



CASE OF THE MONTH

APPLICATION OF THE CALIFORNIA CONSTRUCTION STORM WATER GENERAL NPDES PERMIT TO OIL AND GAS PROJECTS

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I. Introduction

The NPDES “General Permit for Storm Water Discharges Associated With Construction and Land Disturbance Activities” (“Construction General Permit”), adopted by the State Water Resources Control Board (“State Water Board”) in September 2009 as Order 2009-0009-DWQ, became effective on July 1, 2010. Anyone conducting “construction activity” after July 1, 2010 which results in a land disturbance of one acre or more, or less than one acre but part of a larger common plan of development or sale, is required to electronically file Permit Registration Documents. “Construction activity” includes clearing, grading, excavation, stockpiling, and reconstruction of existing facilities involving removal and replacement. Historically, most oil and gas exploration and production activities have been statutorily exempted from the permit requirements of the Clean Water Act.

However, as a result of a 2008 decision by the federal Ninth Circuit Court of Appeals, California’s new Construction General Permit now applies more broadly to oil and gas drilling or construction activities (such as pipeline construction). According to the State Water Board, now oil and gas construction activities that disturb one acre or more, discharge sediment, and contribute to violation of a water quality standard in a receiving water must apply for coverage under the Construction General Permit.

II. Prior Regulation of Oil and Gas Construction Storm Water

Although the Clean Water Act as we know it today was enacted in 1972, it only began to have a regulatory impact on storm water with the 1987 amendments. In the Water Quality Act of 1987, Congress amended the Clean Water Act to regulate certain storm water discharges with National Pollutant Discharge Elimination System (“NPDES”) permits. The 1987 amendments added Clean Water Act Section 402(p) (33 U.S.C. § 1342(p)), which regulates municipal and industrial storm water under NPDES permits, and US EPA regulations adopted in 1990 categorize construction projects as subject to NPDES permit regulation. (40 C.F.R. § 122.26(b)(14).)

The 1987 amendments also included another new section, Section 402(l) (33 U.S.C. § 1342(l)), which exempted oil and gas “operations” from having to get an NPDES permit if the discharge is not contaminated by contact with “overburden, raw material, intermediate products, finished product, byproduct or waste products.” However, the US EPA asserted that under its 1990 regulations, oil and gas construction activities (as distinguished from “operations” of existing facilities) still required an NPDES permit.

Next, when Congress enacted the 2005 Energy Policy Act, it amended the definitions section of the Clean Water Act to provide that oil and gas “operations” also include related construction activities. (33 U.S.C. § 1362(24).) This basically broadened the Section 402(l) NPDES permit exemption for uncontaminated oil and gas operations storm water discharges to include construction activities.

Then, in 2006, the US EPA adopted a new regulation based on the statutory exemptions for oil and gas projects. (40 C.F.R. § 122.26(a)(2)(ii).) The new regulation provided that storm water discharges from oil and gas construction activities that are contaminated only with sediment were exempt from NPDES permit requirements – even if the discharge contributes to a violation of water quality standards. (Water quality standards are regulations that describe the maximum amount of pollution allowed in a water body, e.g., no more than 50 nephelometric turbidity units.)

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III. The Rules Change – NRDC v. US EPA

A. Ninth Circuit Court of Appeals Decides NRDC v. US EPA in 2008, Vacating Prior Regulatory Exemption

Within weeks of the effective date of the US EPA's 2006 regulation, environmental groups led by the Natural Resources Defense Council ("Environmentalists Groups") sued the US EPA in the United States Court of Appeals for the Ninth Circuit ("Ninth Circuit"). The Environmental Groups argued that the US EPA's 2006 regulation exempting oil and gas construction projects from the NPDES permit was an impermissible interpretation of the Clean Water Act statutes the rule was based upon.

In a May 2008 opinion, the Ninth Circuit agreed with the Environmental Groups and vacated the 2006 regulation. (*Natural Resources Defense Council v. United States Environmental Protection Agency* (9th Cir. 2008) 526 F.3d 591.) In a nutshell, the Ninth Circuit invalidated the 2006 regulation because it conflicted with the US EPA's prior position in its 1990 regulations, which provided that sediment discharges from oil and gas construction activities needed an NPDES permit. Because of these "inconsistent and conflicting" positions, the Ninth Circuit vacated the 2006 regulation as arbitrary and capricious.

B. The State Water Board Asserts Oil and Gas Construction Projects Must Obtain Permit Coverage – If The Project Contributes To a Violation of Water Quality Standard

In the wake of the NRDC v. US EPA decision, the State Water Board considered how the new ruling would affect its regulation of storm water from oil and gas construction activities. Initially, in the first page of a February 2009 memorandum, the State Water Board's Office Chief Counsel stated that discharges from oil and gas construction activities contaminated only with sediment require an NPDES permit. (*Memorandum: Impact of Natural Resources Defense Council v. US EPA . . . on the Regulation of Storm Water Discharges of Sediment from Oil and Gas Construction Activities*, February 18, 2009, p. 1.)

The State Water Board's Office of Chief Counsel then issued another memorandum in May 2010, which superseded the February 2009 memorandum. The May 2010 memorandum was revised to "clarify that . . . oil and gas construction activities that discharge storm water contaminated only with sediment require an [NPDES] permit if the discharge contributes to a violation of a water quality standard." (*Memorandum: Impact of Natural Resources Defense Council v. US EPA . . . on the Regulation of Storm Water Discharges of Sediment from Oil and Gas Construction Activities*, May 18, 2010, p. 1, italics added.)

The May 2010 memorandum summarized the State Water Board's position as follows in the conclusion:

If discharges of storm water runoff from oil and gas exploration, production, or treatment operations or transmission facilities, including field activities or operations that may be considered construction activity

- (1) are not contaminated by contact with, or do not come into contact with, any overburden, raw material, intermediate products, finished product, byproduct, or waste products;
 - (2) are only contaminated by or only come into contact with sediment; and
 - (3) pursuant to 40 C.F.R. § 122.26(c)(1)(iii), do not contribute to a violation of a water quality standard,
- then the operator of the facility is not required to be covered by the Construction General Permit. All three factors must be satisfied to avoid coverage under the Construction General Permit. If discharges of sediment from the foregoing oil and gas activities contribute to a violation of a water quality standard and the size of the construction project is one acre or greater, the operator must immediately apply to be covered by the Construction General Permit.

(May 18, 2010, Memorandum, p. 6.) As of September 1, 2010, the May 2010 memorandum did not appear to be available on the State Water Board's web site. A copy may be viewed at the following location:



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http://www.meyersnave.com/mn.pl?p=resource_summary&s=resources &t=app&rn=1283385140uku&rc=Briefs_and_Opinions&y=resourcebase.html

IV. The 2009 Construction Storm Water General Permit Imposes New Obligations on Oil and Gas Development Projects

The Construction General Permit, with attachments, is 285 pages long. A complete description is beyond the scope of this article. Instead, some particularly important provisions for oil and gas projects are highlighted below.

A. Will The Project Contribute To a Violation of a Water Quality Standard?

As the May 2010 State Water Board memorandum makes very clear, one of the most critical issues for oil and gas operators evaluating the impact of the Construction General Permit is whether a construction project could cause a discharge of sediment that would contribute to a violation of a water quality standard. This is a complicated determination that will require careful analysis for each site. A few general observations can be made, however. First, if the project would discharge to a water body already recognized as exceeding water quality objectives for sediment, the likelihood of permit coverage is greater. For example, because most of Calleguas Creek in Ventura County is listed as impaired by sediment, oil and gas construction projects on the Oxnard Plain may require closer analysis. On the other hand, if the project is in a desert area far from any surface waters, the likelihood of permit coverage is lower.

Second, deployment of storm water runoff controls at the site may lessen the likelihood that runoff would contribute to a violation of a water quality standard. These runoff controls, known as “Best Management Practices,” or BMPs, can range from placement of straw waddles to “Active Treatment Systems,” which use chemical or electrical processes to reduce turbidity. In general, the more robust the BMPs, the lower the likelihood of contributing to a violation of water quality standards.

B. Permit Covers Projects That Disturb More Than One Acre

Another important issue to determine whether an oil and gas construction project is subject to the Construction General Permit is whether the project results in a land disturbance of equal to or greater than one acre. While many infill drilling projects in the Los Angeles area may not trigger this threshold, projects taking place on undeveloped land could easily disturb more than an acre just to facilitate drilling rig access. The Construction General Permit indicates that the scope of the project will be determined by reference to the grading and/or building permits issued by local jurisdictions. (Construction General Permit, p. 9.)

C. Risk Level Categories Trigger More Stringent Requirements

The Construction General Permit includes a complex methodology to determine the water quality “Risk Level” for a construction project. The two primary factors that determine the Risk Level are: 1) the project sediment risk, meaning the relative amount of sediment that can be discharged from a site in light of its location and characteristics like slope, soil type and soil cover; and, 2) the receiving water risk, which depends on whether the receiving water is sediment-sensitive or not. Based on these factors, the project is categorized as Risk Level 1, 2 or 3.

The Risk Level of a project is important because higher risk projects are subject to more stringent permit requirements. Risk Level 1 projects will have effluent limitations based only on Best Management Practices, and discharge monitoring is by visual observation. Risk Level 2 projects must comply with all the Risk Level 1 requirements plus “Numeric Action Levels” and the requirement monitor the discharge by sampling and analysis. Numeric Action Levels are numeric benchmark values for pH and turbidity which, if exceeded, require the discharger to evaluate the effectiveness of its pollution control measures. Risk Level 3 projects include all the requirements for Risk Levels 1 and 2 plus Numerical Effluent Limitations for pH and turbidity and an obligation

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to monitor the receiving waters. Numerical Effluent Limitations are compliance benchmarks for pH and turbidity; an exceedance of the Numerical Effluent Limitation is a violation of the permit.

As with an evaluation of the potential for a project to contribute to a violation of water quality standards, determining a project's Risk Level can be complicated. Projects on steep slopes nearby sediment-sensitive water bodies may have a higher Risk Level.

D. When Is the Construction Project Over?

Another question raised by the Construction General Permit for oil and gas operations relates to when coverage under the permit can be terminated. The permit provides that a Notice of Termination must be filed "when construction is complete and final stabilization has been reached." (Construction General Permit, p. 12.) Unlike a subdivision construction project, where the roads will be paved and lots will be landscaped, many oil and gas leases may continue operations with exposed areas for years. Oil and Gas Operators will have to address "final stabilization" in their permit documents in a way that hopefully will avoid perpetual permit coverage.

E. Electronic Reporting And Increased Likelihood of Enforcement

Under the new Construction General Permit, all projects must electronically file Annual Reports documenting compliance (or noncompliance) with the permit. The data from these reports will be posted in a publicly available Storm Water Multi-Application and Report Tracking ("SMARTs") system. Experience from other NPDES programs with similar publicly available databases indicates that the accessibility of this data will increase enforcement activity. Both the State Water Board and citizen plaintiffs, such as environmental groups, will be able to search the SMARTs system to identify self-reported violations. Defending against enforcement actions from the State or from citizen plaintiffs can be a costly proposition. Under the Clean Water Act, citizen plaintiffs can seek up to \$37,500 in civil penalties per day of violation. As such, maintaining compliance with the Construction General Permit is a serious matter.

