

May 18, 2018

Mr. Scott Wilson
Office of Wastewater Management
Water Permits Division (MC4203M)
1200 Pennsylvania Ave NW
Washington, DC 20460

Re: Response to EPA's Request for Comments, Clean Water Act Coverage of "Discharges of Pollutants" via a Direct Hydrologic Connection to Surface Water, Docket ID No. EPA-HQ-OW-2018-0063

Dear Mr. Wilson:

The National Tribal Water Council (NTWC) is pleased to provide comments on the U.S. Environmental Protection Agency's (USEPA or EPA) Request for Comment on Clean Water Act Coverage of "Discharges of Pollutants" via a Direct Hydrologic Connection to Surface Water, 83 Fed. Reg. 7126 (Feb. 20, 2018). NTWC's comments address how such discharges of pollutants impact surface water quality for American Indian Tribes and Alaska Native Tribes (also known as Alaska Native Villages).

Introduction

The NTWC is a technical and scientific body created to assist the EPA, federally recognized Indian Tribes, including Alaska Native Tribes, and their associated tribal communities and tribal organizations with research and information for decision-making regarding water issues and water-related concerns.

The NTWC advocates for the best interests of federally recognized Indian and Alaska Native Tribes and tribally authorized organizations in matters pertaining to water.

Furthermore, the NTWC advocates for the health and sustainability of clean and safe water, and for the productive use of water for the health and well-being of Indian Country and Indian and Alaska Native communities.

NTWC's Responses to EPA's Request for Comments

NTWC fully supports EPA's prior statements finding that point source discharges to groundwater with a direct hydrologic connection to surface water require a NPDES permit, and there is no need for EPA to revise them.

The NTWC, as well as individual American Indian Tribes and Alaska Native Villages, have consistently communicated to EPA and our other federal partners that water resources are precious and sacred and should be protected. We have done so through written comments, consultations and dialogue. For example, in comments to EPA on the need for baseline water quality standards to protect water resources in Indian Country, NTWC prefaced its comments with the following:

***From the North:** For Native people, caring for the water is not a matter of practicality. We lived as human beings on this earth for thousands of years without relying on oil. We can live without gold. But we cannot live without water.*

***From the East:** We give thanks to all the waters of the world for quenching our thirst and providing us with strength. Water is life. We know its power in many forms – waterfalls and rain, mists and streams, rivers and oceans. With one mind, we send greeting and thanks to the spirit of Water. Now our minds are one.*

***From the South:** The water is ha'nyi gash ja (grandfather water). Prayers are said when one partakes of this life giving liquid. The springs (ha' pak) are considered holy waters. The holy water is bathed in for healing of the body and soul. Babies are taken to the sacred springs near their place of birth and washed. Doing this makes the child part of the spring, and the child can return to the spring for blessing and guidance. That child is related to the water. The Hualapai live through the water and the water lives through the Hualapai.*

***From the West:** Water is the Life of All of Us – Felix Aripa, Coeur d'Alene Tribal elder*

The NTWC welcomed EPA's recent review and synthesis of research related to the connectivity of streams and wetlands to downstream waters,¹ as it provided substantive peer-reviewed evidence that surface water and groundwater systems are unequivocally linked. EPA developed this report specifically to inform joint rulemaking by EPA and the U.S. Army Corps of Engineers on the definition of jurisdictional waters, by summarizing current understanding about connectivity and mechanisms by which streams, and wetlands affect the physical, chemical and biological integrity of downstream waters. Similarly, EPA and the U.S. Geological Survey published a joint technical report² that acknowledged the vertical connection between surface and

¹ Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence (EPA/600/R-14/475F), January 2015

² Protecting Aquatic Life from the Effects of Hydrologic Alteration (EPA Report 822-P-15-002; USGS Scientific Investigations Report 2015-5160), 2015

groundwater as a third dimension of connectivity along the various flow paths that connect points of recharge (beginning at the water table) to points of discharge (i.e., a river or stream).

A decision by EPA to disregard this research would create a huge loophole in the Clean Water Act (CWA) regulatory scheme, through which companies could discharge pollutants immediately adjacent to and directly impacting surface waters yet avoid the CWA requirement to obtain a NPDES permit. *See, e.g., Upstate Forever v. Kinder Morgan*, 877 F.3d 637 (4th Cir. 2018) (discussed on page 5 & 6). In fact, a staggering number of facilities that currently are required to obtain NPDES permits might be exempted from NPDES permitting requirements if EPA changes its position regarding point source discharges into groundwater directly impacting a surface water. As a result, transport of contamination by seepage, leakage, overflow, breaching, or runoff, which may then infiltrate into the groundwater system and subsequently migrate laterally to reach a surface water, would go unchecked.

Here we provide examples from three categories of facilities: mine sites, wastewater treatment plants (WWTPs), and coal combustion residual (CCR) storage and disposal facilities. There are numerous other types of facilities that are often proximal to surface waters and that are of concern, but in the interest of brevity and concisely making our point, we do not discuss them here. These include, but are not limited to: petrochemical facilities and refineries; municipal solid waste landfills; hazardous waste treatment, storage and disposal facilities; chemical plants; major rail facilities; and fossil- and nuclear-fueled power plants. Additionally, the U.S. government itself owns many facilities, such as nuclear installations (e.g., Hanford, Savannah River, Oak Ridge) and military installations that are both proximal to surface waters and that could or do result in surface water contamination via hydrologically connected groundwater.

Facilities in the first three categories, which include impoundments of liquids or partially to fully saturated solids, often have large footprints. Because of the large footprint of these facilities or due to their sheer number (e.g., WWTPs, of which there are both publicly owned and private systems), there is a heightened possibility for either intentional or unintentional discharges to the groundwater subsystem with subsequent discharge to the surface water subsystem via direct hydrological connections between the two.

According to the [CDC, with regard to mine sites](#):

“In 2015, there were a total of 13,294 mining operations that reported mine operator employment. The commodity breakdown was 1,460 coal, 315 metal, 924 nonmetal, 4,303 stone, and 6,292 sand & gravel mines.”

Mining operations of concern (and this generally excludes stone and sand & gravel operations) include tailings and other mining waste disposal facilities as well as waste rock piles and heap-leaching facilities. In addition to active facilities that report employment, there are many inactive and abandoned mining facilities that either directly contaminate surface or ground water, or that threaten to do so.

According to [USEPA’s Clean Watersheds Needs Survey 2012 Report to Congress](#), issued in January of 2016, there were 14,691 Publicly Owned Treatment Works (POTWs) serving a

population of nearly 234 million. In addition, there are many, typically small, privately owned wastewater treatment facilities.

According to the [USEPA](#), as of 2012, there were over 310 active CCR landfills with an average footprint of nearly 120 acres each and 735 active CCR surface impoundments with an average footprint of 50 acres each. The total area for these landfills and impoundments amounts to nearly 115 square miles.

Of paramount concern to American Indian and Alaska Native communities and governments are seepage, leakage, overflow, breaching or runoff from these tens of thousands of facilities, many of which are upstream of these tribal communities and of other communities where American Indian and Alaska Native individuals happen to reside or work. Discharges from these facilities have the potential to contaminate, via a direct hydrologic connection from ground water to surface water, potable water sources utilized by these communities.

For example, tribal communities are experiencing many adverse impacts to surface waters from mining activities. In EPA Region 5, tribes in northeastern Minnesota have documented the loss of a sensitive cultural and subsistence resource, wild rice (or manoomin), from polluted mine tailings effluent being discharged without treatment and via groundwater exchange to adjacent shallow lakes that supported harvestable stands only a generation ago. In commenting on NPDES permits for both existing taconite mines and a proposed copper-nickel sulfide mine, tribes have urged the state permitting agency to apply and enforce protective NPDES permit limits for these downstream aquatic resources even though the permitted facility is not discharging directly to those surface waters. Site-specific data and studies have confirmed that polluted mine effluent that seeps through and under these tailings basins “daylights” immediately in the connected surface waters, with obvious adverse biological effects. Yet despite clear and repeated recommendations by EPA to apply NPDES permit requirements for point source discharges of pollutants to surface waters, including those that occur via hydrologically connected subsurface flow, the Minnesota Pollution Control Agency (MPCA) has not proposed to do so for a pending permit for the state’s first copper-nickel sulfide mine. Without these explicit permit requirements, *when* (not *if*) this new facility’s polluted discharge reaches nearby streams and wetlands, the company will be discharging without a permit in violation of the Clean Water Act, and those downstream waters will not be protected. These tribes therefore need EPA to continue to uphold the CWA permitting requirements.

Many other tribes are located in arid or semi-arid regions, making the NPDES permit requirement necessary to protect a scarce resource. In the arid west, groundwater discharges sustain perennial streams and rivers along with intermittent streams and springs, creating and sustaining critical riparian and wetland habitat. Many rare and sensitive plant and animal species depend on these groundwater-fed water resources and are extremely vulnerable to habitat degradation caused by water quality pollution. The looming threat of an even more water-scarce future, as predicted by climate change, increases the urgency in establishing and maintaining the highest level of protection for the quality of groundwater, especially for situations where a discharge of pollutants to groundwater has a direct hydrologic connection to surface water. In

southeast Utah, the only conventional uranium mill left in the nation is discharging pollution to the underlying aquifer under a state-issued permit. The state is not acknowledging the source of groundwater contamination and the contaminant plumes are actively migrating towards and discharging at nearby springs. The ongoing failure of the state permitting agency to implement adequate groundwater protection will manifest soon as a radioactive and toxic surface water quality impairment issue and it is vital that private companies remain liable under the Clean Water Act to eliminate these continuing sources of pollution and mitigate risks to human health and the environment.³

Enforcing the NPDES permit requirement is also necessary to protect subsistence harvesting, and connectivity must be recognized to protect these life-giving resources. Alaska Natives are in the beginning stages of overseeing the clean-up of military and other federal sites, such as abandoned Native boarding schools and clinics. These facilities have left behind PCBs and other dangerous chemical wastes, including petroleum products, asbestos, antifreeze, chlorinated solvents, pesticides, and heavy metals, which are entering the marine and freshwater environment and the fat-rich food web of fish and marine mammals that is essential to Alaska Natives in their subsistence lifestyle. This lifestyle is vital to the health and spirit of the Alaska Native culture and traditions. In the Northeast Cape White Alice site alone, the Army Corp of Engineers identified at least 23 contaminated sites. Studies have shown that fish downstream from the site contain contaminants at levels that warrant a designation of “no consumption recommended” according to EPA guidance. Historic abandoned mines of lead, gold, silver, copper and other rare metals also exist throughout Alaska. There is no mine that does not harbor toxic materials. The most common toxics are arsenic and mercury, which were used to extract and separate the minerals or metals being mined. In the early 1990’s, commercial fishermen of the Taku River approached the Douglas Indian Association for help in researching why salmon were infested with sores and other unhealthy markers. In 1995 with a grant from EPA, the tribe partnered with the U.S. Geological Survey and began water sampling of the river. Mercury and arsenic were found that were traced back to Tulsequah Chief Mine in British Columbia whose tailing pond leached into the Taku River. In the last 10 years, the Greens Creek Mine of Admiralty Island, part of the traditional territory of the Village of Angoon, has leached toxic waters from its tailings into wetlands, and those contaminants have found their way into the marine waters of Hawk Inlet. In the wetlands, where bear and deer are hunted, as well as gathering of berries, vegetables and medicines takes place, to the coastal waters that provide seaweed, clams, seals and other marine foods, toxic materials are an ever-present danger to the lifestyle of Alaska Natives.

The NTWC believes that EPA’s previous statements supporting the proposition that point source discharges into groundwater with a direct hydrologic connection to surface water will trigger the protections of the CWA are clearly in line with the text, structure, and purposes of the CWA. As EPA has acknowledged, “the Act requires NPDES permits for discharges to groundwater where there is a direct hydrological connection between groundwaters and surface waters,” as noted in the Amendments to the Water Quality Standard Regulation That Pertain to

³ Cook, Benjamin I, Toby R Ault, and Jason E Smerdon. 2015. “Unprecedented 21st Century Drought Risk in the American Southwest and Central Plains,” no. February: 1–7. doi:10.1126/sciadv.1400082.

Standards on Indian Reservations, 56 Fed. Reg. 64876-01, 64892 (Dec. 12, 1991). Furthermore, this position has been upheld by numerous courts in prominent cases and is even supported by the Supreme Court in *Rapanos v. United States*, 547 U.S. 715 (2006).

To begin with, CWA § 102(a) specifically recognizes groundwater in its directive to EPA to protect the Nation's waters:

The Administrator shall, after careful investigation, and in cooperation with other Federal agencies, State water pollution control agencies, interstate agencies, and the municipalities and industries involved, prepare or develop comprehensive programs for preventing, reducing, or eliminating the pollution of the navigable waters and ground waters and improving the sanitary condition of surface and underground waters.

Moreover, CWA § 402(b)(1)(D) requires NPDES permit programs to include authority to control the disposal of pollutants into wells, thus contemplating that a discharge of pollutants into groundwater can adversely affect surface water and so trigger NPDES permit requirements. In addition, the definition of "pollutant" in CWA § 502(6)(B) exempts only well injections related to oil and gas production and not any other type of well injection of pollutants.

These provisions demonstrate that Congress had no intent to exclude point source discharges into groundwater from the CWA, but instead intended quite the opposite. As Justice Scalia explained, writing for the plurality in *Rapanos*, "[t]he Act does not forbid the 'addition of any pollutant *directly* to navigable waters from any point source,' but rather the 'addition of any pollutant *to* navigable waters.'" *Id.*, 547 U.S. at 743 (quoting CWA §§ 502(12)(A) and 301).

The courts have therefore required NPDES permits to be issued for point source discharges to groundwater when there is a direct hydrologic connection between the groundwater and surface water. *See, e.g., Waterkeeper Alliance, Inc. v. EPA*, 399 F.3d 486 (2d Cir. 2005). In that case, the court also approved EPA's science-based, case-by-case approach to regulating those discharges, which took into account the fact that "groundwater-related requirements are highly dependent on site-specific variables" and that "variability in topography, climate, distance to surface water, and geologic factors influence whether and how pollutant discharges at a particular site enter surface water via groundwater." *Id.* at 515.

Two other Circuits have recently agreed with the Second Circuit, providing further legal and policy support for maintaining EPA's approach to the issue. In *Hawai'i Wildlife Fund v. County of Maui*, 886 F.3d 737 (9th Cir. 2018), a tracer dye study showed that discharges made into groundwater were impacting surface water. There, dye dropped into municipal wastewater injection wells traveled through groundwater for a half-mile and emerged from submarine springs off a nearby beach. Data showed that 64% of the wastewater from two of the injection wells discharged through groundwater into the ocean, releasing daily quantities of wastewater that were "roughly the equivalent of installing a permanently-running garden hose at every meter along the 800 meters of coastline." *Id.* at 742-43. The court found that this discharge was "fairly traceable from the point source to a navigable water such that the discharge is the functional equivalent of a discharge into the navigable water." *Id.* at 749. The court held that a plain language reading of the

CWA does not require a “direct” discharge to trigger CWA protections, as Justice Scalia noted in *Rapanos*, and thus the defendant was liable for its discharges. *Id.* at 746, 749.

The court in *Upstate Forever v. Kinder Morgan*, 877 F.3d 637 (4th Cir. 2018), agreed with the Second and Ninth Circuit’s analyses. In that case, an underground gasoline pipeline ruptured, discharging gasoline into groundwater less than a thousand feet from surface waters. The court explained that “[t]he logic of *Waterkeeper Alliance* and *Hawai’i Wildlife Fund* is equally applicable here.” 887 F.3d at 651. Reasoning that pollution was migrating through groundwater via a direct hydrologic connection to surface waters from the pipeline, a point source, the *Kinder Morgan* court held “that to qualify as a discharge of a pollutant under the CWA, that discharge need not be channeled by a point source until it reaches navigable waters.” *Id.* The court went on to explain in plain terms that EPA’s longstanding “fact-specific” approach to examining direct hydrologic connection was proper under the CWA. *Id.* at 651-52. Finally, the court pointed out the same serious problem that NTWC raises in this comment letter, namely, the loophole that would arise from exempting all discharges to groundwater from the CWA:

As we have noted, the CWA’s stated purpose is ‘to restore . . . the chemical, physical, and biological integrity of the Nation’s waters,’ 33 U.S.C. § 1251(a), and the statute establishes a regime of zero tolerance for unpermitted discharges of pollutants, 33 U.S.C. § 1311(a). In contrast, if the presence of a short distance of soil and ground water were enough to defeat a claim, polluters easily could avoid liability under the CWA by ensuring that all discharges pass through soil and ground water before reaching navigable waters. Such an outcome would greatly undermine the purpose of the Act.

Id. at 652.

This precedent makes it clear that EPA’s longstanding position on this matter is consistent with both the CWA and the prevailing case law. *See also* Comments of Southern Environmental Law Center (submitted to this docket on April 18, 2018), at 10-13 (listing 26 decisions supporting the proposition that the CWA protects the Nation’s waters from point source discharges made to surface waters via hydrologically connected groundwater). A change in position, when held up against the precedent described here, would be readily subject to challenge and would sow confusion and unpredictability in CWA permitting. NTWC urges EPA to maintain the status quo and avoid this disruption to a settled system.

The NPDES permit program is already designed to address these discharges, as the discussion above of the CWA, case law and prior EPA statements clearly demonstrates. When the NPDES permit requirement is implemented correctly, in conjunction with our knowledge of the connectivity between surface and groundwater systems, it is effective in addressing this issue.

In contrast, federal authorities other than the CWA do not regulate pollution of the Nation’s waters to the fullest extent, but instead are focused on only a subset of those waters. For example, the Underground Injection Control program mentioned in EPA’s Request for Comments does not address impacts to surface water, and it does not even apply to all groundwater but only to underground sources of drinking water. Other federal authorities, such as the Oil Pollution Act, do

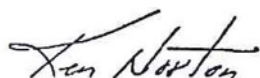
not prevent water pollution but instead apply only after the pollution occurs, imposing liability for cleanup rather than preventing the damage in the first place. State programs by and large do not apply to tribal waters. Rather, tribes rely on the NPDES permit program, and on EPA's enforcement of that program, to protect their surface waters.

The NTWC believes there is no need for EPA to clarify its prior statements regarding point sources discharges to groundwater with a direct hydrologic connection to surface water, as discussed above. EPA's statements simply require proper implementation of the NPDES permit requirement, which is sufficient. Moreover, determinations as to hydrologic connections must take place on a site-specific basis, as the case law demonstrates, and no general language can take the place of that analysis. If EPA does anything, it should make sure that all proposed point source discharges to groundwater consider possible impacts on surface water prior to discharging, so that if a NPDES permit is required, it will be obtained in advance of the discharge rather than after-the-fact.

Conclusion

In summary, with respect to the questions posed in EPA's request for comments, the NTWC reaffirms its support for EPA's longstanding finding that point source discharges to groundwater with a direct hydrologic connection to surface water require a NPDES permit, and there is no need for EPA to revise them. The Council agrees that EPA's previously stated opinions are clearly in line with the text, structure, and purposes of the CWA. The NPDES permit program is unambiguously designed to address these discharges, while other federal authorities are not.

Sincerely,

A handwritten signature in cursive script that reads "Ken Norton".

Ken Norton, Chairman
National Tribal Water Council