

Congress of the United States

Washington, DC 20515

July 19, 2018

The Honorable Andrew Wheeler
Acting Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue N.W.
Washington, D.C. 20460

Dear Acting Administrator Wheeler:

Congratulations on your appointment as Acting Administrator of the U.S. Environmental Protection Agency (EPA). We look forward to working with you to return EPA to its missions of protecting human health and the environment.

Since its beginning, this administration has too often consistently ignored the rule of law, and has sided, behind closed doors, with polluters rather than protecting the health and safety of American families and our environment. In your new role, we urge you to stand up against the continued assault on Clean Water Act (Act) protections.

In that light, we ask that you immediately and publicly revoke the June 2018 memorandum¹ issued by your predecessor, Scott Pruitt, and take no further action to weaken EPA's oversight and enforcement of the Act in protecting our local rivers, lakes, and streams. In addition, we urge EPA, under your direction, to remain steadfast in its exercise of section 404(c) authority when needed, including continued use of its scientifically based 2014 study on the potential impacts of the Pebble Mine project in Alaska.²

As you will recall, Congress enacted section 404(c) of the Act to provide EPA with the final say on whether any proposed activities in covered waters, including activities subject to a permit issued by the U.S. Army Corps of Engineers (Corps), would adversely affect local water quality. EPA has historically exhibited great restraint in its use of section 404(c) – issuing only 13 final determinations³ in the past 45 years – and Federal courts, including the U.S. Supreme Court, have upheld EPA's use of section 404(c) authority each time that it has been challenged in court.⁴

¹ See Memorandum of E. Scott Pruitt, Administrator to EPA General Counsel, et al., "Updating the EPA's Regulations Implementing Clean Water Act Section 404(c)," dated June 28, 2018 (hereinafter June 2018 memorandum), https://www.epa.gov/sites/production/files/2018-06/documents/memo_cwa_section_404c_regs_06-26-2018_0.pdf.

² See 2014 Proposed Determination Pursuant to Section 404c of the Clean Water Act for Pebble Deposit Area, Southwest Alaska, <https://www.epa.gov/bristolbay/2014-proposed-determination-pursuant-section-404c-clean-water-act-pebble-deposit-area>.

³ See EPA, "Clean Water Act Section 404(c) 'Veto Authority'", <https://www.epa.gov/sites/production/files/2016-03/documents/404c.pdf>.

⁴ See e.g., *Mingo Logan Coal Co. v. EPA*, 714 F. 3rd 608 (D.C. Cir. 2013), cert. denied, 134 S. Ct. 1540 (U.S. Mar. 24, 2014).

Yet, despite these facts, your predecessor proposed, in his June 2018 memorandum, that EPA relinquish its own section 404(c) authority – in opposition to the will of Congress and the courts. We urge you to reject this effort for several reasons.

First, the language of section 404(c) provides EPA with clear authority to veto the a potential dredged material disposal site “*whenever [the Administrator] determines ... 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.*”

Regulated parties have challenged EPA’s section 404(c) authority over the years; yet, in each instance, Federal courts have upheld EPA’s use of its section 404(c) authority as a valid exercise of the agency’s Clean Water Act responsibilities. For example, in 2013, the United States Court of Appeals for the District of Columbia Circuit upheld EPA’s veto of a previously issued Corps permit for mountaintop mining at the Spruce No. 1 Surface Mine (West Virginia). In this ruling, the Court found that the language of section 404(c) “unambiguously expresses the intent of Congress”⁵ in granting “EPA a broad environmental ‘backstop’ authority” to the Corps’ implementation of the section 404 permit program.

Second, as you know, Congress has amended the Act more than 50 times since the EPA promulgated its section 404(c) regulations.⁶ Yet, in all that time, Congress has never sent to the President any proposal seeking to modify or alter EPA’s veto authority under section 404(c). There is no historical or legal evidence to suggest that EPA’s exercise of its section 404(c) authority is divergent from congressional intent; in fact, the exact opposite is true, as Congress has specifically blocked legislative efforts to limit EPA’s section 404(c) authority.

Finally, let us be clear in describing the effects your predecessor’s June 2018 memorandum would have on the American people. Had Scott Pruitt’s proposed changes to EPA’s exercise of its section 404(c) authority been in place, EPA could not have stopped the construction of the Yazoo Pumps project in Mississippi – a \$400 million project opposed by the Bush administration, and lambasted by groups such as Taxpayers for Common Sense.⁷ Had these changes been in place, EPA could not have saved countless streams and rivers from being buried under 110 million cubic yards of mining wastes associated with the Spruce mountaintop-mining proposal in West Virginia. And, under Scott Pruitt’s view of section 404(c), EPA could not have undertaken its rigorous scientific review of the Pebble Mine project in Alaska, which has the potential to inalterably damage the nation’s most productive salmon habitat.

Again, in your new role as Acting Administrator, we urge you to immediately and publicly revoke the June 2018 memorandum of your predecessor. In addition, and in furtherance of our Congressional oversight of the Clean Water Act programs, we ask that you respond to the following questions and requests for information:

⁵ See *id.* at 612.

⁶ See 40 C.F.R. pt. 231; 44 Fed. Reg. 58,076 (Oct. 9, 1979).

⁷ See “Lott’sa Pork for Mississippi”, Taxpayers for Common Sense, <https://www.taxpayer.net/infrastructure/lotts-a-pork-for-mississippi/>.

- (1) Please describe your view on the proper exercise of EPA's section 404(c) authority, and how this view is consistent with the Congressional history and judicious use of this authority by your agency in the past.
- (2) Please describe whether you believe, as the U.S. Department of Justice argued in Mingo Logan, that EPA's historic use of its section 404(c) authority balances "Congress' principal aim of environmental protection with the goal of regulatory certainty".
- (3) Our understanding is that the Corps is currently undertaking an environmental review for a new mine proposal by the Pebble Limited Partnership. We also understand that the scope of mining activities contained in new proposal far exceeds the limits that EPA has already determined would cause significant and unacceptable adverse effects to Bristol Bay, Alaska, as described in EPA's 2014 Proposed Determination for the Pebble Deposit Area, Southwest Alaska.
 - a. Please describe whether EPA continues to support the science and findings of adverse ecological impacts described in the 2014 Proposed Determination for the Pebble Deposit Area, Southwest Alaska;
 - b. Please describe what specific actions EPA is taking to inform the Corps of the proposed impacts of mining activities by the Pebble Limited Partnership in its most recent permit request under section 404 of the Act; and
 - c. Please describe the specific actions EPA will take to ensure its review of (and any potential action on) the proposed mining activity by the Pebble Limited Partnership will be consistent with the findings of the 2014 Proposed Determination for the Pebble Deposit Area.

We thank you for your prompt attention to this matter, and request a reply to this letter as soon as possible, but no later than August 15, 2018. If you have any questions, please contact us or have your staff contact Ryan Seiger of the House Committee on Transportation and Infrastructure at (202) 225-0060 or Christophe Tulou of the Senate Committee on Environment and Public Works at (202) 224-8832.

With best personal regards, we are

Sincerely yours,



PETER DeFAZIO
Ranking Member
Committee on Transportation
and Infrastructure
U.S. House of Representatives



TOM CARPER
Ranking Member
Committee on Environment and
Public Works
U.S. Senate