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Re: Comments and Response to Request for Information, Recommendations For Improving Federal Hardrock Mining Regulations, Laws, And Permitting Processes; Docket No. DOI-2022-0003

INTRODUCTION

These comments are submitted on behalf of the undersigned groups. We look forward to working on these critical mining law and regulatory reforms and welcome the opportunity to submit these comments to help shape the work and process of the effort. These comments specifically address the need to close two significant loopholes in application of the Clean Water Act to address pollution and other hazards from the disposal of mining and mine-processing wastes.[1] Those two loopholes are (1) the rule that is generally known as the "waste treatment exclusion" from waters of the United States that are subject to regulation under the Clean Water Act, an exemption that has allowed the perpetuation of using our nation's waters as waste dumps for everything from mining waste to coal ash, in contravention of the very purpose of the Clean water Act; and (2) allowing mine tailings and related waste to be redefined as "fill" material subject to Clean Water Act Section 404 permitting, an approach that circumvents performance standards and effluent limitations designed specifically to address pollutants from mining. These two loopholes and the need to close them are addressed in more detail below.

CLOSING CLEAN WATER ACT LOOPHOLES FOR MINING

I. THE WASTE TREATMENT EXCLUSION IS CONTRARY TO THE CLEAN WATER ACT

A. Background: A History of Improper Action.

When the Environmental Protection Agency ("EPA") first promulgated the waste treatment exclusion in 1979, it explained that cooling ponds should remain protected under the Act:

[1] Many of the groups signed onto this comment letter have joined the comments submitted by other organizations on additional topics.

> Such ponds are frequently extremely large in size and some harbor fish populations which invite recreational uses . . . . *EPA believes this use should remain subject to control under the Act's regulatory provisions, and that such broad jurisdiction is consistent with the thrust of the Act and its legislative history.*

National Pollutant Discharge Elimination System, 44 Fed. Reg. 32,854, 32,858 (June 7, 1979) (emphasis added). In May 1980, through rulemaking, EPA moved the provision that excluded "waste treatment systems" from the definition of "wetlands," to the larger overarching definition of "waters of the United States," change which could have improperly expanded the exclusion for waste treatment and allow waters traditionally protected under the Act to be used as waste dumps. 45 Fed. Reg. 33,290, 33,424 (May 19, 1980). To avoid that outcome, in the same rulemaking, EPA ensured the improper expansion would not occur by adding limiting language stating that "[t]his exclusion applies *only* to *manmade* bodies of water which neither were originally created in waters of the United States (such as a disposal area in wetlands) nor resulted from the impoundment of waters of the United States." *Id.* (emphasis added).[2] In so doing, EPA ensured that polluters would not be able to use the exclusion to convert a water of the United States into a waste dump.

Unfortunately, just two months later, in July 1980, after "[c]ertain *industry petitioners* wrote to EPA expressing objections to the language," EPA announced its decision to "suspend" the limiting language it had just promulgated to stay within the confines of the law. 45 Fed. Reg. 48,620, 48,620 (July 21, 1980) (emphasis added). EPA stated that it planned "promptly to develop a revised definition and to publish it as a proposed rule for public comment." *Id*. EPA never did - handing industry the ability to use our nation's waters as waste dumps, fundamentally contrary to the Clean Water Act.

This error and fundamentally abusive approach has been perpetuated through various administrations. Now is the time to fully and finally correct this enormous polluter-friendly loophole. While the extremely damaging Navigable Waters Protection Rule is vacated and EPA engaged in new rulemaking, the loophole remains. The 1980 version of the exclusion remains in effect with no limitation that it apply only to mandmade waters.[3] The EPA and the Corps of Engineers (hereafter the "Agencies") have claimed to continue "longstanding practice" without acknowledging or addressing the limiting language in the promulgated 1980 rule, the temporary suspension, or the fact that they have been busily expanding what was considered waste treatment to include cooling ponds in the most recent rulemaking.

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[2] This is particularly significant for industries that produce coal ash waste and for the mining industry, like the mines in the upper Midwest that have created tailings basins in wetlands.

[3] In the Obama Administration's Clean Water Rule, the Agencies treated the "suspension" of the limiting language as a settled matter, illegally refusing even to take comment. *See* 80 Fed. Reg. at 37,097, 37,114 (simultaneously lifting suspension and suspending the same language). The Agencies also affirmed an interpretation of the exclusion that effectively authorizes new impoundments of natural waters, such as streams and wetlands, so that they can be pressed into service as industrial waste dumps. *Id.* at 37,096-97. It appears that the Agencies continue to apply this illegal interpretation.

B. The Exclusion Violates The Plain Language, Intent, and Purpose of the Clean Water Act.

The waste treatment exclusion violates the plain language of the Clean Water Act and perpetuates a longstanding dereliction of the Agencies' duty to protect all waters of the U.S. under the Act. It does so largely by sleight of hand with actions characterized as temporary or incremental that harden into permanence as a wholesale exemption from the Act. Congress spoke clearly: the Clean Water Act would apply to "the waters of the United States," 33 U.S.C. § 1362(7), regardless of how those waters were used. The law contains no exceptions, much less for water bodies converted into repositories for industrial waste. Indeed, unregulated dumping of waste is the very practice Congress meant for the Clean Water Act to end. *See* S. Rep. No. 92-414 at 7 (1971) ("The use of any river, lake, stream or ocean as a waste treatment system is unacceptable."). Nothing in the Act empowers the Agencies to remove waters of the U.S. from the Act's protections. *Cf. Nat'l Ass'n of Mfrs. v. Dep't of Lab.*, 159 F.3d 597, 600 (D.C. Cir. 1998) ("There is, of course, no such 'except' clause in the statute [at issue in that case], and we are without authority to insert one."); *NRDC, Inc. v. Costle*, 568 F.2d 1369, 1377 (D.C. Cir. 1977) (EPA lacked discretion to exempt entire categories of point sources from permitting requirements). Yet that is precisely what the waste treatment exclusion does and has done, contravening the clear intent of Congress. The exclusion cannot be reconciled with the Act's purpose of controlling and eventually eliminating pollution discharges into our Nation's waters. *See* 33 U.S.C. § 1251(a)(1). The agencies must take action to correct this significant loophole in the Clean Water Act.

The exclusion is also contrary to the Agencies' own statements over decades that impoundments of waters of the U.S. remain waters of the U.S. based on their significant nexus to foundational waters. The Agencies have never provided an explanation—scientific, technical, or otherwise—for their decision to treat so-called "waste treatment systems" differently from other impoundments of waters of the United States.

The Agencies have also repeatedly failed to address and/or mischaracterize the history of the waste treatment exclusion and the "suspension" that allowed navigable waters of the U.S. to be used as waste dumps. By claiming that the regulatory exclusion has existed for decades and the Agencies are supposedly just fine-tuning the definition, the Agencies sweep years of improper regulatory failure and violations of the Act under the rug. *See e.g.* 85 Fed. Reg. at 22,317 ("included in regulatory text for decades," but defining now); *id.* at 22,324 ("existed since 1979" without any mention or recognition of the fact that the 1979 version did not allow the exemption from waters of the U.S. but rather from a more limited set of wetlands).

Finally, EPA has never explained the shift from its 1980 position that only manmade waste treatment systems should be excluded from the definition of "waters of the United States," to its present position permanently extending the exclusion to systems created in natural waters, and now expanded to include cooling ponds. When EPA promulgated the exclusion in 1980, it explained that it "was not intended to license dischargers to freely use waters of the United States

as waste treatment systems," 45 Fed. Reg. at 33,298; rather the exclusion was limited to manmade waters "to ensure that dischargers did not escape treatment requirements by impounding waters of the United States and claiming the impoundment was a waste treatment system, or by discharging wastes into wetlands." 45 Fed. Reg. at 48,620. When EPA suspended the language limiting the exclusion to manmade systems, the agency said it was responding to complaints that the limitation would otherwise cover "existing waste treatment systems ... *which had been in existence for many years*," 45 Fed. Reg. at 48,620 (emphasis added). More recently, the Agencies harden the exclusion into permanence and expand its application. The Agencies' actions are improper, contrary to the Act and contrary to the interest of the public. The Agencies' allowance of the exclusion and their perpetuation of earlier failures and errors is further contrary science and public health.

It is well past time to correct the fundamental error of 1980 and pass rules that comply with the Clean Water Act to make clear that waste treatment pond exclusions apply *only and exclusively* to manmade ponds created entirely in upland (not wetland) areas. Further there should be no exclusion or "grandfathering" of waste ponds or impoundments created in wetlands or ponds or lakes or streams in the past. Those waters are waters of the United States and must be treated accordingly.

II. MINE WASTE SHOULD NOT BE TREATED AS "FILL" TO CIRCUMVENT REGULATORY REQUIREMENTS.

The second Clean Water mining loophole mining requiring immediate attention, allows mine waste to be dumped into waters of the United States as "fill" under Section 404 (33 U.S.C. § 1344) permits. Again, this practice is entirely contrary to the very purpose and intent of the Clean Water Act to restore and protect the chemical, physical, and biological integrity of the nation's waters. 33 U.S.C. § 1251.

The probmel steps from EPA and the Corps' efforts to deem the tailings effluent from mine activities—waste that is a pollutant with metals and a source of sediment pollution--as "fill material," permitting its discharge into natural water bodies by the Army Corps of Engineers under section 404 of the Clean Water Act and obviating compliance with effluent limitations and new source performance standards for what is obviously mine wastes. This huge loophole practice was not even adopted through formal rulemaking but rather by an informal, internal EPA memo—called the Regas Memo—during the Bush administration.[4] Based on this flawed memo, the Corps allowed and permitted Alaska's Kensington Gold Mine to discharge its tailings directly into a 20-acre lake, completely smothering and destroying the lake and killing all aquatic life, without regard to the zero-discharge performance standard that is part of EPA's rules. *See e.g.*, 40 C.F.R. § 440.104(b)(1) ("there shall be no discharge of process wastewater to navigable waters from mills that use the froth-floation process…for the beneficiation of….gold…ores."); see also, 47 Fed. Reg. 54,598, 54,619 (Dec. 3, 1982); 47 Fed. Reg. 25,682, 25,696 (June 14, 1982). While the Supreme Court upheld this permit in *Coeur Alaska v. Southeast Alaska*

[4] Memo from Diane Regas, James Hanlon, and Geoffrey Grubbs to Randy Smith (May 17, 2004).

Conservation Council,[5] over the vigorous dissent of Justice Ruth Bader Ginsburg joined by two other members of the Court, it did so only in deferring to the Agencies. That does not negate the fact that EPA's interpretation allowing tailings waste to be "fill," completely defeats the point of the effluent limitations and performance standards prohibiting discharge of these pollutants into our waters and in some cases obliterating waters. Effluent limitation and standards, an integral part of the Clean Water Act to ensure that its purpose and intent is met, were adopted to prohibit the very discharges later allowed by the Regas Memo.

Because this interpretation of the law was established through an informal agency memo, it can be reversed with a similar memo adopting the plain-language interpretation of the Clean Water Act law advanced by the dissent in *Coeur Alaska*. The majority opinion of the Supreme Court did not require the Corps to issue permits as it did at the Kensington Mine, but rather deferred to EPA's interpretation in the Regas Memo. Therefore, EPA can readily reverse it, either through another informal memo or through formal rulemaking.

The Regas Memo and its harmful legacy should end now. The agencies of the federal government should not continue to allow any mine or mine-processing waste to be identified as "fill" subject to permitting under Section 404 of the Clean Water Act—an approach that undercuts the act's comprehensive protections.

CONCLUSION

Our organizations welcome the effort by the Administration to address so many long-standing issues with our outdated mining laws and associated loopholes and exemptions from other protective environmental laws. The Administration should seize this opportunity to be comprehensive in ensuring that mining is responsibly done within the boundaries of our most important environmental laws including the Clean Water Act. Wholly eliminating these two extremely damaging loopholes is critical to the overall effort.

Please don't hesitate to contact the undersigned with questions. We look forward to the process moving forward quickly and comprehensively and to our organizations being part of that process.

Sincerely,

[5] 557 U.S. 261 (2009).