September 13, 2019

Mr. Palmer Hough and Ms. Jennifer Linn, Oceans, Wetlands, and Communities Division Office of Water, Environmental Protection Agency, 1200 Pennsylvania Avenue, NW Washington, DC 20460; 404cRuleStates@epa.gov

Re: Proposed Rulemaking under 40 CFR Part 231: Section 404 (c) Procedures

Dear Mr. Hough and Ms. Linn,

The purpose of the Clean Water Act (CWA) as enacted by Congress in 1972 is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." Section 404(c) of the CWA authorizes the U.S. Environmental Protection Agency (EPA) to prohibit, deny, or restrict the specification of a site for disposal of dredged or fill material when the discharge will have an "unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational areas." (Statute 33 U.S.C. § 1344). Since 1972, more than 2 million § 404 permits have been issued by the Army Corps of Engineers (Corps). However, under section 404(c), only 30 actions have been initiated by the EPA (<0.0015% of the total permits issued) and only 13 have resulted in a Final Determination (three of which have been modified, and none have been withdrawn). The remaining 17 cases were terminated upon resolution of issues. An applicant has far greater odds of being struck by lightning than having the EPA initiate a 404(c) action on its project.

Given the extremely rare and judicial use of this authority in the nearly 50 years since Congress enacted the Clean Water Act, the Association of State Wetland Managers (ASWM) and the Association of State Floodplain Managers (ASFPM) do not believe there is any documented cause to revise the regulations. However, ASWM and ASFPM appreciate the opportunity to engage with EPA and provide comment and recommendations as requested. Accordingly, ASWM and ASFPM provide the following responses and recommendations to the questions posed by EPA during the pre-proposal state and local government outreach meeting held on Tuesday, August 13, 2019.

Question #1:

Should the EPA's Section 404(c) regulations be revised to identify considerations for when the Agency initiates a Section 404(c) review, either before a Section 404 permit application has been submitted or after a Section 404 permit has been issued? If so, do you have any recommendations for what those considerations should be?

ASWM and ASFPM do not support revision of existing § 404(c) regulations to include restrictions on EPA authority as to when it initiates a § 404(c) review. The CWA explicitly states that Section 404(c) can be used "whenever" the Administrator determines that the discharge of dredged material

would cause an "unacceptable adverse effect." EPA's regulations at 40 CFR 231.2(e) define "unacceptable adverse effect" as:

> "Impact on an aquatic or wetland ecosystem which is likely to result in significant degradation of municipal water supplies or significant loss of or damage to fisheries, shellfishing, or wildlife habitat or recreation areas. In evaluating the unacceptability of such impacts, consideration should be given to the relevant portions of the Section 404(b)(1) Guidelines (40 CFR part 230)."

The Administrator's authority in regard to § 404(c) is further supported in the text of the CWA:

> "The Administrator is authorized to prohibit the specification (including the withdrawal of specification) of any defined area as a disposal site, and he is authorized 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. Before making such determination, the Administrator shall consult with the Secretary. The Administrator shall set forth in writing and make public his findings and his reasons for making any determination under this subsection." (emphasis added)

EPA's use of its § 404(c) authority has been upheld by Federal courts each time it has been challenged. The U.S. District Court for the District of Columbia found that:

> "Section 404 imposes no temporal limit on the Administrator's authority to withdraw the Corps's specification but instead expressly empowers him to prohibit, restrict or withdraw the specification "*whenever*" he makes a determination that the statutory "unacceptable adverse effect" will result. Using the expansive conjunction "whenever," the Congress made plain its intent to grant the Administrator authority to prohibit/deny/restrict/withdraw a specification at *any* time. See 20 Oxford English Dictionary 210 (2d ed. 1989) (defining "whenever," used in "a qualifying (conditional) clause," as: "At whatever time, no matter when."). Thus, the unambiguous language of subsection 404(c) manifests the Congress's intent to confer on EPA a broad veto power extending beyond the permit issuance…As we have repeatedly stated throughout this opinion, the text of section 404(c) does indeed clearly and unambiguously give EPA the power to act post-permit."[1]

And more recently in 2016, the U.S. District Court of Appeals for the District of Columbia found in the case of Mingo Logan Coal Co. v. U.S. Environmental Protection Agency, that:

> "In Mingo Logan II, we held that the EPA could exercise this "backstop" authority both pre-permit and post-permit; that is, the EPA may prevent the Corps from issuing a 404 permit specifying a disposal site or it may withdraw specification of a disposal site after the Corps has issued a permit."[2]

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[1] Mingo Logan Coal Co. v. EPA, 714 F.3d 608, 613 (D.C. Cir. 2013)
[2] Mingo Logan Coal Co. v. U.S. Environmental Protection Agency, 829 F.3d 710, 714 (D.C. Cir. 2016)

The existing § 404(c) regulations establish detailed procedures that EPA must follow to determine whether a § 404(c) action is warranted. Among other things, EPA must notify the District Engineer or the state, the owner of the record of the site and the applicant; provide public notice of every Proposed Determination and notice of all public hearings; provide a formal opportunity for public comment of not less than 30 or more than 60 days; and give the applicant or project proponent, the state (where the program has been assumed), and the Corps two formal opportunities to revise its application or plans to prevent unacceptable harm. Under this process, the regulations lay out a process that typically takes a minimum of six months to reach a Final Determination; nearly always, this process takes even more time.

The argument provided by former Administrator Pruitt in his June 2018 memo[3] 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" is irrelevant, as 404(c) action is limited to an evaluation of impacts on the relevant environmental resources only. Moreover, it is disingenuous as Pruitt had previously overturned his own proposal to withdraw the pre-permit Proposed Determination for the Pebble Deposit mine in Alaska, concluding that "any mining projects in the region likely pose a risk to the abundant natural resources that exist there." [4] In EPA's Bristol Bay Assessment, the report concluded that "large-scale mining poses risks to salmon and the tribal communities that have depended on them for thousands of years." The assessment also recognizes the substantial economic contributions to the state of Alaska from Bristol Bay's ecological resources that are at risk, including the generation of "nearly $480 million in direct economic expenditures and sales in 2009 and provided employment for over 14,000 full- and part-time workers."[5]

In EPA's own rationale as expressed in response to public comments about the rules governing § 404(c) and EPA's authority to initiate review before a § 404 permit application has been submitted, EPA explained that its authority "will facilitate planning by developers and industry. It will 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." Thus, the review can save the permit applicant thousands, if not millions, in costs and months, if not years, in the time it would have incurred by moving forward with plans for a project that would clearly cause "unacceptable adverse effect."

Again, the use of § 404(c) authority by EPA has been extremely rare, prudent and judicious. In the rare instances in which it has been used, as in the case of Pebble Mine in Alaska, it has been used within the framework of a very careful planning process. According to an agency statement reported by E&E News on May 21, 2015, EPA staff spent "three years evaluating science, conducting hearings and reviewing one million public comments in developing the Bristol Bay Watershed Assessment." EPA's statement went on to say, "That process included two independent peer reviews and a robust public outreach process in which Pebble Partnership readily participated. No process could have been more transparent and inclusive of all views, including for proponents of the Pebble Mine."[6]

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[3] https://www.epa.gov/sites/production/files/2018-06/documents/memo_cwa_section_404c_regs_06-26-2018_0.pdf
[4] https://www.epa.gov/newsreleases/epa-administrator-scott-pruitt-suspends-withdrawal-proposed-determination-bristol-bay
[5] https://www.epa.gov/bristolbay/bristol-bay-assessment-final-report-2014
[6] https://www.eenews.net/stories/1060018975

Question #2:

Should the EPA's Section 404(c) regulations be revised to identify how EPA Regional Offices coordinate with EPA Headquarters prior to taking action on the first three steps of the 404(c) review process? If so, do you have any recommendations for what that coordination process should involve?

ASWM and ASFPM believe that the current process already allows for transparency and accountability. The Proposed and Recommended Determinations provide the insights of the EPA Regions, and the Final Determination provides the insight and reasoning of EPA Headquarters.

Furthermore, the internal coordination and communication between EPA Regions and Headquarters should remain just that—internal. The interests of states, tribes and other interested parties are revealed in their comment letters and/or the public hearing, which are described in the Proposed, Recommended and Final Determinations.

Question #3:

Should the EPA's Section 404(c) regulations be revised to reference the permit elevation procedures established pursuant to Section(q) of the Clean Water Act if applicable? If so, do you have any recommendations for how to reference those procedures?

ASWM and ASFPM strongly object to any efforts by EPA to revise § 404(c) regulations to reference applicable permit elevation procedures pursuant to the § 404(q) Memorandum of Agreement (MOA) between the EPA and the Corps. The § 404(q) MOA is a distinctly separate conflict resolution process between the agencies and involves distinctly different standards for invoking the procedures of the MOA. Moreover, all of the controlling decisions for the 404(q) process rest with the Corps. Other than to initiate the § 404(q) process, the EPA has little or no authority under the MOA. Requiring that EPA elevate the proposed issuance of a permit would unnecessarily add time to the overall process (and likely cost to the applicant/proponent). In addition, the initial stage of the Section 404(c) process already includes consultation with the Army Corps to find a resolution if possible. Although the MOA provides that "EPA reserves the right to proceed with § 404(c)," tying EPA to these elevation procedures would dilute EPA's authority in administering § 404(c). The MOA is not a regulatory process – it is an inter-agency conflict resolution agreement and it should remain so. To do otherwise would change the intent of the CWA and of Congress in regard to Section 404(c) authority for the EPA.

Furthermore, the current § 404(c) process gives the applicant/proponent and the Corps two formal opportunities to revise its application/permit or plans to prevent unacceptable harm, and thus remove the need to complete the § 404(c) process. As mentioned above, ASWM and ASFPM believe that this current process provides the functional equivalent of a permit elevation, but with greater transparency and documentation for the public.

Question #4:

Should the EPA's Section 404(c) regulations be revised to describe a specific process for how to modify or withdraw a Section 404(c) Final Determination? If so, do you have any recommendations for what that process should be?

If the choice is between the outlined two-step process or the three-step process described by EPA during the presentation at the August 13, 2019, regulatory briefing, then the three-step process would be far preferable. However, ASWM and ASFPM believe modifications and withdrawals should be addressed separately and with careful thought and planning. Modifications should be a simple process while withdrawal should be no simpler a process than what is required for the original action. Withdrawal should require a new process with a new proposal and should be substantiated by sufficient data and evidence showing that the Section 404(c) action was either incorrectly conducted or is no longer necessary. Modification and withdrawal procedures should start at the EPA Regional level as that is where the original action began, and the Region is closer to the information required for consideration.

Conclusion

ASWM and ASFPM oppose any revisions to the existing regulations based on the June Memorandum by former Administrator Pruitt because such revisions clearly are not needed. To the contrary, the record demonstrates that Section 404(c) has rarely been used and the existing § 404(c) regulations effectively and efficiently provide the "careful, predictable, and prudent use" of the § 404(c) authority. For this reason, the existing regulations should be retained intact. While these comments have been prepared with input from the ASWM and ASFPM Board of Directors, they do not necessarily represent the individual views of all states and tribes; we therefore encourage your full consideration of the comments of individual states and tribes and other state associations. Please do not hesitate to contact Marla Stelk, ASWM Executive Director, should you wish to discuss these comments.

Sincerely,

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