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The Storm Water Regulatory Scheme: Washing an Industry Down the Drain?

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The Storm Water Regulatory Scheme: Washing an Industry Down the Drain?

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To the uninitiated, a discussion of storm water may appear to be a rather "dry" subject for discussion. However, the regulation of storm water discharges under the Federal Water Pollution Control Act's (Clean Water Act)[1] National Pollutant Discharge Elimination System (NPDES)[2] has generated impassioned debate between governmental regulators, the regulated community, and environmental interests.

This Article discusses several concerns of the oil and natural gas industry with regard to the U. S. Environmental Protection Agency's (EPA) interpretation and application of the Clean Water Act's oil and gas exemption from storm water regulation for uncontaminated storm water runoff. The practical impact of a broad application of the storm water discharge permitting program to the entire community of oil and gas exploration, production, processing, and transmission facilities presents both logistical and financial impossibilities for the oil and gas industry, an industry already subject to environmental regulation protective of both surface and groundwater.

Oil and gas operations in the Appalachian region provide a poignant example of the potential impact of the implementation of an NPDES storm water permitting program that is broader than that contemplated by Congress. The Appalachian region contains 44% of the nation's natural gas wells.[3] These wells produce 3.1% of the

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[1] Federal Clean Water Act, 33 U.S.C. §§ 1251-1387 (1994).

[2] Clean Water Act § 402, 33 U.S.C. § 1342.

[3] Letter from David M. Flannery, Robinson & McElwee, to Tom Seaton, Permits Division of U. S. Environmental Protection Agency, Comments of the Appalachian Oil

nation's natural gas production.[4] Of the oil production in the United States, 1.2% comes from Appalachia, which has 14.2% of the nation's wells.[5] There are almost 200,000 oil and gas wells in Appalachia which would be affected by EPA's storm water regulation.[6] Most of these wells produce relatively small amounts of oil and natural gas.[7] This disproportionately large number of wells as compared to their production volumes of both oil and natural gas makes the region's oil and natural gas operations particularly sensitive to any new regulatory costs.

The following text will discuss the development and the framework of EPA's program governing storm water discharges and will examine the controversy surrounding the application of storm water regulation to the oil and natural gas industry.

I. THE STORM WATER REGULATORY SCHEME

Pollutants in storm water discharges have been cited as a leading cause of water quality impairment.[8] The Clean Water Act[9] is the primary statute regulating the discharge of pollutants to the nation's water resources and, therefore, is the most effective federal law for the regulation of contaminated storm water discharges.

In the 1987 amendments to the Clean Water Act, commonly referred to as the Water Quality Act of 1987, Congress included a provision explicitly addressing storm water discharges, Section 402.[10] This new provision established a two-phased scheme authorizing EPA and approved states[11] to issue NPDES permits for cer-

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and Natural Gas Industry to EPA's Dec. 7, 1988 Notice of Proposed Rulemaking regarding storm water discharges 9 (March 15, 1989) (on file with the *Journal of Natural Resources & Environmental Law*) [hereinafter INDUSTRY COMMENTS].

[4] *Id.*

[5] *Id.*

[6] *Id.* (exhibit 1 at 3).

[7] *Id.*

[8] *See* 55 Fed. Reg. 47,990-991 (1990) (citing National Water Quality Inventory, 1988 Report to Congress (1988)).

[9] A "rewrite" of the Clean Water Act was scheduled for 1995. *See Direct Final Rule Being Considered To Address Small Storm Water Sources,* 25 ENV'T REP. 1660 (Dec. 23, 1994) [hereinafter DIRECT FINAL RULE REPORT].

[10] Clean Water Act § 402, 33 U.S.C. § 1342. This statutory provision was a direct result of Congress' frustration with the EPA's continuing failure to regulate storm water discharges. The EPA issued its first storm water rule in 1973. 38 Fed. Reg. 13,530 (1973). Due to various legal challenges and to internal debate within the regulatory community, the 1973 rule and several other EPA regulatory proposals languished. A detailed recitation of EPA's storm water efforts appears in 53 Fed. Reg. 49,416 (1988).

[11] Under section 402(b) of the Clean Water Act, the EPA may approve a submis-

tain storm water discharges, including those associated with industrial activity.[12] EPA has promulgated its Phase I baseline permitting rule to cover the majority of storm water discharges associated with industrial activity.[13] Only recently has EPA finalized its Phase II storm water process.[14]

The development of regulations to implement CWA section 402 has proven to be enormously complex and controversial. On December 7, 1988, EPA proposed an administrative rule to establish permitting requirements for storm water discharges associated with industrial activity and from large and medium-sized municipal separate storm sewer systems.[15] EPA held six public meetings across the country to discuss the proposed storm water regulations, and it reportedly received over 3,200 pages of comments.[16] The anticipated costs of implementing the proposal generated many of the comments. Costs of individual permits were estimated to range from $1,000 for an individual industrial permit application to nearly $77,000 for a large municipal system application.[17]

Under this intense scrutiny, EPA promulgated final Phase I permit application regulations for storm water discharges on November 16, 1990.[18] The final Phase I regulations addressed two major classes of storm water discharges: 1) discharges associated with industrial activity; and 2) discharges from large and medium municipal separate storm sewer systems. Eleven categories of facilities were determined to be engaging in "industrial activity" for purposes of the regulations.[19] These categories cover a wide range of activities, including certain oil and gas operations that discharge contaminated storm water,[20] manufacturing and transportation facil-

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sion by a state to administer its own NPDES program. 33 U.S.C. § 1342(b). The Appalachian states of Kentucky, West Virginia, Tennessee, Ohio, Virginia, Pennsylvania, and New York all have EPA-approved NPDES programs.

[12] Clean Water Act § 402(2)(B), 33 U.S.C. § 402(2)(B) (1987).

[13] 55 Fed. Reg. 47,990 (1990).

[14] 60 Fed. Reg. 40,230-35 (1995).

[15] *See* 53 Fed. Reg. 49,416 (1988).

[16] *See* 55 Fed. Reg. 47,990-994 (1990).

[17] *Id.* at 48,061.

[18] *Id.* at 47,990.

[19] 40 C.F.R. § 122.26(b)(14) (1994).

[20] *Id.* § 122.126(b)(14)(iii). This Section applies to Standard Industrial Classifications 10 through 14, including "oil and gas exploration, production, processing, or treatment operations, or transmission facilities that discharge [contaminated] storm water. . . ." Natural gas transmission and distribution facilities are classified as Standard Industrial Classification 49 and 46, and as such, are not a regulated "industrial facility." *See* Executive Office of the President, Office of Management and Budget, Standard In-

ities, landfills, steam electric power generating facilities, and construction sites.[21]

The regulations set forth two storm water discharge permitting options for facilities engaging in industrial activities: individual or group applications.[22] Final general permits for storm water discharges associated with industrial activity and with construction activity were issued in 1992.[23] Phase I permit applications were due, depending upon the discharge category, in either 1993 or 1994. The statutory authority for requiring permits for storm water discharges has been amended since the passage of CWA section 402 and currently limits permit requirements to post-October 1, 1994.[24] EPA's failure to meet the statutory deadline for implementing the Phase II program by October 1, 1994, was challenged by the Natural Resources Defense Council.[25]

The EPA issued its final rule on Phase II dischargers on August 7, 1995.[26] The regulations establish "a sequential application process for all Phase II storm water discharges."[27] Those Phase II discharges that are determined to be "contributing to a water quality impairment or are a significant contributor of pollutants to waters of

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dustrial Classification Manual (1987).

[21] The final Phase I regulations have been the subject of legal challenges from both industry and environmental interests. *See, e.g.*, Natural Resources Defense Council v. EPA, 966 F.2d 1292 (9th Cir. 1992) (environmental group's challenge to EPA's exemption for oil and gas operations rejected). The Court remanded for further review EPA's exclusion of several SIC classifications which fell within the "light industrial" category from the definition of "associated with industrial activity," and it remanded for further review EPA's exemption for construction operations that disturb less than five acres of total land area. *Id. See also* American Mining Congress v. EPA, 965 F.2d 759 (9th Cir. 1992). For a review of these cases, see Edwin A. Skoch, II, *Regulation of Storm Water Discharges under the Clean Water Act*, 23 ENVTL. L. 1087 (1993).

[22] *See* 40 C.F.R. § 122.26(c) (1994) (The EPA also has proposed a multi-sector permit option); 58 Fed. Reg. 61,146 (1993).

[23] *See* 57 Fed. Reg. 41,236 (1992) (industrial activity); 57 Fed. Reg. 41,176 (1992) (construction).

[24] 33 U.S.C. § 1342 (1987 & Supp. 1994) (original provision at Title III § 401, 101 Stat. 65 (1987)).

[25] A judicial consent order now requires EPA "to propose by September 1, 1997, and take final action by March 1, 1999, supplemental rules which clarify the scope of coverage and control mechanisms for the phase II program." 60 Fed. Reg. 40,232 (1995) (citing Natural Resources Defense Council, Inc. v. EPA, Civ. No. 95-0634 PLF (D.D.C. April 6, 1995)).

[26] Amendment to Requiremenrs for Natural Pollutant Discharge Elimination System (NPDES) Permits for Storm Water Discharges Under Section 402(p)(6) of the Clean Water Act, 60 Fed. Reg. 40,230-35 (1995) (to be codified at 40 C.F.R. §§ 122 & 124).

[27] *Id.* at 40,230.

the United States will be included in the first tier."[28] All other Phase II dischargers fall into the second tier.[29] Dischargers of storm water that are in this second tier "must apply for permits by August 7, 2001, but only if the phase II regulatory program in place at that time requires permits."[30]

II. APPLICATION OF THE STORM WATER REGULATIONS TO THE OIL AND NATURAL GAS INDUSTRY

In the 1987 amendments to the Clean Water Act that authorized regulation of storm water discharges, Congress created an exemption from the permit requirements for uncontaminated storm water runoff from oil and gas facilities.[31] Specifically, the exemption provides:

> Stormwater [sic] 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 [sic] runoff from . . . 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 do not come into contact with, any overburden, raw material, intermediate products, finished product, byproduct, or waste products located on the site of such operation.[32]

The legislative history accompanying the 1987 amendments discusses the rationale for the oil and gas exemption:

> Section 402 of the Clean Water Act is amended to prohibit the Administrator from requiring permits for [uncontaminated] storm water runoff from . . . oil and gas [operations]. . . . With this limitation on the permitting requirements for such storm water runoff, important oil, gas and mining operations will be able to continue without unnecessary paperwork restrictions, while protection of the environment remains at a premium.[33]

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[28] *Id.*

[29] *Id.*

[30] 60 Fed. Reg. 40,231 (1995).

[31] Clean Water Act § 402(l)(2), 33 U.S.C.S. § 1342(l)(2) (1987).

[32] *Id.*

[33] 133 CONG. REC. H171 (daily ed. Jan. 8, 1987) (Statement of Sen.

Thus, the oil and gas exemption reflects a recognition by Congress that storm water runoff from most oil and gas operations does not create a significant environmental concern. Congress directed EPA to focus its resources on those storm water discharges which have a greater potential to adversely affect the nation's water quality.

EPA's final Phase I storm water regulations restate the Clean Water Act's provision that exempts uncontaminated storm water discharges associated with oil and gas operations from the storm water permitting program.[34] This regulatory exemption appears in the opening subsection of the industrial activity storm water regulations, modifying the specific storm water provisions which are in the remainder of the rule.

The regulations provide explicit directions for determining when an oil and gas storm water discharge is "contaminated," and, accordingly, at what point the exemption from storm water discharge permitting ceases to apply. A storm water discharge from an oil or gas facility is presumed to be contaminated if it resulted in the discharge of a reportable quantity[35] pursuant to the Clean Water Act or the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) since November 1987 or if it contributed "to a violation of a water quality standard."[36] Under these circumstances, the oil or gas operator is required to comply with the storm water permitting program.[37]

The Preamble to the final storm water industrial activity regulations discusses the scope of the oil and gas exemption in terms of "contamination" as follows:

> Oil, gas and mining facilities are among those industrial sites that are likely to discharge storm water runoff that is contaminated by process wastes, toxic pollutants, hazardous substances, or oil and grease. Such contamination can include *disturbed soils* and process wastes containing heavy metals or suspended or dissolved

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Hammerschmidt).

[34] 40 C.F.R. § 122.26(a)(2) (1994).

[35] 40 C.F.R. § 122.26(c)(1)(iii) (1994). Reportable Quantities (RQ's) are quantities the discharge of which "may be harmful to the public health or welfare of the United States." Clean Water Act § 311(b)(4), 33 U.S.C.S. § 1321(b)(4). *See also* CERCLA § 102, 42 U.S.C. § 9602 (1994). Pursuant to both the Clean Water Act and CERCLA, the EPA has established RQ's for many substances. *See* 40 C.F.R. §§ 110, 117, 302. The operator of any vessel or facility which releases an RQ of any of the listed substances must immediately notify the National Response Center. *See, e.g.*, 40 C.F.R. § 110.10 (1994).

[36] 40 C.F.R. § 122.26(c)(1)(iii) (1994).

[37] 40 C.F.R. § 122.26(b)(14)(iii) (1994).

> solids, salts, surfactants, or solvents used or produced in oil and gas operations. . . .[38]

The legislative history indicates that Congress recognized that numerous situations exist in the mining and oil and gas industries where storm water is channeled around plants and operations through a series of ditches and other structural devices in order to prevent pollution of the storm water by harmful contaminants. Based upon consideration of resource drain both on EPA as the permitting agency and on the regulated operator, Congress concluded that operators using good management practices and making expenditures to prevent contamination must not be burdened with the supplemental requirement to obtain a storm water permit.

To implement Section 402(l)(2), EPA promulgated 40 C.F.R. section 122.26(C)(1)(iii), which requires permits for contaminated storm water discharges from oil, gas, and mining operations. "Storm water discharges that are not contaminated by contact with any overburden, raw material, intermediate products, finished product, byproduct or waste products located on the site of such operations will not be required to obtain a storm water discharge permit."[39]

In the Preamble to the final storm water rule for industrial activity, EPA also provided guidance defining oil and gas activities for purposes of the storm water permitting program:

> EPA's intent is for storm water permit requirements (and the exemption at hand) to apply to [oil and gas] activities . . . (exploration, production, processing, treatment, and transmission) as they relate to the categories listed in SIC 13.[40]

"SIC 13" is a reference to Standard Industrial Classification (SIC) Manual 13,[41] a government publication which describes various commercial activities and organizes them for identification purposes into a standard numerical system. SIC 13 lists a broad spectrum of activities within the oil and gas classification including: exploration, drilling, oil and gas well operation and maintenance, pipe testing services, excavating slush pits and cellars, and construction activities related to oil and gas operations.[42] EPA's reference to SIC 13

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[38] 55 Fed. Reg. 48,029 (1990) (emphasis added).

[39] *Id.*

[40] *Id.* at 48,031.

[41] EXECUTIVE OFFICE OF THE PRESIDENT, OFFICE OF MANAGEMENT AND BUDGET, STANDARD INDUSTRIAL CLASSIFICATION MANUAL (1987).

[42] *Id.* The regulatory record of the final storm water rule demonstrates that EPA recognized construction activities as an inherent component of oil and gas operations. In

defines oil and gas operations in such a way as to include the day-to-day workings of the oil and gas business.

The storm water permits issued by EPA in 1992 further clarify the applicability of the storm water permitting program to oil and gas operations.[43] EPA issued two separate sets of general storm water permits: one for construction activities and one for industrial activity. In recognition of the fact that construction is often integrally related to an industrial activity, EPA concluded that storm water discharges from construction which is associated with a Phase I regulated industrial activity[44] can be authorized by the industrial activity general permit.[45] Accordingly, the industrial activity general permit offers coverage for construction related to oil and gas operations that discharge contaminated storm water.

Throughout the development of EPA's storm water regulatory program, members of the oil and gas industry filed comments and questions regarding the industry's storm water permitting obligations. EPA's responses confirmed that only those oil and gas operations, including construction activities, that discharge "contaminated" storm water are subject to the storm water permitting program.[46]

Although the legislative history and the administrative record concerning the Clean Water Act storm water permitting program support the conclusion that the scope of the oil and gas storm water exemption encompasses surface disturbance construction activity, EPA's policy for implementing the program suggests a more narrow interpretation of the exemption. On December 10, 1992, the Chief

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EPA's response to a trade organization's comments on the proposed rule, it agreed that there is no contamination requiring a storm water permit application to the extent that the construction is related to oil and gas activities exempted from the storm water program pursuant to the Clean Water Act. *See* EPA's Detailed Response to Public Comments dated Nov. 16, 1990. Further, the record contains a publication which explicitly describes the integral relationship between well drilling and construction activities. *See* RON BAKER, A PRIMER OF OILWELL DRILLING (4th ed. 1979).

[43] *See* 57 Fed. Reg. 41,236, 41,176 (1992). EPA proposed a "multi-sector" storm water general permit as recently as November 19, 1993. *See* 58 Fed. Reg. 61,146 (1993) [hereinafter Multi-Sector Permit Proposal].

[44] *See* 40 C.F.R. § 122.26(b)(14)(i)-(xi) (1994). Oil and gas operations that discharge contaminated storm water are subject to the storm water permitting program pursuant to 40 C.F.R. § 122.26(b)(14)(iii) (1994).

[45] *See* 57 Fed. Reg. 41,240 (1992). "Indeed, the general storm water permit for industrial activity specifically addresses soil disturbances". *Id.* at 41,244 (1992). *See also id.* at 41,239 (1992).

[46] *See* EPA's Storm Water Response to Comment Document (Sept. 1992). *See also* Multi-Sector Permit Proposal, 58 Fed. Reg. 61,236 (1993).

of EPA's NPDES Program Branch issued an internal memorandum to the Storm Water Coordinator of EPA's Region VIII stating that the storm water regulations were applicable to all construction operations that disturb five or more acres of land, regardless of their affiliation with oil and gas operations.[47] With this 1992 Memo, EPA drew a distinction on record for the first time between the storm water permitting obligations for construction activities associated with oil and gas operations and the permitting obligations of oil and gas operations *per se*. As written, the Memo imposed new and expanded storm water permitting obligations on the oil and gas industry, obligations about which the industry did not learn until May 1, 1993. On that date, counsel for the Appalachian Energy Group (AEG),[48] an *ad hoc* affiliation of nine oil and gas trade organizations from the seven states of the Appalachian region, received a copy of the 1992 EPA Memo from the Storm Water Coordinator of EPA's Region III in response to an inquiry confirming permitting requirements under industrial activity permits for oil and gas operations.

This dramatic and unannounced change in the storm water program by EPA raised significant, new regulatory implications for the oil and gas industry generally, and, more specifically, for the

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[47] To: Vern Berry Region VIII Storm Water Coordinator (8WM-C) From: Ephraim King, Chief NPDES Program Branch (EN-336) Subject: Applicability of NPDES Storm Water Regulations to Discharges from Construction Activities Involving Oil and Gas Facilities The purpose of this memorandum is to respond to your memorandum that asked whether a permit is required for storm water discharges from construction activities involving oil and gas facilities (e.g., access roads, drilling pads, pipelines, etc.). All construction operations, including clearing, grading and excavating activities, that disturb five or more acres of land are required to apply for a NPDES permit for the storm water discharges from that site, pursuant to 40 C.F.R. Part 122.26(b)(14)(x), regardless of its affiliation with an oil and gas operation. The exemption afforded to oil and gas operations pursuant to 40 C.F.R. Part 122.26(c)(1)(iii) applies only to the oil and gas operation itself, not associated activities that may fall under different parts of the definition of storm water discharge associated with industrial activity. I hope this memorandum addresses you concerns. Please call me if you have further questions.

Appalachian Energy Group v. EPA, 33 F.3d 319 (4th Cir. 1994) (quoting the Memorandum from Ephraim King to Vern Berry (Dec. 10, 1992)) [hereinafter 1992 MEMO].

[48] Members of AEG include Independent Oil and Gas Association of New York, Independent Oil and Gas Association of Pennsylvania, Independent Oil and Gas Association of West Virginia, Kentucky Oil and Gas Association, Ohio Oil and Gas Association, Pennsylvania Oil and Gas Association, Tennessee Oil and Gas Association, Virginia Oil and Gas Association, and West Virginia Oil and Natural Gas Association.

industry in Appalachia. The fragile economics of Appalachian wells make the region's oil and gas industry particularly sensitive to even small increases in operating costs. An economic survey of the Appalachian oil and gas business determined that a mere $200 increase in annual operating costs experienced by existing oil and gas wells in Appalachia would force the plugging of nearly 20% of these wells.[49] A $2,000 per year increase would make nearly one half of these wells uneconomical to operate.[50] Considering that the average cost of an individual industrial permit application was estimated to be $1,000,[51] it was not unrealistic or overly dramatic for AEG's membership to predict that this new, overly-broad storm water permitting obligation could potentially destroy a significant segment of the Appalachian oil and gas industry.

Fearful of the severe economic consequences of the 1992 EPA Memo, AEG met with EPA on June 14, 1993 to request that the agency reconsider the Memo's stated position. When EPA refused, AEG sought judicial review of the December 10, 1992 Memo in the United States Court of Appeals for the Fourth Circuit.

III. APPLACHIAN ENERGY GROUP V. EPA

AEG[52] filed the *Appalachian Energy Group v. EPA* case on September 27, 1993. AEG's argument to the United States Court of Appeals for the Fourth Circuit addressed two issues: 1) whether the court had subject matter jurisdiction to review the 1992 EPA Memo; and 2) if so, whether the Memo was unlawful.

AEG asserted that the court of appeals had subject matter jurisdiction pursuant to Section 509(b)(1)(F) of the Clean Water Act.[53] This Section confers jurisdiction on the courts of appeal to review EPA's action in denying or issuing any permit. While acknowledging that EPA did not in the December 10, 1992 Memo formally issue or deny any permit, AEG cited precedent to support its contention that the Memo was reviewable as a rule that regulates the underlying permit procedure.[54] Alternately, AEG suggested that the

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[49] *See* Industry Comments, *supra* note 3, at 8 (exhibit 1 at 14 and Figure 35).

[50] *Id.*

[51] *See* 55 Fed. Reg. 48,061 (1990).

[52] The New York State Oil Producers Association joined AEG in filing the case. For ease of reference, this Article will refer to all of the Petitioners in the case as "AEG."

[53] Clean Water Act § 509(b)(1)(F), 33 U.S.C. § 1369(b)(1)(F).

[54] Natural Resources Defense Council v. EPA, 966 F.2d 1292, 1296-97 (9th Cir.

court could review the Memo pursuant to the "after-acquired grounds" provision of CWA §509(b)(1). Under this provision, parties may seek otherwise untimely review of EPA Clean Water Act actions on grounds which arose after expiration of the relevant statute of limitations.[55]

AEG challenged the lawfulness of EPA's 1992 Memo in two ways. AEG first argued that the December 10, 1992 Memo violated the explicit terms of the oil and gas storm water exemption.[56] AEG also reasoned that, because the December 10, 1992 memo was a new storm water rule modifying the final rule of November 16, 1990, EPA violated the Administrative Procedures Act[57] by adopting it without proper notice.[58] Both of these arguments are based upon the premise that Congress and EPA had formally recognized construction as an intrinsic component of oil and gas exploration, production, processing, treatment operations, and transmission facilities.

This premise is critical to AEG's first assertion that EPA's 1992 Memo is contrary to the language of Section 402(l)(2) of the Clean Water Act,[59] which exempts from NPDES permitting requirements the uncontaminated storm water discharges from oil and gas exploration, production, processing, treatment operations, or transmission facilities. AEG argued to the court that Congress intended to include oil and gas-related construction within the scope of the oil and gas exemption. AEG also directed the court to the final Phase I storm water rule which was promulgated by EPA on November 16, 1990 and to the administrative record of that rule in support of its argument that, prior to the December 10, 1992 Memo, the oil and gas industry had only reviewed and commented upon a storm water permitting program that would include industrial and surface disturbance activities within the oil and gas exemption. In the final storm water rule, EPA implemented the Congressional mandate exempting from permitting requirements uncontaminated

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1992).

[55] The parties' arguments concerning the timeliness of the petition and the finality of EPA's 1992 Memo will not be addressed herein.

[56] Brief for Petitioners at 12-17, Appalachian Energy Group v. EPA, 33 F.3d 319 (4th Cir. 1994) (No. 93-2146).

[57] 5 U.S.C. §§ 551-96 (1989 & Supp. 1994).

[58] Brief for Petitioners at 30-33, Appalachian Energy Group v. EPA, 33 F.3d 319 (4th. Cir. 1994) (No. 93-2146).

[59] Clean Water Act § 402(l)(2), 33 U.S.C. § 1342(l)(2).

storm water discharges from listed oil and gas operations[60] which were defined by Standard Industrial Classification (SIC) 13 to include numerous construction and soil disturbance activities.[61] Consistent with the SIC 13 definition, the Preamble to the final storm water rule explicitly lists disturbed soils as a potential contaminant at an oil or gas facility.[62]

While the final rule also subjects storm water discharges from construction sites to NPDES "industrial activity" permitting requirements,[63] AEG noted that EPA clarified its intent by stating that it "believes that storm water permits are appropriate for *the construction industry* for several reasons. Construction activity at a high level of intensity is comparable to *other activity* that is traditionally viewed as industrial, *such as natural resource extraction.*"[64] It is clear from this statement that EPA intended to cover the construction industry as a separate category in the storm water program and that it viewed the construction industry and the natural resource extraction industry to be two distinct, mutually exclusive categories.

The general storm water permits issued by EPA in 1992[65] lend additional support to AEG's assertion that EPA intended to exempt uncontaminated discharges from oil and gas-related construction activities from storm water permitting responsibility. In 1992, EPA finalized two separate sets of general permits: one for industrial activity discharges and another for discharges associated with construction activity. Significantly, EPA explained that construction related to regulated industrial activities is authorized by the industrial activity general permit as opposed to requiring a separate construction permit.[66] One such regulated industrial activity is an SIC 13 oil and gas operation that discharges contaminated storm water.[67] In further support of its argument, AEG also highlighted

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[60] 40 C.F.R. § 122.26(a)(2) (1994).

[61] EXECUTIVE OFFICE OF THE PRESIDENT, OFFICE OF MANAGEMENT AND BUDGET, STANDARD INDUSTRIAL CLASSIFICATION MANUAL 45 (1987).

[62] 55 Fed. Reg. 48,029 (1990).

[63] 40 C.F.R. § 122.26(b)(14)(x).

[64] 55 Fed. Reg. 48,033 (1990) (emphasis added).

[65] 57 Fed. Reg. 41,236 (1992); *Id.* at 41,176.

[66] *Id.* at 41,240.

[67] 40 C.F.R. § 122.26(b)(14)(iii) (1994). Further, when EPA proposed the multi-sector storm water general permit in 1993, the agency made it clear that it considered oil and gas-related construction to be an inherent component of the oil and gas industry by describing some aspects of oil and gas drilling operations as "construction of access roads, drill pads, mud pits, and possibly work camps or temporary trailers." 58 Fed.

various portions of the administrative record pertaining to comments filed and responses to those comments by EPA.[68]

AEG also asserted that EPA failed to comply with the Administrative Procedures Act (APA)[69] by issuing a new rule in the Memo without adequate notice. The APA requires that legislative rules must be promulgated in accordance with certain public notice and comment procedures.[70] In the 1992 Memo, EPA for the first time declared that it intended to regulate *uncontaminated* storm water flows from oil and gas-related construction. This was a significant departure from EPA's previously-established policy, and it imposed substantial new obligations on oil and gas operators. AEG argued that the Memo should properly be characterized as a "legislative rule" and, as such, would be subject to the APA's notice-and-comment provisions.

In response to AEG's Petition for Review to the court of appeals, EPA presented jurisdictional arguments premised upon a very literal and narrow reading of CWA section 509(b)(1)(F).[71] Because the 1992 Memo did not issue or deny a permit, EPA argued that the court did not have subject matter jurisdiction, despite precedent interpreting Section 509(b)(1)(F) more expansively.[72] EPA also took the position that the "after-acquired grounds" provision of CWA section 509(b)(1) did not confer upon the court jurisdiction since the December 10, 1992 Memo merely confirmed the oil and gas industry's pre-existing obligations under the storm water program.[73]

EPA's arguments in support of the December 10, 1992 Memo focused upon narrowing the definition of oil and gas operations under SIC 13 so as to exclude therefrom *any* construction, regardless of its nexus to the oil and gas operations. EPA claimed that the oil and gas exemption in the Clean Water Act and the regulations promulgated thereunder[74] are very narrow and are limited to dis-

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Reg. 61,146 (1993).

[68] EPA's Storm Water Response to Comment Document (September 1992); EPA's Response to Public Comments Associated with the November 16, 1990 Final Storm Water Rule.

[69] 5 U.S.C. §§ 551-96 (1989 & Supp. 1994).

[70] 5 U.S.C. § 553(b) (1989 & Supp. 1994).

[71] Clean Water Act § 509(b)(1)(F), 33 U.S.C. § 1369(b)(1)(F).

[72] *See* Natural Resources Defense Council v. EPA, 966 F.2d 1292, 1296-97 (9th Cir. 1992).

[73] *See* Industry Comments, *supra* note 3.

[74] *See* Clean Water Act § 402(l)(2), 33 U.S.C. § 1342(l)(2); 40 C.F.R. § 122.26(a)(2) (1994).

charges from only those operations explicitly listed therein: oil and gas exploration, production, processing, or treatment operations or transmission facilities.[75] Because the exemption did not include a detailed definition of these activities and did not set forth an exhaustive list of other activities associated with oil and gas operations, such as construction, EPA argued that these other activities necessarily must excluded from the scope of the exemption.

EPA also argued that the extension of general permits for industrial activity to cover related construction activity was simply intended as an administrative convenience to dischargers who otherwise would be forced to obtain two NPDES permits. EPA did not share AEG's view that this general permit demonstrated that construction activities at industrial sites were exclusively regulated under the industrial activity program.

EPA also urged the Court of Appeals for the Fourth Circuit to find that the agency's December 10, 1992 Memo was an interpretive rule exempt from the APA's notice and comment requirements.[76] EPA contended that, because the Memo only represented EPA's informal interpretation of its own regulations, the court should find that no violation of the APA had occurred. EPA cited precedent establishing that an agency's interpretation of its own regulations is entitled to substantial deference if it is consistent with statutory and regulatory authority.[77] EPA claimed that the Memo was consistent with the oil and gas exemption as set forth in both the Clean Water Act and its accompanying regulations.

The United States Court of Appeals for the Fourth Circuit decided the *Appalachian Energy Group v. EPA* case[78] on August 23, 1994. The court found that it did not have jurisdiction to resolve the central dispute between the parties concerning the lawfulness of EPA's interpretation that surface disturbance activities at oil and gas operations are to be regulated independent of the oil and gas exemption from storm water regulation for uncontaminated runoff. The court characterized the December 10, 1992 Memo as merely one writer's interpretation of two regulations which on its face does not purport to issue a new rule.[79] The Fourth Circuit did, however, offer dicta to the parties concerning the appellate review of the issue

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[75] 40 C.F.R. § 122.26(a)(2) (1994).

[76] 5 U.S.C. § 553(b)(A) (1989 & Supp. 1994).

[77] *See, e.g.*, Fairfax Nursing Ctr., Inc. v. Califano, 590 F.2d 1297 (4th Cir. 1979).

[78] Appalachian Energy Group v. EPA, 33 F.3d 319 (4th Cir. 1994).

[79] *Id.*

when ripe:

> The EPA also contends on the merits that the memorandum is an interpretive rule that reasonably and correctly interprets the Clean Water Act, and accordingly it is not subject to the notice requirements of the {APA}. *See* 5 U.S.C. § 553(b). The EPA relies on 26 C.F.R. § 122.26(b)(14)(x) to justify its requiring a permit for all construction activities involving five acres or more of land, including those undertaken as part of oil and gas operations which would otherwise be exempted. *Although we recognize that problems that the EPA may encounter in maintaining this position, we do not resolve the dispute at this time in light of our ruling that subject matter jurisdiction is lacking.*[80]

The *AEG* opinion presents both EPA and the oil and gas industry with the challenge of resolving this debate informally or through the appellate review of a final agency action. Such final action could take the form of formal publication of the agency's policy and interpretation or an enforcement action requiring a storm water permit for oil and gas-related construction.

CONCLUSION

In the wake of *Appalachian Energy Group v. EPA*, the Appalachian oil and gas industry is faced with a Hobson's choice: economically-strapped operators must expend scarce financial resources either to apply for storm water permits or risk having to defend probable regulatory enforcement actions. The irony of the very perverse situation facing the oil and gas industry, and specifically the Appalachian industry, is that this is not a case in which one must choose to save the environment at the expense of losing an industry. The debate concerning the scope of the authority granted under the Clean Water Act for regulation of *uncontaminated* storm water runoff from oil and gas surface disturbance activities is not a debate over environmental protection. Congress acknowledged that most oil and gas operations are not a significant environmental concern, and it determined that regulatory resources would be better directed at considerably higher priority discharges.[81]

With the support of the legislative history of the Clean Water Act and the Fourth Circuit's statement concerning the problems

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[80] *Id.* at 321, n.3 (emphasis added).

[81] 133 CONG. REC. H171 (daily ed. Jan. 8, 1987).

EPA may experience if appellate review is exercised over the December 10, 1992 interpretation, industry is hopeful of resolving this administrative issue in a cost-effective manner.[82] Resolution of this issue in a manner that would provide for the continued viability of the Appalachian oil and gas industry while assuring environmental protection is a goal all parties to this debate can share.

[82] On September 29, 1995 the EPA issued an NPDES Storm Water Multisector General Permit for several industrial activities, including oil and gas extraction. 60 Fed. Reg. 50,804 (1995). However, the ease and efficiency afforded industry by this general permit are not available to Appalachian energy producers because the Appalachian region is not included in the geographic area covered by the permit. *Id.*