

February 21, 2006

EPA Docket Center (EPA/DC)
1200 Pennsylvania Ave., NW.
Washington, DC 20460

Attention: Docket ID No. EPA-HQ-OW-2002-0068

Subject: Amendments to the National Pollutant Discharge Elimination System (NPDES) Regulations for Storm Water Discharges Associated With Oil and Gas Exploration, Production, Processing, or Treatment Operations, or Transmission Facilities

These comments are filed on behalf of the Independent Petroleum Association of America (IPAA), the International Association of Drilling Contractors (IADC), the International Association of Geophysical Contractors (IAGC), the National Stripper Well Association (NSWA), the Petroleum Equipment Suppliers Association (PESA), Association of Energy Service Companies (AESC), the US Oil & Gas Association (USOGA) and the following organizations:

- California Independent Petroleum Association
- Coalbed Methane Association of Alabama
- Colorado Oil & Gas Association
- East Texas Producers & Royalty Owners Association
- Eastern Kansas Oil & Gas Association
- Florida Independent Petroleum Association
- Illinois Oil & Gas Association
- Independent Oil & Gas Association of New York
- Independent Oil & Gas Association of Pennsylvania
- Independent Oil & Gas Association of West Virginia
- Independent Oil Producers Association Tri-State
- Independent Petroleum Association of Mountain States
- Independent Petroleum Association of New Mexico
- Indiana Oil & Gas Association
- Kansas Independent Oil & Gas Association
- Kentucky Oil & Gas Association
- Louisiana Independent Oil & Gas Association
- Michigan Oil & Gas Association
- Mississippi Independent Producers & Royalty Association
- Montana Petroleum Association
- National Association of Royalty Owners
- Nebraska Independent Oil & Gas Association
- New Mexico Oil & Gas Association
- New York State Oil Producers Association

Northern Alliance of Independent Producers
Ohio Oil & Gas Association
Oklahoma Independent Petroleum Association
Panhandle Producers & Royalty Owners Association
Pennsylvania Oil & Gas Association
Permian Basin Petroleum Association
Petroleum Association of Wyoming
Tennessee Oil & Gas Association
Texas Alliance of Energy Producers
Texas Independent Producers and Royalty Owners Association
Virginia Oil and Gas Association
Wyoming Independent Producers Association

Collectively, these groups represent the thousands of independent oil and natural gas explorers and producers that will be the most significantly affected by the proposed actions in these regulatory actions. Independent producers drill about 90 percent of domestic oil and natural gas wells, produce over 65 percent of domestic oil, and more than 80 percent of domestic natural gas.

These organizations appreciate the opportunity to comment on the Environmental Protection Agency (EPA) proposal to modify its stormwater regulations consistent with the Energy Policy Act of 2005. We support the above-referenced rule as proposed. Subject to the clarification requested in part III.D of these comments, we believe that the proposed rule sets out a correct and reasonable interpretation of sections 402(l)(2) and 502(24) of the Clean Water Act.

I. Support for Proposed Separation of 40 C.F.R. 122.26(a)(2)(i) and (ii)

We support separating the mining exemption from the oil and gas exemption into different proposed regulatory sections at 40 C.F.R. 122.26(a)(2)(i) (for mining) and (ii) (for oil and gas activities). The mining industry and its exemption are distinct from the oil and gas industry and exemption, both in terms of the nature of the activities involved and in the definition of “contamination” that applies under the statute and EPA’s regulations. We take no position on the accuracy of EPA’s statement in section 40 C.F.R. 122.26(a)(2)(i) as to the scope of the mining exemption, but we support the scope of the oil and gas exemption as stated in 40 C.F.R. 122.26(a)(ii).

II. Support for Proposed 40 C.F.R. 122.26(a)(2)(ii), First Sentence, Adoption of CWA 502(24)

We support the first sentence of Section 122.26(a)(2)(ii), which adopts the language of the Energy Policy Act (codified at Clean Water Act (CWA) section 502(24)) essentially verbatim. This adoption makes clear that storm water discharges from all oil and gas field activities and operations, including construction activities, are exempt from the NPDES permit requirement, unless contaminated.

The first sentence of 40 C.F.R. 122.26(a)(2)(ii) states that:

The Director may not require a permit for discharges of storm water runoff from the following . . . [a]ll field activities or operations associated with oil and gas exploration, production, processing, or treatment operations or transmission facilities, including activities necessary to prepare a site for drilling and for the movement and placement of drilling equipment, whether or not such field activities or operations may be considered to be construction activities, except in accordance with section 122.26(c)(1)(iii)(C). . . .¹

It is our position that uncontaminated discharges from oil and gas construction activities have been exempt from the NPDES storm water permitting requirement ever since Congress enacted section 402(l)(2) in 1987.² The legal basis for this position was summarized by IPAA, TIPRO, and other trade associations at pages 18-22 of their brief filed recently in the U.S. Court of Appeals for the Seventh Circuit, which EPA has placed in the rulemaking docket at Document Number OW-2002-0068-0225, pages 18-22. The Energy Policy Act of 2005, codified at section 502(24) of the Clean Water Act, expressly approves our interpretation. The U.S. Court of Appeals for the Seventh Circuit,³ noting “the breadth of the statutory exemption,”⁴ recently held that EPA “can no longer require permits for uncontaminated discharges from construction activities undertaken pursuant to oil and gas ‘field activities or operations associated with exploration, production, processing, or treatment operations, or transmission facilities.’”⁵ Thus, it is now indisputably clear under the statute and judicial decision that storm water discharges from oil and gas construction activities are not required to obtain NPDES permit coverage unless the discharge from a site is contaminated. A copy of the Seventh Circuit’s opinion is provided as Attachment 1 to these comments.

III. Qualified Support for 40 CFR 122.26(a)(2)(ii), Second Sentence, Setting Standard of “Contamination” for “Sediment”

The second sentence of proposed 40 C.F.R. 122.26(a)(2)(ii) states that a discharge of sediment that violates a water quality standard does not, by itself, void the oil and gas exemption, as follows:

Discharges of sediment from construction activities associated with oil and gas exploration, production, processing, or treatment operations, or transmission facilities are not subject to the provisions of § 122.26(c)(1)(iii)(C).⁶

Under this proposed rule, sediment discharge in storm water would void the exemption only if the discharge also resulted in a reportable quantity (“RQ”) discharge of hazardous substances or

¹ 40 C.F.R. 122.26(a)(2), (a)(2)(ii).

² See, e.g., *Texas Indep. Prods. & Royalty Owners Assoc. v. EPA*, 413 F.3d 479, 484 (5th Cir. 2005) (holding industry petitioners’ challenge not ripe for review), rehearing denied without prejudice to seeking relief in the event of unreasonable delay by the agency by Order of 5th Cir. in Case No. 03-60506 (Dec. 2, 2005); *Appalachian Energy Group v. EPA*, 33 F.3d 319, 322 (4th Cir. 1994) (holding EPA December 1992 internal memorandum not to be a final agency action).

³ *Texas Indep. Prods. & Royalty Owners Assoc. v. EPA*, --- F.3d --- (7th Cir. 2006), slip. op. at 14 (Case No. 03-3277, Jan. 27, 2006) (Attachment 1).

⁴ *Id.*

⁵ *Id.* at 15.

⁶ 71 Fed. Reg. at 901 (proposed to be codified at 71 Fed. Reg. 122.26(a)(2)(ii)).

oil requiring notification.⁷ Subject to the clarification requested in section III.D, below, we support the second sentence of proposed 40 C.F.R. 122.26(a)(2)(ii).

A. 40 C.F.R. 122.26(a)(2)(ii) Correctly States That Discharges of Sediment Are Not Subject to Section 122.26(c)(1)(iii)

We believe that proposed 40 C.F.R. 122.26(a)(2)(ii) contains a correct and reasonable interpretation of section 402(l)(2) of the Clean Water Act. The Act requires a permit for oil and gas activities only if storm water discharges are “contaminated by contact with . . . [overburden], raw material, intermediate products, finished product, byproduct, or waste products located on the site of such operations.” 33 U.S.C. 1342(l)(2). None of the listed materials covers surface soils disturbed during construction at oil and gas field activities or operations. Overburden is a mining term applicable only to the mining exemption, as discussed in more detail below.⁸

In clarifying what it meant by “contaminated” with respect to the oil and gas operations, Congress directed EPA to consider whether the discharge contained reportable quantities of oil and hazardous substances under section 311 of the CWA and section 102 of the Comprehensive Environmental Response, Compensation and Liability Act.⁹ EPA followed Congress’s instruction and, in addition, added a provision defining a discharge that contributes to a water quality standard violation as “contaminated.” Specifically, EPA’s existing rule in section 40 C.F.R. 122.26(c)(1)(iii) exempts storm water discharges from oil and gas sites unless the site has a discharge that:

(A) contains a reportable quantity of a hazardous substance for which notification is (or was) required after November 16, 1987 (citing 40 C.F.R. 117.21, 302.6);

(B) contains a reportable quantity of oil for which notification is (or was) required after November 16, 1987 (citing 40 C.F.R. 110.6); or

(C) contributes to a water quality standard violation.¹⁰

Until passage of the Energy Policy Act of 2005 and this proposed rule, EPA’s position had been that all oil and gas construction activities must get a permit, regardless of whether their discharges are contaminated. Until now, therefore, it had not been necessary for EPA, industry, or the courts to take a position on the definition of “contaminated” or whether a discharge of mere sediment (as opposed to oil or hazardous substance) is sufficient to void the oil and gas exemption. This question is now relevant, however and, subject to the clarification requested in Comment III.D, below, we believe that EPA’s proposed rule represents a correct and reasonable interpretation of the Clean Water Act.

⁷ 40 C.F.R. 122.26(c)(1)(iii)(A)-(B).

⁸ See 71 Fed. Reg. at 897.

⁹ H.R. CONF. REP. NO. 100-4, 99th Cong., 2d Sess., at H10574.

¹⁰ See 40 C.F.R. 122.26(c)(1)(iii).

B. EPA Reasonably Concludes That A Discharge of Sediment Is Not “Contaminated By Contact With” the Materials Identified In the Statute.

EPA reasonably concludes in the Federal Register notice for the proposed rule¹¹ that Congress did not intend discharges of sediment in storm water to void the oil and gas exemption, unless the sediment discharge also results in a release of a reportable quantity (RQ) of oil or hazardous substance. In addition to the reasons set out by EPA in the notice of proposed rulemaking,¹² it is reasonable for EPA to conclude that a mere discharge of sediment does not void the oil and gas exemption, even if the discharge contributes to a violation of a water quality standard for sediment. The plain meaning of the statute, common usage of the term “overburden,” and legislative history of the Clean Water Act, all support the reasonableness of EPA’s proposed interpretation.

Section 402(l)(2) reads in relevant part as follows:

The Administrator shall not require a permit under this section . . . for discharges of stormwater runoff from mining operations or oil and gas exploration, production, processing, or treatment operations or transmission facilities . . . which 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.¹³

The plain meaning of section 402(l)(2) is that storm water discharges from oil and gas activities are exempt from the NPDES permit requirement unless the discharges from a site are contaminated by contact with the materials listed in the statute. Surface soils disturbed by oil and gas field activities and operations, including construction activities, are clearly not “raw material, intermediate products, finished product, byproduct, or waste products.” Discharges containing sediment resulting from contact with disturbed surface soils are, therefore, not contamination within the meaning of the statute.

C. EPA Reasonably Concludes That “Overburden” Is a Mining Term.

Similarly, as EPA correctly states in the Federal Register notices of the proposed rule, “the term overburden is applicable only to mining.”¹⁴ The longstanding, common usage of the term “overburden” applies to subsurface geological materials exposed by mining activities, as “[m]aterial overlying a deposit of useful geological materials or bedrock.”¹⁵

EPA’s interpretation of the term “overburden” in the Federal Register notice of the proposed rule is consistent with its definition elsewhere in the regulations. EPA regulations define overburden as “any material of any nature, consolidated or unconsolidated, that overlies a mineral deposit, excluding topsoil or similar naturally occurring surface materials that are not disturbed *by mining*

¹¹ 71 Fed. Reg. at 898.

¹² *Id.*

¹³ 33 U.S.C. 1342(l)(2).

¹⁴ *Id.*

¹⁵ WEBSTER’S NINTH NEW COLLEGIATE DICTIONARY pt. 2 (Merriam-Webster, 1986) ([Attachment 2](#)).

operations.”¹⁶ Similarly, in the preamble to the storm water permit rules, EPA discussed “overburden” only in the context of mining operations and explained that the definition of the term was taken from a mining statute, the Surface Mining Control and Reclamation Act.¹⁷

Common usage and EPA’s regulatory definition of “overburden” clearly apply only to mining activities, particularly open surface mining. The term “overburden” does not apply to oil and gas operations. Moreover, surface soil disturbed by oil and gas activities does not “overlie” an oil or gas formation. There are thousands of feet between an oil and gas formation and any surface materials that might be disturbed during oil and gas field activities and operations. Surface soil disturbed by such activities is, therefore, not “overburden,” and sediment from contact with disturbed soils at oil and gas sites is not intended void the oil and gas exemption.

The reasonableness of this interpretation is borne out by the legislative history of the Clean Water Act. Section 402(I)(2) was originally comprised of two separate exemptions for mining and oil and gas activities, which were combined in Conference Committee into one statutory section. The term “overburden” in the statute was derived from the addition of “mining operations” to the exemption, and was intended to apply to exposure of subsurface geological materials exposed during mining operations. Section 402(I)(2) as enacted in 1987 and now codified at 33 USC 1342(I)(2), was drafted in Conference Committee. The Senate version of the bill exempted only oil and gas operations, and did not mention mining operations. The Senate version exempted storm water discharges from oil and gas operations provided that such discharges were not “contaminated with process wastes, toxic pollutants, hazardous substances, or oil and grease.”¹⁸ There was no mention of “overburden” in the Senate’s oil-and-gas-only version. The House version added mining operations to the exemption and at the same time added the phrase “overburden raw material.” Specifically, the House version exempted discharges from “mining operations or oil and gas operations” that “do not come in contact with any overburden raw material, or product located on the” mining site.¹⁹ The Conference Substitute combined the Senate and House versions, shortened the language of the exemption, and added a comma between the terms “overburden” and “raw materials.”²⁰ Thus, it is clear from the legislative history that the term “overburden” was associated with the addition of the mining exemption to the statute, not with the oil and gas exemption.

Based on the plain meaning of the statute, common usage of the word “overburden,” and the legislative history, we believe that the second sentence of proposed 40 C.F.R. 122.26(a)(2)(ii) correctly and reasonably states that discharges of sediment are not subject to section 122.26(c)(1)(iii)(C) and, therefore, do not void the oil and gas exemption, even if they contribute to a water quality standard violation.

¹⁶ 40 C.F.R. 122.26(b)(10) (emphasis added).

¹⁷ 55 Fed. Reg. 47990, 48032 (Nov. 16, 1990); *see also* 30 U.S.C. 1201 et seq. (governing surface coal mining activities); 30 C.F.R. 710.5 (defining “overburden” under regulations implementing SMCRA as “material of any nature, consolidated or unconsolidated that overlies a coal deposit, excluding topsoil”).

¹⁸ S. 1128, 99th Cong. Sec. 401 (1985).

¹⁹ H.R. 8, 99th Cong. Sec. 401 (1985).

²⁰ H.R. CONF. REP. NO. 100-4, 99th Cong., 2d Sess., at H10576 (Oct. 15, 1986); Water Quality Act of 1987, Pub. L. No. 100-4, Sec. 401, 101 Stat. 7, 65-66 (Feb. 4, 1987).

D. EPA Should Clarify Applicability of the Second Sentence of 122.26(a)(2)(ii) After Initial Construction

By limiting the second sentence of proposed section 122.26(a)(2)(ii) to “discharges of sediment from construction activities” the proposed rule appears to be unreasonably narrow. The statutory exemption, as clarified by CWA 502(24), applies to “all field activities and operations,” including but not limited to construction activities. In light of EPA’s previous distinction between the so-called (by EPA in 1992 and 2001 guidance (Attached)) “operational phase” and the “construction phase” at oil and gas sites, we would request that EPA clarify that there is no distinction under the second sentence of section 122.26(a)(2)(ii) between sediment in discharges from contact with surface soils during the so-called “construction phase” and those that during the so-called “operational phase,” such as sediment that might be picked up during maintenance, workover, expansion, reserve pit excavation, closure, and other similar soil-disturbing activities associated with oil and gas field activities and operations.

IV. Support for Note to 40 C.F.R. 122.26(a)(2)(ii), Voluntary Implementation and Maintenance of Reasonable and Prudent Practices for Stabilization

We support the note to 40 C.F.R. 122.26(a)(2)(ii), encouraging voluntary implementation and maintenance of appropriate management practices at oil and gas sites. We agree that appropriate, common sense measures—such as the Reasonable and Prudent Practices for Stabilization (RAPPS) compiled by oil and gas industry—are effective in reducing pollutants in storm water discharged to waters of the U.S.

To put the RAPPS into a more clear perspective, some history of its development is useful. The RAPPS is a guidance document compiled by an industry group, consisting of environmental representatives of several oil and gas companies and representatives of oil and gas industry associations. The document is a compilation of controls, commonly used in the field, to prevent sediment from entering waters of the United States. Further, it provides a methodology to decide which, if any, controls are needed at a specific site. The RAPPS document also provides information concerning limitations and installation of each control method and discusses final stabilization of oil and gas construction sites.

The purpose of this RAPPS document is to compile the various operating practices utilized by reasonable and prudent operators in the oil and gas industry to effectively control erosion and sedimentation associated with storm water runoff from areas disturbed by clearing, grading, and excavating activities related to site preparation associated with oil and gas exploration, production, processing, treatment, and transmission activities. Site preparation activities associated with such oil and gas activities are referred to in the RAPPS, consistent with EPA’s terminology, as “oil and gas construction activities” or “construction activities.”

In the preparation of the RAPPS document, emphasis was placed on the selection and practical application of effective RAPPS, given a variety of basic physical circumstances. The document is provided as a tool to quickly evaluate which RAPPS may be useful at a given construction site. The document anticipates that the user will be prudent and exercise good judgment in evaluating site conditions and deciding which RAPPS, or combination of RAPPS, is to be used at a specific site. If the RAPPS selected are not effective to prevent discharges of potentially undesirable

quantities of sediment to a regulated water body, different or additional RAPPS should then be employed.

The RAPPS document has been endorsed by and published on web sites of the following organizations:

Independent Petroleum Association of America (IPAA) www.ipaa.org
U.S. Oil and Gas Association (USOGA) (no web site)
Domestic Petroleum Council (DPC) www.dpcusa.org
Oklahoma Independent Petroleum Association (OIPA) www.oipa.com
Texas Independent Producers and Royalty Owners Association (TIPRO) www.tipro.org
Texas Alliance of Energy Producers (TAEP) www.texasalliance.org

The RAPPS document is available free of charge to anyone interested. It is for voluntary use throughout the oil and gas industry and is for non-technical personnel. EPA has placed the RAPPS document in the rulemaking docket at Document Number EPA-HQ-OW-2002-0068-0229.

Finally, the evidence supports that voluntary implementation of RAPPS such as those described in the RAPPS document or other such measures is effective in controlling water quality impacts from oil and gas sites. Most oil and gas sites have so far been operating under the Deferral Rule, without any federal requirement for control measures. Voluntary implementation and maintenance of RAPPS such as (but not limited to) those described in the RAPPS document have proven effective in controlling sediment in discharges of stormwater runoff from oil and gas construction sites.

The attached photographs show the effectiveness of these measures at IPAA member sites. (Attachment 3). For example, a study by the Interstate Oil and Gas Compact Commission (IOGCC) for the Department of Energy, completed in August 2003. (Attachment 4). The IOGCC work group concluded that “all evidence reviewed by the workgroup indicates that the environmental impacts of storm water discharges from CGE [clearing, grading, and excavation] activities are minimal, and are currently being well managed by one or more regulatory agencies within a state.” IOGCC NPDES Stormwater Discharge Work Group Report Executive Summary (Aug. 8, 2003) [hereinafter “IOGCC Work Group Report”]. Similarly, the work group reported that “[t]he documented number of storm water discharge complaints and actual pollution incidents is very small.” IOGCC Work Group Report at 4. Various state regulators have stated that there is no observed water quality impact from oil and gas sites. For example, a regulator in Texas stated:

“At this point I don’t see a need to regulate storm water in Texas because we’re not seeing water quality impacts We’ve not seen any evidence that either construction or the E&P facilities themselves . . . are causing a violation of the water quality standards.”

Platt’s Gas Daily at 4 (Jan. 23, 2006) (comments of Leslie Savage of Texas Railroad Commission) (Attachment 5). Similarly, oil and gas regulatory authorities in the States of Texas,

Oklahoma, and Louisiana submitted amicus briefs in the U.S. Courts of Appeal for the Fifth and Seventh Circuits stating that control measures used by oil and gas operators are effective in controlling the environmental impact from oil and gas construction activities. The amicus briefs filed in the Seventh Circuit are attached to these comments. (Attachments 6 through 8). Oklahoma's brief, also notes that water quality impacts blamed on oil and gas activities are often either nonexistent or not attributable to oil and gas activities. *See Attachment 8* at pages 10-12 (Brief); *Attachment 8*, Appendix B at page 21 (Oklahoma Coordinated Watershed Restoration and Protection Strategy).

V. Support for 40 C.F.R. 122.26(e)(8), Deletion of Permit Requirement

We support the revision to 40 C.F.R. 122.26(e)(8) to delete the requirement for small oil and gas construction activities to obtain permit coverage by June 12, 2006. For the reasons discussed in Part III.A, the removal of the permit requirement is necessary to be consistent with Sections 402(l)(2) and 502(24) of the Clean Water Act and recent court decisions relating to those sections.

VI. Conclusion

As these comments demonstrate, management of storm water during the oil and gas construction activities is an important environmental consideration for domestic producers. Since enactment of the 1987 amendments to the Clean Water Act, these producers have believed that the appropriate test for determining whether an NPDES permit is required should be the discharge of contaminated storm water. The Energy Policy Act of 2005 provided the necessary clarification of the Clean Water Act to assure that contamination would be the applicable standard. EPA's proposed interpretations of sections 402(l)(2) and 502(24) of the Clean Water Act are correct and reasonable; the rule should be adopted as proposed.

If there are any questions regarding these comments, please contact Lee Fuller at IPAA, 202-857-4722.