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# Covered Mining Pits Are Not Point Sources

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*Recognizing that mining pits with engineered covers do not serve to collect or channel stormwater, a federal appeals court has refused to expand the reach of the Clean Water Act over certain mining waste accumulations.*

The Clean Water Act (CWA) requires permits and imposes other requirements on discharges of pollutants from point sources into waters of the United States. The EPA and private plaintiffs have attempted to broaden the reach of the CWA by expanding the definition of "point sources." In *Greater Yellowstone Coalition v. Lewis*, 2010 WL 5191370 (9th Cir. Dec. 23, 2010), a citizen suit over a proposed phosphate mine expansion in Idaho, the Ninth Circuit held that mining pits containing waste rock with engineered covers are not point sources for purposes of the CWA. This important decision provides much-needed clarification of the reach of the CWA and the scope of the definition of "point source," as earlier case law suggested increasingly expansive views of the definition of "point source." *See, e.g., Sierra Club v. Abston Construction Co.*, 620 F.2d 41, 44 (5th Cir. 1980), a point source may exist "where miners design spoil piles from discarded overburden such that, during periods of precipitation, erosion of spoil pile walls results in discharges into a navigable body of water by means of ditches, gullies, and similar conveyances"; *Williams Pipe Line Co.*, 964 F.Supp. 1300, 1319 (S.D. Iowa 1997), "an entire facility or industrial plant may be a point source."; *Friends of Santa Fe County v. LAC Minerals, Inc.*, 892 F.Supp. 1333, 1359 (D.N.M. 1995, "overburden pile deemed a human-made discernable, confined, and discrete conveyance but seeps emanating from pile deemed nonpoint sources."

In *GYC v. Lewis*, GYC and other non-profit groups alleged that the Bureau of Land Management and the U.S. Forest Service failed to comply with the CWA by not obtaining a § 401 certification prior to authorizing the expansion of mine operations onto two federal land parcels. Section 401 of the CWA

requires applicants for federal licenses or permits to construct what may result in a discharge into navigable waters to obtain a certification from the relevant state that any such discharge will comply with, among other things, state water quality standards. Plaintiffs alleged that a § 401 certification was required for the potential "discharge" of pollutants from the mine to surface water via hydrologically-connected groundwater. At the proposed mine, waste rock from mining operations is used to reclaim the surface mining pits and placed in external piles. In both situations, engineered covers were proposed to minimize the infiltration of stormwater into and through the waste rock. Plaintiffs alleged that stormwater that infiltrated the engineered covers and passed through the waste rock to reach surface water constituted a discharge. Although the parties addressed potential hydraulic connections between the waste rock areas and surface water through ground water, the court focused on the more fundamental issue—is a mining pit a point source?

The Ninth Circuit explained that the § 401 certification requirement is inapplicable to the proposed project because it only applies to discharges from point sources, and covered mining pits do not qualify as point sources. The court's analysis begins, as it should, with a discussion of the definition of point source, noting that: "The text of § 401 and the case law are clear that ***some type of collection or channeling is required*** to classify an activity as a point source." *Greater Yellowstone Coalition v. Lewis*, 2010 WL 5191370 at *20 (9th Cir. Dec. 23, 2010) (citing *Trustees for Alaska v. EPA*, 749 F.2d 549, 558 (9th Cir. 1984)). Indeed, a review of the relevant case law shows that most of the cases that have been relied upon to assert that the mine pits are point sources involved either discharges from a pipeline, tank, or other structure designed to collect or convey stormwater or wastewater (see *Williams Pipe Line Co. v. Bayer Corp*. (leaks from crude oil pipeline breaks and other spills at above-ground tank facility); *Washington Wilderness Coalition v. Hecla Mining Co*., 870 F.Supp. 983 (E.D. Wash. 1994) (tailings impoundment); *Umatilla Water Quality Protective Ass'n, Inc., v. Smith Frozen Foods, Inc*., 962 F. Supp. 1312 (D. Or. 1997) (brine pit); *United States v. Earth Sciences, Inc*., 599 F.2d 368 (10th Cir. 1978) (leachate management system); and *Sierra Club v. El Paso Gold Mines, Inc*., 421 F.3d 1133 (10th Cir. 2005) (underground tunnel used to drain inactive mine)), or pollution otherwise traceable to a discharge into a containment structure or via a discernable conveyance (*see In re: Phelps Dodge Corp*., 10 E.A.D. 460, 2002 WL 1315601 (E.A.B. 2002) (municipal wastewater discharged into tailings impoundment); *League of Wilderness Defenders/Blue Mountains Biodiversity Project v. Forsgren*, 309 F.3d 1181 (9th Cir. 2002) (aerial insecticide spraying); *Quivira Mining Co. v. United States EPA*, 765 F.2d 126 (10th Cir.1985) (discharges from uranium mining and milling facilities into gullies or "arroyos")).

The mining pits at issue in *GYC v. Lewis*, as well as surface accumulations of waste rock, were to be overlain by a cover system designed to impede stormwater infiltration through the overburden. Engineered covers shed stormwater over their surface and impede infiltration rather than collect or channel stormwater. Thus, the court logically concluded that water seeping through the cover and into the pits containing waste rock "is nonpoint source pollution because there is no confinement or

containment of the water; the cover is designed to divert water away from the pits." Because stormwater is not collected or channeled and then discharged, these mining pits "do not constitute point sources within the meaning of the CWA." *GYC v. Lewis*, 2010 WL 5191370 at *20-21. Therefore, a § 401 certification was not required for water traceable to the mine pits.

**What This Means To You**

Taken together, prior case law and *GYC v. Lewis* establish, as a matter of law, that pollution is not "from a point source" when it is traceable to structures designed to contain waste and prevent groundwater contamination through the use of engineered covers, unless stormwater or leachate is otherwise collected and discharged. The reasoning of the court further dictates that uncovered waste piles in mining pits or on the surface are also not point sources because they do not serve stormwater collection or transportation functions, and are not, therefore, "discernable, confined and discrete conveyance[s]." 33 U.S.C. § 1362 (14) (defining "point source"). Thus, pollution from uncovered waste piles is also not directly regulated under the CWA in the absence of a discharge from a point source (such as the addition of stormwater or wastewater onto or the collection of leachate from such waste piles, or subsequent channeling of runoff).

In addition, *GYC v. Lewis* shows that merely alleging a hydrologic connection between contaminated groundwater and surface waters is not enough. Litigants contemplating such suits must first establish the existence of a point source to which pollutants can be attributed. Unless groundwater-transported pollution is traceable to a point source such as a leaky tank, pipeline, ditch or other such conveyance, it is not subject to § 401 certification or permitting requirements. Despite its brevity, the CWA portion of this case is one of great importance for the regulated community.

**Contact Info**

For more information, contact your Husch Blackwell attorney or one of the attorneys in our Environmental & Natural Resources practice group.

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