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CIPA

June 24, 2009

Via e-mail (to commentletters@waterboards.ca.gov) *and US Mail*

Jeanine Townsend, Clerk to the Board
State Water Resources Control Board
1001 I Street, 24th Floor
Sacramento, CA 95814

RE: California Independent Petroleum Association Comments to Draft NPDES Permit Number CAR 000002 -- General Construction Stormwater

Dear State Water Resources Control Board Members and Staff:

The California Independent Petroleum Association ("CIPA") is a non-profit, non-partisan trade association representing over 450 oil and gas producers, service and supply companies, and royalty owners throughout California. We appreciate the opportunity to comment on the State Water Resources Control Board ("SWRCB") Draft NPDES General Construction Stormwater Permit ("Draft Construction Permit").

The Draft Construction Permit Fact Sheet ("Fact Sheet") states that the existing General Construction Permit expired in August 2004, suggesting that the SWRCB has been negotiating with other permit stakeholders for nearly five years. However, "construction activities at oil and gas exploration, production, processing and treatment operations, and transmission facilities" ("Oil and Gas Facilities") were only added to the latest version of the Draft Construction Permit which, unfortunately, places a substantial burden on CIPA members to "get up to speed" on a very complex permit and to work with the SWRCB to adopt a permit that makes sense when applied to Oil and Gas Facilities. CIPA and its members respectfully request that the SWRCB conduct a public workshop – to explain the permit requirements to oil and gas facility owners and operators – and extend the comment period so that the newly regulated Oil and Gas Facility community can provide more informed comments to the Draft Construction Permit.

The current Draft Construction Permit appears to be primarily tailored to urban developments, with some special provisions for street, highway and utility projects, which are significantly different than Oil and Gas Facilities for a number of reasons:

- The Draft Construction Permit and Fact Sheet provide no guidance on the applicability of (or exceptions to) the Draft Construction Permit to Oil and Gas Facilities;
- The Draft Construction Permit has provisions that make little sense, and create great ambiguity if applied to construction activities associated with Oil and Gas Facilities, which are typically characterized by much smaller linear and nonlinear footprints and much different phasing and activity than the typical construction projects addressed by the Draft Construction Permit, leaving the owners and operators to guess as to their obligations to comply with the ambiguous provisions of the Draft Construction Permit; and
- Several provisions of the Draft Construction Permit as applied to Oil and Gas Facilities are either overly burdensome for operators, dangerous when applied to Oil and Gas Facility operations, or conflict with other regulatory requirements.

Due to the complex nature of both the Draft Construction Permit, the regulatory environment surrounding Oil and Gas Facilities, and the unique nature of construction activities associated with Oil and Gas Facilities, CIPA would like to meet with members of the SWRCB staff to discuss the application of the Draft Construction Permit on CIPA members and our comments below before a revised draft of the Draft Construction Permit is issued. As a matter of policy, CIPA requests that SWRCB staff extend to operators of Oil and Gas Facilities the same time and opportunities that were provided to the building industry and linear and utility project operators to present unique aspects of their industry and operations to the SWRCB so that the Draft Construction Permit can be appropriately tailored for construction activities associated with Oil and Gas Facilities, and so that operators can gain an understanding of the intent and implications of the Draft Construction Permit requirements for their activities.

I. BACKGROUND

While Oil and Gas Facilities generally perform similar functions – that is, to extract oil and natural gas from subsurface sources for the purposes of producing crude oil (to send to oil refineries) or gas to be treated and/or further processed to produce commercial grade gases and light liquid products, the size, configuration, location, specific function and management of each oil and gas production can vary tremendously. As such, the impact of the Draft Construction Permit on individual facilities will also vary tremendously. Nonetheless, there are numerous provisions in the Draft Construction Permit that make little sense when applied to any Oil and Gas Facility because of the differences between oil and gas facilities and "traditional construction activities" referenced throughout the Draft Construction Permit. For example:

- Traditional urban developments typically involve constructing multiple residential and/or commercial buildings at the same time, impacting large construction footprint areas, installing a vast expanse of impervious area, in fairly typical and planned phases (including mass grading, infrastructure development, vertical development, paving, landscaping and finish work), while Oil and Gas Facility construction projects are less predictable, are often conducted on an "as needed" basis, typically impact very small construction footprint areas, generally temporarily rather than permanently create small impervious areas, and certainly are not constructed in the phases identified in the Draft Construction Permit;

- Construction activities at the larger Oil and Gas Facilities are typically very small in terms of footprint and impervious area created (usually involving only the installation or replacement of a small drilling and pumping pad, or a short expanse of pipeline), but often occur within an otherwise relatively large open space area considered to be the entire oil and gas field or facility, so sediment loads and concentrations from the area of construction activities are likely very small in comparison to natural sediment loads and concentrations generated by open space areas of the facility, stormwater discharges from which are exempt from stormwater permitting requirements;

- Oil and Gas Facility maintenance often involves activities to maintain pipelines and other equipment that are not (and cannot be planned), and for which any permitting delay will result in safety concerns or will create a significant financial burden to the facility owner/operator; and

- Many Oil and Gas Facilities are built in remote areas, often times away from navigable waters as defined in *SWANCC v. US Army Corps of Engineers and American Petroleum Association v. Johnson.*

Because of these differences, many of the provisions in the Draft Construction Permit make little sense when applied Oil and Gas Facilities. Based on those differences, we provide the following comments.

II. APPLICABILITY OF DRAFT CONSTRUCTION PERMIT ON OIL AND GAS PRODUCTION FACILITIES

The applicability of the Draft Construction Permit to Oil and Gas Facilities is complicated by the complex stormwater federal regulatory scheme associated with Oil and Gas Facilities, the complex and continuing nature of Oil and Gas Facility maintenance, upgrade and repair operations and construction activities, and the distance of many of these facilities to "waters of the United States."

A. Application of Draft Construction Permit to Oil and Gas Facilities.

As noted in the Draft Construction Permit, large portions of many Oil and Gas Facilities are not subject to Draft Construction Permits. Specifically, the Clean Water Act, 33 U.S.C. § 1342(l)(2), states:

> "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 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 and 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."

On the other hand, under this Section of the Clean Water Act and the recent Ninth Circuit Court of Appeals' decision in NRDC v. EPA (9th Cir. 2008) 526 F.3d 591, and subsequent denial of the USEPA's petition for reconsideration in November 2008, two types of construction related discharges from Oil and Gas Facilities do require a discharge permit;

- discharges contaminated only with sediment; and
- discharges of stormwater that do become contaminated by pollutants due to contact with overburden, raw material, intermediate products, finished products, byproducts or waste products located on the Oil and Gas Facility construction site.

Currently, as set forth in Note To Paragraph (A)(2)(ii), 40 C.F.R. section 122.26(A)(ii), Oil and Gas Facility operators implement and maintain BMPs in connection with field activities and operations to minimize discharges of pollutants in storm water, including sediment and other pollutants that may be associated with overburden, raw materials, intermediate products, finished products, byproducts or waste products, both during and after construction activities to help ensure protection of surface water quality during storm events, using BMPs and controls that are consistent with site, seasonal and weather conditions and generally accepted engineering and design criteria and manufacturer specifications.

The Draft Construction Permit appears to limit its coverage (for example, under Section I.B.21) to discharges of sediment in connection with construction activities, subject to requirements to minimize discharges of sediment by implementation of appropriate BMPs and compliance with other requirements of the Draft Construction Permit. The Draft Construction Permit should be clarified to similarly provide coverage for discharges that do, or have the substantial potential to come in contact with overburden, raw materials, intermediate products, finished products, byproducts or waste products, both during and

after construction activities, so long as appropriate BMPs are implemented to minimize and control such pollutants as set forth in Note To Paragraph (A)(2)(ii), 40 C.F.R. section 122.26(A)(ii), CIPA is not aware of another available General NPDES permit that provides this coverage.

B. Exemptions to the Draft Construction Permit

As a result of the nature of typical construction activities associated with Oil and Gas Facilities, which activities often involve a very small construction and impervious footprint with an otherwise vast area of open space, most of the stormwater runoff from a typical oil and gas filed will consist of runoff from natural open space, which contains sediment and other constituents that are regulated as pollutants by the Draft Construction Permit. The runoff from small construction sites within vast open space areas will inevitably combine with natural stormwater runoff, creating a "mixed discharge" of regulated runoff and runoff that is unregulated by the Clean Water Act, which does not authorize regulations or permit requirements that would alter natural, background stormwater runoff constituents. The general exemption of natural stormwater runoff from Clean Water Act regulation is further strengthened in the case of Oil and Gas Facilities by the prohibition against requiring NPDES permits set forth in Clean Water Act, 33 U.S.C. § 1342(l)(2) (quoted in Section I.A. above) for uncontaminated stormwater runoff from Oil and Gas Facilities ("unregulated stormwater").

Due to the nature of typical construction activities associated with Oil and Gas Facilities, there is a substantial likelihood that stormwater leaving a Oil and Gas Facility site will be a mixture of a small amount of stormwater that is properly regulated by the Draft Construction Permit and large amount of unregulated stormwater. While the unregulated stormwater is not subject to the Clean Water Act or NPDES permitting, the requirements of the Draft Construction Permit as currently written will result in improper and overreaching regulation of significant volumes of natural, unregulated stormwater.

For example, the Draft Construction Permit monitoring provisions, numeric action levels (NALs) and numeric effluent limits (NELs) present substantial complexities and issues because they will apply to mixed discharges consisting primarily of natural, unregulated stormwater, combined with some small volumes of stormwater from construction activities. These Draft Construction Permit provisions, as discussed in more detail below, may have a significant impact on stormwater treatment compliance costs for Oil and Gas Facilities, and are likely to result in improper assessment of Oil and Gas Facility construction permit violations due to background loads and concentrations of various constituents, including sediment, associated with natural, unregulated stormwater runoff from open space areas.

More specifically, on the one hand, an Oil and Gas Facility operator must implement BMPs and/or technology controls that minimize discharges of sediment from construction sites to levels below Draft Construction Permit limits, yet the natural,

unregulated stormwater leaving the Oil and Gas Facility may well exceed applicable Draft Construction Permit sediment and turbidity limits due to the natural background levels of sediment contained in typcial open space, unregulated stormwater runoff, which will comprise the vast majority of runoff volume leaving a oil and gas field. On the other hand, the BMP control measures currently used under federal regulations to control stormwater discharges from Oil and Gas facilities – in addition to the dilution affect of combining those discharges with natural, unregulated stormwater – may have the affect of significantly reducing sediment in the stormwater from oil and gas related construction projects, perhaps to a level that complies with Draft Construction Permit effluent limits. Due to the complexities of monitoring, regulating and controlling a mixture of unregulated stormwater and stormwater from construction sites, CIPA recommends that the SWRCB allow owners and operators of Oil and Gas Facilities to select their Draft Construction Permit Compliance monitoring points to limit monitoring to stormwater from the construction site boundary, and the SWRCB should revise the Draft Construction Permit NAL and NEL provisions to assure that they will not be applied to natural, unregulated stormwater. Applying such low NALs and NELs to natural, unregulated storm flows would be contrary to, and in violation of the Clean Water Act, which does not permit alteration of natural background constituent levels, particularly where the constituents to be altered are not solely pollutants, but are natural runoff constituents, like sediment, naturally occurring minerals, and metals, and other naturally occurring elements and compounds, that play an ecologically important role in the health of streams and water bodies.

C. Exemptions to the Draft Construction Permit

The Draft Construction Permit exempts from regulation traditional construction activities disturbing less than one acre of land that is not part of a larger common plan of development or land sale[1] because those types of construction activities pose only a low threat to water quality and are therefore exempted from discharge permitting under federal regulations.[2] Similarly, "routine maintenance activities" for infrastructure facilities are exempt from Draft Construction Permit coverage and from CWA discharge permitting under federal regulations[3] based on the low threat posed to water quality, provided that the maintenance projects maintain the original line and grade, hydraulic capacity, and original purpose of the facility maintained as required by federal regulations. Draft Order, Section I.C.24., pp 4-6.

However, as drafted, the Draft Construction Permit does not make it entirely clear that these *de minimus* exceptions are equally applicable to Oil and Gas Facility Construction Discharges disturbing less than one acre of land, or resulting from routine maintenance. The Fact Sheet, Sections II.B.3, and II.C.1.F. focus on traditional urban development in describing the exception from the Draft Construction Permit for "traditional construction activities" disturbing less than one acre of land and not part of a larger common plan of development or sale of disturbed land. In the same manner, the routine maintenance exception for construction related discharges associated with maintenance

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1 Draft Order, Section I.C.28., p. 5.

2 40 C.F.R. Section 122.26(b)(15)(i).

3 *Id.*

activities performed for LUPs[5] appear to focus primarily on maintenance activities performed by municipalities and agencies for highways, street and roads. The Draft Construction Permit does not clarify whether Oil and Gas Facility Construction Discharges associated with routine maintenance activities for Oil and Gas Facilities are exempt from requirements of the Draft Construction Permit.

Oil and Gas Facility Construction Discharges related to (1) routine maintenance for Oil and Gas Facilities, and (2) disturbing less than 1 acre of land, even if that area of disturbance is part of a larger, primarily open space oil and gas field discharging primarily unregulated stormwater runoff, should be clearly exempt from discharge permitting and Draft Construction Permit requirements because they pose only a *de minimums* threat to water quality, even though they are conducted by oil and gas producers and operators rather than other dischargers, and regardless of the types of facilities involved.

As drafted, the general application of the Draft Construction Permit to, and the availability of the Draft Construction Permit for permitting of Oil and Gas Facility Construction Discharges is vague and incomplete. At the same time, certain exceptions to Draft Construction Permit requirements that are based on the low threat posed to water quality by certain types of activities are not clearly available for Oil and Gas Facility Construction Discharges. Both problems should be remedied by revisions to the Draft Construction Permit. Specifically:

- Draft Order Section I.C.24, p. 5 and Fact Sheet Sections II.C.1.b and II.C.2.a should be revised to clarify that Oil and Gas Facility Construction Discharges associated with routine maintenance (as described in the Draft Construction Permit) of Oil and Gas Facilities are exempt from permitting requirements under the Clean Water Act and Porter Cologne, and therefore from compliance with Draft Construction Permit requirements due to the insignificant threat posed to water quality and to be consistent with federal regulations; and

- Draft Order Section I.C.28, and Fact Sheet Sections II.B.3, II.C.1.f, should be revised to clarify that Oil and Gas Facility Construction Discharges disturbing less than one acre of land, even if part of a larger, but primarily open space oil and gas field, are exempt from compliance with Draft Construction Permit requirements due to the insignificant threat posed to water quality and consistent with federal regulations.

D. Construction Stormwater that Discharge to Isolated Intrastate Waters That are Not "Waters of the United States"

Some CIPA members discharge stormwater into certain isolated intrastate waters in the Western San Joaquin Valley that fall under the overly broad definition of "waters of the United States" as defined in 40 CFR 122.2. In April 2009, the Western

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5 Fact Sheet, Section II.C.2.a., pp. 9-10.

States Petroleum Association ("WSPA") sought clarification from EPA that certain waterways including, but not limited to, upland swales, gullies and isolated intrastate waters in the Western San Joaquin Valley are not "waters of the United States," and are thus not subject to the provisions in the Draft Construction Permit. CIPA concurs with WSPA's analysis and hopes that the SWRCB will:

- Confirm that Sections I.A.3 and I.C.35 of the Draft Construction Permit reflect the same definition of "waters of the United States," and exempt from its application those Oil and Gas Facilities that discharge to isolated intrastate water bodies, as defined by the court holding in *American Petroleum Institute v. Johnson,* 541 F.Supp.2d 165 (D.D.C. 2008) ("*API case*"); and

- Upon clarifying the definition of "waters of the United States" and the applicability of the Draft Construction Permit, work with EPA and Oil and Gas Facility owners and operators to provide guidance (and perhaps maps) to the regulated community on the applicability of the Draft Construction Permit to various water bodies throughout California.

By way of background, in 2002, EPA amended its definition of "navigable waters" in its Spill Prevention Control and Countermeasure regulation, greatly expanding its jurisdiction over water bodies that were not covered its original 1973 regulation. The American Petroleum Industry and others challenged EPA's amendment to the definition of "navigable waters" in EPA's Spill Prevention, Control and Countermeasure regulation asserting that: (1) EPA's new regulation includes an impermissibly broad definition of the statutory term "navigable waters," which definition purports to extend EPA's regulatory authority beyond the limits established by the Clean Water Act and Congress' Commerce Clause authority, and (2) EPA failed to offer a rational explanation for its new definition of "navigable waters," rendering it arbitrary and capricious under the APA. In 2008, the United States District Court for the District of Columbia ordered EPA to vacate its amended definition of navigable waters, holding that EPA failed to provide a clear, cogent and reasoned explanation for its decision to promulgate such a broad definition and failed to reconcile its definition with the *Supreme Court Decision in Solid Waste Agency of North Cook County v. U.S. Army Corp. of Engineers*, 531 U.S. 159 (2001). *See* API case, *supra.*

Because the definition of "waters of the United States" in EPA's General National Pollution Discharge Elimination System Permit Program regulations (*see* 40 CFR 122.2) and the definition of "navigable water" under the SPCC (that was the subject of the API case),[6] CIPA joins WSPA in seeking clarification on the jurisdictional reach of the Draft Construction Permit – specifically, CIPA seeks a determination that certain upland swales, gullies and isolated intrastate waters in the Western San Joaquin Valley and similarly situated water streams in California are not subject to the Draft Construction Permit. (*See*

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6 The term "waters of the United States" in 40 CFR 122.2 is very similar to the term "navigable waters" defined in 40 CFR 112.2, except that the former term includes non-navigable intrastate waters that are used for industrial purposes by industries engaged in interstate commerce.

April 13, 2009 letter to Ms. Laura Yoshii, Acting Regional Administrator, Region 9, United States Environmental Protection Agency from Suzanne Noble of WSPA - Attachment 1.)

III. SPECIFIC COMMENTS TO DRAFT CONSTRUCTION PERMIT PROVISIONS

In addition to the above concerns that CIPA has regarding the scope of Draft Construction Permit coverage, and the applicability of the Draft Construction Permit to unregulated stormwater and isolated waters, CIPA has the following general comments regarding the specific provisions of the Draft Construction Permit.

A. Applicability to Draft Construction Permit to Existing Projects.

CIPA understands that all new construction projects and related discharges that are not exempted from permitting requirements must obtain coverage under the permit once it is adopted by the SWRCB. In addition, all existing construction projects and related discharges permitted at the time of adoption of the new permit under Water Quality Order 99-08 must file new required permit registration documents ("PRDs") to obtain coverage under the new permit for those discharges within 100 days of its adoption. For a period of two years after permit adoption, these existing discharges are treated as Risk Level 1 discharges, which is the lowest risk category triggering the least draconian water quality control measures and is a risk level applicable to discharges associated with traditional construction activities rather than Oil and Gas Facility Construction Discharges. However, the Draft Construction Permit is silent with respect to requirements for obtaining coverage for, or the general risk category and related water quality control measures and BMPs that will be assigned to existing Oil and Gas Facility Construction Discharges upon adoption of the new permit.

This is the first time that the statewide General NPDES Permit for Construction Activities will apply to the Oil and Gas Facility Construction Discharges, which unlike traditional construction activities, were not covered under Water Quality Order 99-08. Unless express provisions are incorporated into the Draft Construction Permit to grandfather or allow for a longer period of phase-in, once the permit is adopted its requirements will apply to all Oil and Gas Facility Construction Discharges – even those discharges associated with oil and gas related construction activities that already are, or have for some time been underway. The application of Draft Construction Permit requirements to existing Oil and Gas Facility Construction Discharges will be particularly problematic for any construction activities that producers and operators are conducting at Oil and Gas Facilities located in areas that are not regulated by existing Phase I or Phase II MS4 Permit, because existing Oil and Gas Facilities and related Oil and Gas Facility Construction Discharges in those areas would be required to comply with hydromodification control requirements of the Draft Construction Permit as they may be adopted.[7] In these areas, the new Draft Construction Permit requirements will apply for the first time to Oil and Gas Facilities have not been designed to address currently proposed Draft Construction Permit hydromodification control requirements. As a result, operators and producers are likely to find themselves without the ability to fully comply with the Draft Construction Permit upon its adoption, due to their inability to prepare PRDs that comply with the Draft Construction Permit requirements as adopted, based on the fact that

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7 Additional Issues related to Draft Construction Permit hydromodification control provisions are discussed further below.

Oil and Gas Facility Construction Discharges have not been regulated to date under any Stormwater Permit, and as a result have not been designed to comply with Draft Construction Permit or other Stormwater Permit requirements, particularly, for example hydromodification control requirements. At a minimum, revisions should be made to the Draft Construction Permit to clarify and create a sufficiently long phase-in period and appropriate grandfathering provisions that will be available to existing Oil and Gas Facility Construction Discharges to better facilitate compliance with brand new Draft Construction Permit requirements, and to avoid creating widespread compliance issues throughout the oil and gas production industry. It would also be appropriate, in light of the extremely small impervious surface area that will result from the vast majority of Oil and Gas Facility projects (typically limited to small pumping/drilling pads and short pipeline installations) to revise the Draft Construction Permit to provide an exemption for small Oil and Gas Facility construction projects that create 1 acre or less of impervious surface, regardless of their location with respect to adopted MS4 permits, based on the *de minimus* threat of hydromodification posed by such projects to surface water bodies.

CIPA also requests that the SWRCB provide a phase in period prior to mandating preparation of SWPPPs for Oil and Gas Facilities to allow operators of these facilities to "catch up" with the traditional construction activity stakeholders to better assess the nature of stormwater runoff from Oil and Gas Facilities and to determine the best practices and method available to the industry to comply with stormwater sediment and pollutant control requirements.

B. Linear Underground Projects

The Draft Construction Permit, Attachment A broadly defines Linear Underground Project ("LUP") as:

> "Linear Underground/Overhead Projects include, but are not limited to, any conveyance, pipe, or pipeline for the transportation of any gaseous, liquid (including water and wastewater for domestic municipal services), liquiescent, or slurry substance; any cable line or wire for the transmission of electrical energy; any cable line or wire for communications (e.g., telephone, telegraph, radio, or television messages); and associated ancillary facilities. Construction activities associated with LUPs include, but are not limited to, (a) those activities necessary for the installation of underground and overhead linear facilities (e.g., conduits, substructures, pipelines, towers, poles, cables, wires, connectors, switching, regulating and transforming equipment, and associated ancillary facilities); and include, but are not limited to, (b) underground utility mark-out, potholing, concrete and asphalt cutting and removal, trenching, excavation, boring and drilling, access road and pole/tower pad and cable/wire pull station, substation construction, substructure installation, construction of tower footings and/or foundations, pole and tower installations, pipeline installations, welding, concrete and/ or pavement repair or replacement, and stockpile/borrow locations."

Unfortunately, the definition of LUP is so broad, that it subsumes a large percentage of Oil and Gas Facility repair and maintenance programs for existing pipelines and pads that pose only a *de minimus* risk of stormwater contamination. CIPA questions the need for

seeking Draft Construction Permit coverage for such activities that include, but not limited to:

- Incidental activities following the repair of leaking oil and gas pipelines that pose a threat to human health and safety – such activities include excavation of contaminated soil associated with the leak, necessary inspection activities to determine if nearby pipeline sections are subject to failure, installation of a pipeline clamp or new replacement pipe, etc.;[8]
- Installation of a small footprint pump pad (several square feet) to replace an existing pump;
- Excavation near existing pipeline support foundations associated with seismic enforcement; and
- Installation of a new above ground pipeline to an existing pipe rack – an activity that is a construction project, but that does not disturb soil.

In other words (as we earlier articulated), the LUP requirements of the Draft Construction Permit appear to address construction activities related to highways, streets and utilities, but do not appear appropriate for Oil and Gas pipelines.

Further, CIPA is concerned that the requirement to obtain permit coverage for Oil and Gas Facility LUPs will have the unintended consequence of subjecting all small construction activities (less than one acre) to Draft Construction Permit requirements. As noted above, the Draft Construction Permit requires "Construction activity that disturbs less than one acre of land surface, and that is not part of a larger common plan of development . . .." to seek coverage under the Draft Construction Permit. The Fact Sheet does not provide guidance on this provision as it applies to Oil and Gas Facilities, but CIPA is concerned that the SWRCB or others can interpret this provision to require permit coverage for all maintenance and repair activities that are less than one acre whenever they are part of a larger oil and gas field or pipeline.

Finally, the Draft Construction Permit does not clearly provide for determination of Risk Type or Risk Level for Oil and Gas Facility construction sites, and the Draft Construction Permit fails to clearly specify the minimum BMPs, monitoring measures and other control measures that should apply to Oil and Gas Facility construction sites once a Risk Type or Level is determined. For construction activities related to Oil and Gas Facilities that are also LUPs, such as oil and gas pipelines, arguably the LUP risk assessment methodology in Attachment A.1. should be used to determine the oil and gas construction site risk type, and the Minimum BMPs and Monitoring Measures

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8 The Draft Construction Permit exempt emergency construction activities, which CIPA interprets to include the initial pipeline excavation, but the exemption is not clear on whether related construction activities to prevent reoccurrence of the emergency are also exempt. Likewise, the immediate excavation of contaminated soil is to prevent the spread of contamination – excavation delays associated with stormwater permitting seem counterproductive.

identified in Attachment A, Section I.1 (for Risk Type 1 LUPs), Section I.2 (for Risk Type 2 LUPs), and Section I.3 (for Risk Type 3 LUPs) should be implemented. Several CIPA members have experience in evaluating BMPs as they have done so for the SWPPP for their Oil and Gas Facilities and are willing to share this knowledge with SWRCB staff to establish that the minimum BMPs in those Sections of Attachment A are appropriate and reasonable for linear projects at Oil and Gas Facility sites. Other Oil and Gas Facility construction projects, consisting primarily of installation of, and repairs to pumping and drilling pads or existing facilities, should be exempt from permiting requirements due to *de minimus* water quality impacts.

C. Effluent Limitations and Treatment Systems

The Draft Construction Permit contains strict limitations and may require expensive stormwater treatment systems. Unlike traditional urban developments, many CIPA members operate Oil and Gas Facilities in remote areas with expanses of open space, significant natural slopes and complex topography, but only very small construction sites associated with Oil and Gas Facilities. Runoff from remote areas will exhibit highly variable pollutant loads and concentrations, as would any background runoff, reflecting natural stormwater runoff conditions, but may not comply with very low and strict numeric effluent limits that were set without considering natural variability of, and pollutant loads and concentrations that characterize natural, background storm water conditions. Complying with effluent standards, which can only be accomplished by the installation of an Advanced Treatment System ("ATS") may be prohibitively expensive without any corresponding environmental benefit. In fact, the result of deploying ATS facilities to control natural, background stormwater loads and concentration of constituents that serve an ecological role, such as sediment, and that are not always pollutants, will likely result in the alteration of natural water quality conditions in violation of the federal Clean Water Act.

1. Advanced Treatment Systems

CIPA understands that an ATS facility is a treatment system that employs chemical coagulation, chemical flocculation, or electrocoagulation in order to reduce turbidity caused by fine suspended sediment. Under the Draft Construction Permit, an ATS must be implemented in order to meet the stormwater effluent limitations identified in the Draft Construction Permit, including the turbidity of Numeric Effluent Limits ("NELs") specified for Risk Level 3 sites, a lower NEL for turbidity applies to the discharge.

CIPA also understands that implementing ATS facilities are extremely expensive, and the requirements, restrictions and costs of monitoring ATS discharges are also very substantial and expensive. Both discharge and generally receiving water quality sampling and monitoring plans must be developed and implemented for run-on discharges, both dry weather and wet weather, and, for Risk Level 3 sites, for receiving waters as well (bioassessment and NEL constituents). The Draft Construction Permit also requires wet weather monitoring 3 times per storm event. CIPA understands that there are also technical concerns associated with implementing ATS, including developing procedures to properly dose stormwater to achieve pollutant removal without residual chemical effects or toxicity, all of which stem from the infrequent use of ATS in Central Valley and Southern California to date – where many CIPA members' facilities are located. In addition, if ATS is employed a very low turbidity NEL and other low NELs apply to the

discharge, resulting in lower levels of those constituent in ATS discharge thn would be present in natural stormwater runoff, which violates the federal Clean Water Act. Yet, despite the fact that NEls do not reflect natural background conditions, fines and penalties are prescribed by the Draft Construction Permit for exceedence of the NELs, whether or not any harm to receiving waters results from the violation.

Given that Oil and Gas Facilities are generally very small in size, and have little impact on natural storm water pollutant loads and concentrations, they should be exempt from ATS requirements, and the risk level assessment procedures for oil and gas sites should be adjusted to reflect the *de minimus* risk posed so that oil and gas producers are not forced by the risk assessment to deploy ATs facilities.

Alternatively, Draft Construction Permit provisions should be adjusted to reflect that Oil and Gas Facilities have only recently been added to the Draft Construction Permit and CIPA members have little experience with ATS systems (because Oil and Gas Facilities have been exempt from the requirements of General Construction Permits). In general, many CIPA members have not had to determine the specific contamination levels in their stormwater discharge and are unfamiliar with the permitting and inspection requirements to do so. However, those CIPA members that have adopted BMPs for control of construction sediment have demonstrated that the impact of stormwater discharges on receiving waters is minimal so long as BMPs are properly deployed. This knowledge and practice by some of CIPA's larger members could be of use in regulating small producers. CIPA recommends that the SWRCB provide Oil and Gas Facility owners with at least one additional year grace period from enforcement of the Draft Construction Permit to allow CIPA members to evaluate the effectiveness of BMPs and other potential technologies that may be suitable to treat sediment in stormwater from Oil and Gas Facilities (as opposed to typical construction sites) and to evaluate the economic costs and environmental benefits of various treatment (or non-treatment) options. CIPA also requests that the SWRCB be willing to reopen the General Construction Permit following CIPA's evaluation to determine whether the current ATS is necessary and cost effective.

2. Action Levels

CIPA understands that the Draft Construction Permit imposes Numeric Action Levels ("NALs") for stormwater discharges from Risk Level/Type 2 and 3 sites for pH and turbidity. The pH NAL is set at 6.5 – 8.5 and the turbidity NAL is set at 250 NTU (clear water). If NALs are exceeded, the discharger must conduct a site assessment to determine if the construction activities contributed to the exceedence, implement corrective actions, if necessary, update the project's SWPPP, and electronically report the information to the SWRCB. Monitoring, investigating, and implementing corrective action in response to NAL exceedences will impose additional costs on oil and gas construction sites.

The requirement to include information regarding NAL exceedences in the SWPPP and report it to the SWRCB could provide a record for needless citizen suit litigation under the Clean Water Act citizen suit provision, even if the exceedences did not result in harm to the environment. The electronic reporting system will likely produce volumes of data that the SWRCB may not be able to monitor on a frequent basis and is not an effective means of notifying the SWRCB of a discharge that requires immediate attention. CIPA recommends that the SWRCB implement a procedure that requires dischargers to only notify the SWRCB if an Oil and Gas Facility has a release that is likely to have an adverse affect on the environment.

3. Numeric Effluent Limits

For Risk Level/Type 3 sites, the Draft Construction Permit imposes NELs for pH and turbidity. The pH NEL is set at 6.0 – 9.0 and the turbidity NEL is set at 500 NTU (again, basically clear water). If a NEL is exceeded, the discharger is in violation of the permit unless the storm event is equal to or larger than the compliance storm event (5 year, 24-hour storm though some inconsistencies in language indicate that a 10 year 24-hour storm may constitute the design storm).

Because of the natural variability of stormwater quality, NELs are not an appropriate stormwater permit condition, as determined by the State Board Blue Ribbon Stormwater Panel. The extent NELs are established and applied to stormwater discharges, the natural variability of stormwater constituent concentrations practically assure an exceedence of NELs, which in turn subject dischargers to fines ranging from the mandatory Cal. Water Code minimum penalties of $3,000 per day per violation to the CWA maximum penalty of $27,500 per day per day per violation. In addition, exceedence of a NEL could subject the discharger to enforcement action by the SWRCB or a Regional Water Quality Control Board ("Regional Board") and/or a third party citizen suit under the Clean Water Act. CIPA recommends that the SWRCB adopt appropriate stormwater NELs and not disregard the State Blue Ribbon Stormwater Panel recommendations.

D. Post-Construction Requirements: Hydromodification

The Draft Construction Permit requires dischargers to comply with certain project planning and design standards to protect beneficial uses of project receiving waters from adverse, post-development impacts associated with hydromodification when those projects are located in areas that are not subject to Phase I or Phase II MS4 permits. Specifically, the Draft Construction Permit requires each discharger to design projects constructed under the general construction permit in a manner that will replicate the pre-project water balance, at least for the volume of rainfall that ends up as runoff for the smallest storms up to the 85th percentile 24-hour storm event. (Draft Order, p. 35.) Thus, if any Oil and Gas Facility project is already under construction or otherwise cannot be designed to comply with the Draft Construction Permit condition requiring that the Facility's post-development hydrograph matches the Facility's pre-construction (open space) hydrograph, then individual approval from the appropriate Regional Board must be obtained. In addition, for projects whose disturbed project area exceeds two acres, the discharger is required to preserve the pre-construction drainage density (miles of stream length per square mile of drainage area) for all drainage areas within the project area serving a first order or larger stream and ensure that post-project time of runoff concentration is equal or greater than pre-project time of concentration. Draft Construction Permit, p. 35.

The hydromodification requirements will impose additional costs on Oil and Gas Facility construction projects as necessary for operators and producers to undertake the engineering studies and analysis, site design, and implementation of measures to reduce runoff volumes by infiltration, harvest and reuse of storm water, as necessary to match post-construction flow volume, duration and velocity of flow with pre-construction flow characteristics. In addition, compliance with these standards will be difficult for certain Oil and Gas Facility sites, including extremely small sites, sites located in urbanized areas, and sites that, based on design or soil conditions, are unable to infiltrate and/or store large amounts of stormwater flows on-site. These standards are not necessary to protect certain receiving waters, such as concrete-lined channels, lakes and bays; however, the

Draft Construction Permit mandates the standards for all sites unless such sites are covered by a Phase I or II Municipal Separate Storm Sewer Permit (MS4). Failure to implement these standards would subject oil and gas operators to fines and penalties as discussed with respect to NELs above.

As discussed above, Oil and Gas Facilities that have vast non-construction portions of their sites may or may not require additional facilities to address hydromodification. Based on the relatively small size of construction sites at these Oil and Gas Facilities and the minimal impervious surface installed in conjunction with those facilities, the facilities should be exempt from hydromodification control requirements. At a minimum, CIPA requests that, Oil and Gas Facilities are provided with an extra period of time during phase in of the new Construction Permit to determine the need for such additional facilities and to work with the State Board on appropriate standards for hydromodification control for Oil and Gas Facility sites.

E. Public Participation – Permit Registration Documents

The Draft Construction Permit requires dischargers to electronically file all permit-related compliance documents, including PRDs (Notice of Intents, SWPPPs, Risk Assessments, etc.) and annual reports, as well as Notices of Terminations, NAL and NEL exceedence reports. The electronically submitted compliance information is immediately available to the public, as well as the Regional Boards. While the Draft Construction Permit generally no longer expressly provides the public or Regional Boards with a specified public comment period on the PRDs, certain provisions of the Draft Construction Permit still reference provision of a specific PRD public comments period, and other provisions specify that the Regional Boards have the power at any time to hold a hearing or propose action to modify, amend or revoke discharge authority granted by the adopted permit based on concerns about the permittee's Risk Analysis, SWPPP, hydromodification control measures, monitoring exceedences or other water quality concerns.

The Draft Construction Permit enables public review and hearings on permit applications "when appropriate." Fact Sheet, p. 3. It is unclear under what circumstances the SWRCB or Regional Boards will allow public review and comment on permit applications and the potential action taken by these agencies in response thereto. Public review and comment on a project at the construction phase will provide another opportunity for project opponents to challenge a project once it has received all necessary local, state, and federal entitlements and approvals. Further, Regional Board action to modify or revoke coverage of Oil and Gas Facility Construction Discharges under the general permit could create retroactive liability for potential violations during the period that the permit was in place and operators or producers released discharges in reliance on the later revoked or modified permit.

CIPA recommends that the SWRCB publish guidelines that limit public review to new permits or substantial changes to an existing permit to reduce the possibility that the public participation and public review processes do not unduly delay construction and repairs at Oil and Gas Facilities.

F. SWPPP Requirements/Records

The Draft Construction Permit requires that all SWPPPs, which are required for all dischargers covered under the permit, be prepared by a Qualified SWPPP Developer. A Qualified SWPPP Developer must possess one of the certifications specified in the Draft Construction Permit. In addition, all dischargers covered under the permit are

required to designate a Qualified SWPPP Practitioner to obtain training consistent with the Draft Construction Permit to implement the SWPPP. In terms of record retention and reporting, the Draft Construction Permit requires dischargers to file annual reports and retain all compliance records for three years.

Some CIPA members use contractor to fulfill most of their personnel needs and have but one or two employees. These CIPA members are concerned that requiring employees with multiple responsibilities to take on SWPPP Practitioner training is impractical and likely will not result in lower sediment contamination levels in discharged stormwater, as these employees are already overburdened with responsibilities and will spread their attention among their numerous other task. For these members, complying with the Qualified SWPPP Practitioner will require hiring additional personnel or finding contract labors that are trained as Qualified SWPPP Practitioners – a skill set that may be difficult to find in a contract laborer.

CIPA appreciates the opportunity to provide comments on the Draft Construction Permit and thanks the SWRCB for considering our comments. CIPA must reserve the right to adopt comments (once we have had the opportunity to review those comments) submitted by other regulated parties who may have operations and issues that are similar to those faced by CIPA members because we are very new to the issues that can be presented by stormwater regulation and permits.

Please contact me if you have any questions on this matter and to set up a meeting to discuss the above issues and questions/concerns that may arise (by both the SWRCP and CIPA members) as a result of our discussions. As we mentioned, CIPA members were added to the scope of the Draft Construction Permit at the 11th hour and are just now exploring all of the implications of the Draft Construction Permit on their operations. CIPA would appreciate the opportunity to discuss the above issues through workshops (more than one may be necessary, as we have members throughout the state) or information exchange meetings.

Sincerely,

Rock Zierman
Chief Executive Officer

cc: Western States Petroleum Association

WSPA

Western States Petroleum Association
Credible Solutions • Responsive Service • Since 1907

Suzanne Noble
Manager, Production Regions and State Waste Issues

April 13, 2009

Ms. Laura Yoshii, Acting Regional Administrator
U.S. Environmental Protection Agency
75 Hawthorne Street
San Francisco, California 94105

SUBJECT: APPLICABILITY OF CWA SECTIONS 311 AND 402 AND ASSOCIATED REGULATORY PROGRAMS TO UPLAND SWALES, GULLIES AND ISOLATED INTRASTATE WATERS IN THE WESTERN SAN JOAQUIN VALLEY

Dear Ms. Yoshii:

As you know, there have been a number of judicial decisions over the past several years that have affected the regulatory definitions of "navigable waters" and "waters of the United States" as they may determine the applicability of different programs implementing the federal Clean Water Act (CWA). The Western States Petroleum Association (WSPA) is a trade association that represents companies engaged in the exploration, production, transportation, refining and marketing of crude oil, natural gas and refined petroleum products across the western United States. One of WSPA's functions as a trade association is to support its members in their efforts to obtain clarification from government agencies regarding the scope of different regulatory programs that may be applicable to their operations.

In light of the definitional changes to "navigable waters," WSPA is seeking input from EPA on the applicability (or non-applicability) of the Construction Stormwater (NPDES) and the Spill Prevention Control and Countermeasure (SPCC) programs to oil and gas exploration and production (E&P) operations conducted in the western San Joaquin Valley (SJV). WSPA members own and/or operate E&P facilities in areas of the Valley that are potentially affected by these judicial and regulatory developments concerning the reach of jurisdictional waters.

Based on our review of the case law and EPA guidance and commentary on these decisions, we are requesting EPA's concurrence that neither the Construction Stormwater nor the SPCC program applies to E&P operations that are conducted near isolated, intrastate, upland drainage features that are not traditional navigable waters (perennial waterways) or tributary to such waters. It is our understanding that in order for intrastate waters to be subject to regulation under these particular federal programs, they must have a sufficient nexus to interstate commerce to justify the exercise of power under the Commerce Clause. For purposes of CWA section 311, this requires a finding that the

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waters be utilized by interstate travelers for recreation or other purposes, or that they serve as sources of fish or shellfish that are taken and traded in interstate commerce. See, American Petroleum Institute v. Johnson, 571 F. Supp. 2d 165 (D.D.C. 2008); 40 CFR §112.2 (73 Fed. Reg. 71941). While the API case and resulting revisions to federal regulations did not specifically address CWA section 402, we believe the principles at issue are equally applicable to that section. See, 40 CFR § 122.2 (defining "waters of the United States" in a similar manner, but also including non-navigable intrastate waters that are used for industrial purposes by industries engaged in interstate commerce). See also, Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers, 531 U.S. 159 (2001), and Rapanos v. U.S. Army Corps of Engineers, 547 U.S. 715 (2006) (interpreting "navigable waters" under CWA section 404).

The requested clarification is timely and necessary due to the impending implementation of the judicially-revised Construction Stormwater Program by the California State Water Resources Control Board (SWRCB) and the upcoming November 2009 deadline for preparation and implementation of updated SPCC plans. WSPA members, along with the SWRCB and the California Division of Oil, Gas, and Geothermal Resources (DOGGR), must clearly understand the applicability of the Construction Stormwater Program as it potentially affects the permitting processes of both agencies in circumstances where more than 1 acre is disturbed during well drilling operations. In addition, WSPA members need to be able to clearly distinguish the circumstances in which SPCC plans are required for federal purposes. WSPA members are committed to compliance to all applicable state and federal laws and continue to work directly with state agencies to assure compliance with requirements imposed exclusively under state law.

WSPA members operating in proximity to perennial waterways (whether in the western SJV or in other parts of California) understand that they may be required to apply for coverage under the statewide Construction Stormwater permit and must update their SPCC plans by the November 2009 deadline. However, in those areas where perennial waterways are absent, and the only waters present are found in isolated, non-tributary, upland drainages, WSPA believes that the Construction Stormwater and SPCC programs are not applicable. Where a particular E&P operation was previously subject to the SPCC program (due to the broader, but now-vacated definition of "navigable waters"), our members will be informing EPA of their intention to withdraw from the SPCC program. Similarly, our members will be informing the SWRCB (and the appropriate Regional Water Quality Control Boards) that the requirements of the Construction Stormwater Program do not apply to their respective operations. The attached notification letter templates will be used for these purposes.

WSPA appreciates EPA's assistance in this matter and looks forward to your concurrence with our understanding of the applicability of the Construction Stormwater and SPCC programs to the E&P operations addressed in this letter. Should you need additional information about the specific locations where these program exemptions appear to be appropriate, please do not hesitate to contact me at 661/321-0884.

Sincerely,

Suzanne Noble

cc: U. S. Environmental Protection Agency
Mr. Peter Reich – Oil Program
Mr. Jeremy Johnstone – NPDES Program

California Division of Oil, Gas, and Geothermal Resources
Mr. Hal Bopp – State Oil and Gas Supervisor

California State Water Resources Control Board
Mr. Bruce Fujimoto – Chief, Stormwater Section

Western States Petroleum Association
Ms. Cathy Reheis-Boyd - Executive Vice-President

Pillsbury Winthrop Shaw Pittman LLP
Meg Rosegay

DRAFT- Company Template

April __, 2009

Ms. Laura Yoshii, Acting Regional Administrator
U.S. Environmental Protection Agency
75 Hawthorne St.
San Francisco, CA 94105

SUBJECT: WITHDRAWAL OF SPCC PLANS – (COMPANY NAME), CALIFORNIA

Dear Ms. Yoshii:

In response to judicial clarifications of the applicability of the Clean Water Act and SPCC regulations to isolated, intrastate, upland drainage features in the western San Joaquin Valley, (Company Name) hereby informs the EPA of its intention to withdraw the SPCC and OPA 90 plans described in the following table effective (specific date). The plans will be replaced by spill contingency plans prepared in accordance with regulations adopted by the California Division of Oil, Gas, and Geothermal Resources (DOGGR).

At the same time, (Company Name) will discontinue the current practice of notifying the National Response Center (NRC) when oil spills reach these non-jurisdictional waterways and instead will notify the California Emergency Management Agency (formerly Office of Emergency Services) when the applicable state reporting thresholds are exceeded.

LOCATION	SPCC Plan	OPA 90 Plan
(Example) Cymric Field Western Kern County, CA	X	
(Example) North Midway Sunset Field Western Kern County, CA	X	X
(Example) Production Facility Western Fresno County, CA	X	

(Company Name) will continue to maintain SPCC plans and implement them at its facilities in (Example Counties) and the (Example) location in central Kern County. Releases that reach waterways or tributaries in those areas will continue to be reported to the NRC.

Sincerely,

cc: U. S. Environmental Protection Agency
Mr. Peter Reich (SFD-9-4) – Oil Program

DRAFT – Company Template

April __, 2009

Mr. Bruce Fujimoto, Chief
Stormwater Section
California State Water Resources Control Board
1001 "I" Street
Sacramento, CA 95814

SUBJECT: CONSTRUCTION STORMWATER PROGRAM – (COMPANY NAME), CALIFORNIA

Dear Mr. Fujimoto:

In response to judicial clarifications of the applicability of the Clean Water Act and NPDES Construction Stormwater regulations to isolated, intrastate, upland drainage features in the western San Joaquin Valley, (Company Name) hereby informs the SWRCB of its intention not to file Notices of Intent (NOI) for coverage under the statewide general permit for the facilities identified in the following table due to the absence of NPDES jurisdictional waterways.

LOCATION
(Example) Cymric Field Western Kern County, CA
(Example) North Midway Sunset Field Western Kern County, CA
(Example) Production Facility Western Fresno County, CA

(Company Name) will/has filed NOIs for our facilities in (Example Counties) and the following locations in central Kern County:_____

Sincerely,

cc: (Appropriate) Regional Water Quality Control Board Office
(NPDES Stormwater Contact Name)

(Appropriate) Division of Oil, Gas and Geothermal Resources Office
(District Deputy Supervisor)