

**KDHE's Position On Oil & Gas Construction Stormwater Exemption**  
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Prepared by: Donald Carlson, Chief - Industrial Program Section, Bureau of Water  
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The Kansas Department of Health and Environment (KDHE) is providing notification regarding recent changes to the Federal Clean Water Act (CWA) which exempt oil and gas exploration, production, processing, or treatment operations, and transmission facilities from National Pollutant Discharge Elimination System (NPDES) stormwater permitting requirements associated with construction activities. KDHE is no longer, as a matter of routine, issuing NPDES stormwater runoff permits for construction activities associated with oil and gas exploration, production, processing, or treatment operations, and transmission facilities.

While oil and gas exploration, production, processing, or treatment operations, and transmission facilities are, in general, no longer subject to NPDES stormwater permitting requirements associated with construction activities, such activities are still required to be conducted in a manner that Kansas Surface Water Quality Standards are not violated. KDHE recommends that construction activities associated with oil and gas exploration, production, processing, or treatment operations, and transmission facilities develop and utilize a site specific stormwater pollution prevention plan employing best management practices for controlling erosion and stormwater runoff from areas disturbed by construction activities.

There also remains the "reportable quantity release provisions" of 40 CFR 122.26(c)(iii) which could necessitate the need for a permit. The "reportable quantity release provisions" would typically address construction activities in or around existing operations. The release provisions would require a permit if construction activities would be conducted in the immediate vicinity of a facility, operation, or project that:

- (A) Has 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 117.21 [Hazardous Substance] or 40 CFR 302.6 [Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)] at any time since November 16, 1987; or
- (B) Has 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 [Discharge of Oil] at any time since November 16, 1987; or
- (C) Contributes to a violation of a water quality standard.

**Background Information**

Section 402(1)(2) of the CWA states:

"Stormwater Runoff From Oil, Gas, and Mining Operations. - 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 stormwater runoff from mining operations or oil or 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 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 oil and gas industry felt this provision of the CWA provided them an exemption to the NPDES stormwater construction permitting requirements.

EPA announced in the March 9, 2005, Federal Register (70 FR 11560) a final rulemaking to delay the permit authorization deadline for NPDES stormwater runoff permits for small construction activities associated with oil and gas exploration, production, processing, and treatment operations or transmission facilities. EPA postponed until June 12, 2006, the requirement to obtain NPDES stormwater permit coverage for oil and gas construction activities that disturb one to five acres of land.

On October 31, 2005, EPA published in the Federal Register (70 FR 65345) a notice that on Monday August 8, 2005, President Bush signed into law “The Energy Policy Act of 2005” (H.R. 6, “the Energy Bill”). Section 323 of the legislation modifies Section 502 of the Federal Water Pollution Control Act (CWA) to define the term “oil and gas exploration, production, processing, or treatment operations, or transmission facilities” to mean “all field activities 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”. EPA interprets this statutory language change as excluding all construction activities associated with oil and gas exploration and production operations from NPDES stormwater permit requirements. Reflecting the changes in the new law, EPA expects to propose modifications to its current regulations of construction site stormwater discharges for oil and gas activities regulated by Phase I and Phase II stormwater rules. In the notice, EPA indicates they will be publishing in the Federal Register a Notice of Proposed Rulemaking in December 2005. EPA did not establish a date for completing the proposed rulemaking action.

### **KDHE’s Position**

KDHE had previously agreed to comply with the EPA promulgated June 12, 2006, delay. With the modification of the CWA by Congress, KDHE will no longer, as a matter of routine, issue NPDES stormwater runoff permits for construction activities associated with oil and gas exploration, production, processing, or treatment operations, and transmission facilities. Facilities with issued NPDES Stormwater permits associated with construction activities will be notified at the time of their annual fee billing that a permit for oil and gas exploration, production, processing, or treatment operations, and transmission facility projects is no longer required and the permit may be terminated, if the permittee so desires.

While an NPDES stormwater construction runoff permit is no longer required to discharge stormwater from oil and gas construction sites, there remains a responsibility to comply with Kansas Surface Water Quality Standards. Violations of Kansas Surface Water Quality Standards, resulting from the discharge of stormwater runoff from construction activities will continue to be enforced by KDHE. KDHE recommends that construction activities associated with oil and gas exploration, production, processing, or treatment operations, and transmission facilities develop and utilize a site specific stormwater pollution prevention plan employing best management practices for controlling

erosion and stormwater runoff from areas disturbed by construction activities.

The “reportable quantity release provisions” of 40 CFR 122.26(c)(iii) could necessitate the need for KDHE requiring the issuance of an NPDES stormwater permit for construction activities associated with oil and gas exploration, production, processing, or treatment operations, and transmission facilities.

We recommend the EPA website and Federal Register be monitored for changes being proposed by EPA to the NPDES stormwater permitting regulations.