

Appendix 1 “Common Plan” Issues

EPA’s definition of “small oil and gas construction activities” is limited by 40 C.F.R. § 122.26(b)(15) to activities that disturb five acres or less of land area (and more than one acre). If an oil and gas construction activity disturbs five acres or more, or if it is part of a “common plan” that ultimately will do so, it is not considered a “small oil and gas construction activity.” Thus, the issue of “common plan” is crucial to any proposal that is limited to “small oil and gas construction activities.”

These comments are submitted without waiver of any objection or legal argument as to the validity of an acreage threshold on the availability of the oil and gas exemption under CWA § 402(l)(2). We believe that section 402(l)(2) exempts all oil and gas sites from the requirement for National Pollutant Discharge Elimination System (NPDES) permit coverage, regardless of size. It is our view that there is and should be no “common plan” scheme with respect to oil and gas activities and that, if EPA were to give the full intended effect to section 402(l)(2), the problems associated with the acreage threshold and the definition of “common plan” would go away.

1. General Concern: “Common Plan” Should Not Apply to Oil and Gas Sites

As a general matter, we believe that the “common plan” approach should not apply to oil and gas sites. The “common plan” approach was devised by EPA in the conventional/residential context to avoid “sham” subdivision of large construction projects into smaller projects to avoid the NPDES permit requirement for more-than-five-acre sites. Conventional projects cover a significant portion if not most of a contiguous site. Oil and gas projects, in contrast, proceed in a series of small, separate projects that cover only a small percentage of the area covered by the oil and gas leases. The “common plan” approach was not intended to force “clumping” of separate, smaller projects into one large project, but that is often the effect of EPA’s current definition of “common plan.”

The “common plan” approach should not, therefore, apply to oil and gas construction operations. Instead, whether an oil and gas construction activity is “small” should be determined on a single-project-by-single-project basis. A single project should consist of the contiguous land that is disturbed at a given point in time. If the total area under active construction is less than five acres (and equal to or greater than one acre) at a give point in time, the project should be considered a “small oil and gas construction activity.” This stabilize-as-you-go approach would partially resolve the seemingly intractable difficulties, discussed below, of applying the “common plan” scheme to oil and gas exploration and production activities.

2. If “Common Plan” Applies, The Following Specific Concerns Should Be Addressed

If the “common plan” scheme is to apply to oil and gas sites, EPA should address certain concerns unique to the oil and gas industry in any new proposal. The concerns include:

- (a) Delineation between O&G construction activities and O&G industrial activities;
- (b) Delineation between oil and gas construction activities and conventional construction activities;

- (c) Spacing Role and Distance;
- (d) Effect of Interconnecting Structures;
- (e) Handling of Stand-Alone Project Components (e.g., gathering lines);
- (f) Definition of “Under Construction” vs. “Ultimately Disturbed”;
- (g) Effect of different operators.

We have provided in Attachment 1-A a working draft flowchart showing how an operator might calculate the acreage disturbed for oil and gas sites under the “common plan” scheme giving meaning to various terms utilized in EPA’s definition based on oil-and-gas industry practice. We believe that the complexity of Attachment 1-A illustrates the difficulty in applying the “common plan” approach to oil and gas exploration and production. We believe that Attachment 1-A shows that a better, more appropriate approach may be simply to measure the contiguous acreage actively disturbed for each project component separately against the acreage threshold.

(a) Oil and Gas Construction Activities vs. Oil and Gas Industrial Activities

Both oil and gas industrial activities and oil and gas construction activities are oil and gas operations. Oil and gas industrial activities are activities to which the Multi-Sector General Permit (MSGP) would apply if a permit is required because of contaminated storm water discharged to waters of the U.S. 65 Fed. Reg. 64,746, 64,830 (Oct. 30, 2000) (Sector “I”). Oil and gas construction activities are activities to which the Construction General Permit would apply, if permit coverage is necessary (which we believe should be required only if a discharge to waters of the U.S. is contaminated). Since only oil and gas construction activities would have to comply with the conditions in the proposal being contemplated, we believe it is important to differentiate between oil and gas construction activities and oil and gas industrial activities.

The following activities are oil and gas industrial activities (MSGP), as distinguished from oil and gas construction activities (CGP). This list is not necessarily exhaustive.

- Seismic Surveys;
- Well drilling, completion, re-completion, and stimulation;
- Closure of reserve pit and well pad reduction;
- Installation and operation of production equipment on completed oil and gas pads;
- Production from or through existing oil and gas drill sites or processing, treatment, or transmission facilities;
- Maintenance of existing oil and gas drill sites or processing, treatment, or transmission facilities;
- Maintenance of gathering lines and utilities;
- Site closure (plugging, abandoning, or removing wells or equipment and site restorations).

(b) Oil and Gas Construction vs. Conventional Construction

EPA should clarify what is oil and gas construction and what is conventional construction. Any construction activity that necessarily or customarily takes place in the field as part of an oil and gas activity should be considered an oil and gas construction activity. Oil and

gas construction activities include (but are not necessarily limited to) clearing, grading, and excavation activities for:

- Access roads;
- Drilling and equipment pads (including initial, pre-drilling construction of rig cellars and reserve pits, with subsequent, post-drilling cellars and reserve pits being considered routine maintenance per EPA's July 1, 2003, Fact Sheet);
- Oil and gas facility pads (including initial construction of compressor stations, tank batteries, treating equipment, etc.)
- Equipment storage/staging areas in the field, close to a drill site, to service one or a few drill sites;
- Borrow pits;
- Gathering lines, flow lines, feeder lines, and transmission lines (consistent with March 10, 2003, Federal Register notice, 68 Fed. Reg. 11325, 11327);
- Utility lines (water, electrical, etc.) to service oil and gas exploration, production, processing or treatment operations or transmission facilities (consistent with March 10, 2003, Federal Register notice).

Oil and gas construction activities would generally not include, for example, construction of office buildings for oil and gas company employees or construction of a central support/service equipment yard to store equipment to be used at any number of drill sites, or similar activities not identified with a specific oil and gas site or few sites. These types of activities would generally be considered conventional construction activities.

(c) Spacing Role and Distance

We believe that spacing is an inappropriate criteria on which to determine whether or not there is a common plan at an oil and gas site. Even wells spaced closer together than $\frac{1}{4}$ mile are independent decisions and separate projects. We believe that a better approach is as described above, to treat contiguous land area disturbed at the same time as a single project, and if the contiguous area under construction at the same time is less than five acres (but greater than or equal to one acre), to define that project as a "small construction activity."

If spacing is to be used as a criteria, the $\frac{1}{4}$ -mile spacing distance is too far apart. Many independent oil and gas sites are drilled at 600 to 900 feet from edge to edge (for example, Pennsylvania has told EPA that it would use 900 feet as its spacing criteria). The $\frac{1}{4}$ -mile spacing would pull these sites into a "common plan," and two sites together would generally exceed the five-acre threshold (if based on area ultimately disturbed versus under active construction at a given time—see further comment on this point below).

Therefore, we believe that, if there is to be a spacing criteria at all, that it be set at 600 feet from edge of pad to edge of pad, rather than $\frac{1}{4}$ - mile.

In addition, whether the spacing is $\frac{1}{4}$ -mile or 600 feet, it is not clear whether wells spaced at less than $\frac{1}{4}$ mile apart are automatically counted as part of a common plan (presumably, only if under the control of the same operator—see below), or if they are part of a common plan only if they are "under construction" at the same time. EPA's responses to comments on the July 1,

2003, CGP were confusingly inconsistent on this point. We note that industry trade associations detailed these inconsistencies in their briefs filed in the U.S. Court of Appeals for the Seventh Circuit in 2004. See *Texas Independent Producers and Royalty Owners Assoc. v. U.S. EPA* (7th Cir. Lead No. 03-3277 et seq.), Oil and Gas Petitioners Reply Opening Brief (July 28, 2004) and Oil and Gas Petitioners Reply Brief (Nov. 10, 2004).

(d) Effect of Interconnecting Structures

It is clear that unconnected sites more than ¼ mile apart (or whatever spacing threshold may eventually be established) are not counted as part of a common plan, even if they are under construction at the same time. However, many oil and gas sites have a road, gathering line, or utility structure connecting them. EPA says that two sites more than ¼ mile apart are to be considered part of a common plan if there is an interconnecting structure “under construction” at the same time.

If there is an interconnecting structure connecting two sites, what has to be “under construction” at the same time for all three projects (*i.e.*, the two sites and interconnecting structure) to be considered part of a “common plan”? Both sites and the interconnecting structure? Either site and the interconnecting structure? If all that is required is that either site and the interconnecting structure be under construction at one time, later-constructed sites would be lumped together with the area disturbed by the earlier site and the interconnecting structure, thereby, in most cases, exceeding a five-acre threshold if based on land area ultimately disturbed (but see below, relating to question on land area ultimately disturbed versus under construction at a given point in time).

(e) Standalone Projects

Many times a project is a standalone project. For example, a gathering line would not typically be considered part of a “common plan.” An operator does not usually know whether, when and where it will be installing a gathering line at the time the operator is constructing its road and site. Therefore, gathering lines should generally not be considered part of a common plan, unless they are under active construction at the same time as the site to which they connect.

(f) Definition of “Under Construction” vs. “Ultimately Disturbed

It appears that whether or not there is a “common plan” will depend in part on whether certain components are “under construction” at the same time (also referred to as “under (active) construction” by EPA in its responses to comments on the July 1, 2003 CGP and Fact Sheet). It is not clear what EPA means by “under construction.” It could mean from commencement of land-disturbing activities to “final stabilization.” As a matter of prudent practice in the industry, oil and gas sites may be temporarily stabilized but may not be “finally stabilized” as EPA defines that term in the CGP and Fact Sheet.

We believe that “under construction” or “under (active) construction” for oil and gas activities should commence with the commencement of land-disturbing activities and end when the land area involved is in a condition suitable for the use intended and erosion control measures consistent with reasonable and prudent practices used in the oil and gas industry for either temporary or permanent stabilization have been implemented.

A related problem is whether only the land area under construction at a given point in time must be counted against the acreage threshold, or whether all area ultimately to be disturbed that is part of a common plan must be counted against the threshold. Clearly the shorter the duration of disturbed soil, the less the environmental impact from the disturbance. Additionally, the smaller the area disturbed, the lower the impact. The oil and gas industry believes that this type of “stabilize-as-you-go” concept encourages environmentally beneficial behaviors and is consistent with good oil and gas industry practice.

(g) Effect of Different Operators

It is not uncommon in the oil and gas industry for different oil and gas operators to be drilling wells in relatively close proximity to each other. It is common for a different operator to be installing gathering and transmission lines from the operator of the oil and gas reserves. When there are different operators undertaking these activities, even if those activities are close together or occurring at the same time, the activities should not be considered to be part of a common plan.