

United States Senate

COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS

WASHINGTON, DC 20510-6175

BETTINA POIRIER, MAJORITY STAFF DIRECTOR
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February 20, 2013

The Honorable Bob Perciasepe
Acting Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Ave, NW
Washington, D.C. 20460

Dear Acting-Administrator Perciasepe:

We write to express our concern for actions taken by the Environmental Protection Agency (EPA) pursuant to authority the agency claims to have under the Clean Water Act (CWA). Specifically, we are deeply troubled by EPA's unreasonable claim that it has "preemptive veto authority" over the Pebble Mine Project *before* the sponsor has the opportunity to apply to the Army Corps of Engineers (Corps) for a CWA permit.¹ Such an interpretation is unreasonable and contrary to both the plain text of the CWA and its legislative history. Moreover, in EPA's attempt to rewrite the CWA and grant itself "preemptive veto authority," EPA has resorted to improvising a new system by using its general research authority under Section 104(a) of the Act to conduct a watershed assessment of Bristol Bay.² This assessment has suffered from intense criticism, being described as "hogwash" by one of EPA's own peer reviewers namely because of the highly creative fictional mine study.³ Accordingly, we call on you to disavow this unjustified power grab and instead allow the permitting process designed by Congress to move forward.

As you are aware, Congress delegated to the Army Corps of Engineers the full authority to, "issue permits, after notice and opportunity for public hearings for the discharge of dredged or fill material into the navigable waters at *specified* disposal sites."⁴ Under Section 404 (b) – the law is clear that a permit may be issued only for a *specified site* and only by the Corps.⁵ While section 404(c) authorizes the EPA to "prohibit the *specification*...of any *defined area* as a disposal site,"⁶ EPA must first determine that "the discharge of *such materials* into *such area* will have an unacceptable adverse effect."⁷ In the statute, Congress consistently and repeatedly

¹ See 40 C.F.R. § 231(a) (2010).

² Letter from Arvin Ganesan, Associate Administrator, U.S. EPA to the Honorable Darrell E. Issa, Chairman, House Oversight and Gov't Reform (June 22, 2012).

³ *Editorial: The EPA's Pebble Beaching: Rewriting the Clean Water Act to kill an Alaska mining project*, The Wall Street Journal, Sep. 30, 2012, available at <http://online.wsj.com/article/SB10000872396390443989204577603311958126108.html#articleTabs%3Darticle>.

⁴ 33 U.S.C. § 1344(a) (emphasis added).

⁵ See 33 U.S.C. § 1344(c).

⁶ *Id.* (emphasis added).

⁷ *Id.* (emphasis added).

referred to EPA taking action with respect to a specific site, namely the site identified in the application to the Corps. Therefore, it follows that Section 404(c) was intended to give EPA the authority to initiate the veto process only in the context of a specific permit application for areas designated by the Corps as specified disposal sites. In the absence of a permit application detailing the materials involved and the exact location it is to be discharged, the EPA does not have the requisite information needed to initiate the veto process. Accordingly, it is clear from the four corners of the statute that EPA does not have “preemptive veto authority.”

Assuming *arguendo* that there was some room for interpretation in the statute, its legislative history removes any doubt that Congress did not intend for EPA to have preemptive veto authority. As stated in Senator Muskie’s transmittal of the Conference Committee report:

The decision [to give EPA veto authority] is not duplicative or cumbersome because the *permit application transmitted to the Administrator for review* will set forth both the site to be used and the content of the matter of the spoil to be disposed. The Conferees expect the Administrator to be expeditious in his determination as to whether a site is acceptable or if specific spoil material can be disposed of at such site.⁸

This language unambiguously demonstrates that Congress created a system wherein the Army Corps receives, evaluates, and issues CWA permits, and EPA has authority to lodge a powerful objection to the permit under evaluation. Moreover, Congress explained that it was not their wish to, “*create a burdensome bureaucracy*”⁹ and therefore it was not deliberately creating two separate tracks to evaluate a site.

Despite this clear language, EPA has done precisely what Congress was trying to avoid by inventing a separate regulatory track complete with new and ever evolving hurdles designed to derail a project before it receives due process under the law. However, this *ad hoc* process has no support in the statute. EPA’s procedures regarding the implementation of Section 404(c) state that “consideration should be given to the relevant portions of the Section 404(b)(1) guidelines.”¹⁰ The analysis required under the Section 404(b)(1) guidelines is very detailed. In contrast, a watershed ecological risk assessment authorized under Section 104(a) is not intended to provide the site-specific details required by the guidelines and therefore would not support a Section 404(c) veto.¹¹ The analysis contained in the Bristol Bay Watershed Assessment is based on a hypothetical mine scenario, rather than an actual one, and is therefore unworkable. It contains only speculative data and ignores restoration and mitigation requirements. Therefore, it could not support a decision under Section 404(c).

If EPA continues on this unwieldy path, the agency is jeopardizing billions of dollars of investment and thousands of high paying jobs, all without due process. In the past, EPA has

⁸ See *Senate Consideration of the Report of the Conference Committee*, s. 2770, 93rd Cong. 1st Sess., Oct. 4, 1972, reprinted in 1 *Legislative History of the Water Pollution Control Act Amendments of 1972*, at 177 (1973). (emphasis added).

⁹ *Id.* at 177.

¹⁰ 40 C.F.R. § 231.2(e) (2010).

¹¹ See 40 C.F.R. § 230 (2010).

rebuffed the suggestion that their actions have “killed jobs,”¹² but in the case of Pebble Mine, it is undeniable that EPA is attempting to preemptively eliminate over 2,000 jobs projected for mine construction and an additional 1,000 ongoing skilled mining jobs, averaging \$95,000 per year.¹³ Moreover, EPA’s unauthorized actions would eliminate approximately 10,000 jobs outside of Alaska. Under EPA’s current view, these jobs, along with a reliable source of copper ore, an important mineral vital to the economy, could be eliminated at the sole discretion of the Administrator, before the applicant has the opportunity to design and submit a plan through regular process. This is not what Congress intended. Accordingly, EPA should reverse course and acknowledge that the agency is indeed bound to the letter of the law, which requires the Corps to lead in the permitting process, while taking into full account the environmental concerns articulated by EPA.

Additionally, we request that you respond to the following questions no later than March 12, 2013:

1. How much time, money, and staff have been dedicated to developing the Bristol Bay Watershed Assessment? Please detail expenditures both cumulatively and on an annual basis.
2. Did EPA ever receive a petition or other form of request to conduct a watershed assessment of Bristol Bay? If so, please provide the Committee with a copy of the request.
3. Does EPA believe that environmental damage will accrue to the Bristol Bay Watershed simply by allowing the sponsors of the project to apply to the Corps for a 404 permit?
 - a. If so, please explain the environmental impact that that EPA anticipates will accrue to the Bristol Bay watershed between the time that EPA conducts its watershed assessment and the time that the sponsors of Pebble Mine would otherwise submit their application to the Corps for review.
4. EPA has stated that they intend to have a second peer review panel evaluate the changes EPA made to the watershed assessment in response to the criticism that was leveled at the agency during the first round of peer review. Was the second round of peer review part of the original plan? Is EPA following a standard process to develop the watershed assessment? Please identify all precedent EPA is relying on to develop the Bristol Bay Watershed assessment and any instances where EPA has convened a second peer review panel.
5. Under Section 404(c) of the CWA, the EPA must determine that the discharge of dredged or fill material at specified disposal sites will have an unacceptable adverse effect. When determining whether these effects are unacceptable, the EPA’s procedures regarding the implementation of Section 404(c) state that “consideration should be given to the relevant

¹² James Rosen, *Regulation Nation: EPA Chief Rejects GOP Charges She’s Imposing Job-Killing Rules*, FOXNews.com, Sep. 22, 2011, available at <http://www.foxnews.com/politics/2011/09/22/regulation-nation-epa-chief-rejects-gop-charges-shes-imposing-job-killing-rules/>.

¹³ See *Facts & FAQs*, The Pebble Partnership, available at <http://www.pebblepartnership.com/project/facts-faqs.php>.

portions of the Section 404(b)(1) guidelines.” Has EPA followed the guidelines established in 404(b)(1) in the watershed assessment?

6. Has EPA followed its 1998 Guidelines for Ecological Risk Assessment as it has conducted the Bristol Bay Watershed Assessment? Please provide all documents that refer or relate to EPA’s incorporation of the 1998 Guidelines into the Bristol Bay Watershed Assessment.

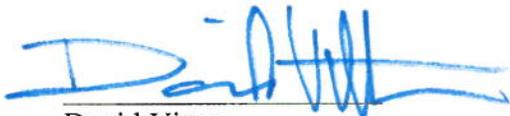
7. The 1998 guidelines state that “[n]o matter what technique is used, the sources of uncertainty...should be addressed.” However, EPA’s construction of a fictitious mine is riddled with uncertainty. How has EPA addressed this massive uncertainty generated by the agency itself? Please provide all documents that refer or relate to the hypothetical mine used in the Bristol Bay Watershed Assessment, as well as for the specific purpose of measuring and identifying levels of uncertainty.

8. What office/team at EPA developed the theoretical scenario to run this analysis, and what was done to ensure conformance with the Data Quality Act?

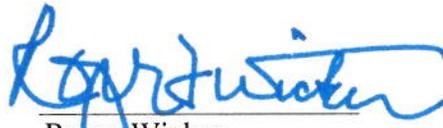
9. Who specifically at the agency made the decision to run the assessment and analysis under 404(c) authority?

If you have any questions regarding this request, please feel free to have your staff contact Kristina Moore with the Senate Environment and Public Works Committee at 202-224-6167.

Sincerely,



David Vitter
Ranking Member
Environment and Public Works



Roger Wicker
U.S. Senator