CLARK HILL

MEMORANDUM

TO: File

FROM: Michael J. Pattwell

DATE: May 17, 2018

CLIENT MATTER: For the Principle of the Matter

SUBJECT: Amendments to EPA's Regulations Governing State 404 Programs

I. EXECUTIVE SUMMARY

EPA should revise its regulations governing EPA "review of and objection to State permits" under Section 404 of the CWA because they are in conflict with the text of and legislative intent which lead to Section 404(j) of the CWA.[1] Among other things, EPA should:

(a) *limit the grounds on which it may veto State-approved 404 permits to only such permits that are outside of the express "requirements" of Section 404 of the CWA and the Section 404(b)(1) guidelines;*[2]

(b) *require that EPA objections contain a detailed explanation of the "reasons" for such objections and the actual "permit conditions" such State permit would need to include in order for the EPA objections to be withdrawn; and*

(c) *provide that when unresolved EPA objections crystalize into a veto of State permits and thereby divest States of permitting authority, such objections constitute reviewable final agency actions under the APA.*

While there are other changes that should be made, these three changes would move the offending EPA regulations much closer to the text of and legislative history underpinning Section 404(j) of the CWA. The changes would also restore the true level of cooperative federalism intended by Congress in passing the 1977 amendments to the CWA and encourage States to assume control of Section 404 permitting programs. Two date, only Michigan and New Jersey have done so.

[1] *Compare* 33 U.S.C. § 1344(j) *with* 40 C.F.R. § 233.50.
[2] That is, EPA should not utilize the 404(j) veto as a means of supplanting the judgment of States on discretionary elements of Section 404 and the Section 404(b)(1) guidelines.

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II. STATUTORY & REGULATORY BACKGROUND

In 1972, Congress amended the Federal Water Pollution Control Act, commonly known as the Clean Water Act ("CWA"), to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[3] To accomplish this goal, Congress prohibited the discharge of any pollutant (including dredge and fill material) into navigable waters of the United States (including certain adjacent wetlands) unless done in compliance with a permit issued under the CWA.[4] Congress then authorized the United States Armey Corps of Engineers ("Corps") to issue permits for the discharge of dredged and fill material into navigable waters by enacting Section 404 of the CWA.[5] The CWA imposes heavy civil and criminal penalties on persons who discharge fill into navigable waters without a permit or in violation of a permit.[6]

In 1977, Congress recognized that the States should have the primary right and responsibility to plan for the development and use of land and water resources and thus expressed its intention for States to implement Section 404 of the CWA.[7] Specifically, Congress allowed States desiring to administer their own permit program for the discharge fill into the navigable waters within their jurisdiction to submit to the United States Environmental Protection Agency ("EPA") a complete description of the program they proposed to establish and administer under State law ("404 Program").[8] If a State's proposed 404 Program met certain proscribed statutory requirements, including that the State had authority to issue permits in compliance with Section 404 of the CWA and the 404(b)(1) Guidelines, Congress required EPA to approve the State's 404 Program and notify the Corps so that the Corps could suspend the issuance of permits which could be issued under an approved State program.[9]

Congress nevertheless established a detailed process in Section 404(j) of the CWA for EPA to oversee State 404 Programs:

1. *First*, a State administrating its own 404 Program is required to transmit to EPA a copy of each permit application received by such State and provide notice to EPA of every action related to the consideration of such permit application, including each permit proposed to be issued by such State.[10]
2. *Second*, within 10 days of receiving such permit application, EPA is required to provide copies of such permit application to the Corps and the United States Fish and Wildlife Service ("FWS") who, in turn, may provide comments to EPA on the permit application.[11]

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[3] 33 U.S.C. § 1251(a).
[4] *Id.* §§ 1311(a), 1362(7), (12).
[5] *Id.* § 1344; *see also* 33 C.F.R. § 320.2; 33 C.F.R. § 323.3(a).
[6] *Id.* § 1319.
[7] *Id.* § 1251(b) (added by P.L. 95-217 §§ 5(a), (Dec. 27, 1977)).
[8] *Id.* § 1344(G) (added by P.L. 95-217 § 67 (Dec. 27, 1977); *see also* 40 C.F.R. 233.1 *et seq*.
[9] *Id.* § 1344(H)(2)(A) (added by P.L. 95-217 § 67 (Dec. 27, 1977); *see also* 40 C.F.R. § 233.15;33 C.F.R. § 323.5.
[10] *Id.* § 1344(j); *see also* 40 C.F.R. § 233.50(a).
[11] *Id.*; *see also* 40 C.F.R. § 233.50(b).

3. *Third*, if EPA intends to provide written comments on a permit application, EPA must notify the State within 30 days of receiving the permit application and provide such written comments to the State, after consideration of any comments made in writing by the Corps and/or the FWS, within 90 days of receiving the permit application. If such State is so notified by EPA, it may not issue the proposed permit until after the receipt of such comments from the EPA, or after 90 days have elapsed, whichever first occurs.[12]
4. *Fourth*, a State may not issue a proposed permit if it receives such written comment in which EPA objects to the issuance of such proposed permit **as being outside the requirements of Section 404**, including, but not limited to, the guidelines developed under Section 404(b)(1) unless the State modifies such proposed permit in accordance with such comments.[13]
5. *Fifth*, whenever EPA objects to the issuance of a permit, **such written objection must contain a statement of the reasons for such objection and the conditions which such permit would include if it were issued by EPA**.[14]
6. *Sixth*, in any case where EPA objects to the issuance of a permit, on request of the State, a public hearing shall be held by EPA on its objection.[15]
7. *Seventh*, if a public hearing is held, EPA shall reaffirm, modify, or withdraw its objections and notify the State of this decision.[16] *This provision, however, is contained only in EPA regulations and is inconsistent Section 404(j) of the CWA. Nothing in Section 404(j) of the CWA allows EPA to "modify" or issue "new objections" after the deadline for objecting in the first instance.*
8. *Eighth*, if the State does not resubmit such permit revised to meet EPA's objection within 30 days after completion of the hearing or, if no hearing is held, within 90 days of the objection, the Corps may issue the permit."[17]

When interpreting Section 404(j) and other provisions within the CWA, Congress demanded that "to the maximum extent possible the procedures utilized for implementing [Section 404] shall encourage the drastic minimization of paperwork and interagency decision procedures, and the best use of available manpower and funds, so as to prevent needless duplication and unnecessary delays at all levels of government."[18]

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[12] *Id.*; *see also* 40 C.F.R. § 233.50(d).
[13] *Id.*; *see also* 40 C.F.R. §§ 233.20(b), 50(f).
[14] *Id.*; *see also* 40 C.F.R. § 233.50(e).
[15] *Id.*; *see also* 40 C.F.R. § 233.50(g).
[16] 40 C.F.R. § 233.50(h).
[17] 33 U.S.C. § 1344(j); *see also* 40 C.F.R. § 233.50(h)(2), (j).
[18] *Id.* § 1251(f).

III. ARGUMENT

A. EPA SHOULD ONLY OBJECT TO STATE 404 PERMITS THAT ARE CLEARLY OUTSIDE THE REQUIREMENTS OF SECTION 404 OF THE CWA OR THE SECTION 404(B)(1) GUIDELINES.

A State's assumption of federal permitting authority under Section 404(h) grants it exclusive permit authority subject only to EPA's limited statutorily-prescribed oversight.[19] Importantly, Congress authorized States to implement Section 404 out of a recognition that it is "the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution."[20] With this overarching policy in mind, Congress limited the grounds upon which EPA could object to a proposed state permit.[21] It expressly provided that EPA could only object to a proposed state permit if it was "outside the requirements"[22] of Section 404 and the Section 404(b)(1) Guidelines.[23] By limiting EPA's veto authority to only the "requirements" of the CWA and the Guidelines, Congress left discretionary decisions to approved state permitting authorities. Such states maintain permanent staffs within special agencies who have particular subject-matter expertise. They are the officials directed by Congress to make case-by-case and site specific determinations under section 404 and they are the ones with superior, professional knowledge of local conditions who are on the ground working with applicants on a day-to-day basis.

Nevertheless, EPA's regulations expand the grounds on which EPA may object stating: "Any such objection shall be based on the Regional Administrator's determination that the proposed permit is (1) the subject of an interstate dispute . . . and/or (2) outside requirements of the Act, these regulations, or the 404(b)(1) Guidelines."[24] And, in no way, do the EPA regulations give any meaning to the limiting word "requirements" as used in Section 404(j) of the CWA. As a result, EPA frequently exceeds the scope of its delegated oversight authority be supplanting its judgment for the judgment of States on mere discretionary matters. That is, EPA often bases its objections on its own subjective evaluations of the discretionary, quantitative, or qualitative factors set forth in the 404(b)(1) Guidelines.[25]

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[19] *Id.* § 1344(h)-(j).
[20] *Id.* § 1251(b).
[21] *Id.* § 1344(j)(2)(B).
[22] *See, e.g., Martin v. IRS (In re Martin),* 508 B.R. 717, 732 (Bankr. E.D. Cal. 2014) ("A requirement means something essential to the existence or occurrence of something else"); *First Graphics v. M.E.P. Cad*, 2001 U.S. Dist. LEXIS 10239, at *16-17 (N.D. Ill. June 29, 2001) (unpublished) ("The Court finds that requirement means something that is necessary").
[23] *Id.* § 1344(j)(2)(B).
[24] 40 C.F.R. § 233.50(e).
[25] The 404(b)(1) Guidelines are chock-full of permissive terms such as "may," "should," "consider," "factors," "reasonable," "practicable," "sufficient," "assess," "adequate," and "appropriate." 40 C.F.R. § 230.1 *et seq.* As a result, courts have recognized that the Guidelines, in many respects, vest discretion in the permitting authority. *See, e.g., Rapanos v. United States*, 547 U.S. 715, 721 (2006) ("In deciding whether to grant or deny a permit, the [Corps] exercises the discretion of an enlightened despot*"); Alliance for Legal Action v. USACE*, 314 F. Supp. 2d 534, 553 (M.D.N.C. 2004) (mitigation under the Guidelines involves discretion); *Hillsdale Envtl. Loss Prevention, Inc. v. USACE*, 702 F.3d 1156, 1169 (10th Cir. 2012) ("alternatives analysis" under the Guidelines involves discretion).

This was not the intent of Congress. Had Congress intended to give EPA this type of broad discretionary and subjective veto authority, it would not have used the word "requirements" in Section 404(j). Moreover, we know from the legislative history regarding EPA's somewhat similar state oversight under Section 402(d) of the CWA, that Congress did not intend to allow EPA to substitute its judgment on discretionary matters for that of the States:

> This amendment does not modify the existing substantive standard of EPA's review to allow the Administrator to substitute his judgment for that expressed by the State in its proposed permit; EPA may object to a State proposed permit only in a case in which limitations and conditions of the State permit are clearly outside the guidelines and requirements of this act ...The role of the Administrator in reviewing State-proposed permits, analogous to that of a Federal court reviewing the action of the administrative agency, is maintained under this amendment. Once the Administrator has approved a State permit program under subsection 402(b), his role in the NPDES process is limited to reviewing State proposed permits, providing comments on proposed permits, and exercising the authority to object to issuance of a permit in those cases of a clear failure to conform to the guidelines and requirements of the act ...This process for approval of State permitting programs was included in the act to continue the primary State role in water pollution control and not to establish EPA as a supervisor of State permitting activities. [See 123 Cong. Rec. H 12,934 (daily ed. Dec. 15, 1977) (remarks Rep. Roberts) (emphasis added)].[26]

Thus, EPA's present position renders Congress's use of the word "requirements" in section 404(j)(2)(B) meaningless and grants EPA carte blanche authority to veto state permitting decisions in its sole discretion and without any judicial review. As the Sixth Circuit warned in *Ford Motor Co. v. EPA*, 567 F.2d 661, 671 (6th Cir. 1977), without the "requirements" limitation imposed on EPA's oversight authority, "EPA could arbitrarily deny [state] permit[s] ...and render state [402] permit programs a farce."

[26] Congressman Roberts' views must be given significant weight because he was chairman of the House Subcommittee that drafted the Amendments, chairman of the House conferees, vice-chairman of the House-Senate Conference Committee, and floor manager of the Conference Report in the House.

B. EPA OBJECTIONS SHOULD BE DETAILED AND LIST THE ACTUAL PERMIT CONDITIONS SUCH PERMIT WOULD NEED TO INCLUDE IN ORDER FOR EPA'S OBJECTIONS TO BE LIFTED.

When objecting to a State 404 permit, EPA must not only list the reasons for the objection but also list the permit conditions necessary for the objection to be lifted. Section 404(j) of the CWA provides that EPA objections to a "proposed permit" "shall" "contain [(1)] a statement of the reasons for such objection and [(2)] the conditions which such permit would include if it were issued by [EPA]." [27] The term "conditions" refers to the term "permit" which is, of course, the state permit. The phrase "permit condition" is used throughout both the EPA's, the Corps', and Michigan's permitting regulations and means a requirement of a permit after issuance and applicable during and after construction.[28] Moreover, enforcement of "permits" are dependent upon violations of "permit conditions."[29] These congressional mandates advanced Congress's intention that States take the primary role implementing Section 404. See 33 U.S.C. § 1251(b). Had Congress not included these limitations and protections, States would have been relegated to the ministerial tasks of information gathering and making initial recommendations EPA could disregard without legal support or explanation.[30]

EPA's regulations do not expressly require a high level of articulation nor do they expressly require the listing of necessary "permit conditions." Rather, they say that the Regional Administrator shall submit "a written statement of his comments, objections, or recommendations; the reasons for the comments, objections, or recommendations; and the actions that must be taken by the Director in order to eliminate any objections." 40 C.F.R. § 233.50(e) ("The final decision to comment, object or to require permit conditions shall be made by the Regional Administrator"). While this language is not terribly off-statute, in practice, EPA officials have regularly given vague and ambiguous reasons for objections and blatantly disregarded the requirement to list actual permit conditions. By not listing such permit conditions, EPA deprives the state and applicant of the statutory right to be afforded tangible permit conditions to which they could timely agree. EPA further deprives the state and applicant of the statutory right to have such permit conditions vetted through the public hearing process.

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[27] 33 U.S.C. § 1344(j)(2)(B).

[28] *See, e.g.,* 40 C.F.R. §233.23(a) ("For each permit the Director shall establish conditions which assure compliance with all applicable statutory and regulatory requirements"); 33 C.F.R §325.4(a) ("Permit conditions will be directly related to the impacts of the proposal, appropriate to the scope and degree of those impacts, and reasonably enforceable"); Mich. Admin. Code R. 281.923(4) ("If a permit is issued, conditions shall reflect the requirements of all appropriate acts").

[29] *See, e.g.,* 40 C.F.R. 233.41(3)(ii); 33 C.F.R. §326.6(b); Mich. Admin. Code R. 281.923(7)(a).

[30] Congress is presumed to be aware that EPA objections were already held by courts to a "high standard of articulation." *Ford*, 567 F.2d at 669 (citing cases).

C. EPA VETOES OF STATE 404 PERMITS SHOULD CONSTITUTE REVIEWABLE FINAL AGENCY ACTION.

EPA has taken the position that by creating a bifurcated process whereby an applicant could still apply anew to the Corps for a federal 404 permit after EPA vetoed a state 404 permit, Congress somehow intended for EPA vetoes of state permits to be unreviewable. That is, EPA believes that the CWA impliedly precludes judicial review of EPA final decisions under Section 404(j). As explained below, the CWA does no such thing.

To begin with, there is a "strong presumption that Congress intends judicial review of administrative action."[31] While crafting the APA in 1945, the Senate Committee on the Judiciary explained the basis for this presumption: "Very rarely do statutes withhold judicial review. It has never been the policy of Congress to prevent the administration of its own statutes from being judicially confined to the scope of authority granted or to the objectives specified."[32] As a result, the presumption of reviewability "cannot be overcome without clear and convincing evidence of a contrary legislative intent."[33] The burden is a "heavy" one.[34] "[W]hen doubt about congressional intent exists, the general presumption favoring judicial review of rights-changing administrative action is controlling."[35]

Nothing in the CWA provides for or prohibits judicial review of Section 404(j) vetoes.[36] The statute is silent.[37] CWA § 404(j) does, however, contain mandatory language limiting the grounds upon which EPA may object to a state permit.[38] This limitation is critical. Because the 404(b)(1) Guidelines contain both discretionary and mandatory elements, Congress's choice to limit EPA objections to only those elements of state permits that are "outside the requirements" of the Guidelines shows that Congress did not authorize EPA to overrule state findings with respect to the discretionary elements of the Guidelines. Without this narrowly-tailored grant of oversight authority, EPA would have been powerless to object all.[39] Furthermore, Congress went further and explicitly demanded that EPA objections "shall" be in writing and "contain [(1)] a statement of the reasons for such objection and [(2)] the conditions which such permit would include if it were issued by [EPA]."[40] These congressional mandates advanced Congress's intention that States take the primary role implementing Section 404. See 33 U.S.C. § 1251(b).

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[31] *Bowen v. Mich. Academy of Family Physicians*, 476 U.S. 667, 670-72 (1986).
[32] *Id.* (citing S. Rep. No. 752, 79th Cong., 1st Sess., 26 (1945)).
[33] *Franklin v. Mass.*, 505 U.S. 788, 816 (1992).
[34] *Dunlop v. Bachowski*, 421 U.S. 560, 567 (1975).
[35] *Versata Dev. Group, Inc. v. SAP Am., Inc.,* 793 F.3d 1306, 1320 (Fed. Cir. 2015).
[36] *See, e.g., Friends of Crystal River v. EPA*, 794 F. Supp. 674, 686 (W.D. Mich. 1992) ("[T]here is no CWA provision that limits judicial review of agency action allegedly taken under section 404(j)"); *Hough v. Marsh,* 557 F. Supp. 74, 78 (D. Mass. 1982).
[37] *See Sierra Club v. Peterson*, 705 F.2d 1475, 1478-79 (9th Cir. 1983) ("Mere silence in the statute should not be read as precluding judicial review under the APA").
[38] See 33 U.S.C. § 1344(j) (EPA may only object to a state permit "as being outside the requirements of" the CWA and the 404(b)(1) Guidelines) (emphasis added).
[39] *See La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986) (federal agencies have "no power to act . . . unless and until Congress confers power upon [them]").
[40] 33 U.S.C. § 1344(j)(2)(B) (emphasis added).

The mandates and limitations imposed upon EPA by Congress therefore show that Congress intended for EPA's vetoes to be subject to judicial review.[41] The congressional intent favoring judicial review is obvious. Why else would Congress expressly limit the grounds and manner in which EPA could veto state permits if Congress did not intend for EPA vetoes to be subject to judicial review? The unavoidable fact is that when Congress lays out directives to administrative agencies, Congress intends for those directives to be enforce by the courts.[42] Furthermore, the "writing," "reasons," and "conditions" provisions show that Congress intended for there to be a written record upon which courts could evaluate EPA vetoes.

Because the mandatory limitations imposed upon EPA's oversight authority under § 404(j) show that Congress intended for EPA's vetoes to be immediately reviewable, EPA should revise its regulations to provide the EPA vetoes constitute final agency actions that are immediately reviewable. This makes good policy sense where unresolved EPA vetoes of State permits constitute EPA's "last word" with respect to the State permit and consummated the end of both EPA's and the State's review of same. It also makes good policy sense where EPA vetoes of State permits halt construction; result in the loss of funds spent during the state-permitting process; jeopardized project funding sources; divest States of permitting authority; and require applicants to prepare and submit to the Corps an entirely new application at major cost and delay,[43] or risk enforcement action, imposition of significant penalties, and criminal sanctions.[44]

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[41] *See, e.g., Beverly Health & Rehab. Servs. v. Thompson*, 223 F. Supp. 2d 73, 90 (D.D.C. 2002) ("[M]andatory language is evidence that Congress intended that the statute be subject to judicial review"); *Minneapolis, Northfield & S. Ry., Inc. v. ICC.*, 707 F.2d 984, 988 (8th Cir. 1983) (congressional "use of mandatory language" "serves as strong evidence that judicial review of the agency's [action] was not to be precluded"); *Bennett,* 520 U.S. at 175 (statute did not preclude judicial review because it spoke to FWS in obligatory terms); *Mich. Academy,* 476 U.S. at 681 ("Congress intends the executive to obey its statutory commands and . . . expects the courts to grant relief when an executive agency violates such a command").

[42] *See, e.g., Mach Mining, LLC v. EEOC*, 135 S. Ct. 1645, 1651-53 (2015) ("Congress rarely intends to prevent courts from enforcing its directives to federal agencies" and knows that "legal lapses and violations occur, and especially so when they have no consequence"); *Dart v. United States*, 848 F.2d 217, 223 (D.C. Cir. 1988) ("When Congress limits its delegation of power, courts infer . . . that Congress expects this limitation to be judicially enforced"); *Ryskamp v. Comm'r*, 797 F.3d 1142, 1150 (D.C. Cir. 2015) ("If no judicial review whatsoever were available, taxpayers . . . would be without recourse when the IRS incorrectly concludes that their requests for hearings are entirely frivolous—a result Congress cannot have intended"); *NAACP v. Sec'y of Hous. & Urban Dev*, 817 F.2d 149, 152 (1st Cir. 1987) ("Federal action is nearly always reviewable for conformity with statutory obligations") (superseded by statutory amendment expressly providing for judicial review); *Gulf Restoration Network v. McCarthy,* 783 F.3d 227, 240 (5th Cir. 2015) ("The structure of section 1313(c)(4)(B) [of the CWA], which employs mandatory language, also suggests reviewability").

[43] There are many procedural and substantive differences between Michigan's approved 404 program and the Corps' 404 permitting regulations including, but not limited to, separate definitional terms, different public interest factors and mitigation ratios, distinct processing fees and deadlines, enforcement provisions, and, critically, that the Corps process is subject to the time-consuming and holistic environmental-review process laid out in the National Environmental Policy Act ("NEPA"), 42 U.S.C § 4321 et seq.

[44] Notably, the Corps' arduous, expensive, and time-consuming permitting process will never result in judicial review of a vetoed state permit. Rather, it would result in review of a different application, with a different administrative record, denied by a different agency acting pursuant to different regulations. EPA vetoes should not continue to exist in such an "interlocutory" vacuum forever shielded from judicial review.