EPA Meeting 08/02/2018

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Outline: Meeting with EPA Acting Deputy Administrator
August 2, 2018

- Personal Introductions
  - Tom: Experience at DOI and AR
  - Peter: Experience at EPA
- Short background of preemptive veto
- January 2018 Administrator Pruitt decision
- Why veto should be withdrawn
  - Overhang, cannot get a permit
  - No statutory authority
  - Good policy demands a full record, including an environmental impact statement
  - EPA can always initiate a veto later
- Veto based on BBWA's bad science
  - The Chair of the U.S. House Committee on Science, Space, and Technology stated that EPA officials "acted with bias and predetermined conclusions aimed to prevent this project and improperly expand EPA's authority under the Clean Water Act."
  - Former U.S. Secretary of Defense William Cohen said that his independent review "raise(d) serious concerns" on a number of issues, including "whether EPA orchestrated the process to reach a pre-determined outcome," whether it "had inappropriately close relationships with anti-mine advocates," and "whether EPA was not candid about its decision-making process."
  - EPA had to remove references to two of these reports when their author Ann Maest admitted to falsifying scientific information in environmental litigation in Ecuador.
  - EPA stated 67 times in response to peer reviewer concerns that the BBWA was not a decision document.
  - The BBWA was based on hypothetical mine plans that were designed to fail and not designed to best practices.
  - EPA had excessive contacts with mining opponents throughout the Pebble decisionmaking process.
  - The BBWA's authors and contributors were heavily biased against Pebble.
  - PLP secured a preliminary injunction in federal court halting EPA's 404(c) efforts due to EPA's inappropriate contacts with mining opponents.
- The veto sets dangerous precedent.
  - Using the Clean Water Act in this way is the Antiquities Act on steroids.

    - The next administration could abuse Pruitt's precedent.
    - ANWR, pipelines, and coal opponents could point to this decision.
- The veto is inconsistent with several key policies of this administration.
    - President's Infrastructure Plan
    - EPA's recent directive on preemptive vetoes
    - Proposed rule on strengthening EPA science
- How to withdraw the veto
    - Announce no vetoes during this administration
    - Withdraw all pending vetoes
    - Scoping report as justification
- No legal risk to withdrawal
    - No statutory authority for veto
    - Withdrawal is not final agency action
    - Vetoes are entirely discretionary
- Political implications
    - Conservative group letters
    - Letters from Congress
    - Support from API and NMA

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OUTLINE: MEETING WITH EPA GENERAL COUNSEL
July 11, 2018

Preemptive vetoes violate the Clean Water Act.

- The language of the statute itself contemplates a permit application before EPA can exercise its narrow veto authority.
    - The U.S. Army Corps of Engineers is authorized to issue permits "for the discharge of dredged or fill material into the navigable waters at *specified* disposal sites." 33 U.S.C. § 1344.
    - EPA's authority is narrow and must be based on a permit application, as the statute only allows the Agency to "prohibit the *specification*" or "deny or restrict the use of any *defined area* for *specification*." *Id.*
    - EPA can only take this action after determining that the discharge "into *such area*" will have an unacceptable adverse effect on the environment. *Id.*
- The legislative history of the Clean Water Act and major cases interpreting it confirm that it was not intended to allow for preemptive vetoes.
    - When Congress enacted the Clean Water Act, it expressly declined to give EPA complete authority over the issuance of permits, dividing up responsibilities between EPA and the Corps.
    - The Senate Debate on the Conference Report contemplated that there would be a permit application before any 404(c) action "because *the permit application* transmitted to [EPA] for review will set forth *both the site to be used and the content of the matter of the soil to be disposed*."[1]
    - The United States Supreme Court held that the Clean Water Act "gives EPA authority to 'prohibit' *any decision by the Corps* to issue a permit for *a particular disposal site*." *Coeur Alaska Inc. v. Southeast Alaska Conservation Council*, 557 U.S. 261, 274 (2009).
    - The D.C. Circuit, in its ruling upholding that EPA could issue a veto even after the Corps has issued a permit, still ruled that the Clean Water Act veto authority could not be applied preemptively because EPA could only veto a "specification"

[1] *Senate Consideration of the Report of the Conference Committee* (Oct. 4, 1972), *reprinted in* 1 A Legislative History of the Water Pollution Control Act Amendments of 1972, at 161, 177, Cong. Research Serv. (Jan. 1973) (emphasis added).

that is described in a permit application. *See Mingo Logan Coal Co. v. EPA*, 714 F.3d 608, 614 (D.C. Cir. 2013).

- EPA's actions throughout the history of the Clean Water Act confirm that the Agency does not have preemptive veto power.
    - EPA has only exercised its authority under Section 404(c) thirteen times. *See* Chronology of 404(c) Actions, EPA, https://archive.epa.gov/water/archive/web/html/404c.html.
    - In each instance, EPA invoked Section 404(c) only after receipt of a permit application that described the scope and details of the project being proposed, the anticipated environmental impact, and techniques to be employed to mitigate or control that impact.
    - The sole instance in which EPA vetoed a project that had not yet filed a permit application occurred in Florida in 1988, when an agricultural developer had proposed substantially similar development proposals on three adjacent plots of land. When EPA moved to veto the Corps' pending 404 permit for the first two projects, it vetoed the third at the same time because it deemed them to have the same characteristics as the other two properties.[2]
- Pebble has made a strong legal case that the 2014 Proposed Determination was illegal.
    - Prior to settling litigation, Pebble obtained a preliminary injunction halting the Proposed Determination on the grounds that EPA's decision-making process violated the Federal Advisory Committee Act. *See Pebble Ltd. P'ship v. EPA*, No 3:14-cv-00171 (D. Alaska 2014).
    - Pebble also made a convincing case that the Proposed Determination violated the Clean Water Act and Administrative Procedure Act. *See Pebble Ltd. P'ship v. EPA*, No. 3:14-cv-0099 (D. Alaska 2014). Neither the U.S. District Court for the District of Alaska nor the Ninth Circuit ruled that Pebble's claims on the merits were lacking; rather they simply held that the Proposed Determination was not yet ripe for judicial review.

EPA should withdraw the Pebble Proposed Determination immediately.

- The Proposed Determination is based entirely on the Bristol Bay Watershed Assessment ("BBWA"), which EPA admitted no fewer than *67 times* in response to peer review criticism is insufficient as a "decision document."

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[2] *See* The Cohen Group, *Report of An Independent Review Of The United States Environmental Protection Agency's Actions In Connection With Its Evaluation Of Potential Mining In Alaska's Bristol Bay Watershed* (Oct. 6, 2015) ("Cohen Report") at n.42, http://files.cohengroup.net/Final-Report-with-Appendices-compressed.pdf.

- The pending veto creates a cloud of uncertainty over all major economic development projects.
    - Companies will not spend the hundreds of millions of dollars on exploration that the Pebble Partnership did if they know EPA can step in and prevent submission of a permit application.
    - The Trump Administration clearly recognizes that delays and uncertainties like those created by the Proposed Determination chill investment overall and has even proposed eliminating EPA's Clean Water Act veto altogether.
- The Pebble project will create thousands of jobs in Alaska and in the lower 48 states.
    - Pebble has begun efforts to try to estimate the number of jobs that would be associated with the smaller mine proposed in its 404 permit application in December, as modified. Based on those efforts, including economic analysis work in connection with previous concepts for the mine done before the permit application was submitted, we believe that the mine will likely create on the order of **2000 jobs**, typically paying in the range of $100,000 per year, in Alaska during the construction of the mine.
    - Alaska development projects leave a large wake of job development across the rest of the country because of the need to procure goods and services not available in Alaska. Recognizing this reality, we also believe that the mine will create thousands of indirect and induced jobs throughout the lower 48 states.

The Proposed Determination is inconsistent with Administrator Pruitt's proposed Clean Water Act rulemaking.

- Before leaving office, Administrator Pruitt directed EPA to undertake rulemaking to update EPA's Clean Water Act Section 404(c) regulations.
    - The rulemaking will eliminate preemptive Clean Water Act vetoes (those initiated before a permit application has been filed and before an environmental impact statement has been completed) entirely.
    - The rulemaking will also eliminate retroactive Clean Water Act vetoes (those initiated after the U.S. Army Corps of Engineers or a state permitting agency has already issued a permit) entirely.
- Leaving the Proposed Determination in place is thus inconsistent with this rulemaking and sends the message that EPA can still selectively choose which development projects are worthy of due process.
- As members of the Trump Administration have stated numerous times, making such a significant regulatory decision (such as the Proposed Determination) in the absence of a complete administrative record is bad policy.

The BBWA is a dangerously flawed document on which to base such an important regulatory decision.

- The BBWA emerged from early efforts within EPA to veto Pebble before the Agency conducted any scientific analysis of the Bristol Bay watershed.
    - One vocal Pebble opponent in EPA's Region 10, Phil North, not only successfully lobbied for a Pebble veto within the Agency, he also helped draft the petition purportedly submitted by six Alaska Native Tribes that EPA claimed was the impetus for the BBWA.
    - Before announcing its intention to draft the BBWA, EPA drafted internal memoranda stating that the Agency believed it had sufficient data to veto Pebble but needed a process to reduce "litigation risk."
- The BBWA's authors and contributors were heavily biased against Pebble.
    - EPA conducted a secret peer review of several anti-Pebble reports so that they could be included in the final BBWA. EPA ignored the peer reviewers' scathing criticism of these reports.
    - EPA had to remove references to two of these reports when their author Ann Maest admitted to falsifying scientific information in environmental litigation in Ecuador.
    - Alan Boraas, author of the BBWA appendix on Traditional Ecological Knowledge, had written several anti-Pebble op-ed pieces in Alaska newspapers.
    - North, the leader of the anti-Pebble faction within EPA, was installed as the BBWA "technical lead."
    - Richard Parkin, who testified to being opposed to Pebble and who even stated in a public meeting that the BBWA process was as much about politics as science, was the BBWA overall team leader.
- These actions and selections alarmed multiple independent investigations.
    - The Chair of the U.S. House Committee on Science, Space, and Technology stated that EPA officials "acted with bias and predetermined conclusions aimed to prevent this project and improperly expand EPA's authority under the Clean Water Act."
    - The U.S. House Committee on Oversight and Government Reform concluded "that EPA employees had inappropriate contact with outside groups and failed to conduct an impartial review of the proposed Pebble mine."
    - Former U.S. Secretary of Defense William Cohen said that his independent review "raise(d) serious concerns" on a number of issues, including "whether

EPA orchestrated the process to reach a pre-determined outcome," whether it "had inappropriately close relationships with anti-mine advocates," and "whether EPA was not candid about its decision-making process."

- The scientific content of the BBWA was distorted against Pebble.
  - Because EPA had no permit application with mine specifications and compensatory mitigation to evaluate, the BBWA studies hypothetical mines that fail to adhere to international best mining practices.
  - One example of the flawed assumptions created by the hypothetical nature of the BBWA is surplus water release scenarios.
    - The BBWA assumes that a mine would release surplus water into only two of three streams. This is a wholly arbitrary assumption and one that would not be allowed by state or federal regulatory agencies.
    - If, instead, EPA had chosen to assume that surplus water would have been released into all three steams in equal amounts, it would have concluded, for each hypothetical mine scenario, that the change in streamflow would involve a relatively *high* level of ecosystem protection, rather than finding a potentially adverse impact on the surrounding ecosystem.
  - EPA also refused to incorporate into the BBWA Pebble's environmental baseline documents, the most comprehensive studies of the Bristol Bay watershed, comprising 27,000+ pages of studies and completed by several independent consultants and contractors. All of the material provided for the BBWA thus came exclusively from mining opponents.
- The BBWA's peer review processes were heavily flawed.
  - EPA officials had excessive contact with peer reviewers during the review period and limited oral and written submissions during public peer review meetings.
  - Several peer reviewers complained that the time given to review the Assessment was far too short to enable them to reach sound conclusions.
  - Despite the second draft of the BBWA essentially being an entirely new study, EPA limited the peer review to asking only if the second draft addressed concerns from the first draft of the BBWA, even as the peer reviewers and members of the public requested a full peer review of the document.

A decision to withdraw a Proposed Determination is judicially non-reviewable.

- A decision to withdraw the Proposed Determination is not "final agency action," subject to any administrative records requirements or judicial review.

- Withdrawing the veto would not be considered challengeable "final agency action" because it is "not finally determinative of the issues or rights to which it is addressed, and does not establish any norms binding on [EPA]." *Secs. Indus. & Finan. Markets Assoc. v. U.S. Commodity Futures Trading Comm'n*, 67 F. Supp. 3d 373, 425 (D.D.C. 2014).

- There are no record requirements for an intermediate step such as withdrawing the Proposed Determination because "[i]n the absence of any decision from either agency to ultimately deny or grant the permit, however, we have nothing to review." *Marquette Cnty. Road Comm'n v. EPA*, 2018 WL 1388541, *4 (6th Cir. March 20, 2018).

- Under both the Administrative Procedure Act and the Clean Water Act, a plaintiff may only challenge a *nondiscretionary* duty to obtain judicial review of an agency decision.

  - Administrative Procedure Act: allows judicial review "except to the extent that . . . agency action is committed to agency discretion by law." 5 U.S.C. § 701(a).

  - Clean Water Act: Citizen suits may be brought where there is an alleged "failure ... to perform any act or duty under this Act which is not discretionary with the Administrator." 33 U.S.C. § 1365.

- The Clean Water Act makes decisions whether to exercise the veto authority discretionary.

  - According to the language of the statute, the Administrator is "*authorized* to deny or restrict the use of any defined area for specification." 33 U.S.C. § 1344(c).

  - The Clean Water Act's implementing regulations state that "the Administrator *may* exercise a veto over the specification by the U.S. Army Corps of Engineers." 40 C.F.R. § 231.1(a).

  - Federal courts have agreed with this interpretation and ruled that declining to exercise Clean Water Act veto authority is discretionary.

    - *Preserve Endangered Areas of Cobb's History, Inc. v. United States Army Corps of Engineers*, 87 F.3d 1242 (11th Cir. 1996): "In regulations adopted pursuant to the statute, the Regional Administrator 'may' initiate certain actions if he believes that an 'unacceptable adverse effect' could result. . . . We agree with the EPA that this power is discretionary. By statute, the Administrator is authorized rather than mandated to overrule the Corps. . . . Because this power is discretionary, the citizen suit provision of the Clean Water Act does not apply." *See also Hill v. Boy*, 144 F.3d 1446 (11th Cir. 1998) (upholding dismissal of citizen suit against EPA and USACE for failing to use their authority to veto the Corps' issuance of a section 404 permit because authority to veto a section 404 permit is discretionary).

- *City of Olmstead Falls v. EPA*, 266 F. Supp. 2d 718 (N.D. Ohio 2003): EPA's "veto power as set forth in Section 404(c) is discretionary."
- *Mingo Logan Coal Co. v. EPA*, 70 F. Supp. 3d 151 (D.D.C. 2014): "[S]ection 404(c) contains permissive, discretionary language."
- *Ctr. for Biological Diversity v. United States Army Corps of Engineers*, No. CV 14-1667, 2015 U.S. Dist. LEXIS 76653 (C.D. Cal. Feb. 4, 2015): EPA "has the *discretionary* authority to veto that decision if it makes certain findings regarding the adverse effects of the permitted action."

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REVIEW & OUTLOOK

A Veto for Scott Pruitt

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REVIEW & OUTLOOK

Pruitt's Bad Pebble Precedent

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The Greens' Back Door at the EPA

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REVIEW & OUTLOOK

The Pebble Mine Victory

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The Washington Post

Energy and Environment

EPA rushed to judgment in blocking Alaskan gold mine, report suggests

By Joby Warrick October 6, 2015

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Joby Warrick
Joby Warrick joined The Washington Post's National staff in 1996. He has covered national security, the environment and the Middle East and writes about terrorism. He is the author of two books, including 2015's "Black Flags: The Rise of ISIS," which was awarded a 2016 Pulitzer Prize for nonfiction. Follow

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The Washington Post

Politics

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by Juliet Eilperin and Michael Laris January 26

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John Wagner contributed to this report.

Juliet Eilperin

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Lamar Smith, Chairman

For Immediate Release
November 5, 2015

Media Contact: Laura Crist
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Statement of Chairman Lamar Smith (R-Texas)
Examining EPA's Predetermined Efforts to Block the Pebble Mine

Chairman Smith: This morning's hearing will examine a report written by former Secretary of Defense (and former Senator and Congressman) William S. Cohen about the Environmental Protection Agency's efforts to block the Pebble Mine Project from development.

The report, released last month, summarizes the findings of Secretary Cohen's independent review of EPA's decision-making process to mine in southwest Alaska's Bristol Bay watershed.

The Committee has examined the EPA's numerous expensive and expansive regulations. These regulations include the Clean Power Plan, The Waters of the United States rule, and the Ozone National Ambient Air Quality Standard.

EPA's regulations will stifle economic growth, destroy American jobs, and increase energy prices. That means everything will cost more – from electricity to gasoline to food, which disproportionately hurts low income Americans.

Not only are these regulations unnecessary and costly, we also have learned from previous hearings how EPA has used secret science, questionable legal interpretations, and flawed analysis to promulgate these rules. This is not sound science – it is science fiction.

But it doesn't stop there. Today's hearing on the EPA's attempted expansion of the Clean Water Act to prevent the development of the Pebble Mine Project demonstrates how the EPA is truly out of control.

In this case, the EPA attempted to stop the Pebble Mine from moving forward before it even submitted a permit application or finalized a mine plan. Allowing EPA to proceed in this pre-emptive fashion raises many concerns about the due process that should be afforded to those who apply for permits under the Clean Water Act.

Moreover, it appears that the EPA will use this case as precedent to block additional projects throughout the United States. The negative impact this would have on the growth of the American economy is profound.

If we allow the EPA to pursue this path of action the Agency will have the power to tell states, local governments, and even private citizens how they can develop their land before a permit application has ever been filed. This is unprecedented and dangerous.

Given that we have already seen the EPA expand the definition of the Waters of the United States to accomplish its extreme agenda, we should not allow the agency to stop projects before they even apply for a permit. This would be an injustice to the rule of law.

Secretary Cohen's report lays out evidence that shows collusion and a cozy relationship between the EPA and groups actively opposed to the Pebble Mine. Recently, the Committee has uncovered other instances of EPA's inappropriate relationship with outside environmental groups.

In a July hearing with EPA Administrator Gina McCarthy the Committee learned that top EPA officials attended private parties with environmental activists.

During the course of its investigation, the Committee uncovered an event called "Goo-fest" where Michael Goo, a then-policy administrator at the EPA, invited his environmental activist friends to an extravagant party at his lake house where attendees were encouraged to consume shots of alcohol from an ice luge.

These relationships could inappropriately influence EPA's ability to conduct policy based on sound science. The EPA has a responsibility to be open and transparent with the people it serves and whose money its uses.

Unfortunately, it appears that the Pebble Mine Project is another victim of this EPA's extreme agenda. In fact, one of the former EPA employees who this Committee found to have colluded with environmental groups to stop the Pebble Mine project fled the country when Congress attempted to interview him.

Secretary Cohen's independent review of EPA's decision-making process concluded that EPA's actions were not fair to all stakeholders.

This review focused on the process EPA used to assess the environmental risks and to propose restrictions to reduce risks associated with potential mining in the Bristol Bay watershed.

Secretary Cohen and his colleagues carefully reviewed thousands of documents from various and disparate stakeholders, which include the EPA, the State of Alaska, the Pebble Partnership, and other sources.

To maintain his impartiality, Secretary Cohen interviewed individuals with different points of views of the EPA's actions. These include three former EPA administrators and several former senior EPA officials.

No one should be surprised by the findings of Secretary Cohen's report. Just this past spring the EPA received a "D" grade for its lack of openness and transparency, according to the non-partisan Center for Effective Government.

It is my hope that the EPA will finally come clean with the American people about its true involvement with the Pebble Mine Project.

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