

## **Questions for EPA re Impact of NRDC v. EPA**

### **1. In light of NRDC v. EPA and EPA's Petition for Rehearing, what is the status of EPA's Stormwater O&G Construction Rule and what action, if any, would be expected to change the status of EPA's Stormwater O&G Construction Rule nationwide?**

Agency Response: The existing regulations remain in effect unless and until either of the following occurs: seven days after the court denies EPA's petition for rehearing or seven days after the court denies a motion for a stay of the mandate, whichever is later. If the mandate issues in this case, then the Agency's amendments to 40 CFR § 122.26 published on June 12, 2006, will no longer be in effect. The relevant provisions of the Energy Policy Act of 2005 -- i.e., 33 U.S.C. §1362(24) -- will, however, remain in effect.

### **2. What impact, if any, does the NRDC v. EPA decision and EPA's petition have on state delegated stormwater permitting programs?**

Agency Response: The impact on authorized state programs is the same as the impact on the Agency. The Clean Water Act (CWA) exemption at 402(l)(2) prohibits EPA and states from requiring an NPDES permit for the discharges described in that section. However, states retain authority pursuant to state law to regulate these activities through non-NPDES programs as they deem appropriate.

### **3. How would vacatur of EPA's Stormwater O&G Construction Rule impact the statutory exemption for construction activities at oil and gas exploration and production facilities that do not trigger the exceptions under 40 CFR 122.26(c)(1)(iii) - namely, no discharge of a reportable quantity under the CWA or CERCLA, and no contribution to a violation of a water quality standard?**

Agency Response: Vacatur of the 2006 rule does not impact the statutory exemption as written. Applicable regulatory requirements would revert back to the pre-2006 rule language.

### **4. If the stormwater regulation is vacated and we go back to the statutory exemption, what criteria will EPA use to determine if stormwater discharges violate a water quality standard for sediment? Would EPA consider agreeing that following RAPPs or other applicable BMP creates a presumption of compliance with statutory requirements?**

Agency Response: EPA presumes that operators who select, install, and maintain control measures that minimize pollutant discharges will be able to meet applicable water quality standards in most instances. EPA has explained the term, "minimize," in the context of the 2008 Construction General Permit, to mean "to reduce and/or eliminate to the extent achievable using control measures (including best management practices) that are technologically available and economically practicable and achievable in light of best industry practice."<sup>1</sup> However, if at any time an operator or EPA becomes aware that a discharge from these activities contributes to a violation of a water quality standard, the operator must immediately apply for permit coverage.

For discharges to impaired waters, it is appropriate for operators to contact their permitting authorities to determine what additional control measures, if any, are necessary to ensure that the

---

<sup>1</sup> See Part 3 of the 2008 Construction General Permit. [http://www.epa.gov/npdes/pubs/cgp2008\\_finalpermit.pdf](http://www.epa.gov/npdes/pubs/cgp2008_finalpermit.pdf)

discharges do not contribute to a violation of water quality standards.

While RAPPs or other similar documents may be appropriate in certain instances, EPA reserves judgment for the time being on whether such practices would constitute appropriate controls.

**5. If the petition for rehearing is denied, does EPA contemplate rulemaking and, if so, will the rulemaking merely remove the second sentence of Section 122.26(a)(2)(ii) and the explanatory note encouraging BMPs, or does EPA contemplate adding provisions, beyond Section 122.26(c)(1)(iii), on the meaning of “contamination” for oil and gas construction activities?**

Agency Response: EPA is considering rulemaking as one of its options should the court deny the petition for rehearing. At this time, however, the Agency has not made a decision on how it will proceed.

**6. If the rule is vacated, how will EPA define “site”? Industry believes that the “common plan of development or sale” guidance for conventional construction is poorly suited to its oil and gas sites.**

Agency Response: At this time, EPA does not yet have plans to further define the term “site” as used in CWA § 402(l)(2), or 40 CFR §122.26(a)(2)(ii). The Agency disagrees, however, with the suggestion that its discussion of “common plan of development or sale” is “poorly suited” to oil and gas sites. Although not repeated in the recent 2008 CGP, EPA believes that the following response to a similar question articulated in the 2003 CGP fact sheet is applicable to oil and gas construction activities:

*Where discrete construction projects within a larger common plan of development or sale are located 1/4 mile or more apart and the area between the projects is not being disturbed, each individual project can be treated as a separate plan of development or sale provided any interconnecting road, pipeline or utility project that is part of the same “common plan” is not concurrently being disturbed. For example, two oil and gas well pads separated by 1/2 mile could be treated as separate “common plans.” However, if the same two well pads and an interconnecting access road were all under construction at the same time, they would generally be considered as part of a single “common plan” for permitting purposes. If a utility company was constructing new trunk lines off an existing transmission line to serve separate residential subdivisions located more than 1/4 mile apart, the two trunk line projects could be considered to be separate projects.*

*If you have a long-range master plan of development where some portions of the master plan are a conceptual rather than a specific plan of future development and the future construction activities would, if they occur at all, happen over an extended time period, you may consider the “conceptual” phases of development to be separate “common plans” provided the periods of construction for the physically interconnected phases will not overlap. For example, an oil and gas exploration and production company could have a broad plan to develop wells within a lease or production area, but decisions on how many wells would be drilled within what time frame and which wells would be tied to a pipeline would be largely driven by current market conditions and which, if any, wells proved to be commercially viable.*