Reforming the Waste Treatment System Exclusion

Background

On May 19, 1980, the Environmental Protection Agency (EPA) revised its regulations defining waters of the United States. The new regulations provided an exclusion for "waste treatment systems":

> Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of the Act (other than cooling ponds as defined in 40 CFR 123.11(m) which also meet the criteria of this definition) are not waters of the United States. This 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.

40 C.F.R. § 122.2. According to EPA, the purpose of the final sentence of the exclusion was 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. 33298 (May 19, 1980) (emphasis in original).

This clarification of the waste treatment system (WTS) exclusion was later suspended by EPA without public notice or comment. 45 Fed. Reg. 48620 (July 21, 1980). EPA explained that there was some confusion as to whether the regulation inadvertently outlawed existing waste treatment facilities which had been constructed in waters of the United States. Id. There was no indication that EPA was modifying its regulatory stance towards future in-stream treatment facilities. The Army Corps of Engineers (Corps) adopted the WTS exclusion without the explicit manmade waters limitation in 1986. 33 C.F.R. § 328.3(a)(8).

Nine years later, in a case involving the same exclusion, coal mine operators argued that the July 1980 suspension was evidence of EPA's intent to exclude all in-stream treatment facilities from the definition of waters of the United States. *West Virginia Coal Assn. v. Reilly*, 728 F.Supp. 1276, 1289 (S.D. W.Va. 1989). EPA countered that the suspension had no effect on the clear definitional mandate that impoundments of waters remain waters of the United States for purposes of the Clean Water Act. The court not only upheld EPA's position, it specifically found that the policy against in-stream treatment merely articulated the requirements of the statute. Id. at 1292.

In the years since *West Virginia Coal*, EPA changed its position. On May 8, 1989, Rebecca Hanmer, Acting EPA Assistant Administrator for Water, sent a letter to Brigadier General Patrick Kelly, Director of Civil Works, asking for his assistance in addressing the regulation of mining discharges into waters of the United States. Ms. Hanmer explained that EPA had met with members of the West Virginia congressional delegation who had expressed frustration with EPA's approach to regulating the disposal of coal mine wastes into waters of the United States.

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According to Ms. Hanmer, "under current EPA regulations, discharges into these instream impoundments continue to be discharges into waters of the U.S., and, therefore, NPDES permit limitations must be met prior to treatment in the impoundment, rather than after." She then proposed an "alternative approach" in which the Corps would review impoundments of waters pursuant to section 404 and EPA would revise its regulations so that "where such a review has been conducted and section 404 criteria have been met, a 402 permit will only be required for discharges from the instream impoundment, not into it (emphasis in original).

In 1992, EPA adopted this alternative approach in a memo from LaJuana Wilcher, EPA Assistant Administrator for Water, to Charles Findley, Water Division, Region X. The memo addressed the AJ and Kensington gold mines in Alaska which had proposed impounding wetlands and streams behind earthen dams for purposes of tailings disposal. EPA and the Corps agreed that as long as the Corps approved the construction of the tailings impoundment under section 404, the waters within the impoundment would no longer be considered waters of the United States and tailings discharges would not require either a section 402 or 404 permit. EPA and the Corps subsequently relied on similar reasoning to authorize the Fort Knox open pit gold mine near Fairbanks and purportedly other Alaska hard rock mines as well.

In 2007, the Fourth Circuit found that the established practice of EPA and the Corps with respect to surface coal mines was now to view sediment ponds in non-manmade waters as waste treatment systems rather than waters of the United States. Although the district court had emphasized that EPA "advances a different interpretation of the 'waste treatment system' exclusion that conflicts with the interpretation offered contemporaneously with the enactment of the regulations," the appeals court distinguished *West Virginia Coal* and upheld the current agency practice as reasonable. *Ohio Valley Environmental Coalition v. Aracoma Coal Co.,* 556 F.3d 177, 214-15 (4th Cir. 2009).

Current Usage

Last April, National Wildlife Federation (NWF) submitted a Freedom of Information Act (FOIA) request to EPA seeking (1) all records reflecting EPA's interpretation of the WTS exclusion and (2) all records pertaining to specific discharges of mining and other wastes under the WTS exclusion into non-manmade waters. As part of its response, EPA agreed to conduct an informal survey of its regional offices to determine which industries, other than the mining industry, rely upon the WTS exclusion to discharge waste into non-manmade waters and the number of times each industry has used the exclusion since the beginning of 1997.

EPA's survey responses demonstrate that, with the exception of mining, very few industries have actually made it a practice of treating their wastes in waters of the United States. Regions 1, 2, 3, 5, 8, and 10 reported that there were no industries, other than the mining industry, using the WTS exclusion in non-manmade waters. Region 4 has authorized in-stream storm water treatment as has Region 6 within certain drainages in Albuquerque, New Mexico. The EPA survey responses also indicate that a nylon plant in Region 4, a slaughter house in Region 7, and three wastewater treatment plants in Region 9 have relied upon the WTS exclusion. EPA's

informal survey may not have identified every instance of the WTS exclusion being used in connection with non-manmade waters, but it is evident that the constituency for maintaining the WTS exclusion in its current form is very limited.[1]

Even in the context of hard rock mining, the WTS exclusion has been used less frequently in recent years. While Regions 3 and 4 reported that numerous surface coal mines have treated waste in waters of the U.S., hard rock mines developed since 2002 have apparently relied upon the revised definition of "fill" to obtain section 404 permits that authorize tailings discharges into non-manmade waters. Should the fill definition be modified to exclude waste discharges subject to effluent guidelines, it is likely that hard rock mine developers will once again seek to discharge wastes into the nation's waters pursuant to the WTS exclusion—a practice with a long and tragic history of creating acid runoff and contaminating rivers, lakes, and groundwater.

Current EPA guidance indicates that the WTS exclusion provides a separate and alternative basis for discharging mine wastes into waters of the U.S. In a 2004 memo concerning the Kensington Mine in Alaska, Diane Regas, EPA Director of Wetlands, Oceans and Watersheds, stated that the rulemaking which had redefined fill to include mine wastes did not "alter EPA's interpretation of the waste treatment exclusion contained in 40 C.F.R. § 122.2." Ms. Regas went on to say that while the permitting framework described in the memorandum "does not invoke the exclusion for the discharge of mine tailings to impounded waters, neither does it preclude its use for waste treatment systems or system components that meet the definition in 40 C.F.R. § 122.2." EPA confirmed this view of the WTS exclusion in a letter from Assistant Administrator, Benjamin Grumbles, to Assistant Secretary of the Army, John Paul Woodley, on March 1, 2006.

Future Applications

The growth of sulfide mining in the West and Midwest will encourage the use of the WTS exclusion in non-manmade waters. For instance, the proposed Pebble Mine in the headwaters of Alaska's Bristol Bay would be the largest open pit gold and copper mine in North America. Bristol Bay is a remote and spectacular area that sustains the world's largest remaining runs of sockeye salmon. The Pebble Mine proposes to discharge billions of tons of tailings into two enormous impoundments built directly on top of streams, ponds, and wetlands creating vast reservoirs of slurry hundreds of feet deep. If the complex of headwaters impounded by the Pebble Mine is viewed as a waste treatment system rather than waters protected by the CWA, the mine developers would not need a section 402 or 404 permit for the actual discharge of tailings (although they would need section 404 authorization to build the dams). Such a finding would also make a 404(c) veto inapplicable to the tailings discharges.

The Fix

[1] EPA is confirming Region 10's survey response. To review the documents produced by EPA in response to NWF's FOIA request, contact Tony Turrini at National Wildlife Federation, turrini@nwf.org or (907) 339-3911.

EPA and the Corps should revise the WTS exclusion to conform to the original intent of the regulations. The exclusion should apply only to manmade waters but include a grandfather provision for waste treatment systems operating in non-manmade waters as of the date of the revision:

> Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA (other than cooling ponds which also meet the criteria of this definition) are not waters of the United States. This exclusion applies only to waste treatment systems that are created in manmade waters and not in waters of the United States or impoundments of waters of the United States except that waste treatment systems created in non-manmade waters, operating before the date of this regulation, are not waters of the United States.

This simple fix would be clear and fair, and its implementation would be largely beyond the discretion of regional decision-makers. Given the huge amounts of money involved in many mining projects, it is essential that the WTS exclusion be as straightforward and unambiguous as possible.