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Impact of *Natural Resources Defense Council v. U.S. EPA* (9th Cir. 2008) 526 F.3d 591 on
the Regulation of Storm Water Discharges of Sediment from
Oil and Gas Construction Activities.

February 18, 2009

Overview

The United States Environmental Protection Agency (U.S. EPA) promulgated a rule exempting oil and gas construction activities from National Pollutant Discharge Elimination System (NPDES) permitting requirements. (See 71 Fed.Reg. 33,628 (Jun. 12, 2006), [codified at 40 C.F.R. § 122.26(a)(2)(ii)].) Under the rule, oil and gas construction activities were no longer required to obtain an NPDES permit if the storm water discharge was contaminated only with sediment, even if the sediment discharge contributed to a violation of water quality standards. The Natural Resources Defense Council (NRDC) and other interested parties challenged this rule in the United States Court of Appeals for the Ninth Circuit. (*Natural Resources Defense Council v. U.S. E.P.A.* (9th Cir. 2008) 526 F.3d 591 [*NRDC v. U.S. EPA*].) The Ninth Circuit vacated the rule, finding that it was an impermissible interpretation of the Clean Water Act (CWA), as amended by the 2005 Energy Policy Act. The U.S. EPA petitioned for a rehearing, which was denied in November 2008.

This memorandum summarizes the vacated rule and the relevant laws and regulations that were affected, if at all, by the vacatur. The Office of Chief Counsel has concluded that oil and gas construction activities that discharge storm water contaminated only with sediment are now subject to California and federal NPDES permitting requirements.¹

The Original Statutory Exemption

The Water Quality Act of 1987 amended the Clean Water Act (CWA) to require NPDES permits for certain discharges of storm water. (See CWA § 402(p), 33 U.S.C. § 1342(p).) The amendment exempted oil and gas “operations” from having to obtain NPDES permits if the sole discharge was uncontaminated storm water. (See *id.* § 402(l)(2), 33 U.S.C. § 1342(l)(2).) Section 402(l)(2) provides,

The Administrator shall not require a permit under this section, nor shall the Administrator directly or indirectly require any State to require a permit, for discharges of storm water runoff from mining operations or oil and gas

¹ See Memorandum from Sarah Olinger, Staff Counsel, to Michael Lauffer, Chief Counsel (Feb. 18, 2009), “Impact of *Natural Resources Defense Council v. U.S. EPA* (9th Cir. 2008) 526 F.3d 591 on the Regulation of Storm Water Discharges of Sediment from Oil and Gas Construction Activities.”

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 do not come into contact with, any overburden, raw material, intermediate products, finished product, byproduct, or waste products located on the site of such operations.

The U.S. EPA intentionally limited the exemption to oil and gas “operations.” Dischargers of storm water from oil and gas construction activities were still required to apply for an NPDES permit because “the runoff generated while construction activities are occurring has potential for serious water quality impacts . . . because of high unit loads of pollutants, primarily sediments.” (See 55 Fed.Reg. 47,990, at 48,033 (Nov. 16, 1990).)

The issue of NPDES storm water permit requirements for oil and gas activities arose again in 2005. Section 323 of the 2005 Energy Policy Act amended section 502 of the CWA to define “oil and gas exploration, production, processing, or treatment operations and facilities”² as

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.

(Pub. L. No. 109-58, § 323, 119 Stat. 694 [codified as amended at CWA § 502(24), 33 U.S.C § 1362(24)]). In essence, the 2005 Energy Policy Act broadened the definition of oil and gas-related “operations” to include related construction activities.

The Regulation

In January 2006, the U.S. EPA proposed to extend the statutory exemption to include storm water discharges of sediment, even if such sediment discharges contributed to violations of water quality standards in the receiving waters. The proposed rulemaking stated that a “water quality standard violation for sediment alone does not trigger a permitting requirement” for oil and gas activities. (71 Fed.Reg. 894, at 898 (Jan. 6, 2006).) The agency made clear, however, that “consistent with the language of CWA section 402(l)(2), the proposed regulatory changes would not exclude oil and gas construction activities from regulation under the NPDES storm water program when such field activities or operations discharge storm water that has been contaminated by contact with” any pollutants other than sediment. (*Ibid.* at 897.)

The U.S. EPA promulgated the final rule (hereinafter “sediment rule,” or “rule”) in June 2006. (See 71 Fed.Reg. 33,628 (Jun. 12, 2006), [codified at 40 C.F.R. § 122.26(a)(2)(ii)].) The sediment rule provides,

² Throughout the remainder of this memorandum, “oil and gas activities” means “oil and gas exploration, production, processing, or treatment operations and facilities.”

- (2) The Director may not require a permit for discharges of storm water runoff from the following:
- ...
- (ii) All field activities or operations associated with oil and gas 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 activities, except in accordance with paragraph (c)(1)(iii) of this section. *Discharges of sediment from construction activities associated with oil and gas exploration, production, processing, or treatment operations or transmission facilities are not subject to the provisions of [The Phase 1 Rule] paragraph (c)(1)(iii)(C) of this section.*³

(*Ibid.*, italics added.) As a result of the rule, storm water discharges comprised solely of sediment from oil and gas construction activities were fully exempted from NPDES permit requirements, even if such discharges contributed to a violation of a water quality standard. (*Ibid.*; see also *NRDC v. U.S. EPA*, *supra*, 526 F.3d at 600.) In the sediment rule's preamble, the U.S. EPA explained that because sediment is the "pollutant most commonly associated with construction activity," it is the "very pollutant being exempted from permitting by the Energy Policy Act of 2005." (71 Fed.Reg. 33,628, at 33,630-31, 33,634 (Jun. 12, 2006).)

NRDC v. EPA

The NRDC and other organizations challenged the sediment rule, arguing that it violated CWA § 402(l)(2), and asked the Ninth Circuit to vacate the rule as arbitrary and capricious under the federal Administrative Procedure Act. (See *NRDC v. U.S. EPA*, *supra*, 526 F.3d at 600.) The Ninth Circuit vacated the sediment rule, holding that it was an impermissible interpretation of § 402(l)(2), and a complete departure from the U.S. EPA's long-standing position that construction storm water discharges of sediment required an NPDES permit. (*Id.* at 608.) The Ninth Circuit concluded, the "EPA's inconsistent and conflicting position regarding the discharge of sediment-laden storm water from oil and gas construction sites causes its interpretation of amended section 402(l)(2), as reflected in the storm water discharge rule, 40 C.F.R. § 122.26, to be an arbitrary and capricious one." (*Id.* at 607-08.)

On July 21, 2008, the U.S. EPA filed a petition for rehearing in the case. The Ninth Circuit denied the EPA's request for a rehearing on November 3, 2008.

³ An explanatory note to paragraph (a)(2)(ii) states as follows: "EPA encourages operators of oil and gas field activities or operations to implement and maintain Best Management Practices (BMPs) to minimize discharges of pollutants, including sediment, in storm water both during and after construction activities to help ensure protection of surface water quality during storm events. Appropriate controls would be those suitable to the site conditions and consistent with generally accepted engineering design criteria and manufacturer specifications. Selection of BMPs could also be affected by seasonal or climate conditions."

The Aftermath

As a result of the Ninth Circuit's decision, the sediment rule is vacated. Both CWA sections 402(l)(2) and 502(24) remain in effect, including the 2005 Energy Policy Act definition of oil and gas activities exempted under CWA § 402(l)(2). In addition, the following regulations that were in place prior to the sediment rule are now controlling:⁴

40 C.F.R. § 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.

40 C.F.R. § 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.*⁵

Accordingly, oil and gas *construction activities* discharging storm water contaminated only with sediment are no longer exempt from the CWA and the discharger must obtain coverage under an NPDES permit. To address the Ninth Circuit's order, the U.S. EPA is considering rulemaking to remove the second sentence of the current 40 C.F.R. § 122.26(a)(2)(ii) and the explanatory note encouraging BMPs, but has yet to act.⁶ (See U.S. EPA, Question and Answer Regarding Implications of the Case, *NRDC v. EPA* (Oct. 13, 2008) at <http://www.epa.gov/npdes/pubs/oilandgas_epaqa.pdf> [as of Feb. 18, 2009].)

Conclusion

Oil and gas construction activities discharging storm water contaminated only with sediment are no longer exempt from the NPDES program. If a storm water discharge of sediment from these activities contributes to a violation of a water quality standard, the operator must immediately

⁴ It should be noted that 40 C.F.R. § 122.26(c)(1)(iii) remains in effect as written.

⁵ The current 40 C.F.R. § 122.26(e)(8) is identical, except the italicized parts are removed.

⁶ Due to the change in administration, it is possible that the U.S. EPA will not pursue this consideration.

Michael Lauffer

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apply for an NPDES permit, or else be in violation of the CWA. In California, such activities are subject to the Construction General Permit and operators must file a Notice of Intent to discharge.

cc:

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