

**OKLAHOMA DEPARTMENT OF ENVIRONMENTAL QUALITY**  
**GENERAL PERMIT NUMBER OKR10**  
**STORM WATER DISCHARGES FROM CONSTRUCTION ACTIVITIES WITHIN**  
**THE STATE OF OKLAHOMA**

**RESPONSIVENESS SUMMARY AND FINAL PERMIT DECISION**

The Department of Environmental Quality (DEQ), Water Quality Division received five (5) written comments from five (5) parties concerning the draft general permit OKR10 for storm water discharges from construction activities within the state of Oklahoma.

After reviewing the comments and considering issues with the permit, changes were made to the draft permit. A copy of this responsiveness summary has been provided to all commenters. A copy of the final permit, fact sheet, and response to comments has been posted on DEQ website at <http://www.deq.state.ok.us/WQDnew/stormwater/index.html>.

The final permit, including the changes shown below, will become effective on September 13, 2007. This constitutes DEQ's final permit decision.

A summary of the comments received, DEQ's responses, modifications after public review and staff-identified changes follows.

**PART I: COMMENTS RECEIVED PERTAINING TO THE CONSTRUCTION**  
**GENERAL PERMIT (CGP) OKR10 WITH DEQ'S RESPONSES**

The majority of the comments were for clarification purposes. All comments were fully considered and changes were made where appropriate.

A. Written Comments from the Oklahoma Department of Transportation (ODOT) dated August 10, 2007.

1. Page 5, Part 1.3.2. I. (2<sup>nd</sup> paragraph) *“Permittees must incorporate any limitations, conditions or requirements applicable to their discharges necessary for compliance with the TMDL, including any monitoring or reporting required by the TMDL, into their SWP3 within the time specified in the TMDL in order to be eligible for coverage under this permit.”*

What specific materials/ data does ODEQ require to meet the above sentence?  
Please give more information into what this will specifically entail.

**DEQ's Response:** Specific materials/data that DEQ will require to meet Part 1.3.2.I will be specified in the applicable TMDL report. In general, the permittees could be required to modify their SWP3 to address the pollutant of concern, implement specific BMPs, conduct discharge monitoring and reporting, certify their compliance, or undertake other TMDL implementation measures. Any such measures that may apply to construction activities and the time allowed for implementation would be specified in the applicable TMDL report. Affected permittees will be notified and provided additional details from the applicable TMDL report. No changes have been made in response to this comment.

2. Page 34, Northeast HUC-11 Watersheds  
Please use verbiage in this area that is geographically specific; i.e. stream names, locations, etc.

**DEQ's Response:** The location of these areas is shown on the map following on page 36. The geographical stream names and locations within the HUC-11 watersheds, along with all other sensitive waters and watersheds, will be added as a new feature of the DEQ GIS Data Viewer. To access the DEQ GIS Data Viewer goes to DEQ's website at [http://maps.scigis.com/deq\\_wq/](http://maps.scigis.com/deq_wq/). No changes have been made in response to this comment.

3. Page 34, Illinois River: Mayes County (typo), Page 34, Note: Beckham County (typo), and Page 35: Mountain Fork Watershed (typo)

**DEQ's Response:** These typos have been corrected (see Page 35 and 36)

4. Page 37, Notice of Intent  
Why is the co-permittee check box on the NOI?

**DEQ's Response:** This co-permittee check box provides an opportunity for ODOT's existing co-permitted contractors, who are not able to submit a NOT within 90 days after the effective day of this permit, to continue being a co-permittee with ODOT. No changes have been made in response to this comment.

5. Page 37, "Is there an approved TMDL applicable to this site?" How is DEQ going to use this information? This is going to confuse most people. It seems that DEQ could more easily determine this information for their database at the time of processing the NOI. TMDL's are a complicated process and this question on the NOI will cause a lot of extra time and phone calls between the applicants and DEQ. The OKR10 regulations cover this issue adequately and ODOT requests that this question be removed from the NOI.

**DEQ's Response:** The purpose of this question in the NOI is to ensure that applicants understand that their discharges must be consistent with the conditions and requirements of any EPA approved or established TMDLs that may apply to their site. Answering this question will help the applicants to include any necessary TMDL requirements in their SWPPP. DEQ will review the submitted information and notify the applicant of any identified deficiencies during the review. No changes have been made in response to this comment.

6. Additionally, ODOT requests that an editable, digitized version of the Notice of Intent be made available on the DEQ website.

**DEQ's Response:** The DEQ is investigating alternatives for online versions of the Notice of Intent (NOI) and hopes to offer this in the near future. In the meantime, the printed NOI is the only option to be used for this permit. No changes have been made in response to this comment.

B. Comments Submitted by Mike Means, Executive Vice President of Oklahoma State Home Builders Association, received on August 24, 2007.

1. Under Part 3.4 Discharge Compliance with Water Quality Standards, it introduces the concept of a discharge that may create a “reasonable potential” to violate water quality. We would like to seek justification for this provision along with clarification for what DEQ would consider “reasonable potential.” Perhaps some specific examples could be given to help us understand this provision.

**DEQ’s Response:** The concept of “reasonable potential” is found in the EPA rules at 40 CFR 122.44(d)(1)(i). According to that rule, which has been adopted by DEQ at OAC 252:606-1-3, water quality-based effluent limits must be established in permits to control all pollutants or pollutant parameters that are or may be discharged at a level which will cause, have reasonable potential to cause, or contribute to an excursion above any state water quality standard. The “reasonable potential” determination is a technically defensible analysis to assess the possible impact of a discharge on the receiving water. For example, a water quality model may be used to assess the potential impact of the discharge on the receiving water under foreseeable “critical” conditions. If the receiving water concentration is predicted to be equal or less than the water quality standard, there will be no need to establish a water quality-based limit. If the receiving water concentration is predicted to be greater than the water quality standard, there is a “reasonable potential” that the standard will be violated and a water quality-based limit is needed. No changes have been made in response to this comment.

2. The consequences for Part 4.5.5 and Part 10, Documentation of Federal, State or local historic preservation laws are unclear and we would like to better understand the implications of this for our homebuilder members. It appears in Part 10 that the Oklahoma Antiquities Law and Burial Desecration Law are binding on stormwater permit holders. We assume few homes are built on state land, so perhaps the impact of this provision may be minimal, but better understanding is paramount for our members.

**DEQ’s Response:** As stated in Part 4.5.4 and Part 10 of the permit, applicants are required to comply with state or local historic preservation laws, such as the Oklahoma Antiquities Law and Burial Desecration Law. Also applicants may be required to comply with Section 106 of the National Historic Preservation Act if any Federal funding or other Federal assistance is involved. While the Antiquities Law is limited to state property, the Burial Desecration Law applies generally. It is intended to protect human remains in unmarked graves. The law generally requires that if human remains are encountered, disturbance should stop until law enforcement authorities are notified. More information is available from the Oklahoma Archaeological Survey at <http://www.ou.edu/cas/archsur/laws.htm>. If historic properties may be affected, we recommend that applicants contact the State Historic Preservation Office and/or Oklahoma Archeological Survey, as well as Federal agencies directly for applications and documentation required. The contact information for those offices has been updated.

3. We commend the DEQ for incorporating a provision for Qualifying Local Programs into their permit package. Adoption of the qualifying locals programs by Oklahoma brings efficiencies to the state's stormwater efforts and simplifies stormwater requirements for home builders.

**DEQ's Response:** Thank you for the compliment, however DEQ has not yet incorporated such a provision in the State's storm water programs. We will evaluate this program for possible implementation in the future. No changes have been made in response to this comment.

C. Written Comments from AT&T Services, Inc. received on August 24, 2007.

We have only one comment on the Draft GP and for this I refer to the 2002 State of OK "Responsiveness Summary and Final Decision" dated September 13, 2002. Item 10 in that letter notes that several commenters discussed an exemption from the permit for linear construction projects. The DEQ responded by stating that linear projects are indeed subject to the permit but also went on to state the following:

"However, for clarification and permitting purposes the DEQ does not consider the use of soil plows – or other equipment/techniques that do not include excavation or creation or overburden – an activity that requires a Storm Water Discharge permit.

Our question for the 2007 Draft is to ask if this reasoning and interpretation will still apply under the new GP? For those projects which are able to employ these minimally disturbing techniques for cable placement, we believe this interpretation is still prudent and justified and we encourage you to extend this interpretation of the rules to the 2007 GP and to make it explicit in the document for clarity.

**DEQ's Response:** DEQ agrees the above interpretation still applies to this permit. For clarification purposes, the following sentence has been added in Example 1 of the fact sheet:

“Linear construction using soil plows or other trenchless equipment or techniques which do not include excavation or create overburden do not need to be covered under this permit. However, linear construction using trenching or any excavation and replacement of overburden is required to obtain permit coverage.”

D. Written Comments from American Electric Power Received on August 22, 2007.

Section 2.5.3 indicates the SWPPP must be submitted along with the Notice of Intent to ODEQ if the disturbed area of the construction site is 40 or more acres. Requiring a review of the SWPPP by the department has the potential of causing delays in obtaining permit coverage due to finite ODEQ resources that can be applied to the review process. Additionally, due to the nature of linear projects, right-of-way and access are not always obtained for all affected properties prior to developing the SWPPP. The SWPPP is a living document that is modified in the

field to accommodate site specific conditions. As such, it would be a better use of resources to review the SWPPP during ODEQ inspections of the project. PSO is requesting utility line construction, and other linear projects, be exempted from requirement of Section 2.5.3.

**DEQ's Response:** Part 1.4.1.B and Part 4.1.1 of the permit state that the storm water pollution prevention plan (SWPPP) is required to be developed prior to submittal of the NOI in order to obtain authorization. DEQ believes that reviewing the SWPPP for large sites will help ensure compliance with permit requirements and reduce the impact of discharges from these large sites on the state's waters. We also understand that the SWPPP is a living document that can be modified according to specific site conditions, and we will conduct field inspections to ensure that applicant's SWPPP is being implemented. The DEQ does not believe there are inherent differences with utility line construction and other linear projects that would justify exemption from the requirement of Part 2.5.3 of the permit. We understand the concern regarding our limited resources. We will make every effort to issue authorizations in a timely and expeditious manner after all required information is received. No changes have been made in response to this comment.

E. Written Comments from U. S. Fish and Wildlife Service (USFWS) Received on August 27, 2007.

1. Endangered Species Act (ESA) Compliance

The USFWS states "the Draft GP provides little or no protection for the American burying beetle (ABB). The construction-related soil disturbance associated with the Draft GP has potential to adversely impact the ABB, including take as defined under section 9 of the ESA". Furthermore USFWS recommends implementation of a conservation bank to protect and enhance ABB habitat in conjunction with either a Section 7 consultation or a Section 10 Habitat Conservation Plan (HCP).

**DEQ's Response:** DEQ's storm water programs address pollutants in runoff from construction activities, industrial facilities and municipal separate storm sewer systems. The goal of these programs is to "restore and maintain the chemical, physical and biological integrity" of the State's waters so that they can support "the protection and propagation of fish, shellfish, and wildlife and recreation in and on the water" (Clean Water Act, Sec. 101). Regarding questions whether protecting the ABB is within the jurisdiction of the stormwater regulations, DEQ has consulted with the EPA Region Six (6) Office and received the following information:

- a. States' storm water programs are subject to protecting those endangered species and their habitats which are found in or rely on aquatic resources. Since the ABB is not dependent on aquatic resources, protecting the ABB would be more appropriately addressed in other programs instead of storm water programs.
- b. While DEQ does not have any authority or obligation for consultation under ESA Section 7 since it is limited to federal entities, we believe we have complied with the MOU between DEQ and USFWS addressing

endangered species issues. DEQ also has no authority to participate with the USFWS in carrying out development of a HCP for the ABB under ESA Section 10. EPA Region Six believes they have worked with USFWS thru Section 7 consultation. A solution through Section 10, such as a statewide HCP for ABB could be an option for the future.

No changes have been made in response to this comment.

## 2. Workload Concerns

The USFWS indicates the language in the draft permit directly or indirectly instructs applicants to contact the Service and generates a significant workload for their office. The Service suggests that the following draft permit wording be changed to remove all references to the Service prior to Part 11.2, Step 2.

- Example 6: b on page 6 of the Fact Sheet
- 1.3.2.E.2.c. on page 4 of the Draft GP, and
- 1.3.2.E.4. (also on page 4)
- Part 11.1 also suggests applicants contact the Service “or meet the requirements of Part 11.2, Step 2 (which include the option of a written concurrence in Part 1.3.2.E.2.c.).
- Part 11.2 directs applicants to “follow the steps outlined below or contact the appropriate wildlife agency prior to completing and submitting a Notice of Intent (NOI) form”.

Furthermore USFWS states “due to the number of requests we receive and limited staff resources, we are forced to prioritize our work load and are unable to review or provide timely Responses for many storm water related projects. We cannot fulfill the function of the reviewing biologist for ODEQ permits without funding to support additional staff. If your agency is able to provide this funding, we suggest scheduling a meeting to discuss such an arrangement. Otherwise, we encourage the ODEQ to hire qualified staff to assume the responsibility of reviewing permit applications for potential impacts to federally-listed species and assist the Service in finding ways to streamline the process to reduce the number of actions we are asked to review”.

**DEQ’s Response:** The above referenced language was rewritten to clarify that applicants only need to follow the steps outlined in the permit. If the eligibility requirements of Part 1.3.2.E.2.b are met, there is no need to contact the USFWS.

## **PART II: MODIFICATIONS AFTER PUBLIC REVIEW AND STAFF IDENTIFIED CHANGES**

### A. Permit

Please note that specific page numbers below refer to the pages as numbered in the September 13, 2007 final draft.

Page 4, Part 1.3.2.E.2.c, Added language to clarify that if applicant’s storm water discharges and storm water discharge-related activities meet one of the criteria

under Part 1.3.2.E.2.a, b, d, or e, there is no need to contact the U.S. Fish and Wildlife Service (USFWS) for Federal sensitive waters and watersheds or the Oklahoma Department of Wildlife Conservation (ODWC) for State sensitive waters (see Part 11).

Page 30, Part 10 Historic Preservation, Corrected a typo: “Desecration”, also updated the contact information for State Historic Preservation Office/Oklahoma Historical Society.

Page 31, Part 11.1 Background, Deleted the sentence that indicates the reference to contact the appropriate wildlife agencies (both USFWS and ODWC).

Page 31, Part 11.2 Procedures, Deleted the sentence that indicates the reference to contact with USFWS and ODWC.

Page 34-36, ADDENDUM A - Oklahoma Sensitive Waters and Watersheds Harboring Endangered and Threatened Species and their Critical Habitat of Concern: 1) Corrected two typos: Mayes Counties under “B. Illinois River” and Beckham under “Note”; 2) Corrected one typo: Mountain Fork Watershed under “legend”.

Page 39, Instruction – DEQ Notice of Intent (NOI) for Stormwater Discharges Associated with Construction Activity to be covered under the OPDES General Permit OKR10, Added a sentence to read: “If applicant’s storm water discharges and storm water discharge-related activities meet the criteria under Part 1.3.2.E.2.a, b, d, or e, the applicants does not need to contact the U.S. Fish and Wildlife Service (USFWS) for Federal sensitive waters and watersheds or the Oklahoma Department of Wildlife Conservation (ODWC) for State sensitive waters (see Part 11). Otherwise, applicants may contact those agencies for either a no jeopardy opinion or a finding that the storm water discharges are not likely to adversely affect listed species or critical habitat”.

Pages 6, 9, 14, 17, 48, and 50. Language was added to the permit, NOI form, and instructions to require compliance with any watershed plan incorporated in Oklahoma’s Water Quality Management Plan in lieu of a TMDL. The draft language in these sections addressed compliance with TMDL requirements. Since the State is contemplating the development of watershed plans in lieu of TMDLs in some cases, permittees will need to meet any requirements in those plans which may apply to stormwater discharges in the same manner as a TMDL.

## B. Fact Sheet

Page 4, Example 1: Added the following sentence for clarification: “Linear construction using soil plows or other trenchless equipment or techniques which do not include excavation or create overburden do not need to be covered under this permit. However, linear construction using trenching or any excavation and replacement of overburden is required to obtain permit coverage.”

Page 6, Example 6: Added language to clarify that if applicant's storm water discharges and storm water discharge-related activities meet one of the criteria under Part 1.3.2.E.2.a, b, d, or e, there is no need to contact the U.S. Fish and Wildlife Service (USFWS) for Federal sensitive waters and watersheds or the Oklahoma Department of Wildlife Conservation (ODWC) for State sensitive waters

Page 7, Example 7: Corrected a typo: "Desecration".