EPA TO "VETO" ITS OWN VETO AUTHORITY UNDER THE CLEAN WATER ACT?

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On June 26, 2018, in one of his final acts as Administrator of the U. S. Environmental Protection Agency ("EPA"), Scott Pruitt issued a memorandum [1] that has set in motion a process to amend the regulations that govern the agency's exercise of its "veto" authority under Section 404(c) of the Clean Water Act. [2] The memo directs EPA staff to prepare a proposal, within six months, that would potentially curtail EPA's authority to effectively bar development projects that require a Section 404 dredge-and-fill permit from the U.S. Army Corps of Engineers.

As background, Section 404 of the Clean Water Act authorizes the Corps (and state agencies with delegated permitting authority) to issue permits authorizing the discharge of dredged or fill material into regulated waters at "specified disposal sites." [3] However, the statute provides EPA the authority to "prohibit" or "withdrawal" the specification of any area as a disposal site when it determines that a proposed discharge will have an unacceptable adverse effect on water supplies, fisheries, wildlife, or recreational areas. [4] This is commonly known as EPA's "veto" authority because the EPA can effectively veto a project that would otherwise be authorized under Clean Water Act permits issued by the Corps by prohibiting construction in areas for which there is no reasonably available alternative disposal site. EPA currently administers its veto authority through regulations that were last amended nearly four decades ago, in 1979. [5] To date, EPA has used its final veto authority only 13 times. [6]

The new memo grows out of concerns surrounding EPA's prior use of its veto authority *before* a Section 404 permit application had been filed—i.e., a "preemptive" veto—or *after* a permit had already been issued—i.e., a "retroactive" veto—rather than in the midst of the permitting process. [7] Recent examples include EPA's proposed preemptive veto of a high-profile copper and gold mining project near Bristol Bay, Alaska in 2014 (which remains pending), [8] and its 2011 retroactive veto of a coal mining project in Logan County, West Virginia. [9] Both of these cases spawned substantial litigation [10] and caused many observers (including former Administrator Pruitt) to question whether in the future "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." [11]

In response to these concerns, former Administrator Pruitt's Memo directs EPA staff to prepare and provide to the White House Office of Management and Budget a proposal within six months (before the end of 2018) that would consider and seek public comment on the following changes:

- Eliminating EPA's authority to veto a project before a permit application has been filed.
- Eliminating EPA's authority to veto a project after a Section 404 permit has been issued.

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- Requiring EPA regional administrators to obtain approval from EPA headquarters before initiating the Section 404(c) veto process.
- Requiring the completion of environmental review under the National Environmental Policy Act before preparing and publishing a proposed veto determination.
- Requiring EPA to publish and seek public comment on final veto determinations before those determinations take effect.

While former Administrator Pruitt is no longer in office following his July 5 resignation, all indications are that the new Acting Administrator, Andrew Wheeler, will forge ahead with the rulemaking process initiated by his predecessor. Administrator Wheeler has publicly expressed his commitment to the regulatory agenda pursued by Pruitt prior to his departure and he has strong ties to the mining industries which, of all industries, were most negatively impacted by EPA's application of the agency's veto power under the Obama administration.

The coming weeks should serve as a valuable window into whether Administrator Wheeler will indeed move forward with a new 404(c) rulemaking. In a letter dated July 19, Senator Tom Carper (D-Del.) and Representative Peter DeFazio (D-Ore.) urged Wheeler to "immediately and publicly revoke" Pruitt's memorandum. [12] The letter requests that by August 15, 2018, Administrator Wheeler respond to several 404(c)-related questions, including his "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." [13]

Assuming Administrator Wheeler stays the course set by his predecessor, the upcoming rulemaking process will provide a critical opportunity for EPA leadership and the regulated community to shape the Clean Water Act regulatory landscape for years to come. Persons and industries with interests tied to high-profile, capital intensive development projects—such as oil and gas, mining, and large scale water supply/impoundment projects—should give particular consideration to participation in the rulemaking process, as it is these types of ventures that are most likely to be negatively impacted by a surprise veto under EPA's current regulatory regime.

The anticipated rulemaking limiting EPA's Clean Water Act veto authority is already generating considerable controversy, so interested stakeholders should consider weighing in with EPA even before any proposed rule is released. K&L Gates has a team of lawyers and policy professionals in Washington, D.C. and beyond that is positioned to assist with such efforts.

Notes:

[1] Memorandum from E. Scott Pruitt, EPA Administrator, to General Counsel, Assistant Administrator, Office of Water, and Regional Administrators, *RE: Updating the EPA's Regulations Implementing Clean Water Act Section 404(c)* (June 26, 2018) ("Memo"), https://www.epa.gov/sites/production/files/2018-06/documents/memo_cwa_section_404c_regs_06-26-2018_0.pdf.

[2] 33 U.S.C. § 1344(c).

[3] *Id*. § 1344(a).

[4] *Id*. § 1344(c).

[5] 40 C.F.R. Part 231.

[6] *Chronology of 404(c) Actions*, EPA, https://www.epa.gov/cwa-404/chronology-404c-actions.

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[7] Memo at 1.
[8] *Proposed Determination of the U.S. Environmental Protection Agency Region 10 Pursuant to Section 404(c) of the Clean Water Act, Pebble Deposit Area, Southwester Alaska, EPA* (July 2014), https://www.epa.gov/sites/production/files/2014-07/documents/pebble_pd_071714_final.pdf.
[9] *Final Determination of the U.S. Environmental Protection Agency Pursuant to § 404(c) of the Clean Water Act Concerning the Spruce No. 1 Mine, Logan County, West Virginia*, EPA (January 13, 2011), https://www.epa.gov/sites/production/files/2015-12/documents/1_spruce_no_1_mine_final_determination_011311.pdf.
[10] *See e.g. Mingo Logan Coal Co. v. EPA*, 829 F.3d 710, 713 (D.C. Cir. 2016) (finding that EPA's "ex post withdrawal is a product of its broad veto authority under the CWA, not a procedural defect"). Interestingly, current Supreme Court candidate, Judge Brett Kavanaugh, wrote a dissenting opinion in Mingo Logan, reasoning that, among other things, EPA failed to consider the costs (e.g., economic impact to mine owners and shareholders, coal miners' job loss, collateral business loss) of revoking the permit. *Id*. at 730–31.
[11] Memo at 3.
[12] Letter from Sen. Carper & Rep. DeFazio to Andrew Wheeler, *Carper, DeFazio Press Acting EPA Administrator on Enforcement of the Clean Water Act*, U.S. SENATE COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS (July 19, 2018), https://www.epw.senate.gov/public/index.cfm/2018/7/carper-defazio-press-acting-epa-administrator-on-enforcement-of-the-clean-water-act.
[13] *Id*.

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