

Testimony of Lowell Rothschild, Senior Counsel, Bracewell & Giuliani LLP
House Committee on Science, Space, and Technology, Subcommittee on Oversight
“EPA’s Bristol Bay Watershed Assessment – A Factual Review of a Hypothetical Scenario”
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Members of the Committee –

Thank you very much for inviting me to testify today. My name is Lowell Rothschild, and I am Senior Counsel at the law firm of Bracewell & Giuliani LLP here in Washington, where I practice environmental law. I have practiced exclusively in the area of environmental law for almost 20 years, both in law firms and in-house, with my primary focus on the laws affecting land development, like those related to wetlands, environmental review (NEPA) and endangered species. I have represented governmental, quasi-governmental and private clients in permitting and litigation over major projects with significant wetland impacts and NEPA analyses. I am also the co-author of the Environmental Law Institute’s *Wetland Deskbook*.

As requested, my testimony today focuses on the NEPA Environmental Impact Statement process as it relates to mining activity and how that process compares to assessments EPA undertakes under Clean Water Act Section 104(a) and (b), like the one for Bristol Bay. For background, I’ll also discuss the context of how NEPA and EPA’s Bristol Bay Assessment fit into the wetland permitting process under Section 404 of the Clean Water Act.

NEPA

Starting with the National Environmental Policy Act, NEPA was the first major US environmental law. It is purely procedural, requiring only that a federal agency, before undertaking a major action that may significantly affect the environment, analyze the impacts of, and the alternatives to, its proposed action. By “purely procedural,” I mean that NEPA does not require any specific result. It does not, for example, mandate environmental protection. A federal agency could do a NEPA analysis of an action that would have major adverse environmental consequences and, as long as it adequately looked at the impacts of and alternatives to that action, there is nothing in NEPA that would prevent it from taking that action. There would likely be other laws that would prevent it, because they have substantive limitations, but NEPA wouldn’t.

But since it is purely procedural, NEPA has a lot of process and it involves a very thorough analysis of impacts and alternatives. Before authorizing a major project, like most mines, the authorizing agencies must finalize an Environmental Impact Statement or “EIS.” The EIS process begins with a high-level determination of the nature of the proposed project, the geographic and physical environment it might impact and what, exactly, the EIS should examine – in other words, the “scope” of the EIS. This scoping process is a public one – notice of scoping is published by the agency, and the public has a right to comment on the scope of the document.

Following scoping, a draft EIS is prepared covering the range of impacts and alternatives. The number of alternatives varies from EIS to EIS, but it always includes at least two - the proposed

project and what is called the “no action” alternative, which is the alternative under which the agency doesn’t issue its authorization and therefore no project is undertaken. The agency also typically looks at a number of other alternatives.

The number of different resources examined in the impact analysis is rather large. For example, in the most recent mining EIS on which I worked, related to mining in central Florida, the US Army Corps of Engineers analyzed impacts to 20 different categories of resources, well beyond wetlands, water quality and wildlife. These included

1. Surface Water Resources
2. Groundwater Resources
3. Water Quality
4. Aquatic biological communities
5. Wetlands
6. Wildlife Habitat
7. Species listed under federal and state species protection laws
8. Economic Resources
9. Socioeconomics
10. Environmental Justice
11. Radiation
12. Cultural Resources
13. Historic Properties
14. Surface geology and soils
15. Air Quality
16. Noise
17. Land use
18. Cumulative effects
19. The relationship between short-term use of the environment and long-term productivity; and
20. Irreversible and irretrievable commitment of resources

The degree of analysis required for each resource area varies, but in all cases, the nature of the analysis is the same: The agency uses current science to identify the existing condition of that resource – called “the baseline” – and then the impacts which will occur to that resource under the various different alternatives.

This analysis is compiled into a Draft EIS, which, when completed, is released for public review and comment, typically for a minimum of 45 days but often longer. Comments are solicited from individual members of the public as well as federal, state and local governmental agencies and non-governmental organizations that have an interest in the proposed project or expertise in certain resource areas. After the close of the comment period, the comments are reviewed and any changes required because of those comments (or for other reasons) are incorporated into a Final EIS. The FEIS also typically contains a section responding to all of the comments made on the DEIS.

Then the FEIS is released for public comment. Those comments are received and reviewed and, after a waiting period, a final decision can be made on the proposed project.

For large projects, the EIS can be fairly time-consuming and expensive, often taking several years to complete and costing millions of dollars. As it is not feasible for the government to fund all the necessary studies, EIS funding is almost always the responsibility of the project proponent. The federal agency typically ensures the independence of the NEPA process by contracting directly with a consultant for the preparation of the document and acting as the primary point of direction for that consultant. The project proponent's responsibility is solely to fund the EIS, not to direct it.

EPA's role in the NEPA process

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.

The wetland permitting process under CWA Section 404

As I mentioned before, NEPA is purely procedural, but there is usually a substantive statute at play, too. For wetlands permitting, that statute is the Clean Water Act.

Section 404 of the Clean Water Act authorizes the Corps to issue permits allowing the filling of wetlands. Most of the wetland fill projects undertaken in the US involve relatively small amounts of wetland fill and are authorized by general permits, which allow for certain low-impact projects to proceed under specific terms and conditions identified in advance. Bigger projects, which are generally those with more than 1/2-acre of wetland impact per project, require an individual permit from the Corps.

The individual permitting process is similar to the NEPA process, but it is also different in a few critical ways. It is similar in that the Corps receives a permit application from a project proponent, undertakes a preliminary analysis of the project and solicits comments from the public. After reviewing and, in some cases, responding to those comments, it decides whether or not to issue a permit.

However, there are a number of significant differences between the wetland permitting process and NEPA analysis. For the purpose of describing the matters about which I was asked to testify, the most critical differences involve, first, the fact that the wetland permitting process is substantive, not procedural, and second, that EPA has two statutory points of influence over the process.

Substance versus procedure

As I said, Clean Water Act Section 404 mandates a substantive requirement. The Corps must select the “Least Environmentally Damaging Practicable Alternative.” That phrase is continually parsed and fly-specked, but I will limit the parsing for my testimony to noting that it includes a requirement that a project proponent *avoid* impacts to the maximum extent practicable, take appropriate and practicable steps to *minimize* any adverse impacts that cannot be completely avoided and then provide appropriate and practicable *mitigation* for impacts which remain after avoidance and minimization.

This three-pronged approach of undertaking all appropriate and practicable avoidance, minimization and mitigation measures is required of all permit applicants. It is very difficult to analyze these measures in the abstract, since what is appropriate and practicable varies from case to case. For example, practicable avoidance measures changes over time, as new technologies and practices become available which make certain actions practicable today that weren’t practicable yesterday. Minimization is incredibly fact-specific, since it often involves small modifications to projects to avoid impacts to high-quality wetlands, if the project can then avoid impacts to a similar number of acres of low-quality wetlands. That type of avoidance is dependent on an analysis of the functions and values of particular wetlands in the project area. As a result, the 404 permitting analysis and decision are specific to each individual application.

EPA’s statutory rights

The other notable difference between NEPA and wetland permitting is the statutory rights that EPA has in the wetland permitting process. As the Committee may know, when Congress passed the Clean Water Act, there was a fair amount of discussion over which agency – the Corps or EPA – should have authority to issue permits for wetland fills. The Corps had previously had authority over similar activities in open water under the River and Harbors Act, but EPA had also had similar authority, regulating the discharge of chemicals and other pollutants under the Clean Water Act’s point-source discharge permitting program. Congress’ solution was essentially to split the baby. It gave the Corps the authority to issue permits, but EPA the authority to veto them. Thus, under Clean Water Act Section 404(c), after consulting with the Corps, EPA can “prohibit the specification of any defined area as a disposal site” which meets certain criteria.

Knowing that wetland permitting affected a number of other agencies’ authorities, including not just the Corps and EPA, but also USDA, DOI and DOT, and that its splitting of the baby between the Corps and EPA might create duplication, Congress also required, under 404(q), that these agencies enter into agreements with the Corps to minimize duplication, needless paperwork and delays. This resulted in a Memorandum of Agreement between EPA and the Corps outlining certain steps that the agencies must take to coordinate, elevate policy issues, and elevate individual permit decisions. It is this ability to elevate from the local, district and regional level to the headquarters level the decisionmaking on specific, contentious permits, that provides EPA its second, significant, statutory right in the wetland permitting process.

As the Committee might surmise, these statutory rights not only afford EPA significant influence over permitting at the end of the process, but also significant leverage during the early stages.

Since the Corps knows that EPA has the ultimate authority to reject a permit, it has every reason to take seriously any concerns EPA raises early in the process, to help ensure that permits can be issued smoothly, without threat of elevation or veto. This process has been quite effective – EPA has only vetoed 13 projects in the 41 years since 404(c) was enacted and has only vetoed two projects in the last 24 years.

Clean Water Act Sections 104(a) and (b)

The other statutory provisions on which the Committee asked me to comment are Clean Water Act Sections 104(a) and (b). These provisions give EPA authority generally related to extensive, programmatic efforts and for the research, investigations, monitoring and technical assistance undertaken in support of those efforts. These provisions also give EPA broad authority to study, investigate and monitor water pollution.

In fact, these authorities are so broad, it isn't really possible to discuss in the abstract how they compare to the NEPA EIS process – it's really necessary to compare a particular EPA action taken under 104(a) and (b) to the EIS process. So I'll turn to EPA's Bristol Bay Assessment ("the Assessment") for that comparison.

EPA's Bristol Bay Assessment

Given EPA's broad authority under Sections 104(a) and (b), it certainly appears that EPA is well within its authority to have undertaken the Assessment. The question is how that the Assessment compares to an EIS undertaken under NEPA. As described above, the EIS process involves extensive analysis of impacts to numerous resources from a proposed project and at least one alternative to that project.

EPA's assessment is more general and more limited than an EIS would be. EPA has selected three hypothetical mining scenarios and analyzed their impacts by conducting an "ecological risk assessment" focusing on the Bristol Bay watersheds and on several sub-watersheds. The Assessment's Executive Summary provides a good synopsis of the parameters of EPA's study. It notes that "the primary focus of the assessment is on the abundance, productivity and diversity" of the region's salmonids. "[W]ildlife and Alaska native cultures in Bristol Bay are also considered as assessment endpoints" "but only as affected by changes in salmonid fisheries."

The Assessment "is not an in depth assessment of a specific mine," but analyzes "scenarios that reflects the expected characteristics of mine operations at the Pebble deposit." "It is intended to provide a baseline for understanding the impacts of mine development throughout the studied watersheds."

With this background, it appears that EPA's Bristol Bay Assessment is both more generic and more limited than an eventual EIS would need to be, although as to some resources, it is duplicative of what would be required in the EIS, if that study were being currently undertaken.

More limited than an EIS

EPA's Bristol Bay Assessment is intentionally more limited than an EIS would be. It is only intended to be – and therefore only is – a portion of the eventual analysis required under an EIS. As I described in discussing the Corps' EIS for mining in central Florida, there are approximately 20 resource areas analyzed in an EIS, from air, noise and endangered species resources, to economic, socioeconomic and environmental justice impacts. The Assessment is specifically limited to a microcosm of the factors that would be analyzed in an EIS.

General nature of the Assessment as compared to an EIS

The Assessment is also more generic than an EIS would be in that it is analyzing hypothetical scenarios. Its limitations here are less obvious than those related to not looking at certain impact areas. The scenarios EPA analyzes are by definition less specific than those that would be reviewed in an EIS that was analyzing the impacts of a specific project application and this difference can be significant. A wetland permit application is a good example. As described above, a wetland permit applicant must avoid, minimize and mitigate the impacts of its project on wetlands. 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 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.

Duplicative

That is not to say that the Assessment is completely without value, it is just to say that that value is limited. To the extent 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's 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.

As a result, it is not possible to understand the resource impacts and if they are acceptable - and if they are unacceptable how close they are to acceptable - until an actual project is analyzed. Thus, the resource impacts analyzed in EPA's Bristol Bay Assessment are of limited value to any eventual EIS. How limited will depend on the specifics of the permit application and how much the avoidance, minimization and mitigation measures it contains differ from EPA's hypothetical scenarios.