

Response to Comments

AK0053791

EPA received an NPDES permit application from Gold Vault Mining Company on June 1, 2015. A public notice in the Fairbanks Daily News Miner announced that a draft permit and fact sheet were available for public comment from March 7 through April 6, 2016. EPA received a request from the State of Alaska Department of Environmental Conservation (DEC) to extend the comment period by 2 weeks. EPA agreed to extend the comment period to April 20th. The applicant and the National Park Service (NPS) were informed of this extension and it was reflected on EPA's website.

EPA received comments from the applicant and from DEC on this permit action.

1. **Comment:** The applicant requested that the Best Management Practice (BMP) in Permit Part I.C.2. which reads:

Motorized winches or other motorized equipment shall not be used to move boulders, logs, or other natural obstructions within the active stream channel.
be removed from the permit.

Response: The intent of this BMP is to ensure that the flow of the natural stream channel will not be heavily altered, especially preventing the undercutting of the stream banks, and where fish are present to prevent habitat alteration. The applicant provided the following requirements from the Mining Plan of Operations that is under review by the NPS:

- No significant change in flow or gradient of creek
- All boulders, rocks and cobbles will be placed in a way that looks natural
- All instream gravels will stay instream.
- No undercutting banks
- All reclamation will coincide with dredging activity

These requirements meet the intent of the BMP and EPA will therefore remove the prohibition on the use of motorized equipment.

2. **Comment:** The applicant requested that the BMP in Permit Part I.C.3. which reads:

No wheeled or tracked equipment may be used instream while dredging is in progress.
be removed from the permit.

Response: The intent of this BMP is to protect anadromous fish habitat. Since Eldorado Creek does not contain anadromous fish habitat, this BMP should not have been included in the draft Permit and will be removed.

3. **Comment:** DEC asserts that under 40 CFR § 121.1 (g), "water quality standards" means national water quality standards and "State-adopted water quality standards for navigable waters which are not interstate waters." As Alaska's water quality standards apply statewide and in Eldorado Creek within Denali, see 18 AAC 70.050 & 70.990(65); AS 46.03.900(37) ("waters" includes "creeks ... in the territorial limits of the state"), and because the waters within Denali are "navigable waters which are not interstate waters," under EPA's regulations Alaska's water quality standards meet the definition of "water quality standards" with respect to the waters within Denali.

Response: Section 11(a) of the Alaska Statehood Act states that “[n]othing in this Act shall effect the establishment, or the right, ownership, and authority of the United States in [Denali] National Park...; but exclusive jurisdiction, in all cases, shall be exercised by the United States for the national park...” There are three specific exceptions to this exclusive jurisdiction: (1) the right of the State to serve civil or criminal process within the park for crimes committed outside of the park; (2) the right of the State to tax persons and corporations on the lands within the park; and (3) the right of people residing within the park to vote. Therefore, within Denali National Park, the United States reserved exclusive federal jurisdiction.

Under exclusive federal jurisdiction, only federal law applies except to the extent Congress has otherwise provided. State laws have no effect unless they are specifically adopted by Congress or the state expressly reserved jurisdiction over such matters. Here, the state water quality standards were adopted as part of the state’s regulations after Alaska became a State. Thus, under exclusive federal jurisdiction, the water quality standards do not apply within Denali National Park.

40 CFR 121.1(g) defines “water quality standards” to mean “standards established pursuant to Section 10(c) of the Act, and State adopted water quality standards for navigable waters which are not interstate waters.” The reference to Section 10(c) of the Act is a reference to the Water Quality Act of 1965, which pre-dates the Clean Water Act. Section 10(c) of the Water Quality Act of 1965 addresses the ability of the federal government to promulgate WQS if the States failed to do so for the waters under their jurisdiction. Again, in this case, Alaska does not have jurisdiction over waters within Denali National Park due to exclusive federal jurisdiction. In addition, the water quality standards that ADEC refers to are general water quality standards that apply *statewide* – the cited water quality standards do not specifically apply to Eldorado Creek within Denali National Park.

Despite the fact that Alaska water quality standards do not apply within Denali National Park, EPA utilized the Alaska water quality standards in determining the conditions of the permit in order to ensure that those water quality standards are met at the downstream boundary of the Park.

4. **Comment:** DEC comments that Section 11 of the Statehood Act, providing for "exclusive jurisdiction" by the United States for Denali, does not exempt the park from Alaska's water quality standards. Under § 313 of the CWA, each federal agency "having jurisdiction over any property or facility" must determine that approved actions on federal property do not result in pollution in violation of a state's water quality standards. This section "indicate[s] unequivocally (*sic*) that all Federal facilities and activities are subject to all of the provisions of State and local pollution laws." S. Rep. 95-370 at 67, 1977 U.S.C.C.A.N. 4326, 4392.

Response: CWA § 313 states that “[e]ach department, agency or instrumentality ... of the Federal Government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result, in the discharge ... of pollutants... shall be subject to ... all Federal, State ... requirements ... respecting the control ... of water pollution in the same manner...as any nongovernmental entity.” 33 U.S.C. § 1323(a). The purpose of this statutory provision was to ensure that all federal agencies complied with the Clean Water Act in the same way that nongovernmental entities were required to do. In general, this means that all federal facilities

are required to obtain NPDES permits. Section 313 of the Clean Water Act cannot be read to override the exclusive federal jurisdiction that exists for Denali National Park. Moreover, as explained in the previous response to comment, in order to ensure that the downstream state waters are not affected by the permittee's discharge, EPA used state water quality standards to ensure that state water quality standards are met at the downstream boundary of the Park. See *also*, Response to Comment #3, above.

5. **Comment:** DEC requests that EPA certify, pursuant to § 401 of the Clean Water Act (CWA), that the proposed discharge by Gold Vault Mining Company into Eldorado Creek within Denali National Park and Preserve will comply with Alaska's water quality standards (Alaska Administrative Code 18 AAC 70). Section 3.01(17) of the August 11, 2011 NPDES Memorandum of Agreement (MOA) between the Environmental Protection Agency (EPA) and the State of Alaska, and the CWA, both require EPA to issue the § 401 certification.

Section 3.01(17) of the MOA requires DEC to issue "§ 401 certifications of draft NPDES permits that comply with Alaska Water Quality Standards prepared by EPA for facilities that EPA retains legal jurisdiction over that discharge to state waters (with the exception of an NPDES permit issued for a discharge within , .. Denali National Park and Preserve *where EPA is responsible to issue the CWA § 401 Certification*)." (emphasis added).

Response: While the MOA does say that EPA will certify permits in Denali, EPA does not find that with respect to this EPA-issued NPDES permit, it is reasonable or necessary for EPA to do so. Nor do federal statutes or regulations require EPA to certify the permit. By issuing a permit with requirements and limits designed to protect Denali's waters and Alaska's waters at the downstream boundary of the Park, EPA's permit affords all the relevant protections to Alaska of an EPA certification. EPA's NPDES regulations at 40 CFR 124.53 contemplate that the state in which the discharge originates (not EPA) issue any certification for an NPDES permit. 40 CFR 121.21 requires EPA to issue a CWA Section 401 certification where (1) standards have been promulgated by EPA or (2) water quality standards have been established, but no State or interstate agency has authority to give such a certification. EPA has not promulgated water quality standards for Denali nor have there been water quality standards established for Denali National Park. Therefore, 40 CFR 121.21 does not require EPA to issue a certification for this permit under CWA Section 401. While CWA section 401(a)(1) requires that EPA issue a certification on behalf of states that lack authority to do so, EPA interprets this language as applying to permits issued by *other* federal agencies and not to permits issued by EPA that are themselves designed to ensure that local and downstream state water quality standards are met.