

NINTH CIRCUIT VACATES EPA FINAL RULE PROVIDING FOR NPDES PERMITTING EXEMPTIONS FOR OIL AND GAS FACILITIES

In May 2008, the Ninth Circuit granted a petition to vacate the EPA's amendment to Clean Water Act ("CWA") storm water discharge rule. *Natural Resources Defense Council v. United States Environmental Protection Agency*, No. 06-73217 (9th Cir. 5/23/2008), 526 F.3d 591. The EPA's final rule exempted discharges of storm water containing sediment from oil and gas construction activities from the CWA's permitting requirements. *Id.* at 593-594. The NRDC contended that the "exemption for storm water discharges of sediment from oil and gas construction activities was unlawful under section 402(l)(2) of the CWA, 33 U.S.C. § 1342(l)(2), as amended by section 323 of the Energy Policy Act of 2005, 33 U.S.C. § 1362(24), and under the Administrative Procedure Act (APA), 5 U.S.C. § 706(2)(A)." *Id.* at 594.

Evolution of NPDES Permitting Exemption For Oil and Gas Construction Sites

The issue in *NRDC v. EPA* was whether the exemption to NPDES permitting found in section 402(l) of the CWA applied to discharges of sediment from construction activities related to oil and gas exploration, production, processing, or treatment operations, or transmission facilities. *See*, 33 U.S.C. § 1342(l)(2); 526 F.3d at 594.

Pursuant to section 402(p) of the CWA, neither the EPA nor the NPDES States could require a permit for storm water discharges until October 1, 1992, unless the storm water discharges were listed under section 402 (p)(2) of the CWA. *Id.* at 595 (citing, 33 U.S.C. § 1342(p)(2)). Section 402(p)(2) created two separate phases for the regulation of storm water discharges. *Id.*

Phase I of the EPA's NPDES storm water rule was issued in 1990 and created permitting requirements for certain storm water discharges, including storm water discharges associated with "large construction sites," *i.e.*, those sites disturbing five acres or more of property. *Id.* at 595. In Phase I, the exemption for permitting under CWA section 402(l)(2) related to oil or gas facilities was granted to an 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 . . . unless the facility: (A) [h]as had a

discharge of storm water resulting in the discharge of 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) [h]as 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)[c]ontributes to a violation of a water quality standard." *Id.* at 595-596 (emphasis added).

It was the EPA's position that the Phase I rule merely codified the EPA's interpretation that section 402(l)(2) of the CWA creates a statutory exemption from storm water permitting requirements for uncontaminated runoff from those facilities. *Id.* at 596-597 (citing 55 Fed. Reg. 47,990 (Nov. 16, 1990), 48029). However, the EPA found that "because the statutory exemption was limited to 'operations,' . . . that all related construction activities were ineligible for the exemption and must apply for a permit in light of the 'serious water quality impacts' caused by construction storm water discharges polluted with sediment." *Id.* at 597 (citing 55 Fed. Reg. 47,990, 48,033-48,034).

Phase II of the EPA's NPDES storm water rule was issued in 1999 and expanded the NPDES storm water program to include "small construction sites," *i.e.*, those sites covering one to five acres of property. *Id.* at 598 (citing 69 Fed. Reg. 68,722 (Dec. 8, 1999)). Under Phase II, small construction sites had to obtain NPDES permits by March 10, 2003. *Id.* (Citing 40 CFR §122.26(e)(8)). The EPA postponed implementation of the permitting requirements for storm water discharges from small construction activity associated with oil and gas sites until March 10, 2005. *Id.* at 598. *See*, 68 Fed. Reg. 11,325 (Mar. 10, 2003). Thereafter, the EPA postponed implementation of the permitting requirements a second time until June 12, 2006. *Id.* *See*, 70 Fed. Reg. 11,560 (Mar. 9, 2005).

EPA Rulemaking

A. Definition of Oil and Gas Exploration and Production Under CWA Revised

Before the deadlines for NPDES permitting under Phase II had passed, Congress enacted Section 323 of the Energy Policy Act which amended section 503 of the CWA by revising

This newsletter is designed as a general report on legal developments. The published material does not constitute legal advice or rendering of professional services.

the definition for “oil and gas exploration and production.” *Id.* at 599 (citing 33 U.S.C. § 1362(24) (emphasis added)). The effect of the revision to that definition was to define “oil and gas exploration, production, processing, or treatment operations, or transmission facilities” to specifically include related construction activities, thereby bringing such activities within the CWA section 402(l)(2) exemption from the NPDES permitting requirement.” *Id.* at 599 (emphasis added).

B. EPA’s Notification of Proposed Rulemaking

In January 2006, the EPA gave notice of its proposed rulemaking and indicated that it would modify the NPDES storm water permit regulations to include the revision to the definition of “oil and gas exploration and production” made in the Energy Policy Act and to enforce the resulting impact on permitting requirements for construction activities under section 402(l)(2) of the CWA. *Id.* at 599 (citing 71 Fed. Reg. 894, 897 (Jan. 6, 2006)). The EPA’s proposed rulemaking was intended “to clarify...[that] ‘a water quality standard violation for sediment alone does not trigger a permitting requirement.’” *Id.* (citing 71 Fed. Reg. at 898)). Further, the proposed rulemaking indicated a change in the EPA’s interpretation of the phrase “contaminated by contact with” in section 402(l)(2) of the CWA. *Id.* at 5962.

The EPA’s initial interpretation of the phrase “contaminated by contact with” in section 402(l)(2) of the CWA was “that oil and gas operations were exempt from permit requirements except where their discharges (1) contribute reportable quantities of oil, grease, or hazardous substances to waters of the United States or (2) contributed to a violation of a water quality standard.” *Id.* at 599-600 (citing 71 Fed. Reg. at 897-898; *see also*, 40 C.F.R. § 122.26(c)(1)(iii) (emphasis added)). Though the text of section 402(l)(2) of the CWA did not change, the EPA’s proposed rulemaking indicated that “the EPA determined that ‘a plain reading of [that section] suggests that oil and gas sites where runoff is not contaminated by contact with raw material, intermediate products, finished product, byproduct or waste products located at the site are not required to obtain NPDES permits, even in situations where the runoff might be contributing to a violation of water quality standards’” *Id.* at 599-600, (citing 71 Fed. Reg. at 898).

C. EPA’s Final Rule: 40 C.F.R. § 122.26

The EPA’s final rule that was challenged by NRDC was promulgated in June 2006 and is located at 40 C.F.R. § 122.26(a) (2). *Id.* at 600. Pursuant to the final rule promulgated by the EPA and according to the EPA’s interpretation, the “EPA [could not] require permits for storm water discharges comprised solely of sediment from oil and gas construction activities, even if such discharges contribute[d] to a violation of a water quality standard.” *Id.* at 600. Stated differently, the EPA “specifically exclude[d] from NPDES permitting requirements sediment-laden storm water discharges from construction activities.” *Id.* Further, “[n]oting that the Energy Policy Act amendment to the CWA does not specifically address sediment, EPA nevertheless reasoned that sediment, being the ‘pollutant most commonly associated with construction activity,’ is the ‘very pollutant being exempted from permitting by the Energy Policy Act of 2005.’” *Id.* at 600 (citing 71 Fed. Reg. at 33630-33631, 33634).

Ninth Circuit Court of Appeals’ Review of EPA’s Final Rule

On NRDC’s petition, the Ninth Circuit reviewed the EPA’s final storm water discharge rule under the Administrative Procedure Act (APA), 5 U.S.C. §§ 701-06. *Id.* at 5601, 602. The Ninth Circuit used the two-step approach established in

Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-44 (1984), to review the EPA’s interpretation of the statute. *Id.* at 603.

Under that two-part analysis, the Ninth Circuit first ruled that Congress did not “unambiguously intend to exempt from NPDES permitting requirements for oil and gas construction activities the discharge of storm water runoff contaminated solely with sediment” when it amended section 503(24) of the CWA through section 323 of the Energy Policy Act. *Id.* Next, the Ninth Circuit examined whether the EPA’s interpretation of amended section 402(l)(2) of the CWA was permissible. *Id.* at 605. The Ninth Circuit ultimately concluded “that EPA’s interpretation of the CWA section 402(l)(2), as amended by the Energy Policy Act, is arbitrary and capricious because of the agency’s changed position on *what* constitutes ‘contamination’ under that section.” *Id.* at 606 (citations omitted). Specifically, the Ninth Circuit noted that prior to the Energy Policy Act amendment to the CWA that an oil and gas facility that discharged storm water runoff contaminated only with sediment was not exempted from permitting under section 402(l)(2), even if that runoff was otherwise uncontaminated. *Id.* at 606, 607. The Ninth Circuit took issue with the EPA’s change in “interpretation of what constitutes ‘contamination’ under section 402(l)(2) based exclusively on a legislative amendment that does not mention (1) sediment or (2) EPA’s long-standing position that discharges of storm water runoff from oil and gas activities, contaminated solely with sediment *and* which contribute to a violation of a water quality standard, require a NPDES permit.” *Id.* at 606-607.

Ultimately, the Ninth Circuit vacated the EPA’s final rule and remanded the matter for further proceedings consistent with the decision—meaning that the Ninth Circuit ruled that there was not an exemption to the NPDES permitting requirements for storm water runoff from oil and gas-related construction sites contaminated only with sediment if the discharge of sediment contribute to a water-quality violation. *Id.* at 608.

Current Status of Ninth Circuit Ruling

On July 21, 2008, the EPA filed a petition for panel rehearing and petition for rehearing en banc. Thereafter, on August 4, 2008, the American Petroleum Institute, Independent Petroleum Association of America and Independent Producers and Royalty Owners Association filed an amicus brief supporting the rehearing of the Ninth Circuit’s decision. No ruling has been issued granting a rehearing as of the date of this publication. Therefore, it is not known whether the Ninth Circuit’s ruling eliminating the exemption for NPDES permitting requirements for construction activities related to oil and gas exploration and production facilities will remain effective in the Ninth Circuit or whether the Ninth Circuit’s ruling will be given effect by the EPA in the areas outside of the geographic area included in the Ninth Circuit’s jurisdiction.



Laura L. Hart
225.389.3730

laura.hart@keanmiller.com