



March 21, 2012

Via Email: josepadams@pa.gov

Joseph Adams
Department of Environmental Protection
Office of Oil and Gas Planning and Program Management
P.O. Box 8765
Harrisburg, PA 17105-8765

Re: Comments on the Draft Erosion and Sediment Control General Permit for Earth Disturbance Associated with Oil and Gas Exploration, Production, Processing or Treatment Operations or Transmission Facilities (ESCGP-2)

Dear Mr. Adams,

Below please find the Delaware Riverkeeper Network's (DRN) comments on the Draft ESCGP-2 Permit:

- **Comment 1:** The ESCGP-2 should be expanded to include construction activities associated with oil and gas exploration, production, processing or treatment operations or transmission facilities that have an **earth disturbance of 1 acre or greater**. Even if DEP expands coverage to earth disturbances of 1 acre or greater under the ESCGP-2, DEP must regulate oil and gas construction activities disturbing 1 acre or greater under an NPDES permit, like the construction activities general permit or individual permit.
 - **Rational:** As a result of the 9th Circuit Court of Appeals decision in *NRDC v. United States EPA*, 526 F.3d 591 (9th Cir. 2008), an unpermitted oil and gas facility engaging in construction activities of 1 acre or greater which is discharging runoff that is contaminated (with sediment or another substance), and that contaminated runoff contributes to a violation of water quality standards, then that facility would be in violation of the Clean Water Act. Thus, to escape liability the oil and gas facility is required to obtain an NPDES permit by June 12, 2006.¹
 - **Explanation of *NRDC v. US EPA*:** The 9th Circuit in *NRDC v. USEPA* vacated the EPA's June 12, 2006 published final rule in which EPA attempted to exempt stormwater discharges from oil and gas operations ("operations" include construction activities) from water quality standards. Because the 2006 EPA rule

¹ See 40 C.F.R.122.26(e)(8)
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has been vacated and EPA has not engaged in rulemaking on the issues, the regulations in place prior to the 2006 rule, as read in conjunction with the Energy Policy Act amendments (expanding oil and gas operations to include construction activities), are controlling.² The impacted regulations that were effective prior to the 2006 rule, which are now effective after the vacature, are 40 C.F.R. § 122.26(a)(2) and (e)(8). Each is reproduced below:

- 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. (Emphasis added).
- 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. (Emphasis added).

Thus, under 40 C.F.R. §122.26(a)(2), when read in conjunction with 33 U.S.C. § 1362 (24), stormwater discharges from oil and gas construction activities are not to be regulated under an NPDES permit unless the runoff has been contaminated with “any overburden, raw material, intermediate products, finished product, byproduct or waste products located on the site of such operations.” Importantly, contamination in this context includes sediment-laden runoff.³ Therefore, entities discharging stormwater runoff from oil and gas construction activities contaminated with sediment are not per se exempted from NPDES permitting requirements under 40 C.F.R. § 122.26(a)(2).

Because 40 C.F.R. §122.26(c)(1)(iii) was not at issue in the *NRDC v. USEPA* litigation, it remains in effect and requires:

² See <http://cfpub.epa.gov/npdes/stormwater/oilgas.cfm>

³ See 55 Fed. Reg. at 48029 (Nov. 16, 1990) (“contamination can include disturbed soils”). Also, the court’s holding in *NRDC v. USEPA* that EPA’s 2006 rule was arbitrary and capricious was premised on the notion that contamination includes discharge of sediment-laden stormwater. See *NRDC v. USEPA*, 526 F.3d at 606-608.

- 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... (C) Contributes to a violation of a water quality standard. 40 C.F.R. §122.26(c)(1)(iii) (emphasis added).

When these three regulations are read together, they require an oil and gas facility engaging in small and large construction activities which are discharging runoff that is contaminated (with sediment or another substance), and that contaminated runoff contributes to a violation of water quality standards, to obtain an NPDES permit.

Therefore, each facility that meets the above criteria is required to be enrolled in an NPDES permit or it will be in violation the Clean Water Act. As DEP has been authorized by EPA to administer its NPDES program, DEP has an obligation to regulate these facilities and require enrollment in NPDES permits appropriately.

- Recommendation: the Delaware Riverkeeper Network’s strongly recommends that DEP follow its Clean Water Act obligations by requiring oil and gas facilities engaging in small and large construction activities that discharge runoff that is contaminated, and that runoff contributes to a violation of a water quality standard, to enroll in an appropriate NPDES permit.
- **Comment 2**: Monitoring, Inspection, and Reporting Requirements in paragraph 8 of the Draft ESCGP-2 should be strengthened
 - In addition to “visual site inspections” conducted on weekly basis that are required under the proposed permit, the Delaware Riverkeeper Network recommends that the operator/facility should be required to sample and report stormwater discharge on a quarterly basis because sampling and reporting will more effectively ensure that E&S BMPs are properly constructed and maintained to effectively minimize pollution to the waters of the Commonwealth. In particular, DRN believes the following changes should be made to the Draft ESCGP:
 - The sampling of discharge should occur during the first rain event of the quarter and within 4 hours of the start of such rain event. Should the operator fail to sample during the first rain event, the operator is required to sample during the next rain event within 4 hours of the start of such rain event.
 - Samples should be sent for 3rd party laboratory analysis testing for TSS, Turbidity, pH, Oil and Grease, and other relevant parameters.
 - The parameters should have guidelines or thresholds, an exceedence of which would indicate that BMPs are not properly functioning thereby triggering the design and implementation of new and improved BMPs to prevent future guideline/threshold exceedences.

- Reporting of the sampling should be required within two months of the last day of the quarter.
- *Recommendation*: the Delaware Riverkeeper Network strongly recommends that DEP adopt these important sampling and reporting measures into the ESCGP-2 to best safeguard the waters of the Commonwealth. Merely requiring “visual inspections” without more protective and verifiable methods to ensure compliance with the ESCGP-2 provides inadequate protection of our waterways.

We thank the Department for considering these comments and we look forward to the Department’s response. Should you have questions or comments, please do not hesitate to contact our organization.

Sincerely,



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