Committee on Transportation and Infrastructure
U.S. House of Representatives
Washington, DC 20515

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The Honorable Michael S. Regan
Administrator, United States Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

The Honorable Michael L. Connor
Assistant Secretary of the Army (Civil Works)
108 Army Pentagon
Washington, D.C. 20310

Dear Administrator Regan and Assistant Secretary Connor:

As the nation celebrates the 50th anniversary of the Clean Water Act, we urge you to incorporate additional scrutiny and economic, environmental, and public interest analysis in your review of permit applications, in order to preserve critical federal protections for human health and the health of U.S. waters and wetlands.

Last month, we issued a committee report, entitled *"NO CURRENT PLANS…" Pebble LP, Sham Permitting, and False Testimony Threatening the World's Largest Salmon Habitat*, that demonstrated how polluters try to deceive federal regulators and exploit existing regulatory loopholes for private, economic gain at the expense of everyday Americans and the environment. [1]

The report highlighted significant regulatory loopholes in the U.S. Environmental Protection Agency (EPA) and the Army Corps of Engineers (Corps) implementation of section 404 of the Clean Water Act that allow polluters to obfuscate or artificially segment permit applications in order to avoid federal regulations and compliance costs.

Our report detailed how Pebble LP purposefully sought to deceive Congress and the American public by masking their intent to construct the nation's largest open pit mine in one of its most pristine regions behind a smaller, non-economically-viable mining proposal concocted simply

[1] See https://transportation.house.gov/news/press-releases/news-chairs-defazio-and-napolitano-release-committee-report-on-pebble-mineask-the-ag-to-investigate-false-statements-to-congress.

to gain initial regulatory approval. This process of obfuscating, reducing, or artificially segmenting the scale of an intended activity to avoid regulatory scrutiny has been called *sham permitting*. It is a deceptive practice, employed by bad actors, that involves seeking a streamlined regulatory approval for one smaller activity when the ultimate goal is a far more comprehensive operation that, if presented as whole, would likely require more rigorous regulatory scrutiny, bring additional compliance and mitigation costs, and engender greater public interest.

For over 50 years, the Clean Water Act has served as the leading federal statute for the protection and restoration of countless rivers, streams, lakes, and other waterbodies, including wetlands, throughout the United States. The Act's prohibition against any discharge of a pollutant into jurisdictional waters has dramatically improved water quality as the nation continues to make progress towards universally "fishable and swimmable" waters.[2] Similarly, sections 402 and 404 of the Act establish rules for the issuance of Clean Water Act permits that seek to avoid or minimize adverse water quality impacts of discharges, ensuring that economic growth and environmental protection are not mutually exclusive outcomes.

However, for the Clean Water Act to remain successful in addressing the water quality challenges of the next 50 years, EPA and the Corps must remain vigilant to the schemes of bad-actor polluters who will exploit every loophole or utilize deceptive practices to avoid regulatory scrutiny, to reduce or eliminate environmental compliance costs, or to carry out activities that otherwise might be prohibited.

The rise in potential sham permitting schemes, which have been proactively identified by EPA in the context of the Clean Air Act[3] and successfully blocked in that context by the Courts,[4] requires EPA and the Corps to exercise greater diligence in looking beyond the information provided by potential permittees and to ensure that Clean Water Act permit proposals are fully vetted through rigorous economic, environmental, and public interest analysis.

For example, in seeking to avoid sham permit schemes in the context of the Clean Air Act, EPA guidance calls for the agency to "look to objective indicia to identify circumvention situations … which include: the filing of [federal and state pollution permits with conflicting information]; the

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[2] See 33 U.S.C. 1251 and 1311(a).

[3] Terrell E. Hunt and John S. Seitz, "Guidance on Limiting Potential to Emit in New Source Permitting," U.S. EPA, June 13, 1989, accessed here: https://www3.epa.gov/airtoxics/pte/june13_89.pdf; *see also* Requirements for the Preparation, Adoption, and Submittal of Implementation Plans; Approval and Promulgation of Implementation Plans, 54 Fed. Reg. 27, 274, 27, 280–81 (June 28, 1989) (codified at 40 C.F.R. pts. 51, 52), accessed here: https://www.law.cornell.edu/cfr/text/40/part-51 and https://www.law.cornell.edu/cfr/text/40/part-52. p. 13.

[4] See *In the Matter of Issuance of Air Emissions Permit No. 13700345-101 for Polymet Mining, Inc.,* City of Hoyt Lakes, St. Louis County, Minnesota. A19-0115, A19-0134, Court of Appeals, March 23, 2020, accessed here: https://mn.gov/law-library-stat/archive/ctappub/2020/OPa190115-032320.pdf. In this case, throughput of a copper-nickel mine, as reflected in permitting requests to the EPA, did not align with the significantly larger capacity of the mine's operating equipment. The permit for a less impactful mine, with infrastructure capable of supporting a larger mining operation, seemed to be masking a planned mine expansion. As noted by the presiding judge, "[I]f expansion is the current intent, the time to comply with [the applicable expanded mine permitting] requirements is now. Of course, once a project is operating, expansion proposals may be viewed more favorably by regulators. If that is the true course being charted [by this mine], then there is merit to [the] argument that the … permit is a sham."

economic realities surrounding a transaction; and projected levels of operation as portrayed to lending institutions and other records of projected demand and output."[5]

We request that EPA and the Corps develop similar regulatory safeguards in the context of the Clean Water Act to ensure that sham permit schemes are quickly identified, rigorously analyzed, and required to fully comply with the law before being considered for approval—and that those bad actors that continue to pursue sham permits be subject to even greater regulatory scrutiny and compliance measures in the future.

Specifically, we request EPA and the Corps to undertake the following actions:

- Revise the existing section 404(b)(1) guidelines for the evaluation of Clean Water Act permits to ensure that regulators have sufficient information to spot sham permit schemes.
- Ensure a complete, robust "public interest review" of Clean Water Act permit applications, including rigorous review of the economic viability of a proposal and its necessity in the marketplace; and
- Update the requirements for nationwide permits to ensure that the cumulative adverse effects of multiple crossings of waterbodies for the same approved project are fully evaluated and addressed.

More detail about each of these suggestions is provided below.

(1) Revise the existing section 404(b)(1) guidelines for the evaluation of Clean Water Act permits to ensure that regulators have sufficient information to spot sham permit schemes.

The section 404(b)(1) guidelines are the regulations, established by the EPA in coordination with the Corps, that constitute the substantive criteria used in evaluating activities regulated under section 404 of the Clean Water Act.[6] The purpose and policy of these regulations are "that dredged or fill material should not be discharged into the aquatic ecosystem, unless it can be demonstrated that such a discharge will not have an unacceptable adverse impact either individually or in combination with known and/or probable impacts of other activities affecting the ecosystems of concern."[7]

To further implement the 404(b)(1) guidelines, the Corps and EPA entered into a 1990 memorandum of agreement that establishes the proper sequencing of potential impacts to jurisdictional waters and wetlands—directing the Corps first to avoid potential impacts to waters and wetlands, then to minimize those impacts, and finally, to comprehensively mitigate for impacts should avoidance or minimization not be possible.[8]

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[5] "Applicability of New Source Review Circumvention Guidance to 3M – Maplewood, Minnesota," EPA, June 23, 1993, accessed here: https://www.epa.gov/sites/default/files/2015-07/documents/maplwood.pdf.
[6] See 40 CFR Part 230.
[7] See 40 CFR 230.1(c).
[8] See https://www.epa.gov/cwa-404/memorandum-agreement-regarding-mitigation-under-cwa-section-404b1-guideines-text.

Both documents require the Corps and EPA to conduct a rigorous analysis of each proposed section 404 permit for the discharge of dredge or fill material in a jurisdictional water or wetland—examining every aspect of the proposed activity, its necessity in terms of purpose, location and scope, as well as practicable alternatives to the proposed activity. However, these documents should be further revised to ensure that the Corps and EPA are requesting sufficient information from permittees to quickly identify sham permit schemes.

For example, these documents already require the Corps and EPA to gather information from permittees that is sufficient to evaluate environmental consequences of the proposed activity, as well as practicable alternatives to the proposed activity, taking into consideration costs, existing technologies, and logistics in light of the overall project purposes. The Corps and EPA should further revise the 404(b)(1) guidelines (and other implementation documents) to require permittees to provide additional background on the intended short- and long-term plans for the proposed activity, additional information on the economic feasibility of the proposed activity, and any objective information necessary to identify circumvention situations.

As in the previously-referenced guidance related to the Clean Air Act, the Corps and EPA should require permittees to provide information on the economic realities of the proposed activity, the projected benefits of the proposed activity as may be suggested to lending institutions, and any other records of projected economic benefit of the proposed activity, as well as any potential future development that the permittee may intend at the same location. Ensuring that the Corps and EPA have sufficient information to fully understanding both the short- and long-term implications of the proposed activity is critical to meeting the overall goals of the Clean Water Act—to balance the requirements to protect waters and wetlands with the realities that certain impacts to those waters and wetlands may be necessary for discharge activities that are in the public interest—as well as any potential follow-on work that may later be requested by the permittee to accomplish their overall goal in the proposed activity.

(2) Ensure a complete, robust "public interest review" of Clean Water Act permit applications, including rigorous review of the economic viability of a proposal and its necessity in the marketplace.

In addition to compliance with the section 404(b)(1) guidelines, the Corps regulations require the agency to conduct a public interest review of potential Clean Water permit applications to ensure that the discharge will comply with the applicable requirements of other statutes and be in the public interest.[9]

As noted in the General Regulatory Policies governing its permitting authority, the Corps is required to consider "the full public interest [of the proposed activity] by balancing the favorable impacts against [the activity's] detrimental impacts".[10] Further, the regulations specifically require the Corps to undertake a comprehensive review of "all factors" related to the proposed activity, including consideration of the economic viability of the proposed activity—stating that:

[9] See 33 CFR Part 320.
[10] See 33 CFR 320.1.

> "When private enterprise makes application for a permit, it will generally be assumed that appropriate economic evaluations have been completed, the proposal is economically viable, and is needed in the market place. However, the [Corps] in appropriate cases, may make an independent review of the need for the project from the perspective of the overall public interest."[11]

A significant factor suggesting that Pebble LP was engaged in sham permitting was a general awareness that the proposed smaller scale mine was not economically viable—with an expert witness to a House Transportation and Infrastructure Subcommittee on Water Resources and Environment hearing testifying that the mine that Pebble was proposing, in the form they were proposing, didn't make financial sense.[12] According to Mr. Richard Borden:

> "Based upon a careful review of the available financial data, it is my professional opinion that the [Pebble] mine plan being evaluated by the EIS [Environmental Impact Statement] is, most certainly, not economically feasible. I have estimated the proposed project to have a net present value of approximately negative $3 billion."[13]

In our view, had the Corps fully utilized its public interest review obligation under existing regulations, including its responsibility to request necessary information from the permit applicant, and to independently review the economic viability of the underlying activity, the Corps might have better understood that the proposed smaller-scale mine application was a sham permit, and could have taken appropriate steps to require Pebble LC to update the proposal or to deny the permit application as incomplete or inconsistent with the Clean Water Act.

Accordingly, the Corps should undertake such efforts necessary to ensure that it complies with its robust "public interest review" obligations related to the review and issuance of Clean Water Act permits, including conducting a thorough economic analysis of the proposed activity to determine whether the activity is, as proposed, economically viable and necessary in the marketplace. If the Corps determines that the proposed activity is either not economically viable or necessary, that should be considered significant warning that the proposed activity may not be in the public interest, and therefore, should not be permitted.

(3) Update the requirements for nationwide permits for linear pipeline and energy-transmission projects to ensure that the cumulative adverse effects of multiple crossings of waterbodies for the same approved project are fully evaluated and addressed.

Pebble LP's mine permitting effort also raises concern regarding other existing Clean Water Act loopholes that allow for segmentation of potential impacts to waters and wetlands and avoid comprehensive review of these impacts to water quality or other environmental or public interest benefits of waters and wetlands.

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[11] See 33 CFR 320.4(q).
[12] "The Pebble Mine Project: Process and Potential Impacts," Hearing, Committee on Transportation and Infrastructure, Subcommittee on Water Resources and Environment, October 23, 2019, accessed here: https://www.govinfo.gov/content/pkg/CHRG-116hhrg41942/pdf/CHRG-116hhrg41942.pdf.
[13] See id.

The Clean Water Act authorizes the issuance of section 404 permits for the discharge of dredge and fill materials either on an individual basis or under general permits issued on a State, regional, or nationwide basis. Generally speaking, activities that are likely to have potentially significant adverse impacts on waters and wetlands are typically reviewed as individual permits (which allows for project-specific review and public input), whereas for activities that will likely have only minimal adverse effects, a general permit may be suitable and would not allow for project-specific review or public comment).[14] However, we remain concerned that certain activities with more than a minimal adverse impact to waters and wetlands are being reviewed under the general permit authority, rather than the individual permit process.

Last year, we wrote to President Biden expressing our concern with the reissuance of several Clean Water Act nationwide permits (NWPs) developed by the previous administration, in part because of the flawed review of these proposals under the National Environmental Policy Act, as well as our concern that the reissued permits expanded the activities covered by nationwide permits beyond the "minimal adverse environmental effect" authorized under section 404(e)(1) of the Act.[15] We recognize that, in March 2022, the Corps issued a notice in the *Federal Register* for further public review of one of these NWPs (NWP 12 related to oil or natural gas pipeline activities) and that this review is currently ongoing.[16]

In reviewing NWP 12 and other similar pipeline and energy transmission NWPs, (including NWP 57 for electric utility line and telecommunications activities and NWP 58 for utility line activities for water and other substances), we ask you to reconsider the existing loophole that allows certain projects to segment Clean Water Act review of individual waterbody crossings at separate and distinct locations, and to allow these impacts to be evaluated individually rather than cumulatively for the purposes of adverse impacts to jurisdictional waters.[17] In our view, this loophole is inconsistent with the Clean Water Act requirement that activities pursued under a general permit (including a NWP) "will have only minimal cumulative adverse effect on the environment."[18]

As you know, the general condition 15 for the applicability of NWPs states that an activity eligible for approval under such a permit "must be a single and complete project…[and] the same NWP cannot be used more than once for the same and complete project.[19] However, for certain linear projects, including oil and gas pipeline activities under NWP 12, there is an explicit exemption from this general condition for "activities crossing a single waterbody more than one time at separate and distant locations or multiple waterbodies at separate and distant locations, each crossing is considered a single and complete project for the purposes of NWP authorization."[20] As a result,

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[14] See https://www.usace.army.mil/Missions/Civil-Works/Regulatory-Program-and-Permits/Obtain-a-Permit/.
[15] See https://transportation.house.gov/news/press-releases/committee-chairs-urge-president-biden-to-delay-implementation-of-flawed-trump-era-army-corps-permitting-rule and https://transportation.house.gov/news/press-releases/defazio-and-cohen-urge-president-biden-to-reopen-and-reexamine-us-army-corps-nationwide-permits-
[16] See. 59 Fed. Reg. 17281 (March 28, 2022).
[17] See 33 CFR 330.5 By regulation, NWPs can be modified, reissued, revoked, or suspended before they expire.
[18] See. 33 U.S.C. 1344(e)(1).
[19] See USACE 2021 Nationwide Permit, Index of 2021 Nationwide Permits, Conditions, District Engineer's Decision, Further Information, and Definitions, https://usace.contentdm.oclc.org/utils/getfile/collection/p16021coll7/id/20099.
[20] See id.

certain linear projects, such as a pipeline extending hundreds of miles with potentially hundreds of individual stream crossings, can be reviewed and approved under this expedited process without full consideration of the actual, cumulative impacts of these waterbody crossings.

This loophole prevents the Corps from fully accounting for the complete impact of the project, as well as fails to account for cumulative effects that can have more than minimal impact on aquatic resources. Further, because such activities are being pursued under a NWP rather than under an individual permit, the NWP process does not allow for project-specific environmental review or public input under either the Clean Water Act or the National Environmental Policy Act, as the opportunity for such review would have had to occur during the issuance of the general authority for the NWP, not its specific project application.

Like the concerns expressed for the Pebble LP proposal, allowing permittees to artificially-compartmentalize the adverse impacts of hundreds of stream crossings without any cumulative impact analysis or opportunity for public comment or review is, in our opinion contrary to the intent of the Clean Water Act and to the intent of the NWP programs prohibition against cumulative adverse environmental effects.

If we are to continue to make progress in improving the health of our nation's waters as the Clean Water Act marks its next 50 years, the Corps and EPA must take every effort to prevent bad actors from manipulating the system to avoid regulatory scrutiny and compliance. We, again, urge you to revise existing Clean Water Act regulations and implementation guidance to impose additional scrutiny and economic, environmental, and public interest analysis in your review of the sham permit schemes of polluters seeking to circumvent critical federal protections for human health and the health of U.S. waters and wetlands.

Thank you for consideration of our request.

PETER A. DEFAZIO
Chair

GRACE F. NAPOLITANO
Chair
Subcommittee on Water Resources
and Environment