EPA-1095

"jeff parker"
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04/10/2012 02:52 PM

To Phil North, Cara Steiner-Riley, Palmer Hough
cc
bcc
Subject Memo and Law Review Article on 404(c) and 45-year History of Federal and State efforts to Conserve the Kvichak and Nushagak Drainages

2 attachments

Memo re Law Rewiew Article.doc.pdf

parker_history_kvichak_nushagak.pdf

To: Phil North, Cara Steiner-Riley and Palmer Hough.

I recently published a law review article that may assist your work. You may copy, distribute and use it as you and others in EPA or the federal government see fit.

A cover memo and the article are attached.

Best regards,

Jeff Parker

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To: Phil North, USEPA; Cara Steiner-Riley, USEPA; Palmer Hough, USEPA
From: Geoffrey Y. Parker
Re: Law Review Article on 404(c) and 45-year History of Federal and State Efforts to Conserve the Kvichak and Nushagak Watersheds. Please circulate as you see fit.
Date: April 10, 2012

I hope that you and others in EPA will find the attached law review article helpful. It is titled: "Section 404(c) of the Clean Water Act and the History of State and Federal Efforts to Conserve the Kvichak and Nushagak Drainages of Alaska." I am the author. Please feel free to copy, distribute or use as you and others in EPA see fit.

The article is published on-line now, and will be published in May in a hard copy volume issued by the *Seattle Journal of Environmental Law* of the Seattle University School of Law at http://www.sjel.org/images/pdf/2012/parker_history_kvichak_nushagak.pdf.

The article documents the 45-year history of federal, state and local efforts to balance conservation and development in the Kvichak and Nushagak watersheds, as land ownership evolved, from what was once nearly all federal, into a fragmented pattern of state, Native and federal ownership. The article divides this history into three periods:

(1) from 1967 to 1971, when the land was nearly all federal, the State of Alaska supported federal efforts to conserve uplands in the Kvichak and other watersheds to protect fish, game and public uses of them, by closing 6.5 million acres, including the Pebble deposit, to state land selection, and by closing much of it to mining claims;
(2) from 1967 to 2005, many state and federal efforts and measures sought to conserve waters and uplands in the Kvichak and Nushagak drainages, including where the Pebble deposit is located, to protect fish and wildlife habitat, and public uses of fish and game, but cooperative efforts to do so across property boundaries eventually failed, when no one faced an actual decision having practical consequences.
(3) since 2005, the State (in the case of its current 2005 Bristol Bay Area Plan for State Lands) and the federal government (in the case of EPA's watershed assessment and potential use of Section 404(c)) have moved closer to making decisions that do have practical consequences for fish, wildlife and public uses of them.

The article demonstrates that EPA's potential use of Section 404(c) is consistent with nearly all of this history. The article is long, so the abstract, table of contents, and conclusion should help. Although the article details many federal and state efforts to conserve uplands in the Kvichak and Nushagak drainages, I was interested in the many State efforts, because the State recently urged EPA to cease its watershed assessment. So, I will draw out a few points of many in the State's history:

- In 1967, when the land in the Kvichak and Nushagak watersheds was 99.8 percent federally owned, Alaska's Governor, Walter Hickel, *supported* BLM's land classification order that established the 6.5-million acre "Iliamna Planning Unit and Classification Area," which *closed* most of the Kvichak River watershed and some of the Nushagak watershed, including where the Pebble claims now lie on state land, to *state land selections* and much of the area to *mining claims*. BLM's classification order and subsequent resource assessment in 1971 (as detailed in the article) begin the 45-year history of federal and state efforts to conserve uplands in the Kvichak and Nushagak drainages to protect fish, wildlife and public uses of them. EPA's current efforts are consistent with nearly all the history.

- In 1970, the Alaska Senate voted to *oppose* what is now the road, pipeline and transportation route to Pebble mine. The Alaska Senate did so to protect salmon and game habitat and big game hunting.

- In 1971, the Alaska Senate and the Alaska House of Representatives both voted unanimously to "urgently" request the federal government to manage the Kvichak and other watersheds "in a manner designed to give *primary recognition* to the extremely valuable commercial and sport fishing resources existing there." Shortly thereafter, BLM issued its resource assessment of the lands and waters in the 1967 Classification Order. That assessment addresses issues still current today, including habitat protection, mining and road development, and recommended specific actions to protect fish and game habitat, and public uses of fish and game.

- Records of the Alaska Legislature, from 1976, demonstrate that the State acquired the uplands at the Pebble mining claims, in the Kvichak and Nushagak watersheds, to *protect fish*. State officials repeatedly so advised the public and the legislature when it ratified the Cook Inlet Land Exchange by which the State acquired the uplands at Pebble to *protect fish*.

- In 2000, the State adopted its current Policy for the Management of Sustainable Salmon Fisheries, at 5 AAC 39.222. EPA's potential use of Section 404(c) in advance of permit applications is *consistent*, in *several important respects*, with the State's current Policy.

History lights the future, fosters stability of a potential Section 404(c) determination, and points the way ahead beyond the immediate moment. You are in the footsteps of many who have gone before. You will find that they include not only countless federal and state officials and local interests, but also the wisdom of Lincoln, Shakespeare, Socrates, and Blackstone. Your work has context and meaning in part because of history. Good luck with it.

Section 404(c) of the Clean Water Act and the History of State and Federal Efforts to Conserve the Kvichak and Nushagak Drainages of Alaska

Geoffrey Y. Parker†

The Kvichak and Nushagak river drainages of Bristol Bay in southwest Alaska are major contributors to the world's largest commercial salmon fishery, offer world-class sport fishing and hunting, and provide important subsistence foods for local residents. For forty-five years, the state and federal governments have sought to balance conservation and development in these drainages, as the land ownership, once nearly all federal, evolved into a fragmented pattern of state, federal and Native ownership, where fish and wildlife ignore such distinctions. Now, the potential that metallic sulfide deposits on state land in these drainages may be mined has prompted tribes, commercial fishing organizations, and many others to petition the U.S. Environmental Protection Agency (EPA) to commence a public process under Section 404(c) of the Clean Water Act to determine whether to restrict or prohibit the discharge of dredged or fill material, including mine wastes, into waters of the United States, including wetlands, before permits to do so are sought. In response, EPA has begun a scientific assessment of the watersheds to determine whether to invoke Section 404(c). This article demonstrates that EPA's potential use of Section 404(c) is consistent with most of the history of state and federal efforts to balance conservation and development in these drainages, offers a perspective on that history, and concludes that use of Section 404(c) is one of the few opportunities in this history for government to conserve these drainages across property boundaries.

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† Geoffrey Y. Parker, B.A. Dartmouth College, 1972, J.D. Georgetown University Law Center, 1980, practices law in Anchorage, Alaska. He has worked for thirty years on public land and fish and wildlife issues in Alaska, including in the Bristol Bay drainages. He is co-counsel to six federally recognized tribes which filed the initial petition to EPA that it commence a public process under Section 404(c) of the Clean Water Act with respect to potential metallic sulfide mining in the Kvichak and Nushagak drainages, and co-counsel in representing the same six tribes and commercial and sport fishing organizations in litigation challenging state actions related to the State's 2005 Bristol Bay Area Plan. This article reflects his views, and not necessarily those of any client.