

# Regulation of Oil and Gas Construction Activities

Last updated: December 3, 2008

The 1987 Water Quality Act (WQA) added section 402(j)(2) to the CWA specifying that EPA and States shall not require NPDES permits for uncontaminated storm water discharges from oil and gas exploration, production, processing or treatment operations, or transmission facilities. Section 323 of the Energy Policy Act of 2005 added a new provision to the CWA defining the term "oil and gas exploration, production, processing, or treatment operations or transmission facilities" to mean "all field activities or operations associated with exploration, production, processing, or treatment operations, or transmission facilities, including activities necessary to prepare a site for drilling and for the movement and placement of drilling equipment, whether or not such field activities or operations may be considered to be construction activity." See 33 U.S.C. § 1362(24).

On June 12, 2006, EPA published a final rule to address the new provision added by the Energy Policy Act of 2005. This regulation effectively exempted from NPDES permit requirements stormwater discharges of sediment from construction activities associated with oil and gas exploration, production, processing, or treatment operations or transmission facilities unless the relevant facility had a discharge of stormwater resulting in a discharge of a reportable quantity of oil or hazardous substances. 40 CFR § 122.26(a)(2)(ii) (citing 122.26(c)(1)(iii)(C)).

Shortly thereafter, the Natural Resources Defense Council (NRDC) petitioned the Ninth Circuit Court of Appeals (Ninth Circuit) for direct review of EPA's action. On May 23, 2008, the Ninth Circuit Court of Appeals issued an opinion in *Natural Resources Defense Council v. United States Environmental Protection Agency*, 526 F.3d 591 (9th Cir. 2008), vacating EPA's 2006 oil and gas construction stormwater regulation. On July 21, 2008, EPA filed a petition for rehearing in this case. On November 3, 2008, the Ninth Circuit Court of Appeals issued its order denying EPA's request for rehearing of the Court's decision vacating EPA's 2006 oil and gas construction stormwater regulation.

**Now that the 2006 rule has been vacated, the effective requirements are the regulations in place prior to the 2006 rule plus the additional Energy Policy Act clarification of the activities included in the CWA 402(j)(2) exemption.** The sections of the regulations affected most directly by this decision are 40 CFR § 122.26(a)(2) and (e)(8). Impacted regulations that are currently effective after the vacature (and that were effective prior to the June 12, 2006, rule):

**122.26(a)(2)** *The Director may not require a permit for discharges of storm water runoff from mining operations or oil and gas exploration, production, processing or treatment operations or transmission facilities, composed entirely of flows which are from conveyances or systems of conveyances (including but not limited to pipes, conduits, ditches, and channels) used for collecting and conveying precipitation runoff and which are not contaminated by contact with or that has not come into contact with, any overburden, raw material, intermediate products, finished product, byproduct or waste products located on the site of such operations.*

**122.26(e)(8)** *For any storm water discharge associated with small construction activity identified in paragraph (b)(15)(i) of this section, see 122.21(c)(1). Discharges from these sources, other than discharges associated with small construction activity at oil and gas exploration, production, processing, and treatment operations or transmission facilities, require permit authorization by March 10, 2003, unless designated for coverage before then. Discharges associated with small construction activity at such oil and gas sites require permit authorization by June 12, 2006.*

Questions have arisen regarding the impact this litigation may have had on 40 CFR § 122.26(c)(1)(iii). This provision was not at issue in the litigation described above and remains in effect, just as it did prior to the 2006 rule. This provision is included below:

**122.26(c)(1)(iii)** *The operator of an existing or new discharge composed entirely of storm water from an oil or gas exploration, production, processing, or treatment operation, or transmission facility is not required to submit a permit application in accordance with paragraph (c)(1)(i) of this section, unless the facility:*

*(A) Has had a discharge of storm water resulting in the discharge of a reportable quantity for which notification is or was required pursuant to 40 CFR 117.21 or 40 CFR 302.6 at anytime since November 16, 1987; or*

*(B) Has had a discharge of storm water resulting in the discharge of a reportable quantity for which notification is or was required pursuant to 40 CFR 110.6 at any time since November 16, 1987; or*

*(C) Contributes to a violation of a water quality standard.*

## Background

- [Ninth Circuit Opinion to Vacate 2006 Oil and Gas Rule \(PDF\)](#) (34 pp, 122K) - May 23, 2008
- [US Department of Justice \(DOJ\) petition seeking rehearing \(PDF\)](#) (26 pp, 814K) - July 21, 2008
- [NRDC response to DOJ's petition for rehearing \(PDF\)](#) (21 pp, 624K) - September 4, 2008
- [Question and Answer regarding implications of the case \(PDF\)](#) (2 pp, 18K) - October 13, 2008

## Final Rule

[Amendments to the NPDES Regulations for Stormwater Discharges Associated with Oil and Gas Exploration, Production, Processing, or Treatment Operations, or Transmission Facilities \(PDF\)](#) (13 pp, 175K) - On June 12, 2006, EPA published a rule that exempts construction activities at oil and gas sites from the requirement to obtain an NPDES permit for stormwater discharges except in very limited instances. These amendments are consistent with the Energy Policy Act of 2005 signed by the President on August 8, 2005. This action also encourages voluntary application of best management practices for construction activities associated with oil and gas field activities and operations to minimize erosion and control sediment to protect surface water quality. The final rule is effective June 12, 2006.

- [Fact Sheet on the Final Rule \(PDF\)](#) (2 pp, 27K)
- [Oil and Gas Questions and Answers\(PDF\)](#) (4 pp, 35K)

## Proposed Rule

[Proposed Amendments to the NPDES Regulations for Stormwater Discharges Associated with Oil and Gas Exploration, Production, Processing, or Treatment Operations, or Transmission Facilities \(PDF\)](#) (33 pp, 218K). On December 30, 2005, the Administrator signed this proposed rule for publication in the Federal Register.

## NPDES Oil and Gas Public Meeting

On May 10th, 2005, EPA hosted a public meeting in Dallas, Texas to discuss the NPDES Stormwater Permit Regulations for Small Oil and Gas Construction Activities. EPA representatives included Jack Faulk, Jim Hanlon, Michael Lee, Deborah Nagle, and Jeff Smith. Jim Elder, an independent consultant, served as facilitator for the meeting. EPA created a panel of 11 representatives from state and federal government, the oil industry, and environmental organizations. A full [transcript \(PDF\)](#) (90 pp, 340K) and [registration list \(PDF\)](#) (11 pp, 65K) is available for this meeting.

Several PowerPoint presentations were given and some attendees gave public statements during the meeting.

PowerPoint presentations given during the meeting can be downloaded by clicking the links below:

Presenter	Affiliation	File Information (PowerPoint Presentation)
Garland Anderson	Citizen representative of Colorado	<a href="#">Stormwater Permitting for Small Oil and Gas Construction Activities (PPT)</a> (12 pp, 4.27MB)
Jack Faulk	EPA, Office of Wastewater Management	<a href="#">Stormwater Discharges from Oil and Gas Related Construction Activities (PPT)</a> (21 pp, 4.34MB)
Marilyn Fish	EOG Resources	<a href="#">Reasonable and Prudent Practices for Stabilization (RAPPS) of Oil and Gas Construction Sites (PPT)</a> (35 pp, 14.5MB)
Tad Mayfield	Goldston Oil Corporation	<a href="#">Stormwater Permitting (PPT)</a> (14 pp, 1.45MB)
Dave Perkins	Anadarko Petroleum Corporation	<a href="#">E&amp;P Stormwater Overview Domestic Onshore Energy (PPT)</a> (12 pp, 7.2MB)
Casey Lockett Schneider	EPA Region 6	<a href="#">Presentation (PPT)</a> (18 pp, 2.13MB)
Lori Wrotenbery	Oklahoma Corporation Commission	<a href="#">Stronger State Review Process (PPT)</a> (9 pp, 1.4MB)

Public statements given and comments submitted during the meeting can be downloaded by clicking the links below:

Presenter	Affiliation	Description - [File information]
David Baumgarten	Gunnison County	<a href="#">Public statement (PDF)</a> (7 pp, 79K)
Sharon Buccino	Natural Resources Defense Council	<a href="#">Public statement (PDF)</a> (5 pp, 90K)
Angie Burckhalter	Oklahoma Independent Petroleum Association	<a href="#">Public statement (PDF)</a> (3 pp, 1.1MB)
Mark Carl	Interstate Oil and Gas Compact Commission	<a href="#">Public statement (PDF)</a> (3 pp, 123K)
Michael Decker	Oklahoma Corporation Commission	Not available for download.
Tom Fisk	Gas Processors Association	<a href="#">Cover letter (PDF)</a> (1 pp, 125K) <a href="#">Public statement (PDF)</a> (2 pp, 123K)
George Holliday	Holiday Environmental Services, Inc.	<a href="#">Submitted comments (PDF)</a> (5 pp, 23K)

Janet McQuaid	Fulbright and Lapowski and IPAA	<a href="#">Submitted comments (PDF)</a> (5 pp, 120K) <a href="#">Appendix 1 (PDF)</a> (5 pp, 115K) <a href="#">Appendix 1 - Attachment 1-A (PDF)</a> (3 pp, 98K) <a href="#">Appendix 2 (PDF)</a> (55 pp, 3.5MB) <a href="#">Appendix 3 (PDF)</a> (26 pp, 111K) <a href="#">Appendix 3, Attachment 1 (PDF)</a> (10 pp, 38K)
David Polter	ARCADIS	<a href="#">Public statement (PDF)</a> (3 pp, 1.11MB)

**Additional documents pertaining to the meeting can be downloaded by clicking the links below:**

[Meeting transcript \(PDF\)](#) (90 pp, 340K)

[Registration list \(PDF\)](#) (11 pp, 65K)