



May 21, 2018

Mr. Scott Wilson  
Office of Wastewater Management  
Water Permits Division (MC4203M)  
U.S. Environmental Protection Agency  
1200 Pennsylvania Ave., N.W.  
Washington, D.C. 20460

*Submitted electronically via regulations.gov (Docket ID No. EPA-HQ-OW-2018-0063)*

**In Re: Comments of Colorado Mining Association on the U.S. Environmental Protection Agency's Notice, "Clean Water Act Coverage of 'Discharges of Pollutants' via a Direct Hydrologic Connection to Surface Water"**

Dear Mr. Wilson:

The Colorado Mining Association (CMA) appreciates the opportunity to comment on the U.S. Environmental Protection Agency's (EPA) previous statements regarding the application of the Clean Water Act (CWA) to discharges of pollutants that reach "navigable waters" via groundwater or other subsurface flow with a direct hydrologic connection to such surface waters. This issue is of paramount importance to the mining industry and CMA.

As EPA notes, the agency's assertions that the National Pollutant Discharge Elimination System (NPDES) program applies to discharges into groundwater with a direct hydrologic connection to a "water of the United States" (WOTUS) have primarily been "collateral to the central focus of a[n unrelated] rulemaking or adjudication."<sup>1</sup> As a result, the public has until now generally not been provided with the opportunity to outline the many legal and policy concerns stemming from EPA's "direct hydrologic connection" theory of CWA liability. These issues include the unlawful expansion of CWA liability and infringement of state primacy over land and groundwater resources; evisceration of Congress' "clear and precise distinction"<sup>2</sup> between point and nonpoint sources of pollution and how to address them; creation of unreasonable levels of regulatory uncertainty; failure to provide the public with adequate notice; discouragement of environmentally beneficial practices such as Good Samaritan cleanups and green infrastructure development; and imposition of impracticable requirements that duplicate or may even conflict with other state and federal laws.

CMA therefore urges EPA to promulgate a rule outlining the legal and policy reasons supporting the position that discharges to and through groundwater, including groundwater with a "direct

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<sup>1</sup> 83 Fed. Reg. 7127 (Feb. 20, 2018).

<sup>2</sup> S. Rep. No. 95-370, at 8 (1977).



hydrologic connection” to a WOTUS, are not subject to NPDES permitting requirements. In light of recent conflicting district and circuit court decisions addressing the issue, EPA should also consider issuing a public statement concerning how the agency intends to enforce the CWA with respect to groundwater discharges while it proceeds with a rulemaking.

### **Groundwater Discharges are Addressed by Multiple State and Federal Statutes**

In light of the extensive existing field of groundwater regulation in place throughout the country, application of the “direct hydrologic connection” theory of liability would result in a duplicative, unnecessary, and potentially even conflicting regulatory regime that will increase regulatory uncertainty and costs without a corresponding environmental benefit. The CWA itself contains alternative tools to address groundwater including CWA Section 311, total maximum daily loads,<sup>3</sup> planning,<sup>4</sup> grants,<sup>5</sup> “processes, procedures, and methods to control [nonpoint source] pollution;”<sup>6</sup> and nonpoint source management programs.<sup>7</sup>

There are also multiple state and other federal programs that specifically address impacts to groundwater. For example, all states have adopted laws to protect groundwater independent of the NPDES program.<sup>8</sup> State laws consistently regulate the discharge of pollutants into any state waters, surface or ground, and provide for separate enforcement authority.<sup>9</sup> With respect to federal laws, the Resource Conservation and Recovery Act, Safe Drinking Water Act, and Comprehensive Environmental Response, Compensation, and Liability Act all address discharges to groundwater. Extending the NPDES program to discharges to groundwater would therefore add an unnecessary layer of regulation to a comprehensively regulated field while creating inevitable conflicts with other state and federal laws and increasing the burdens on not only the regulated public, but also on the agencies that implement these programs.

Colorado adopted groundwater protection regulations beginning in 1987 with the adoption of Basic Standards for Groundwater, Regulation 41. Regulation 42 (Site Specific Water Quality Classifications and Standards for Ground Water) and Regulation 43 (On Site Wastewater Treatment System Regulation) followed in 1991 and 2013 respectively. In 1989 the Colorado General Assembly enacted Senate Bill 181 which allowed the Water Quality Control

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<sup>3</sup> 33 U.S.C. §1313(d)(1)(C).

<sup>4</sup> 33 U.S.C. §1288(b).

<sup>5</sup> 33 U.S.C. §1288(f).

<sup>6</sup> 33 U.S.C. §1314(f)(2)(A)-(F).

<sup>7</sup> 33 U.S.C. §1329(b).

<sup>8</sup> See, e.g., Brief of *Amici Curiae* the State of West Virginia et al., *Upstate Forever v. Kinder Morgan Energy Partners, L.P.*, No. 17-1640 (4th Cir. Sept. 8, 2017) (Doc. 55-1); Brief of the State of Alabama et al. as *Amici Curiae*, *Tenn. Clean Water Network v. Tenn. Valley Auth.*, No. 17-6155 (6th Cir. Feb. 6, 2018) (Doc. 38); Brief of *Amici Curiae* States of Arizona et al., *Hawai'i Wildlife Fund v. Cty. of Maui*, No. 15-17447 (9th Cir. Mar. 12, 2018) (Doc. 75).

<sup>9</sup> See, e.g., W. Va. Code § 22-11-8(b).



Commission (the agency delegated authority by EPA to promulgate water quality standards) to establish classifications and standards for groundwater. Implementation of the act, however, was delegated by statute to various “implementing agencies” such as the Department of Agriculture, the State Engineer, and the Mined Land Reclamation Division. Notwithstanding such delegation, the Water Quality Control Commission retains the ability under statute to reassert itself 1) to assure compliance with standards and classifications, 2) when necessary to protect present and future beneficial uses of the water, and 3) when an implementing agency fails to provide reasonable assurance the compliance has been obtained through its own programs. Thus, each implementing agency submits an annual report of its activities and compliance to the Water Quality Control Commission. For mining operations, implementation of SB 89-181 is overseen by the Colorado Division of Reclamation, Mining, and Safety (successor to the Mined Land Reclamation Division). The most recent report relative to mining can be viewed at <https://www.colorado.gov/pacific/sites/default/files/SB181arDRMS2016-17.pdf>

Other programs also regulate mining activities which could potentially impact groundwater. These include the Mined Land Reclamation Act, which was enacted in 1977. Hard rock mining in Colorado is regulated under the Colorado Mined Land Reclamation Act (“MLRA”). Colo. Rev. Stat. § 34-32-101. The MLRA establishes the Colorado Division of Reclamation, Mining and Safety (“DRMS”) to implement the Act. It also creates the Mined Land Reclamation Board (“MLRB”) which adopts regulations, sets policy direction for the program, and administers the program through the issuance of permits and enforcement of the standards and permit provisions. Standards and regulatory requirements are implemented by DRMS through the site-specific permits required for mining operations. Id. § 34-32-109. The statute requires that reclamation plans be site-specific, and it calls for “acid-forming and toxic producing material that has been mined” to be handled in a manner that will protect the relevant surface drainage area. Id. § 34-32-116(7)(c). The Colorado Hardrock, Metal, and Designated Mining Operations Rule sets forth the MLRB’s detailed requirements for hardrock mining activities in the state, including requirements for reclamation planning, permitting, and mining, management, and environmental protection plans. Rule 3.1.5(10) contains a specific prohibition against impacts to surface water from any mining operations—“All mined material to be disposed of within the affected area must be handled in such a manner so as to prevent any unauthorized release of pollutants to the surface drainage system.” Similarly, Rule 3.1.6(1) and (4) contain specific performance requirements for hardrock mining to protect both surface and groundwater. These include compliance with surface and groundwater quality standards and submission of baseline data to characterize surface and groundwater quality for monitoring of potential impacts. Rule 3.7.1(6) specifies points of compliance for groundwater protection and mandates that such points of compliance must be established to avoid potential surface water impacts. Rule 6.3.3(i) requires preparation and implementation of a mining plan that among other things explains how surface water may be impacted and requires implementation of methods to minimize such potential impacts. Rule 6.4.7 requires preparation and implementation of a management plan that addresses how the mine facility will protect against pollution of surface and groundwater. Rule 6.4.21 requires development of an Environmental Protection Plan



("EPP"). An EPP must specifically address potential surface water impacts by specifying specific surface water control and containment features (Rule 6.4.21(10)), identifying surface water quality information for all surface waters in the vicinity of the mining operation (Rule 6.4.21(11)), and implementing a water quality monitoring plan for both surface water and groundwater to confirm that all facilities designed to protect water quality are functioning as designed (Rule 6.4.21(12)).

Coal mining in Colorado is regulated under the Colorado Surface Coal Mining Reclamation Act ("Coal Act") Colo. Rev. Stat. § 34-33-101 et seq. The Colorado Coal Act enacted in 1979 to conform to requirements of the Federal Surface Coal Mining and Reclamation Act of 1977 (SMCRA) and regulations adopted in 1980 allowed Colorado to gain primacy under SMCRA to administer its own program. Among the various environmental protection requirements of the Coal Act and regulations are provisions to protect groundwater. As it does for hardrock mining, the Division of Reclamation, Mining, and Safety serves as the implementing agency to assure compliance with the groundwater protection goals of Colorado Senate Bill 89-181. Among specific regulations targeting groundwater protection are Rule 4.0511 (Ground Water Protection), 4.05.12 (Protection of Ground Water Recharge Capacity), and 4.05.13) Surface and Ground Water Monitoring.

Through the Ground Water Regulations adopted and enforced by the Colorado Department of Public Health & Environment Water Quality Control Commission and the implementing agencies acting under Colorado Senate Bill 89-181, Colorado's ground water resource is amply protected and additional federal regulation is unwarranted.

### **Multiple Legal Considerations Support Rejection of the "Direct Hydrologic Connection" Theory**

Throughout the CWA, Congress purposefully distinguished between point sources and nonpoint sources of pollution. Point sources are "discernible, confined, and discrete conveyance[s]" such as pipes that discharge channeled or collected fluids to navigable waters. 33 U.S.C. § 1362(14). Nonpoint source pollution, by contrast, reaches navigable waters in a diffuse way (e.g., wind dispersion, groundwater migration, or overland runoff).<sup>10</sup> This distinction is important, as Congress chose to handle point and nonpoint source pollution differently under the CWA. Specifically, while point source pollution is subject to the requirements of the NPDES permitting program,<sup>11</sup> nonpoint source pollution is controlled by the states, including under the CWA Sec. 208 process and by Sec. 319 nonpoint source management programs.

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<sup>10</sup> While the term "nonpoint source" is not defined in the CWA, it generally refers to "pollution that does not result from the 'discharge' or 'addition' of pollutants from a point source." See *Or. Natural Res. Council v. U.S. Forest Serv.*, 834 F.2d 842, 849 n.9 (9<sup>th</sup> Cir. 1987).

<sup>11</sup> See 33 U.S.C. §§ 1311(a), 1342(a)(1), 1362(12).



Importantly, the term “discharge of a pollutant” requires that the “point source” itself be the actual conveyance from which the pollutant is added to a navigable water for NPDES permitting requirements to apply. Any other reading of the CWA’s text would eliminate all meaningful differentiation between the terms “point source” and “nonpoint source,” since nearly all nonpoint source pollution can be traced back to some origin meeting the definition of “point source.”<sup>12</sup> The method of addition to a navigable water is the crux of the distinction between the two.<sup>13</sup> However, because groundwater is itself neither a “point source”<sup>14</sup> nor a “navigable water,”<sup>15</sup> EPA’s “direct hydrologic connection” theory ignores this key distinction and “eviscerate[s] the point source requirement and [undoes] Congress’ choice”<sup>16</sup> to exclude things such as diffuse runoff and seepage from the NPDES program.

Additionally, as explained further below, the “direct hydrologic connection” theory will expand the NPDES permitting program to include potentially millions of previously unpermitted sources, and infringe upon state decision-making with respect to land use and groundwater resources without any hint from Congress that such an expansion is authorized. As such, the theory also runs afoul of the U.S. Supreme Court decisions in *Utility Air Regulatory Group v. Environmental Protection Agency*<sup>17</sup> and *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*,<sup>18</sup> which hold that a clear indication from Congress is needed for “agency decisions of vast economic and political significance...[including t]he power to require permits for...thousands...of small sources nationwide,”<sup>19</sup> and for “a significant impingement of the States’ traditional and primary power over land and water use.”<sup>20</sup>

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<sup>12</sup> See, e.g., *Crown Assocs., LLC v. Greater New Haven Reg’l Water Control Auth.*, No. 3:15-cv-1439 (JAM), 2017 WL 2960506 at \*8 (D. Conn. July 11, 2017), appeal docketed, No. 17-2426 (2d Cir. Aug. 4, 2017)(“Nonpoint source pollution...could invariably be reformulated as point source pollution by going up the causal chain to identify the initial point sources of the pollutants that eventually ended up through nonpoint sources to come to rest in navigable waters”).

<sup>13</sup> *South Florida Water Management District v. Miccosukee Tribe of Indians*, 541 U.S. 95, 105 (2004) (the “definition makes plain” that “a point source need not be the original source of the pollutant,” but “it need[s] [to]...convey the pollutant to ‘navigable waters.’”).

<sup>14</sup> See, e.g., *Crown Assocs./, LLC v. Greater New Haven Reg’l Water Control Auth.*, 2017 WL 2960506 at \*8 (D. Conn. July 11, 2017) (noting that it is “basic science” that groundwater is diffuse, and groundwater is therefore the antithesis of a “discernible, confined and discrete” conveyance”).

<sup>15</sup> See, e.g., *Rice v. Harken Exploration Co.*, 250 F.3d 264, 269-70 (5<sup>th</sup> Cir. 2001); *Vill. Of Oconomocwoc Lake v. Dayton Hudson Corp.*, 24 F.3d 962, 964-65 (7<sup>th</sup> Cir. 1994).

<sup>16</sup> *Cordiano*, 575 F. 3d at 224.

<sup>17</sup> 134 U.S. 2427 (2014).

<sup>18</sup> 531 U.S. 159 (2001).

<sup>19</sup> *UARG* at 2444.

<sup>20</sup> *SWANCC* at 174.



The CWA's penalty scheme also requires rejection of the "direct hydrologic connection" theory. The CWA is a strict-liability regime with substantial criminal and civil penalties imposed for violations. Criminal statutes like the CWA are subject to the rule of lenity and must be narrowly construed.<sup>21</sup> Doubts about the statute's meaning must be construed against the government. Under the "direct hydrologic connection" theory, however, landowners and users nationwide would be both civilly and criminally liable for any pollutants released from the innumerable "point sources" under their control that might eventually find their way to navigable waters via groundwater. There is no way every landowner, business owner, operator, or independent contractor can ascertain whether its conduct might result in pollutants being carried from a point source under its control eventually to navigable waters via groundwater migration or other diffuse means outside of his control. Such migration could occur over long periods of time and across vast geographic areas, and even detailed technical studies may not disclose whether their conduct might be considered a criminal discharge into a navigable water. As one court noted, such a theory would "add a new level of uncertainty...and would expose potentially [millions] of...[sources] to...litigation and legal liability if they...happen to make the 'wrong' choice."<sup>22</sup> The rule of lenity exists to protect landowners and the regulated public against this very sort of uncertainty.

### **Key Policy Concerns Also Support Rejection of the "Direct Hydrologic Connection" Theory**

The "direct hydrologic connection" theory would also lead to impracticable results that Congress could not have intended when it structured the CWA to include a clear distinction between point and nonpoint sources of pollution.<sup>23</sup> Much of what EPA and the courts have long considered nonpoint source pollution would suddenly be included in the NPDES program under the "direct hydrologic connection" theory. In particular, many treatment and pollution control measures, such as green infrastructure, that landowners currently implement without NPDES permits could require such permits. For mining operations, there are numerous. Hundreds of thousands – or possibly millions – of additional NPDES permits could be required nationwide under the "direct hydrologic connection" theory. As noted above, nothing approaching a clear statement can be found in the CWA to authorize such an absurd result. Moreover, Congress could not possibly

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<sup>21</sup> See *McNally v. United States*, 42 U.S. 350, 359-60 (1987) ("[W]hen there are two rational readings of a criminal statute, one harsher than the other, we are to choose the harsher only when Congress has spoken in clear and definite language"); see also *United States v. Bass*, 404 U.S. 336, 348 (1971) (noting that "legislatures and not courts should define criminal activity"); *United States v. Plaza Health Labs*, 3 F.3d 643, 649 (2<sup>nd</sup> Cir. 1993) (construing the term "point source" in accordance with the rule of lenity and dismissing criminal prosecutions).

<sup>22</sup> *Umatilla Waterquality Protective Ass'n, Inc. v. Smith Frozen Foods, Inc.*, 962 F. Supp. 1312, 1320 (D. Or. 1997).

<sup>23</sup> See *Ariz. State Bd. For Charter Schools v. U.S. Dep't of Educ.*, 464 F.3d 1003, 1008 (9<sup>th</sup> Cir. 2006) ("Well-accepted rules of statutory construction caution us that statutory interpretations which would produce absurd results are to be avoided").



have intended such a result when it drew sharp and meaningful distinctions between point and nonpoint source pollution control throughout the CWA and preserved primary authority over land use for state and local governments.

Furthermore, it is far from clear whether NPDES permitting requirements can even be applied intelligibly to the litany of pollutant sources that the “direct hydrologic connection” theory would bring into the NPDES program. NPDES requirements were not designed with diffuse pollution migration in mind, much less methods to remove pollutants through infiltration and percolation. Rather, NPDES requirements were aimed at “end of pipe” discharges directly into surface waters.<sup>24</sup> For pollutants that migrate diffusely via groundwater, however, it may not be possible to determine where the groundwater ultimately connects to a navigable water. Thus, there are no readily identifiable, defined outfalls or discharge points that can be used for purposes of calculating effluent limitations, determining the potential to exceed water quality criteria, ensuring consistency with antidegradation policies, allocating loads and waste loads as part of TMDLs, assessing the appropriateness of mixing zones, and conducting the required sampling and monitoring.<sup>25</sup> Even assuming NPDES permit writers could somehow identify outfalls or discharge points, it may not be possible for the owner or operator of the “point source” to conduct the required sampling and monitoring because those locations may be miles away and beyond the owner or operator’s control, and that groundwater will likely contain pollutants from a host of other sources as well.<sup>26</sup> In short, it would be impracticable, if not impossible, to apply NPDES requirements to the types of pollution that the “direct hydrologic connection” theory may reach. The permitting process would become even more burdensome and expensive for permit writers and applicants than it already is, and that is to say nothing of the costs that would be imposed on state agencies responsible for implementing the complex NPDES permitting program.

## Conclusion

Justice Kennedy recently noted that “the CWA...continues to raise troubling questions regarding the Government’s power to cast doubt on the full use and enjoyment of private property throughout the Nation.”<sup>27</sup> The issue of whether the Act regulates discharges via groundwater migration poses one such “troubling question.” EPA must take this opportunity to provide an

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<sup>24</sup> See U.S. EPA, *Overview of the National Pollutant Discharge Elimination System (NPDES) Program*, at 16, 17, 23; see also 40 C.F.R. § 122.45(a) (requiring that effluent limitations, standards and prohibitions be established “for each outfall or discharge point of the permitted facility”).

<sup>25</sup> See 40 C.F.R. § 122 Subpart C.

<sup>26</sup> *Ecological Rights Foundation*, 713 F.3d at 508 (groundwater can be a “soup” of pollutants – mixing with pollutants from other sources and those naturally occurring, their fate and transport unknown).

<sup>27</sup> *Army Corps of Engineers v. Hawkes Co.*, 136 S. Ct. 1807, 1817 (May 31, 2016) (J. Kennedy, joined by J. Thomas and J. Alito, concurring).



answer to this problem by clarifying that the strict, and potentially criminal, liability of the CWA does not apply to groundwater seepage and other diffuse means of pollutant transport. Such a rulemaking is critical to providing much-needed legal and regulatory certainty and preserving the careful balance between state and federal authority Congress crafted in the CWA.

Sincerely,

Stan Dempsey