Committee of Transportation and Infrastructure

Subcommittee on Water Resources and Environment

Oversight Hearing

"EPA's Expanded Interpretation of Its Permit Authority Veto under the Clean Water Act"

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Chairman Gibbs, Representative Bishop and members of the Subcommittee, my name is Patrick Parenteau and I want to start by thanking you for the opportunity to present these views on one of the important tools provided by the Clean Water Act (CWA) to protect the quality, biological integrity, and economic productivity of our nations' waters.

By way of background I have been involved in various ways with the CWA for over forty years. While working at the National Wildlife Federation from 1976-1984 I participated in many of the legislative debates, judicial actions, rulemakings, and other administrative proceedings during the formative stages of the Act's programs including in particular the section 404 permit program that is the subject of today's hearing. During the Reagan Administration I served as Regional Counsel for EPA's New England office and was directly involved in the Attleboro Mall 404 (c) action. Following that I served as Commissioner of the Vermont Department of Environmental Conservation with responsibility for implementing the CWA at the state level. After that I was with the Perkins Coie law firm in Oregon providing advice and representation to business interests on permitting, compliance, enforcement and other regulatory matters. For the past 21 years I have been on the faculty of the Vermont Law School, the top ranked environmental law program in the nation, where I teach the CWA, conduct training programs for judges and practitioners, research and publish articles, write amicus briefs in cases before the Supreme Court and other courts, and frequently give presentations and media interviews on the latest developments under the Act.

There are four points I'd like to share with the subcommittee.

1. <u>EPA has not expanded its interpretation of its authority under section 404 (c)</u>

With respect, I believe the title of this hearing is based on a misunderstanding of how EPA has interpreted and applied its authority under section 404(c) since the beginning. First, the statute grants EPA very broad authority to "prohibit, deny, restrict or withdraw" any "defined area" as a disposal site for dredged or fill material "whenever" the Administrator determines that the discharge of such materials would have an "unacceptable adverse impact" on specified resources such as municipal water supplies, fisheries and wildlife. EPA's regulations have always provided that this authority can be exercised either before or after a permit is issued by the Corps of Engineers. 40 CFR §231.1 states:

> "Under section 404(c), the Administrator may exercise a veto over the specification by the U.S. Army Corps of Engineers or by a state of a site for the discharge of dredged or fill material. The Administrator may also prohibit the specification of a site under section 404(c) with regard to any existing or potential disposal site before a permit application has been submitted to or approved by the Corps or a state."

The regulations further define the terms withdraw, prohibit, and deny as follows

> "(a) Withdraw specification means to remove from designation any area already specified as a disposal site by the U.S. Army Corps of Engineers or by a state which has assumed the section 404 program, or any portion of such area.
>
> (b) Prohibit specification means to prevent the designation of an area as a present or future disposal site.
>
> (c) Deny or restrict the use of any defined area for specification is to deny or restrict the use of any area for the present or future discharge of any dredged or fill material."
>
> 40 CFR §231.2

In its recent decision upholding EPA's use of section 404 (c) authority to veto the permit for the Spruce Mine in West Virginia the DC Circuit stated:

> "Section 404 imposes no temporal limit on the Administrator's authority to withdraw the Corps' 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. (emphasis original)[1]

[1] Mingo Logan Coal Company v USEPA, 714 F.3d 608, 615 (D.C. Cir. 2013); cert denied, _US_, March 14 2014. The case has been remanded to the District Court for a hearing on the merits of EPA's decision.

In an earlier case involving a challenge to EPA's veto of a permit for a dam in Georgia the court said that EPA may exercise its authority "before a permit is applied for, while the application is pending or after the permit is issued."[2]

With the Supreme Court's denial of certiorari in *Mingo Logan*, it is fair to say that the issue of EPA's authority to exercise the 404 (c) authority whenever the Administrator determines that there will be "unacceptable adverse effects" on the designated resources is settled law. That still leaves important policy questions of whether and how the Administrator should exercise this authority but there can no longer be any doubt that EPA has had this authority since the 1972 CWA amendments and has consistently interpreted the statute as granting that authority since the first regulations were written.

Further, assertions that EPA has "never" used 404 (c) in advance of a permit application are simply wrong. In 1988, during the Reagan administration, EPA used its authority to restrict the designation of three separately owned wetland properties totaling 432 acres in the Everglades as disposal sites in order to protect endangered wildlife including the Florida Panther.[3] Nor is it true that EPA has "never" vetoed a Corps permit after the fact. Also in 1988, in the Russo Development Corporation case, EPA vetoed Corps permits for disposal of fill into the Hackensack Meadowlands of New Jersey. The developer sued and EPA's after the fact veto was upheld by the New Jersey Federal District Court.[4]

What is certainly true is that EPA rarely exercises its 404 (c) authority at all (only thirteen times in over 40 years) and even more rarely does it do so either before permit applications have been filed or after permits have been issued. But to say that it has never done so in the past is factually incorrect and to suggest that it should not have the authority to do so in the future could lead to unnecessary damage to aquatic resources that the CWA is supposed to protect. Forcing EPA to make decisions within artificial time constraints that cannot take account of the unique situations presented by the wide variety of projects that must be evaluated will inevitably lead to less informed decisions that will not serve the purposes of the law or the public good.

2. <u>The 404(c) process is apolitical, science based, and transparent</u>.

Eleven of the thirteen 404 (c) vetoes to date were issued by Republican administrations. President Ronald Reagan holds the record for the largest number of vetoes at seven, more than all of the other administrations combined. Point being this is not a liberal or conservative issue.

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[2] <u>City of Alma v United States</u>, 744 F.Supp.1546, 1588 (S.D. Ga. 1990)

[3] In Re Henry Rem Estate, 53 Federal Register 30093, August 10, 1988. In this case EPA vetoed two permits that had been issued and also acted proactively to restrict any further disposal on the properties.

[4] <u>Russo Development Corp. v. EPA</u>, 20 ELR 20938, 39 (D. N.J. 1990)

This is a tool designed to protect water quality and special places for everybody. Pollution does not respect political affiliation. When drinking water supplies are contaminated, when breeding and spawning habitat is destroyed, when wetlands that nurture wildlife and protect communities from storms and floods are filled, when rivers and lakes used by millions are polluted by poorly designed developments, everyone suffers. The reason that 404 (c) exists is that the prescient framers of the landmark 1972 legislation thought it was important to provide a backstop, a safety net, to ensure that permits to dispose of dredged and fill material, which can encompass everything from plain dirt to toxic mine tailings, did not result in unacceptable impacts on a select list of critical resources. Edmund Muskie, considered by many to be the father of the Clean Water Act and who saw firsthand the environmental degradation that results from poorly regulated industrial discharges to his beloved Androscoggin River, explained why Congress decided to vest EPA rather than the Corps with final authority on 404 permits affecting these special resources:

> "[T]he[Conference] Committee did not believe there could be any justification for permitting the Secretary of the Army to make determination as to the environmental implications of either the site to be selected or the specific soil to be disposed of in a site. Thus the conferees agreed that the Administrator of the Environmental Protection Agency should have the veto power over the selection of the site for dredge spoil disposal and over any specific spoil to be disposed of at any specific site."[5]

With no disrespect to the dedicated professionals in the Corps that administer the 404 permit program, Congress chose EPA to be the final arbiter in those few cases where important resources were at stake and special expertise was required to judge whether the impacts to water quality were "unacceptable." This is inherently a value judgment that must be informed by the best available science through a fair and open process. As the principal agency of the federal government whose mission is to protect the environment Congress wisely chose to vest this important function in EPA. The safety net concept that underlies 404 (c) remains critical in today's world where water resources are under even greater stress from polluted runoff, atmospheric deposition, nutrient enrichment, dead zones, and looming threats of climate change and ocean acidification. Maintaining the resilience of natural systems in the face of these daunting challenges should be of paramount concern to members of Congress.

3. <u>The 404(c) authority has been used judiciously, with extensive public involvement, development of strong science-based administrative records that have withstood every legal challenge, and with positive results for water quality and society as a whole—exactly as Congress intended.</u>

[5] Congressional Research Service, 93d Cong., "A legislative History of the Water Pollution Control Act Amendments of 1972" (Comm. Print 1973) at 177

There have been 13 actions under 404(c). No two are exactly alike. The cases run the gamut from small commercial developments to major dams and mining operations. I will discuss three that I am most familiar with to illustrate how the process has worked to successfully accomplish the goals of the law.

Attleboro Mall/Sweedens Swamp (1986)

As mentioned I was Regional Counsel for Region One with responsibility for overseeing the legal work on this case. It involved a proposed shopping mall in in Attleboro Massachusetts. The Pyramid Corporation proposed to build the mall in a 50 acre wetland known as Sweedens Swamp. After a long permit process that took over two years the New England District of the Corps proposed to deny the permit but was overruled by HQ and the permit was issued. Region One initiated the veto process which took another year and featured several public hearings, two rounds of public comments, development of an extensive administrative record, meetings with the applicant, consultations with EPA headquarters and many site visits to gather data on the functions and values of the wetland. In the end the decision to veto the permit was based on a combination of the value of the wetland in a watershed that had seen a huge loss of wetland functions and the fact that there were other upland sites available to Pyramid when it first began looking for a place to build the mall. One of the key policy issues raised by the case was whether an applicant for a 404 permit had duty to avoid filling a wetland where there were practicable alternatives available. EPA and the Corps disagreed on the role of avoidance in the permit process. The Corps took the position that applicants could mitigate impacts without going through a practicable alternatives analysis. EPA took the position that avoidance should be the first priority. After three years of litigation the Second Circuit upheld the veto and endorsed EPA's avoidance first rationale.[6] Having lost in court Pyramid did what EPA had recommended all along which was to negotiate a deal with another mall developer who had acquired an alternative upland site that would serve the same market. The upshot is that the mall was built and Sweedens Swamp was saved.

Perhaps the most important outcome of this veto action was what happened afterwards. EPA and the Corps finally resolved their differences through a Memorandum of Understanding setting forth a new "sequencing" approach to mitigation that incorporated the avoidance first principle. In due course this MOU became the full blown Compensatory Wetland Mitigation Rule that we have today.[7]

Two Forks Dam (1989)

[6] Bersani v Deland, 850 F.2d 36 (2d Cir. 1988)
[7] 40 CFR Part 230

This is one of the more well-known 404 (c) vetoes. It was initiated during the administration of George HW Bush and was personally overseen by Administrator Bill Reilly. Briefly, it involved the proposed construction of a water supply dam in Cheesman Canyon in the headwaters of the South Plate River high in the Rocky Mountains of Colorado. Cheesman was a wilderness canyon with a "gold medal" trout fishery. The dam, as big as Hoover Dam, would flood six towns as well as much of Cheesman Canyon, and would have turned the canyon into a 7,300-acre reservoir, creating the largest lake in Colorado. Reilly cited the fact that the stretch of the South Platte flowing through the canyon was unsurpassed in the West as a natural habitat and recreation area, and that far less expensive and destructive alternatives were available. His prediction ultimately came true as the Denver Water Board (DWB) the primary sponsor of the project, turned to more aggressive water conservation and groundwater management alternatives that addressed the water supply needs of the Denver metropolitan area in a more cost effective and environmentally sound way. In 1990, the DWB served 890,000 people within Denver and its surrounding suburbs. In 1999, it served an additional 95,000 people with the same amount of water. Monte Pascoe, head of the DWB at that time, recalls: "One of the good things about the Two Forks discussions was that it created cooperation. That was when we got the cultural facilities tax passed, and a large number of other cooperative arrangements."[8]

Once again the 404 (c) process led to a change in policy that resulted in more environmentally and economically sound use of water resources.

Yazoo Pumps (2008)

This veto occurred during the George W Bush administration. It involves a flood control project that would have destroyed between 67,000 and 200,000 acres of bottomland hardwood wetlands in the Lower Mississippi River Watershed. Located near the confluence of the Yazoo and Big Sunflower Rivers north of Jackson, Mississippi, the Yazoo Backwater Area contains some of the richest wetland and aquatic resources in the nation, and serves as critical fish and wildlife habitat. After an extensive evaluation, EPA concluded that the project would result in "unacceptable damage to these valuable resources that are used for wildlife, economic, and recreational purposes." The Project would have cost more than $220 million for construction, with an annual operational cost of more than $2 million. The Mississippi Levee Board sued arguing the project was exempt under 404 (r) but the Fifth Circuit disagreed and upheld EPA's veto ruling that the exemption did not apply.[9]

[8] High Country News, "Water Pressure "Nov. 20, 2000, uploaded 7/12/14 from http://www.hcn.org/issues/191/10100

[9] Board of Mississippi Levee Commissioners v EPA _F3d _ No. 11-60302 (March 6, 2012); http://www.ca5.uscourts.gov/opinions%5Cpub%5C11/11-60302-CV0.wpd.pdf

EPA's veto wasn't heavy-handed, nor did it come out of the blue. EPA engaged in protracted negotiations with the Corps of Engineers over ten years, trying to reach agreement on a less environmentally damaging alternative. Finally in 2008, after inviting comment, holding a local public hearing, informing members of the state's congressional delegation, and consulting one last time with the Corps and local officials, EPA vetoed the Corps' approval of the project. The veto not only saved a priceless complex of unique wetlands generating millions of dollars' worth of ecosystem services each and every year, it also saved the American taxpayer well over $200 million.

EPA has been sued multiple times over the use of its 404(c) veto and it has won every case. This is a remarkable record, almost unheard of in the annals of environmental law, and it speaks to the care with which the agency chooses to exercise this last resort measure and builds administrative records that have been vindicated by the judiciary all the way to the Supreme Court.

4. <u>The controversy over the Pebble Mine 404 (c) action is misdirected at EPA which is proceeding exactly as the law envisions instead of at the project proponents who for whatever reason have failed to follow through on their promises to file a permit application.</u>

In the current controversy over the Pebble Mine in Alaska the charge has been leveled that EPA has launched a "preemptive veto" before an application for a 404 permit has been submitted. Pebble Limited Partnership (PLP) the project proponent has even filed a lawsuit seeking to block EPA from proceeding with its detailed review of the impacts of potential mining scenarios in the Bristol Bay Watershed, one of the most biologically rich fisheries on earth, the source of over half of the world's supply of sockeye salmon, and a vital subsistence, cultural and economic asset for Native Alaskan communities and many others. The suit is groundless and should be dismissed as premature.[10]

First, PLP can file an application for a permit anytime it wants. Instead as pointed out by Senator Murkowski in a letter dated July 1, 2013 PLP has been promising to file an application and mining plan for over eight years.[11] Senator Murkowski notes that "For nearly a decade Alaskans have been told that these actions are imminent. Yet today after years of waiting it is anxiety frustration and confusion that have become the norm in many communities…" There is nothing preventing PLP from filing its application and having the Corps process it at the same time EPA is conducting its 404 (c) review. As mentioned the statute and regulations give EPA

[10] <u>Newport Galleria v Deland</u>, 618 F. Supp. 1179 (D.D.C., 09/25/1985) (The court dismissed Pyramid's attempt to enjoin the 404 (c) veto process on the ground that there was no final agency action.)

[11] http://www.energy.senate.gov/public/index.cfm/2013/7/sen-murkowski-calls-on-pebble-partnership-to-release-mining-plan

the authority to initiate 404 (c) before, during or after the permit process. Indeed the work that EPA is doing will facilitate the ultimate resolution of this matter. Rather than creating uncertainty as PLP is doing through its foot-dragging, EPA is actually working to provide greater certainty about what is and is not acceptable mining in this pristine watershed.

Second, EPA did not act unilaterally here. Alaska Native tribes, Native Corporations, commercial and recreational fisher organizations, and local officials formally petitioned EPA to initiate the 404 (c) process as a way of removing the uncertainty created by PLP's failure to move forward with its proposal. According to Bob Waldrop, executive director of the Bristol Bay Regional Seafood Development Association, "The Bristol Bay fishermen are weary and exasperated by the economic cloud of uncertainty that Pebble brings to our world-class fishery."[12]

Third, EPA has not vetoed anything at this point. In fact EPA is at step one of a four step process that will take many months to complete. EPA has a broad array of options, including "restricting" mining through detailed performance standards governing what kind of mining could take place without doing unacceptable harm to a resource that supports the subsistence and cultural practices of indigenous peoples, a $1 +billion fishery and its 14,000 jobs, and a world class sport fishery. In this process EPA must consider such things as what is the toxicity of the mining wastes from various kinds of ore deposits, where will this material be dumped in relation to where the salmon runs go and what kind of long term monitoring, management and seepage controls will be needed to ensure not future harm once the mining is over. This should be viewed as a positive step to ensure that whatever mining takes place does not jeopardize an irreplaceable natural resource of immense value to Alaskans and the nation as whole.

I also would like to say that it is unfortunate that the committee does not have a witness from the Bristol Bay region, as they are the ones that asked EPA to help protect the waters in their region and they know the most about what is stake there.

Conclusion

Vermonters have a saying: "If it ain't broke don't fix it." Section 404(c) is not broken. It is doing what Congress intended. And so is EPA. Rather than shooting the messenger I would submit that a more productive approach would be to address the merits of each project that falls under the aegis of the 404 permit program and find ways to "maintain and restore the chemical, physical and biological integrity of the nation's waters" in keeping with the common sense objectives of the Clean Water Act.

Thank you.

[12] Commercial Fishermen for Bristol Bay http://fishermenforbristolbay.org/2014/01/final-epa-bristol-bay-assessment-concludes-pebble-wrong-mine-wrong-place/