December __, 2018

Andrew Wheeler
Acting Administrator
U.S. Environmental Protection Agency
William Jefferson Clinton Building (Mail Code: 1101A)
1200 Pennsylvania Avenue, N. W.
Washington, DC 20460

Re: Retain the Existing Clean Water Act Section 404(c) Implementing Regulations

Dear Acting Administrator Wheeler:

On behalf of our millions of members and supporters across the country, the undersigned [insert ##] organizations call on you to retain the existing Clean Water Act Section 404(c) implementing regulations, and to rescind the June 26, 2018 Memorandum issued by your predecessor that directs the revision of those regulations. The revisions required by the June Memorandum are unlawful and unwarranted, and threaten the health of the nation's waters and the vital benefits they provide to people and wildlife.

Poll after poll shows that the public overwhelmingly wants the clean, fishable, and swimmable waters promised by the Clean Water Act. Section 404(c) is a vital tool for fulfilling this promise for all communities by reinforcing the importance of avoiding adverse impacts to the nation's waters and serving as an action of last resort to stop the most unacceptably damaging harm to the nation's rivers, streams, and wetlands.

The Environmental Protection Agency has used its 404(c) authority to protect an extensive array of nationally significant resources, while stopping just 13 out of more than two million Section 404 activities in the 46-year history of the Clean Water Act. These 404(c) actions have protected more than 200,000 acres of wetlands and 36 miles of rivers and streams in 11 states, including: red maple forested swamps in New England; vital bottomland hardwood wetlands in Mississippi and Georgia; blue crab and shrimp spawning grounds in South Carolina; fish nurseries and Black Duck habitat in the Chesapeake Bay; habitat for endangered and threatened species in Florida and New Jersey; a gold medal trout stream in Virginia; and some of the last remaining high quality headwater streams in West Virginia.

If finalized, the proposed 404(c) determination for the Pebble Deposit Area in Bristol Bay Alaska would protect the habitat that supports the largest salmon fishery on earth, the source of over half of the world's supply of sockeye salmon, and the largest source of economic activity for the region.[1] More than sixty two million adult salmon returned to the rivers of Bristol Bay in 2018.

[1] U.S. Environmental Protection Agency, Proposed Determination of the U.S. Environmental Protection Agency Region 10 Pursuant to Section 404(c) of the Clean Water Act Pebble Deposit Area, Southwest Alaska, July 2014. Notably, this pre-permit proposed determination was upheld by former Administrator Pruitt just months before he issued the June Memorandum that seeks to eliminate the authority to issue pre-permit determinations. 83 Fed. Reg. 8,668 (Feb. 29, 2018).

Each of these Section 404(c) actions was carried out under the existing 404(c) regulations, which have been in place since 1979. In a testament to the quality of the existing regulations, EPA's use of its 404(c) authority has been upheld by Federal courts each time it has been challenged. The existing regulations should be retained intact due to their clear track record of ensuring careful and prudent use of the 404(c) authority.

The June Memorandum directs EPA to develop and propose new regulations that would eliminate the authority to initiate the Section 404(c) process before a permit application is filed or after a permit has been issued. However, any such regulations must be rejected because they cannot be reconciled with the plain language of the Clean Water Act. The Clean Water Act explicitly states that Section 404(c) can be used "whenever" the Administrator determines that the discharge of dredged material would cause an unacceptable adverse impact on "municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational areas." Federal Courts have confirmed that this language means just what it says: the Section 404(c) authority may be used at **any** time.[2]

Any revisions to the existing regulations based on the June Memorandum must also be rejected because such revisions clearly are not needed. To the contrary, the record demonstrates that the existing 404(c) regulations fully satisfy the June Memorandum's stated purpose of ensuring the "careful, predictable, and prudent use" of the 404(c) authority. The existing regulations establish detailed procedures that EPA must follow to determine whether a veto is warranted. Among other things, EPA must conduct an extensive scientific review of the impacts of the activity in question, hold at least one public hearing, provide a formal opportunity for public comment, and give the permit applicant and the Army Corps of Engineers two formal opportunities to revise their permits or plans to prevent unacceptable harm. These procedures require a minimum of six months to complete. As discussed above, these procedures have protected an extensive array of nationally significant water resources while stopping just 13 of more than two million activities in the past 46 years.

Our organizations call on EPA to retain the existing Clean Water Act Section 404(c) implementing regulations, which have ensured careful, predicable and prudent use of the 404(c) authority since they were adopted in 1979. EPA should also rescind the June Memorandum since it requires unwarranted regulatory revisions that are contrary to the plain language of the Clean Water Act. Instead of engaging in this ill-advised and unnecessary rulemaking, EPA should focus its limited resources on achieving the Clean Water Act's promise of clean, fishable, and swimmable waters for all Americans.

Sincerely,

[2] *Mingo Logan Coal Co. v. U.S. Environmental Protection Agency*, 829 F.3d 710, 714 (D.C. Cir. 2016); *Mingo Logan Coal Co. v. U.S. Environmental Protection Agency*, 714 F.3d 608, 613 (D.C. Cir. 2013), *cert denied*, 572 U.S. 1015 (March 14 2014); *City of Alma v United States*, 744 F.Supp.1546, 1588 (S.D. Ga. 1990).