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ADMINISTRATOR

June 26, 2018

MEMORANDUM

SUBJECT: Updating the EPA's Regulations Implementing Clean Water Act Section 404(c)
FROM: E. Scott Pruitt 
TO: General Counsel
Assistant Administrator, Office of Water
Regional Administrators

It is essential that the U.S. Environmental Protection Agency adhere to its core mission of protecting human health and the environment in a manner that is fully considered as well as consistent with the agency's authority. When the EPA uses its authority preemptively and without the benefit of the fully developed factual record or attempts to reimagine its authority in ways that diverge from statutory text or congressional intent, it diverts its attention from this core mission and engages in decision making without a full understanding of the impacts of those decisions. To address this concern, at every opportunity I have directed the agency to ensure predictability and regulatory certainty and take actions based upon a comprehensive understanding of the facts. These are the hallmarks of the proper exercise of administrative authority and due process under the law.

Today, I am directing the Office of Water to take another step toward returning the agency to its core mission and providing regulatory certainty by developing a proposal to change the regulations governing the EPA's exercise of its authority under *Clean Water Act* section 404(c), which allows the EPA to veto the issuance of permits by the U.S. Army Corps of Engineers or an approved state to discharge dredged or fill material at specified disposal sites. These regulations were last revised nearly 40 years ago – at a time in our history when environmental safeguards and analytical methods were far less developed than today. The EPA's regulations should reflect today's permitting process and modern-day methods and protections, including the robust existing processes under the *National Environmental Policy Act* that already require federal agencies to consider the environmental and related social and economic effects of their proposed actions while providing opportunities for public review and comment on those evaluations. Any new regulations should seek to address significant concerns surrounding the EPA's prior use of its veto authority before a permit application has been filed or after a permit has been issued. This long-overdue update to the regulations has the promise of increasing certainty for landowners, investors,

businesses and entrepreneurs to make investment decisions while preserving the EPA's authority to restrict discharges of dredge or fill material that will have an unacceptable adverse effect on water supplies, recreation, fisheries and wildlife.

Section 404 of the *Clean Water Act* regulates the discharge of dredged or fill material into waters of the United States by assigning differing roles to the Administrator and the Secretary of the Army. Section 404(a) empowers the Secretary of the Army, acting through the Army Corps of Engineers, to issue permits allowing for discharge of dredged or fill material at "specified disposal sites." States may assume administration of this program, as Michigan and New Jersey have done. Section 404(b) provides that the Corps or state shall specify each disposal site for each permit "subject to subsection (c)." The EPA has developed guidelines for this process. Section 404(c) provides the EPA with so-called veto authority. Specifically, section 404(c) authorizes the Administrator "to prohibit the specification (including withdrawal of the specification) of any defined area as a disposal site" as well as to "deny or restrict the use of any defined area for specification (including the withdrawal of specification) as a disposal site ... whenever he determines, after notice and opportunity for public hearings, that the discharge of such materials into 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."

In 1979 – seven years after Congress enacted section 404 – the EPA promulgated regulations that established procedures for exercising authority under section 404(c). *See* 44 FR 58076 (Oct. 9, 1979). The regulations establish defined steps with specific associated criteria: The EPA's regional administrators are given responsibility for initiating the 404(c) process, issuing a proposed determination and preparing and transmitting to EPA Headquarters a recommended determination to prohibit, withdraw, deny or restrict the specification of a site as a disposal site. The Administrator, upon receipt of a recommended determination and after consultation with the Corps or the state, has the authority to issue a final determination to affirm, modify or rescind the recommendation determination. The EPA has issued 13 final determinations since 1972 at various stages in the permitting process, including two instances where the action extended to areas for which a permit application was not pending and other instances after a permit had been issued.¹

The EPA has asserted since 1979 that its "section 404(c) authority may be exercised before a permit is applied for, while an application is pending or after a permit has been issued." 44 FR at 58076; *see also* 40 C.F.R. § 231.1(c). Commenters at the time the regulations were proposed opposed the use of the EPA's authority before a permit application had been received or after a permit had been issued by the Corps or state. 44 FR at 58077. The EPA responded to concerns about the practical application of pre-permit use of 404(c) by noting that this approach will facilitate planning by developers and industry and "eliminate frustrating situations in which someone spends time and money developing a project for an inappropriate site and learns at an advanced stage that he must start over." *Id.* The EPA also stated that while "the statute on its face clearly allows EPA to act after the Corps issued a permit," the EPA "recognize[d] that where possible it is much preferable to exercise this authority before the Corps or state has issued a permit, and before the permit holder has begun operations." *Id.*

¹ *See* U.S. EPA, Chronology of 404(c) Actions, *available at* <https://www.epa.gov/cwa-404/chronology-404c-actions>.

During the prior administration, the EPA proposed to restrict discharges of dredge and fill material associated with mining activity near Bristol Bay, Alaska, which drew significant public scrutiny. Before advocates of mining of the Pebble Deposit submitted a permit application to the Corps, EPA Region 10 undertook an ecological risk assessment of three mining scenarios of different sizes based on information submitted to the Securities and Exchange Commission. Region 10 then issued a Proposed Determination to restrict the discharge of dredged or fill material from mining of the Pebble Deposit for “the potential disposal site [defined as] the waters within the mine claims held by [Northern Dynasty Minerals] subsidiaries, including PLP [Pebble Limited Partnership], that fall within the [South Fork Kaktuli River, North Fork Kaktuli River and Upper Talarik Creek] watersheds.” PLP subsequently obtained a preliminary injunction that halted the section 404(c) process before Region 10 could determine whether to prepare a recommended determination to transmit to EPA Headquarters. In December 2017, PLP submitted a permit application to the Corps. Earlier this year, the EPA suspended its proposed withdrawal of the proposed determination; the EPA also has committed not to send a recommended determination from Region 10 to EPA Headquarters until after a final Environmental Impact Statement has been completed by the Corps, so long as that EIS is completed by May 2021. I believe that it is critical for the agency to participate in the EIS process and review the final EIS in detail before determining whether to proceed with the section 404(c) process in this case.

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The EPA’s historical interpretation of its statutory authority and its current regulatory framework applies the same procedures notwithstanding whether a permit application has been filed or a permit issued. I am concerned that the mere potential of the EPA’s use of its section 404(c) authority before or after the permitting process could influence investment decisions and chill economic growth by short-circuiting the permitting process. Although the Corps can process a permit application and conduct a NEPA analysis while a section 404(c) action is ongoing, it cannot issue a permit. Moreover, the short timeframes in EPA’s existing regulations allow the Administrator to issue a final determination restricting the specification of a site as a disposal site within just a few months’ time from the start of the process. I am also concerned that under current regulations, the EPA could issue a final determination without the benefit of full information about the project for which a permit is sought, the proposed disposal areas and the environmental impacts of those activities.

Accordingly, I direct the Office of Water to prepare a proposal for submission to the Office of Management and Budget within six months from the date of this directive that proposes to consider, at a minimum, the following changes to EPA’s regulations that would govern the future use of EPA’s section 404(c) authority and seek public comment thereon:

- Eliminating the authority to initiate the section 404(c) process before a section 404 permit application has been filed with the Corps or a state, otherwise known as the “preemptive veto.”
- Eliminating the authority to initiate the section 404(c) process after a permit has been issued by the Corps or a state, otherwise known as the “retroactive veto.”

- Requiring a regional administrator to obtain approval from EPA Headquarters before initiating the section 404(c) process.
- Requiring a regional administrator to review and consider the findings of a final Environmental Assessment or Environmental Impact Statement prepared by the Corps or a state before preparing and publishing notice of a proposed determination.
- Requiring the agency to publish and seek public comment on a final determination before such a determination takes effect.

Changing the current regulations would help to ensure that the EPA exercises its extraordinary authority under section 404(c) in a careful, predictable and prudent manner. The guiding principle should be to provide landowners, developers and entrepreneurs with certainty that the EPA will not short-circuit the permitting process and will consider all available information, including the results of an EIS, before taking any steps to veto a permit application. Adopting these changes would further the EPA's core mission of protecting human health and the environment while improving predictability and regulatory certainty. The Office of Water shall begin preparing a regulatory proposal forthwith that includes these proposed changes for review and public comment.