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Re: SAB Review of the Draft EPA Report *“Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence”*

Thank you for the opportunity to comment on the Science Advisory Board’s review of the draft EPA report, *“Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence.”* We write to highlight serious concerns about EPA’s proposal to codify the “waste treatment system” exclusion from the definition of “waters of the U.S.”

The proposed waste treatment system exclusion is encompassed in the EPA’s “Technical Charge to External Peer Reviewers,” which requests that the Board “comment on the adequacy of the scientific and technical basis of the other definitions *and exclusions.*” (Emphasis added). However, the Board’s preliminary comments contain very little discussion of this proposed exclusion. We respectfully offer the following information on the history of the exclusion, and on how it is applied in routine practice to allow severe long-term degradation of natural headwater streams in Appalachia. Based on this information, we urge the SAB to advise EPA that the waste treatment system exclusion lacks scientific or technical basis.

In mountainous regions of Appalachia, the waste treatment system exclusion is routinely invoked by federal and state agencies to allow the impoundment of natural streams that drain runoff from surface coal mines. Following is a schematic illustration:

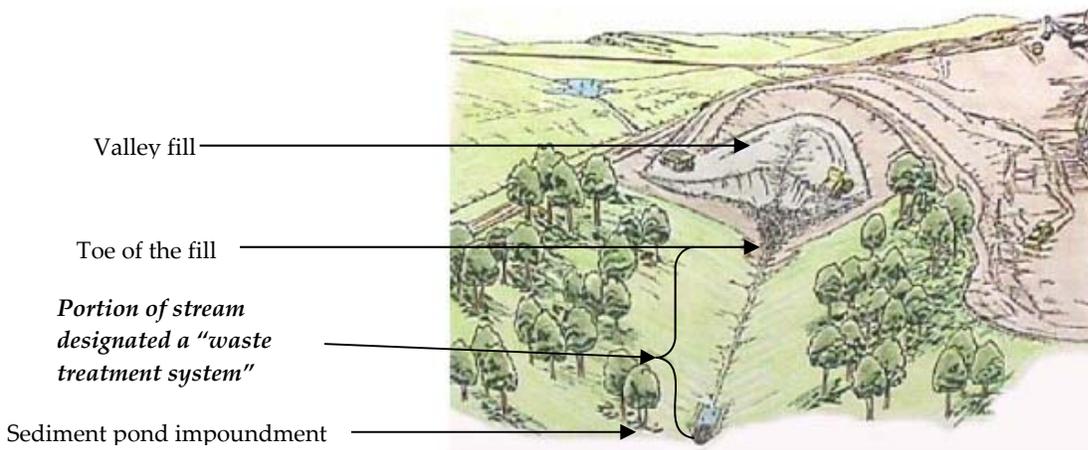


Illustration adapted from EPA's *Draft Programmatic Environmental Impact Statement on Mountaintop Mining/Valley Fills in Appalachia* (2005) at III.K-4 (descriptive labels added).

The portion of natural stream segment upstream of the sediment pond impoundment would, absent this exclusion, unquestionably be considered a covered tributary under both the existing and proposed rule. However, under current practice and under the version of the exclusion that EPA now proposes to codify, these natural headwater streams lose their protected regulatory status as waters of the United States and for at least the 10 to 20-year life of the mining operation are taken over as "waste treatment systems." Although discharges into downstream segments *from* the sediment pond impoundment in this type of waste treatment system are typically regulated under a point source permit, the discharges *into* the portion of the stream that has been taken over for the system are not. Indeed these pollutant-laden discharges could not meet water quality requirements needed to obtain a Clean Water Act permit. Moreover, extensive evidence confirms that the permitted discharges from these "waste treatment systems" have significant adverse impacts on downstream waters.¹

¹ For just a few relevant resources see: *Draft Programmatic Environmental Impact Statement on Mountaintop Mining/Valley Fills in Appalachia* (2005), main document at: <http://nepis.epa.gov/Exe/ZyPURL.cgi?Dockey=P100G0BS.txt>, and appendices at: <http://www.epa.gov/region03/mtntop/eis2003appendices.htm>. See also EPA *Final Guidance Protect Water Quality in Appalachian Communities from Impacts of Mountaintop Mining* (2011) at <http://www.epa.gov/owow/wetlands/guidance/mining.html>, EPA's *Final Conductivity Benchmark Report*, and Science Advisory Board's final review: <http://cfpub.epa.gov/ncea/cfm/recordisplay.cfm?deid=233809>.

Insofar as it allows waters of the United States to be impounded and thereafter treated as unprotected “waste treatment systems,” the exclusion is not justified by any scientific or technical basis. Unlike other anthropogenic water features (such as ornamental reflecting pools, swimming pools, fish farm ponds, or water-filled depressions from construction activities), these “treatment ponds” are not constructed outside of natural waterways. Instead they are constructed directly in and completely assimilate the stream. Nor are they designed to be isolated from covered waters, but are instead designed to discharge directly into protected waters.

The history of the regulatory definition of “waters of the U.S.” shows that the waste treatment system exclusion was not originally intended to be used in this manner. In fact, the 1980 regulatory definition explicitly stated that the exclusion “applies only to manmade bodies of water which neither were originally created in waters of the United States (such as disposal area in wetlands) nor resulted from the impoundment of waters of the United States.” However, EPA published a notice in the Federal Register several months later purporting to temporarily “suspend” operation of that limiting language. *See* 45 Fed. Reg. 48,620 (July 21, 1980). As a result, the current version of the exclusion which EPA now proposes to codify has never been subject to a public rulemaking process. EPA has never assessed the technical basis for keeping this exclusion on the books without the limiting language in the 1980 definition, or studied the environmental effects of applying the exclusion in such a manner.

We urge the SAB to advise EPA that this exclusion lacks scientific or technical basis. At a minimum, the waste treatment system exclusion deserves a focused and transparent examination before it is codified in the federal definition of waters of the U.S.

We stand ready to provide additional background material on how the waste treatment system exclusion has been applied and on the ecological damage that has occurred under it. If you and the members of the Science Advisory Board have any questions or wish to discuss this further, please feel free to contact me.

Sincerely,

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