

March 9, 2019

Andrew Wheeler
Administrator
U.S. Environmental Protection Agency
William Jefferson Clinton Building
Mail Code 1101A
1200 Pennsylvania Ave., NW
Washington, DC 20460

Re: Proposed Amendments to Clean Water Act Section 404(c) Procedures

Dear Administrator Wheeler,

We encourage you to move forward with the common sense changes to the Section 404(c) regulations that the Agency currently has on its agenda. Some environmental groups recently asked you to rescind a June 26, 2018, memorandum titled “Updating the EPA’s Regulations Implementing Clean Water Act Section 404(c)” (“June 2018 Directive”). Doing so would be a mistake.

The June 2018 Directive called on the Environmental Protection Agency (“EPA”) to update and clarify procedures for implementing Section 404(c) of the Clean Water Act. But the letter not only distorts the proposed amendments to EPA’s regulations, it endorses an activist role for the Agency that violates both federal law and decades of precedent. Contrary to the alarmist letter, the proposed amendments will retain EPA’s authority to play a critical role – including, if necessary, the power to veto dredge-and-fill permits – in the Clean Water Act permit application and approval process. The June 2018 Directive simply seeks much-needed clarity regarding *when* in the process EPA may exercise its authority. By prohibiting vetoes issued before a permit application is even received (“preemptive vetoes”) and those issued after the U.S. Army Corps of Engineers (“the Corps”) grants a permit (“retroactive vetoes”), the proposed amendments strengthen a process that provides both environmental protection and due process. We strongly urge you to implement the June 2018 Directive’s proposals.

Prior to the Obama Administration, EPA had for nearly forty years followed an established procedure for exercising its Section 404(c) authority. In each instance when they exercised their veto authority, EPA invoked Section 404(c) only after receipt of a permit application that described the scope and details of the project being proposed, the anticipated environmental impact, and techniques to be employed to mitigate or control that impact. This is consistent with the Clean Water Act’s language, which authorizes the Corps to issue permits “for the discharge of dredged or fill material into the navigable waters at *specified* disposal sites.” EPA’s authority is narrow and must be based on a permit application, as the statute only allows the Agency to “prohibit the *specification*” or “deny or restrict the use of any *defined area* for *specification*.” Only the developer’s permit application can specify the proposed disposal sites. And EPA can only take action after determining that the discharge “into *such area*” will have an unacceptable adverse effect on the environment. Thus, the statute only allows EPA to act based on information about specified disposal sites, which are proposed by the developer in its permit application.

In 2011, the Obama Administration EPA revoked a permit that the Corps had issued to the Mingo Logan Coal Company in 2007, even though EPA had actively participated in the earlier permit review process. EPA's unprecedented action was devastating to Mingo Logan, which had invested millions of dollars in reliance on the 404 permit that had been issued years before. EPA's action also dramatically changed the calculus for other projects. EPA's assertion of authority to revoke permits retroactively disrupts the finality and certainty of the CWA Section 404 permit process, a process that is critical to a wide range of industries and projects. This lack of certainty could chill investment in vital infrastructure and other development projects that require 404 permits.

In July 2014, the Obama Administration initiated a Proposed Determination under Section 404(c), effectively vetoing development of the Pebble Mine in southwest Alaska, even though the Pebble Limited Partnership (the project's proponent) had not submitted a permit application. Internal planning emails showed that officials within EPA were aware that such a move had “[n]ever been done before in the history of the [Clean Water Act].” The decision sparked years of litigation and further increased the uncertainty for other development projects, as investors were no longer sure when EPA might unilaterally decide to halt a project and nullify years of planning and investment.

Under the previous administration, therefore, EPA could decide to veto a permit before there was any administrative record at all *and* well after a developer already had a permit. A status quo in which EPA wields that much arbitrary power, especially in the absence of statutory support, is untenable. The June 2018 Directive addresses these overreaches and clarifies EPA's role in the larger permit application process. The proposed regulations would eliminate EPA's authority to issue preemptive and retroactive vetoes. Ensuring that the Corps has an opportunity to publish an EIS is consistent with the National Environmental Policy Act (“NEPA”), which requires federal agencies to “take a hard look” at potential environmental impacts of proposed projects. The NEPA/EIS process also requires significant public involvement, including Federal Register notice, public comment periods, and public meetings. The Natural Resources Defense Council, a signatory to the recent letter to EPA, has even called NEPA the “magna carta” of environmental law.

These proposed amendments do not pose any threats or limits to environmental protection. It is beyond disingenuous to assert that the June 2018 Directive “threaten[s] the health of the nation's waters and the vital benefits they provide” when the proposals do not abolish EPA's authority to exercise Section 404(c) authority. Although the letter claims that the existing framework was necessary to save Alaskan waters from the Pebble Mine, such an assertion is nonsense. EPA proposed the Pebble veto before the proponent even submitted its mine plan. Only a complete EIS process will allow the public to understand any effects of that project. That record would also include an evaluation of economic and environmental benefits of the proposed mine, which could, for example, provide much-needed copper to the green-energy sector.

EPA has a critical role to play in the Clean Water Act permitting process and ensuring that its role is fulfilled consistently is best for the environment and for regulated industries. We, the undersigned, therefore urge you to move forward with the regulatory revisions as planned.

American Exploration & Mining Association

American Farm Bureau Federation

American Petroleum Institute

Global Energy Institute, an affiliate of the U.S. Chamber of Commerce

GPA Midstream Association

Independent Petroleum Association of America

National Mining Association

National Stone, Sand, and Gravel Association

Western Energy Alliance