(c) criteria. That being said, as I stated in my written testimony

> It is often difficult to know in the abstract what those avoidance, minimization and mitigation measures are, for several reasons.
>
> First, the project applicant can often move the footprint of the project in order to avoid certain quantities of impacts or certain high-quality wetlands. Avoiding certain quantities of wetlands is an obvious way to avoid impacts – instead of impacting ten acres, the project only impacts eight. Avoiding certain high-quality wetlands is less obvious and can't really be done until project-specific information is gathered. At the time of a project application, the project proponent will have completed an assessment of the functions and values of the wetlands in the project area and is often able to shift the project so that even though the same number of acres is impacted, those impacts are

[4] I also note that Mr. Yocom is not consistent with the standard he wishes to apply. Later in his comments he notes that "it serves no one to proceed through a long and costly EIS process if a project is *likely* to fail to qualify for a permit (emphasis added). I strongly disagree that this is a proper standard - if a project is unlikely to qualify for a permit, a project application should most certainly be allowed to proceed through the NEPA process

[5] Mr. Yocom's suggestion that his recommendation of a prospective veto is offered in part to conserve the financial resources of the project proponent (p. 6) and "in the best interests of the regulated community" (id.) is unpersuasive - those entities should be allowed the opportunity to spend their money as they wish.

> to lower-quality wetlands. These facts and the resultant possible modifications do not appear to be part of the Bristol Bay Assessment.
>
> A second reason that abstract analysis of avoidance, minimization and mitigation is also not very fruitful is because it is difficult for an agency to know what the most current avoidance and minimization measures are that can be undertaken by a project developer. The dynamic nature of business means that new methods are always being developed that can avoid and minimize impacts. Not all the methods result in significant impact reductions, but some do, and it is difficult for a federal agency to stay current with an industry's current best practices. And this is just a wetland example – there are similar ways to avoid and minimize impacts to groundwater, surface water, wildlife, air and other resources. As a result, being able to rely on a specific project application significantly aids the federal agency in undertaking its analysis.

Further, while Mr. Yocom and others outside of EPA may believe the mine would not be able to operate without conflict with the 404(c) criteria, that is not their decision to make - it is EPA's. While Mr. Yocom may have a good sense of what an eventual mining project would entail (pp. 7-9), neither he (nor EPA at this point in the process) are aware of either (1) the footprint limitations and alterations the project proponents would be willing to undertake or (2) the current state of the art minimization measures available to the project proponents, among other avoidance and minimization options.

At its core, however, how close Mr. Yocom's analysis is to what the potential mine might look like is irrelevant, since his comments themselves refute his assertion that EPA should act proactively in this instance. He states that he has "recommended that EPA initiate a 404(c) process to restrict, not prohibit, discharges of dredged or fill material associated with mining the Pebble deposit and other large-scale mines that may be proposed in the Bristol Bay watershed." p. 9. He continues on by stating that this restriction "could result in restricting discharges of dredged or material" in a way to limit certain environmental harms and risks. Id. This statement confirms Mr. Yocom's view that there are mining alternatives which could be accomplished that do not conflict with the 404(c) prohibitions (since he is suggesting that EPA prospectively mandate them). Given this belief, there is no harm with moving forward with the permitting and NEPA processes and allowing the project proponent to submit such potentially "compliant" alternatives. If, after the normal permitting process, EPA believes the project proponent's alternative is insufficient, EPA can issue such a "restrictive" 404(c) veto at that time.

Questions submitted by Rep. Daniel Maffei (D-NY)

Question 1: Please describe your familiarity with the Bristol Bay region and the Pebble prospect?

Response 1: I am only slightly familiar with either the region and the project. In fact, most of my familiarity comes from my brief review of the EPA Watershed Assessment prior to my testimony. The remainder of my familiarity came from reading the occasional news story about the Watershed Assessment

Question 2: In preparing to appear before the Subcommittee, did you review the Letter from Six Federally Recognized Tribes to Lisa Jackson, EPA Administrator and Dennis McLerran, EPA Regional Administrator, Region X, May 2, 2010?

Response 2: I did not.

Question 3: The Six Tribes letter argues that because of an improper State designation of the lands forming the Pebble prospect, the NEP A process would be flawed and inadequate. Your testimony suggests that the NEP A process, particularly the Environmental Impact Statement (EIS) done for that process, would necessarily be more complete and more robust than any review that EPA might do of the area under its Clean Water Act (CWA) authorities. You stated to the Subcommittee:

"EPA's assessment is not an adequate substitute for an EIS, and even for the resources it does analyze, its impact assessment is less informed and therefore less useful than the analysis which would occur under a project-specific EIS."

However, while the EIS would deal with matters that go well beyond the scope of EPA's concerns under the CWA, it is not obvious that those other matters are germane to the agency. As for the specific analysis that the EIS would contain for matters germane to EPA and the CWA, the implication of the Bristol Bay Area Plan (BBAP) is that the designation of the land as mineral land brings with it a very different set of expectations regarding environmental impacts and protection.

Question 3a: Do you agree or disagree with the Six Tribes' letter in viewing the BBAP as having a material impact on the NEPA process?

Response 3a: In response to this request, I have briefly reviewed the portion of the Six Tribes' letter related to the BBAP. I agree with the letter that an EIS would analyze and address the applicable state land use plans, as the Tribes state on page 7 of their letter. However, I do not believe that the BBAP would materially impact the information presented in the EIS. As I noted in my written testimony, land use is only one of approximately 20 categories of resources analyzed in an EIS. Further, the EIS is not a decision-making document – it only presents the impacts and alternatives. At most, the EIS would note consistencies or inconsistencies between alternatives and a land use plan like the BBAP. It would be in the decisionmaking stage – in this case, the Corps' permitting process, that any consistencies or inconsistencies would become relevant to the Corps' decision.

Question 3b: If you disagree, please explain why.

Response 3b: Please see the response to question 3a.

Question 3c: If you agree, please describe in detail how the NEPA process would differ for lands designated by the state as mineral land as opposed to lands that may be designated as habitat for the purposes of protecting native species of fish and mammals.

Response 3c: As I disagree, I have not responded to this question.

If you have any questions or would like to discuss my responses, please do not hesitate to call or email.

Very truly yours,

Bracewell & Giuliani LLP

/s/

Lowell Rothschild
Senior Counsel

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