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 rule[11] 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(*l*)(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(*l*)(2) as enacted in 1987 and now codified at 33 USC 1342(*l*)(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.

IPAA Attachment 1

In the
United States Court of Appeals
For the Seventh Circuit

Nos. 03-3277, 03-3278, 03-3279, 03-3280 & 03-3281

TEXAS INDEPENDENT PRODUCERS
AND ROYALTY OWNERS ASSOCIATION, *et al.*,

Petitioners,

v.

ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

Petitions for Review of an Order
of the Environmental Protection Agency.
No. 02-OW-55

ARGUED DECEMBER 7, 2004—DECIDED JANUARY 27, 2006

Before BAUER, MANION, and WILLIAMS, *Circuit Judges*.

MANION, *Circuit Judge*. In a previous opinion, *Texas Independent Producers and Royalty Owners Association v. EPA*, 410 F.3d 964, 977-78 (7th Cir. 2005), this court addressed various issues concerning a general permit issued by the Environmental Protection Agency ("EPA") for storm water discharges. We reserved several issues pending the resolution of litigation in another circuit. This opinion now addresses those unresolved issues relating to the "Final National Pollutant Discharge Elimination System General Permit for Storm Water Dis-

charges From Construction Activities" ("General Permit"), promulgated by the EPA on July 1, 2003. 68 Fed.Reg. 39,087 (July 1, 2003). To recap: Following the EPA's issuance of this General Permit, several organizations filed petitions for review, and those petitions were consolidated before this court. On June 13, 2005, this court held that the General Permit does not violate the Clean Water Act's ("CWA") requirements for public notice and public hearing. *Texas Indep. Producers and Royalty Owners Ass'n v. EPA*, 410 F.3d 964, 977-78 (7th Cir. 2005). We also held that in issuing the General Permit, the EPA complied with the requirements of the Endangered Species Act. *Id.* at 979. However, we dismissed the petition filed by the Natural Resources Defense Council, Inc., for lack of standing. *Id.* at 976. We then stayed consideration of the remaining challenges presented by organizations representing individuals in the oil and gas industries, pending resolution by the Fifth Circuit as to whether those petitioners were required to obtain a permit in the first instance. *Id.* at 980. After the Fifth Circuit held that the Oil and Gas Petitioners' challenge to the application of the General Permit was not ripe for review, *Texas Independent Producers and Royalty Owners Assoc. v. EPA*, 413 F.3d 479, 484 (5th Cir. 2005), we directed the parties to file supplemental briefing addressing the import of that decision. Before briefing was due, Congress passed the Energy Policy Act of 2005, which expressly exempts construction activities in the oil and gas industries from the permit requirements of the CWA.[1] Energy Policy Act of 2005, Pub. L. No. 109-58, § 323, 119 Stat. 594, 694 (2005). We directed further briefing on the impact of the Energy Policy Act. We now hold that because of the exemption contained in the Energy Policy Act, those

[1] Following passage of the Energy Policy Act, the Oil and Gas Petitioners sought rehearing. On December 2, 2005, the Fifth Circuit denied the Petition for Rehearing, "WITHOUT PREJUDICE to seeking relief in the event of unreasonable delay by the Agency."

aspects of the General Permit that the Oil and Gas Petitioners seek to challenge do not apply to them. We therefore dismiss this petition for lack of standing.

I.

Congress enacted the Clean Water Act ("CWA" or "Act") "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). Among other things, the CWA prohibits the "discharge of any pollutant," except in compliance with the Act's provisions. 33 U.S.C. § 1311(a). In particular, the discharge of pollutants into navigable waters is illegal unless authorized by a permit issued pursuant to § 402 of the Act. 33 U.S.C. § 1342. Section 402 established the National Pollutant Discharge Elimination System ("NPDES"), and requires dischargers to obtain a permit from the EPA or an authorized state.[2] 33 U.S.C. § 1342(a)(1), (b).

In 1987, Congress added § 402(p) to the CWA, establishing a two-step phased approach to regulating storm water discharges. 33 U.S.C. § 1342(p). "In Phase I, Congress required NPDES permits for storm water discharges from 'industrial activities,' 33 U.S.C. § 1342(p)(3)(A), defined as construction activities involving five or more acres, as well as discharges from certain large municipal storm sewer systems. 55 Fed.Reg. 47,990, 48,066 (Nov. 16, 1990)." *Texas Indep. Producers*, 410 F.3d at 968. The EPA decided to implement the permit requirement for Phase I by using a general permit system, as opposed to a system requiring individual permits for each construction

[2] "The EPA administers the NPDES program in each state unless the EPA previously authorized a state program to issue NPDES permits." *Am. Paper Inst., Inc. v. EPA*, 890 F.2d 869, 871 (7th Cir. 1989) (citing 33 U.S.C. § 1342(b)).

activity. 55 Fed.Reg. 47,990, 48,005-06 (Nov. 16, 1990). *Texas Indep. Producers*, 410 F.3d at 968. As we explained in our prior opinion, "[t]he NPDES permitting system originally used individual permits, which was feasible for regulating discharges from wastewater facilities or industrial plants. However, by the 1980's it became clear that the individual permitting process was unworkable to regulate storm water discharges which can occur virtually anywhere." *Texas Indep. Producers*, 410 F.3d at 967-68 (citing 56 Fed.Reg. 40,948, 40,949-50 (Aug. 16, 1991)). "With a general permit, the EPA issues a permit for specific types of activities and establishes specific rules for complying with the permit. Then, rather than apply for an individual permit, operators must file a Notice of Intent stating that they plan to operate under the general permit, and absent a negative ruling by the EPA, discharges that comply with the terms of the general permit are automatically authorized." *Id.* at 968.

In 1992, the EPA issued its first general permit for construction-related storm water discharges. 57 Fed.Reg. 41176 (Sept. 9, 1992). The EPA, in 1997, proposed a revised general permit. 62 Fed.Reg. 29786 (June 2, 1997). *Texas Indep. Producers*, 410 F.3d at 968. Then in 1999, the EPA issued its Phase II storm water rules, which defined as additional discharges subject to the general permitting requirements "small construction sites (one to five acres), smaller municipalities, and additional sources that might be designated on a case-by-case basis. 64 Fed.Reg. 68722 (Dec. 8, 1999); 40 Fed.Reg. § 122.26(b)(15)." *Texas Indep. Producers*, 410 F.3d at 968. On December 20, 2002, the EPA proposed a third General Permit for storm water discharges from both large and small construction sites, 67 Fed.Reg. 78,116 (Dec. 20, 2002), although this General Permit only applies in jurisdictions not regulated by a State or Tribal NPDES permitting program. *Texas Indep. Producers*, 410 F.3d at 968. "After holding a series of public meetings and considering public comments, the EPA published notice of the final

General Permit on July 1, 2003. 68 Fed.Reg. 39,087." *Texas Indep. Producers*, 410 F.3d at 968.

Under the terms of the final General Permit, potential dischargers must submit a Notice of Intent to operate under the General Permit and a responsible corporate official must certify the basis for eligibility for such coverage under the General Permit. General Permit, Appendix G at 11A.1. We detailed many of the other terms of the General Permit in our prior opinion:

> The General Permit also requires that the operator create, maintain, and implement a site-specific Storm Water Pollution Prevention Plan ("SWPPP"), which must also be certified by a corporate official. General Permit 3.13; General Permit, Appendix G at 11A.1. The discharger must further implement best management practices ("BMP") necessary to comply with water quality standards, assure weekly site inspections, and document those inspections, including detailing weather conditions. See General Permit 4.5A (construction operators must "select, install, and maintain BMPs at your construction site" that minimize pollutants in the discharges as necessary to meet applicable water quality standards); General Permit 3.10.A (detailing requirements for inspections).

410 F.3d at 969.

After the EPA issued the General Permit, several organizations filed petitions for review of this final agency action, and those petitions were consolidated before this court. Of relevance here, the Oil and Gas Petitioners[3] presented several arguments. First, "the Oil and Gas Petitioners argue[d] that the EPA's definition of 'common plan' contained in the General Permit is so broad, ambiguous, and vague that it violates their

---

[3] As noted above, this court resolved all the remaining petitions in our previous opinion. *Texas Indep. Producers*, 410 F.3d at 980.

rights to due process because they do not know if they need to apply for a General Permit." *Texas Indep. Producers*, 410 F.3d at 970. Similarly, "[t]he Oil and Gas Petitioners . . . argue[d] that the EPA's definition of 'final stabilization' is too vague." *Id.* Finally, "the Oil and Gas Petitioners argue[d] that the EPA's definitions of 'common plan' and 'final stabilization' are arbitrary and capricious because the definitions do not take into account the differences in construction activities related to oil and gas exploration and conventional residential and commercial activities." *Id.*

In presenting these arguments, the Oil and Gas Petitioners also asserted that the permit requirements of the CWA did not apply to them in the first instance. *Id.* However, the Oil and Gas Petitioners maintained that they were not challenging the EPA's decision that they must obtain storm water discharge permits, as that question was pending before the Fifth Circuit. *Id.* The Fifth Circuit case involved several final rules promulgated by the EPA, beginning with Final Rule, 68 Fed.Reg. 11,325. *See* 413 F.3d at 481. In 68 Fed.Reg. 11,325 ("Deferral Rule"), the EPA deferred the Phase II permit requirements it had established in 64 Fed.Reg. 68,722 for construction activities disturbing one to five acres, but only for construction activities at oil and gas sites. Specifically, the EPA stated that "[d]ischarges associated with small construction activity at such oil and gas sites require permit authorization by March 10, 2005."[4] 68 Fed.Reg. at 11,330.

Although the Deferral Rule extended the deadline for obtaining permits for construction activities at oil and gas sites, in doing so, the Deferral Rule also constituted the first time that the EPA maintained in a final agency action that such construction activities were subject to the permit requirements of the CWA. In response, in their petition filed in the Fifth Circuit, the Oil and Gas Petitioners argued that the EPA lacked

---

[4] The EPA in 64 Fed.Reg. 68,722 originally required permits by March 10, 2003.

the authority to require permits for oil and gas construction activities based on § 402(l)(2) of the CWA. Section 402(l)(2) expressly prohibited the EPA from requiring a § 402 permit for storm water discharges for oil and gas activities unless the discharges were contaminated by contact with materials located on the site of such operations. 33 U.S.C. § 1342(l)(2).

After filing a petition for review of 68 Fed.Reg. 11,325, the EPA issued 70 Fed.Reg. 2832 (Jan. 18, 2005), which extended the deadline until March 10, 2005, and then in 70 Fed.Reg. 11,560 (March 9, 2005), the EPA extended the deadline again until June 12, 2006. On June 16, 2005, the Fifth Circuit issued its ruling, holding that the Oil and Gas Petitioners' challenge to the Deferral Rule was not ripe for review. 413 F.3d at 484. The Fifth Circuit reasoned: "Given that EPA has specifically stated its intent to examine, during the Deferral Period, the issue of 'how best to resolve questions posed by outside parties regarding section 402(l)(2) of the Clean Water Act,' any interpretation we would provide would necessarily prematurely cut off EPA's interpretive process." *Id.* at 483.

Following the Fifth Circuit's decision, this court directed the parties to file supplemental briefing on the issue of ripeness and the import of the Fifth Circuit's decision, later extending the briefing schedule, pursuant to the parties' request, until September 9, 2005. Before briefing was completed, Congress passed the Energy Policy Act of 2005, signed into law on August 8, 2005. Energy Policy Act of 2005, Pub. L. No. 109-58, § 323, 119 Stat. 594, 694 (2005). Among other things, the Energy Policy Act amended the CWA's definition of oil and gas exploration, providing:

> Section 502 of the Federal Water Pollution Control Act (33 U.S.C. § 1362) is amended by adding at the end the following:
>
> (24) OIL AND GAS EXPLORATION AND PRODUCTION.—

> The term "oil and gas exploration, production, processing or treatment operations or transmission facilities" means all field activities or operations associated with 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.*

Energy Policy Act of 2005, Pub. L. No. 109-58, § 323, 119 Stat. 594, 694 (2005) (emphasis added).

Based on the Energy Policy Act's amendment to the definition of oil and gas exploration, the Oil and Gas Petitioners filed with this court a "Motion to Dismiss Without Prejudice." In their motion, the Oil and Gas Petitioners argued that their petition was moot because revised Section 502(24) made clear that they cannot be required to obtain coverage under the General Permit for uncontaminated discharges from oil and gas construction sites. However, the "Oil and Gas Petitioners request[ed] that the dismissal be without prejudice because EPA has not yet taken a position as to the impact of the Energy Policy Act of 2005 on the permit requirement or this litigation, and the Oil and Gas Petitioners should be able to raise these claims if EPA were to interpret the Energy Policy Act of 2005 to . . . require permits for uncontaminated discharges from oil and gas sites. . . ."

Concerned about the propriety of a dismissal without prejudice, given that 33 U.S.C. § 1369(b)(1) requires petitions to be filed within 120 days of the Final Rule, we requested supplemental briefing. The EPA responded that based upon 33 U.S.C. § 1369(b)(1), the deadline for filing a petition challenging the General Permit passed in October 2004, and that a dismissal without prejudice was tantamount to a dismissal with prejudice because any future challenge by the Oil and Gas Petitioners would be untimely. Based on the EPA's

position that the Oil and Gas Petitioners could not challenge the terms of the General Permit at a later date, the Oil and Gas Petitioners requested this court to deny their Motion to Dismiss Without Prejudice, seeking instead resolution of their underlying petition. The EPA did not object to the Oil and Gas Petitioners' request that we deny its motion to dismiss. Accordingly, on October 6, 2005, this court denied the Oil and Gas Petitioners' motion to dismiss without prejudice, and directed the parties to complete the supplemental briefing previously ordered and stayed pending resolution on the motion to dismiss, and to also brief the newly raised issue of mootness. Having received and reviewed the parties' supplemental briefs, we now consider the Oil and Gas Petitioners' petition.

II.

In their petition, the Oil and Gas Petitioners challenged various aspects of the General Permit as applied to uncontaminated discharges. The Oil and Gas Petitioners do not object to the General Permit to the extent that it applies only to contaminated discharges, as defined by the EPA. Rather, the Oil and Gas Petitioners claim that as to uncontaminated discharges, the General Permit's definitions of "common plan" and "final stabilization" are so broad, ambiguous, and vague that the General Permit violates their rights to due process because they do not know if they need to apply for a General Permit for uncontaminated discharges. The Oil and Gas Petitioners also argued that the EPA acted arbitrarily and capriciously in establishing the terms of the General Permit related to uncontaminated discharges, without accounting for the differences between construction activities at general construction sites and at oil and gas sites. However, before we can address the merits of the Oil and Gas Petitioners' challenge, we must first determine whether the parties have standing to sue. *Texas Indep. Producers*, 410 F.3d at 970-71.

The CWA authorizes any "interested person" to obtain review of an EPA action in a Circuit Court. 33 U.S.C. § 1369(b)(1)(F). To qualify as an "interested person," at a minimum, a party must have Article III standing. *Texas Indep. Producers,* 410 F.3d at 971 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)). Generally, this requires a petitioner to "demonstrate an injury in fact; a causal link between the injury and the challenged action; and redressability through a favorable court decision." *Texas Indep. Producers*, 410 F.3d at 971 (citing *Lujan*, 504 U.S. at 561). Moreover, because the Oil and Gas Petitioners are organizations, to demonstrate standing, they must show that they represent members who have standing in their own right. *See Texas Indep. Producers*, 410 F.3d at 971.

In their original brief before this court, the Oil and Gas Petitioners made only passing reference to standing, merely stating that they have standing because their members are regulated under the General Permit. However, the Oil and Gas Petitioners also asserted that they were not required to obtain a permit for uncontaminated discharges. If true, that would mean that the Oil and Gas Petitioners' members would not be injured by the terms of the General Permit that they seek to challenge. In its supplemental briefing, the EPA agrees that if the Oil and Gas Petitioners are not subject to the NPDES permit requirements for storm water discharges from construction activities, then their challenges to the General Permit are no longer justiciable. Thus, before we can consider the Oil and Gas Petitioners' challenges to the terms of the General Permit, we must initially determine whether the Oil and Gas Petitioners are subject to the General Permit for uncontaminated discharges.

The Oil and Gas Petitioners maintain in their supplemental briefing that, following passage of the Energy Policy Act of 2005, they are definitively not subject to the General Permit for

uncontaminated discharges.[5] We agree. As noted above, the CWA expressly provides that:

> 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 storm water 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 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.

33 U.S.C. § 1342(l)(2) (emphasis added).

After the EPA issued its Deferral Rule purporting to regulate construction activities at oil and gas sites, Congress responded by passing the Energy Policy Act of 2005, which expressly addressed the issue, providing:

> The term "oil and gas exploration, production, processing or treatment operations or transmission facilities" means all field activities or operations associated with 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*

---

[5] The Oil and Gas Petitioners maintain that even prior to the passage of the Energy Policy Act of 2005, Section 402(1)(2) exempts them from the permit requirements of the CWA, but add that the Energy Policy Act of 2005 now resolves the issue beyond dispute.

> *activities or operations may be considered to be construction activities.*

Energy Policy Act of 2005, Pub. L. No. 109-58, § 323, 119 Stat. 594, 694 (2005) (emphasis added).

Given the broad definition of exempt activities for uncontaminated discharges and Congress's explicit clarification that the exemption applied even if those activities constitute construction activities, we conclude that the Oil and Gas Petitioners lack standing. Because the record establishes only that the Oil and Gas Petitioners represent members involved in oil and gas exploration and related activities and they challenge only uncontaminated discharges which are exempt from the permitting requirements, the Oil and Gas Petitioners cannot establish that the General Permit injured its members.

The EPA does not challenge the Oil and Gas Petitioners' analysis of the § 402(l)(2) exemption. In fact, notwithstanding this court's order directing the EPA to address whether the Energy Policy Act of 2005 exempts the Oil and Gas Petitioners from the permitting requirements of the CWA, the EPA failed to address that issue. That is especially troubling since the EPA correctly noted in its supplemental brief that "[a]n actual controversy must exist at all stages of the case, not merely at the time the case is filed." The EPA further recognized that this means that this "Court must determine whether some members of the Oil and Gas Petitioners are still injured by the terms of the General Permit following enactment of the Energy Policy Act of 2005 before resolving the merits of their petition." But then, rather than provide an analysis of the issue, much less take a position, the EPA instead stated that it "recognizes that the recently enacted Energy Policy Act of 2005 affects the NPDES permitting requirements applicable to oil and gas activities [and the] EPA intends to take into account

this new law in forthcoming rulemaking . . . ."[6]

On January 6, 2006, the EPA filed with this court as supplemental authority its proposed administrative action titled "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." 71 Fed.Reg. 894 (Jan. 6, 2006). "This proposed regulation would implement Congress' intention, in the Energy Policy Act of 2005, to exclude virtually all[7] oil and gas construction activities from regulation under the NPDES storm water program." 71 Fed.Reg. at 897. This raises the issue of ripeness. In determining whether a case is ripe for review, this court considers whether: (1) delayed review of an agency decision could cause hardship to the petitioner; (2) judicial intervention would inappropriately interfere with further administrative action; and (3) the court would benefit from further factual development of the issues presented. *Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726, 733 (1998). Applying these three factors, the Fifth Circuit concluded that the Oil and Gas Petitioners' challenge to the Deferral Rule was not ripe because the EPA

---

[6] In passing, the EPA also posits, without support, that since the Petitioners must obtain a permit for contaminated discharges, they have standing to challenge the terms of the General Permit. However, the Petitioners do not claim any injury flowing from the General Permit where contaminated discharges are involved. Rather, the Petitioners argue that the broad language of the General Permit, when applied to non-contaminated discharges, violates their due process rights and is arbitrary and capricious. To assess standing, then, we must ask whether the Petitioners are injured in the way they assert—not whether they would have standing to present a different claim.

[7] The only activities not exempt would be contaminated discharges. 71 Fed.Reg. at 897.

has specifically stated its intent to examine, during the Deferral Period, the issue of "how best to resolve questions posed by outside parties regarding section 402(l)(2) of the Clean Water Act . . . ." 413 F.3d at 483. Although the EPA had sought dismissal on ripeness grounds in the Fifth Circuit, in its supplemental briefing before this court, the EPA asserts that the Oil and Gas Petitioners' claim is ripe for review. We agree for several reasons.

First, as the EPA recognized, the Fifth Circuit's decision addressed only the EPA's rule deferring NPDES permitting deadlines for construction activities at small oil and gas sites. 413 F.3d at 481. Because those deadlines would not go into effect for a year, the Fifth Circuit reasoned that there is no immediacy for resolution, and thus no hardship to the petitioners. *Id.* at 484. In contrast, the permitting requirements for large construction activities are currently in force. 55 Fed.Reg. 47,990, 48,066 (Nov. 16, 1990) (adopting Phase I, and requiring NPDES permits for storm water discharges from construction activities involving five or more acres). *See Texas Indep. Producers*, 410 F.3d at 968. Moreover, the General Permit the Oil and Gas Petitioners seek to challenge applies to uncontaminated storm water discharges from both small and large construction activities. Thus, the immediacy lacking in the Fifth Circuit case is present here.

Second, withholding of judicial review of the Oil and Gas Petitioners' challenge presents a significant hardship to the Petitioners' members. The EPA itself acknowledges this hardship, explaining, "[w]ithholding court consideration of the Oil and Gas Petitioners' current challenge would likely preclude them from seeking judicial review of the General Permit in the future." This again contrasts with the Fifth Circuit decision in which no such hardship existed. Moreover, given the breadth of the statutory exemption, further factual development is unnecessary. Finally, while in some circumstances it would make sense to await final agency action, given

Congress's clear directive this is not such a case. The agency 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."[8] Energy Policy Act of 2005, Pub. L. No. 109-58, § 323, 119 Stat. 594, 694 (2005). *Cf. Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 174 (2001) (striking a regulation promulgated by the Corps because it exceeded the statutory authority granted it by Congress in the CWA). Therefore, given the limited circumstances before us, and because a refusal to consider their petition would cause substantial hardship to the petitioners, this case is ripe for review. However, as discussed above, our review discloses that the terms of the General Permit which the Oil and Gas Petitioners challenge do not apply to them. Therefore, because those terms do not injure any of their members, they lack standing.

III.

The Oil and Gas Petitioners sought review of the General Permit as applied to uncontaminated discharges. However, since filing their petition, Congress made clear that oil and gas construction activities undertaken pursuant to "field activities or operations associated with exploration, production, processing, or treatment operations, or transmission facilities," are exempt from the permitting requirements for uncontaminated discharges. The Oil and Gas Petitioners represent members seeking to challenge the permit requirements for uncontaminated discharges. But Congress made clear in the Energy Policy Act of 2005 that the EPA may not require permits for such discharges. Therefore, the Oil and Gas Petitioners cannot

---

[8] The proposed administrative action recognizes as much. 71 Fed.Reg. 894 (Jan. 6, 2006).

establish standing. Accordingly, we DISMISS this petition for lack of standing.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

IPAA Attachment 2

Ninth New Collegiate Dictionary

A Merriam-Webster®

MERRIAM-WEBSTER INC., *Publishers*
Springfield, Massachusetts, U.S.A.

A GENUINE MERRIAM-WEBSTER

The name *Webster* alone is no guarantee of excellence. It is used by a number of publishers and may serve mainly to mislead an unwary buyer.

A Merriam-Webster® is the registered trademark you should look for when you consider the purchase of dictionaries or other fine reference books. It carries the reputation of a company that has been publishing since 1831 and is your assurance of quality and authority.

Library of Congress Cataloging in Publication Data
Main entry under title:

Webster's ninth new collegiate dictionary.

Based on Webster's third new international dictionary.
Includes index.
1. English language—Dictionaries. I. Merriam-Webster Inc.
PE1628.W5638 1985 423 84-18979
ISBN 0-87779-508-8
ISBN 0-87779-509-6 (indexed)
ISBN 0-87779-510-X (deluxe)

Made in the United States of America

1819RMcN86

over·con·trol
over·cook
over·cool
over·count
over·crit·i·cal
over·cul·ti·va·tion
over·cure
over·dec·o·rate
over·dec·o·ra·tion
over·de·lib·er·ate
over·de·mand·ing
over·de·pen·dence
over·de·pen·dent
over·de·sign
over·dif·fer·en·ti·a·tion
over·di·rect·ed
over·dis·count
over·di·ver·si·ty
over·dra·mat·ic
over·dra·ma·tize
over·drink
over·dry
over·ea·ger
over·ea·ger·ness
over·ear·nest
over·ed·it
over·ed·u·cate
over·ed·u·ca·tion
over·elab·o·rate
over·elab·o·ra·tion
over·em·bel·lish
over·emote
over·emo·tion·al
over·em·pha·sis
over·em·pha·size
over·em·phat·ic
over·en·am·ored
over·en·cour·age
over·en·er·get·ic
over·en·gi·neer
over·en·rolled
over·en·ter·tained
over·en·thu·si·asm
over·en·thu·si·as·tic
over·equipped
over·es·ti·mate
over·es·ti·ma·tion
over·eval·u·a·tion
over·ex·ag·ger·ate
over·ex·ag·ger·a·tion
over·ex·cite
over·ex·er·cise
over·ex·ert
over·ex·er·tion
over·ex·pand
over·ex·pan·sion
over·ex·pec·ta·tion
over·ex·plain
over·ex·plic·it
over·ex·ploit
over·ex·ploi·ta·tion
over·ex·tract
over·ex·trac·tion
over·ex·trap·o·la·tion
over·ex·trav·a·gant
over·ex·u·ber·ant
over·fac·ile
over·fa·mil·iar
over·fa·mil·iar·i·ty
over·fas·tid·i·ous
over·fa·vor
over·fer·til·iza·tion
over·fer·tile
over·fo·cus
over·fond
over·ful·fill
over·fund
over·fussy
over·gen·er·al·iza·tion
over·gen·er·al·ize
over·gen·er·os·i·ty
over·gen·er·ous
over·gen·er·ous·ly
over·glam·or·ize
over·gov·ern
over·hasty
over·ho·mog·e·nize
over·hunt
over·hype
over·ide·al·is·tic
over·ide·al·ize
over·iden·ti·fi·ca·tion
over·iden·ti·fy
over·imag·i·na·tive
over·im·press
over·in·debt·ed·ness
over·in·dus·tri·al·iza·tion
over·in·dus·tri·al·ize
over·in·flate
over·in·fla·tion
over·in·form
over·in·ge·nious
over·in·ge·nu·ity
over·in·sis·tent
over·in·tel·lec·tu·al·iza·tion
over·in·tel·lec·tu·al·ize
over·in·tense
over·in·ten·si·ty
over·in·vest·ment
over·la·bor
over·lad·en
over·large
over·lav·ish
over·lend
over·length
over·length·en
over·light
over·lit·er·al
over·lit·er·ary
over·load
over·long
over·loud
over·lush
over·man·age
over·man·nered
over·ma·ture
over·ma·tu·ri·ty
over·med·i·cate
over·med·i·ca·tion
over·milk
over·mine
over·mix
over·mod·est
over·mod·est·ly
over·mus·cled
over·nice
over·nour·ish
over·nu·tri·tion
over·ob·vi·ous
over·op·er·ate
over·opin·ion·at·ed
over·op·ti·mism
over·op·ti·mist
over·op·ti·mis·tic
over·op·ti·mis·ti·cal·ly
over·or·ches·trate
over·or·ga·nize
over·or·na·ment
over·par·tic·u·lar
over·pay
over·pay·ment
over·ped·al
over·peo·ple
over·plan
over·plant
over·plot
over·po·tent
over·praise
over·pre·cise
over·pre·scribe
over·pre·scrip·tion
over·prize
over·pro·cess
over·pro·duce
over·pro·duc·tion
over·prom·ise
over·pro·tect
over·pro·tec·tion
over·pro·tec·tive
over·pump
over·rate
over·re·act
over·re·ac·tion
over·re·fined
over·re·fine·ment
over·reg·u·late
over·reg·u·la·tion
over·re·li·ance
over·re·port
over·re·spond
over·rich
over·rig·id
over·rouge
over·salt
over·san·guine
over·sat·u·rate
over·sat·u·ra·tion
over·sauce
over·scru·pu·lous
over·se·cre·tion
over·se·ri·ous
over·se·ri·ous·ly
over·ser·vice
over·ship·ment
over·smoke
over·so·lic·i·tous
over·so·phis·ti·cat·ed
over·spe·cial·iza·tion
over·spe·cial·ize
over·spec·u·late
over·spec·u·la·tion
over·sta·bil·i·ty
over·staff
over·stim·u·late
over·stim·u·la·tion
over·stock
over·strain
over·stretch
over·struc·tured
over·sub·tle
over·suds
over·sup·ply
over·sus·pi·cious
over·sweet
over·sweet·en
over·sweet·ness
over·swing
over·talk
over·talk·ative
over·thin
over·think
over·tight
over·tight·en
over·tip
over·tired
over·train
over·treat
over·treat·ment
over·use
over·uti·li·za·tion
over·uti·lize
over·vi·o·lent
over·viv·id
over·wa·ter
over·wind
over·with·hold
over·zeal·ous
over·zeal·ous·ness

over·achiev·er \ˌō-və-rə-ˈchē-vər\ *n* (1952) : one who achieves success over and above the standard or expected level esp. at an early age
over·act \ˌō-və-ˈrakt\ *vt* (1631) : to exaggerate in acting ~ *vi* **1** : to act more than is necessary **2** : to overact a part — **over·ac·tion** \-ˈrak-shən\ *n*
over·ac·tive \-ˈrak-tiv\ *adj* (1854) : excessively or abnormally active — **over·ac·tiv·i·ty** \-rak-ˈtiv-ət-ē\ *n*
over against *prep* (1611) : as opposed to : in contrast with
¹over·age \ˌō-və-ˈrāj\ *adj* [*²over* + *age*] (1886) **1** : too old to be useful **2** : older than is normal for one's position, function, or grade
²over·age \ˈō-v(ə-)rij\ *n* [*³over* + *-age*] (1909) : SURPLUS, EXCESS
¹over·all \ˌō-və-ˈrȯl\ *adv* (13c) **1** : as a whole : GENERALLY ⟨~, prices are still rising —*Forbes*⟩ **2** : from the extreme forward point to the extreme after point of a ship's deck including overhangs
²over·all \ˈō-və-ˌrȯl\ *n* (1815) **1** *pl* **a** *archaic* : loose protective trousers worn over regular clothes **b** : trousers of strong material usu. with a bib and shoulder straps **2** *chiefly Brit* : a loose-fitting protective smock worn over regular clothing
³over·all \ˌō-və-ˈrȯl, ˈō-və-ˌ\ *adj* (1876) **1** : including everything **2** : viewed as a whole : GENERAL
over·alled \ˈō-və-ˌrȯld\ *adj* (1908) : wearing overalls
over and above *prep* (15c) : in addition to : BESIDES
over and over *adv* (15c) : REPEATEDLY
over·arch·ing \ˌō-və-ˈrär-chiŋ\ *adj* (1720) **1** : forming an arch overhead **2** : dominating or embracing all else
over·arm \ˈō-və-ˌrärm\ *adj* (1864) **1** : OVERHAND **2** *of a swimming stroke* : made with the arm lifted out of the water and stretched forward over the shoulder to begin the stroke
over·awe \ˌō-və-ˈrȯ\ *vt* (1579) : to restrain or subdue by awe
¹over·bal·ance \ˌō-vər-ˈbal-ən(t)s\ *vt* (1608) **1** : OUTWEIGH **2** : to cause to lose balance
²over·bal·ance \ˈō-vər-ˌ\ *n* (1659) : something more than an equivalent
over·bear \ˌō-vər-ˈba(ə)r, -ˈbe(ə)r\ *vt* **-bore** \-ˈbō(ə)r, -ˈbȯ(ə)r\; **-borne** \-ˈbō(ə)rn, -ˈbȯ(ə)rn\ *also* **-born** \-ˈbȯ(ə)rn\; **-bear·ing** (1535) **1** : to bring down by superior weight or force : OVERWHELM **2 a** : to domineer over **b** : to surpass in importance or cogency : OUTWEIGH
over·bear·ing *adj* (1677) **1 a** : tending to overwhelm : OVERPOWERING **b** : decisively important : DOMINANT **2** : harshly and haughtily arrogant *syn* see PROUD — **over·bear·ing·ly** \-iŋ-lē\ *adv*
over·bid \ˌō-vər-ˈbid\ *vb* **-bid; -bid·ding** *vi* (1616) **1** : to bid in excess of value **2 a** : to bid more than the scoring capacity of a hand at cards **b** *Brit* : to make a higher bid than the preceding one ~ *vt* : to bid beyond or in excess of; *esp* : to bid more than the value of (one's hand at cards) — **over·bid** \ˈō-vər-ˌbid\ *n*
over·bite \ˈō-vər-ˌbīt\ *n* (1887) : the projection of the upper anterior teeth over the lower in the normal occlusal position of the jaws
¹over·blown \ˌō-vər-ˈblōn\ *adj* [*³blow*] (1616) : past the prime of bloom ⟨~ roses⟩
²overblown *adj* [*¹blow*] (1864) **1** : excessively large in girth : PORTLY **2** : INFLATED, PRETENTIOUS
over·board \ˈō-vər-ˌbō(ə)rd, -ˌbȯ(ə)rd\ *adv* (bef. 12c) **1** : over the side of a ship or boat into the water **2** : to extremes of enthusiasm **3** : into discard : ASIDE
over·book \ˌō-vər-ˈbu̇k\ *vt* (1903) : to issue reservations for (as an airplane flight) in excess of the space available ~ *vi* : to issue reservations in excess of the space available
over·bought \-ˈbȯt\ *adj* (1929) : not likely to show an immediate rise in price because of prior heavy buying and accompanying price rises ⟨an ~ market⟩
over·build \-ˈbild\ *vb* **-built** \-ˈbilt\; **-build·ing** *vt* (1601) : to build beyond the actual demand of ~ *vi* : to build houses or commercial developments in excess of demand
¹over·bur·den \-ˈbərd-ᵊn\ *vt* (1532) : to place an excessive burden on
²over·bur·den \ˈō-vər-ˌbərd-ᵊn\ *n* (1855) : material overlying a deposit of useful geological materials or bedrock
over·buy \ˌō-vər-ˈbī\ *vb* **-bought** \-ˈbȯt\; **-buy·ing** *vt* (1745) : to buy in excess of needs or demand ~ *vi* : to make purchases beyond one's needs or in excess of one's ability to pay
over·call \-ˈkȯl\ *vt* (ca. 1903) : to make a higher bid than (the previous bid or player) in a card game ~ *vi* : to bid over an opponent's bid in bridge when one's partner has not bid or doubled — **over·call** \ˈō-vərˌkȯl\ *n*
over·ca·pac·i·ty \ˌō-vər-kə-ˈpas-ət-ē, -ˈpas-tē\ *n* (1928) : excessive capacity for production or services in relation to demand
over·cap·i·tal·ize \-ˈkap-ət-ᵊl-ˌīz, -ˈkap-tᵊl-\ *vt* (1890) **1** : to put a nominal value on the capital of (a corporation) higher than actual cost or fair market value **2** : to capitalize beyond what the business or the profit-making prospects warrant — **over·cap·i·tal·iza·tion** \-ˌkap-ət-ᵊl-ə-ˈzā-shən, -ˌkap-tᵊl-\ *n*
¹over·cast *vt* **-cast; -cast·ing** (13c) **1** \ˌō-vər-ˈkast, ˈō-vər-ˌ\ : DARKEN, OVERSHADOW **2** \ˈō-vər-ˌ\ : to sew (raw edges of a seam) with long slanting widely spaced stitches to prevent raveling
²over·cast \ˈō-vər-ˌkast, ˌō-vər-ˈ\ *adj* (1625) : clouded over ⟨an ~ day⟩
³over·cast \ˈō-vər-ˌkast\ *n* (1686) : COVERING; *esp* : a covering of clouds over the sky
over·cast·ing \ˈō-vər-ˌkas-tiŋ\ *n* (1885) : the act of stitching raw edges of fabric to prevent raveling; *also* : the stitching so done
overcast stitch *n* (1891) : a small close embroidery stitch sometimes done over a foundation thread and used to form outlines
over·charge \ˌō-vər-ˈchärj\ *vt* (14c) **1** : to charge too much or too fully **2** : to fill too full **3** : EXAGGERATE, OVERDRAW ~ *vi* : to make an excessive charge — **over·charge** \ˈō-vər-ˌ\ *n*
over·cloud \ˌō-vər-ˈklau̇d\ *vt* (1592) : to overspread with clouds
over·coat \ˈō-vər-ˌkōt\ *n* (1802) **1** : a warm coat worn over indoor clothing **2** : a protective coating (as of paint)
over·coat·ing \-iŋ\ *n* (1950) : OVERCOAT 2
over·come \ˌō-vər-ˈkəm\ *vb* **-came** \-ˈkām\; **-come; -com·ing** [ME *overcomen*, fr. OE *ofercuman*, fr. *ofer* over + *cuman* to come] *vt* (bef. 12c) **1** : to get the better of : SURMOUNT ⟨~ difficulties⟩ **2** : OVERWHELM ~ *vi* : to gain the superiority : WIN *syn* see CONQUER — **over·com·er** *n*
over·com·mit \-kə-ˈmit\ *vt* (1951) : to commit excessively: as **a** : to obligate (as oneself) beyond the ability for fulfillment **b** : to allocate (resources) in excess of the capacity for replenishment — **over·com·mit·ment** \-mənt\ *n*
over·com·pen·sa·tion \-ˌkäm-pən-ˈsā-shən, -ˌpen-\ *n* (1912) : excessive compensation; *specif* : excessive reaction to a feeling of inferiority, guilt, or inadequacy leading to an exaggerated attempt to overcome the feeling — **over·com·pen·sate** \-ˈkäm-pən-ˌsāt\ *vb* — **over·com·pen·sa·to·ry** \-kəm-ˈpen(t)-sə-ˌtōr-ē, -ˌtȯr-\ *adj*
over·crowd \ˌō-vər-ˈkraud\ *vt* (1766) : to cause to be too crowded ~ *vi* : to crowd together too much
over·de·ter·mined \-di-ˈtər-mənd\ *adj* (1915) **1** : excessively determined **2** : having more than one determining psychological factor
over·de·vel·op \-di-ˈvel-əp\ *vt* (1869) : to develop excessively; *esp* : to subject (exposed photographic material) to a developing solution for excessive time or at excessive temperature, agitation, or concentration — **over·de·vel·op·ment** \-mənt\ *n*
over·do \ˌō-vər-ˈdü\ *vb* **-did** \-ˈdid\; **-done** \-ˈdən\; **-do·ing** \-ˈdü-iŋ\; **-does** \-ˈdəz\ *vt* (bef. 12c) **1 a** : to do in excess **b** : to use to excess **c** : EXAGGERATE **2** : to cook too long **3** : EXHAUST ~ *vi* : to go to extremes
over·dom·i·nance \-ˈdäm(-ə)-nən(t)s\ *n* (1947) : the property of having a heterozygote that produces a phenotype more extreme or better adapted than that of the homozygote — **over·dom·i·nant** \-nənt\ *adj*
¹over·dose \ˈō-vər-ˌdōs\ *n* (1700) : too great a dose (as of a therapeutic agent); *also* : a lethal or toxic amount (as of a drug)

Attachment 3
Examples of Stabilization Techniques During Oil and Natural Gas Construction Activities

Surge Road & Culvert Installation

Cut Side Stabilization

Diversionary Channel

Lease Road Wing Out

IOGCC NPDES Stormwater Discharge Work Group Report

On

Stormwater Guidance And EPA Identified Needs

Prepared By
Interstate Oil and Gas Compact Commission

For The

U.S. Department Of Energy
Contract No. DE-AP5-03SW54441

August 8, 2003

TABLE OF CONTENTS
IOGCC NPDES Storm Water Discharge Workgroup

LIST OF ACRONYMS

APD	Application for Permit to Drill
BLM	Bureau of Land Management
BMPs	Best Management Practices
CGE	Clearing, Grading and Excavation
CWA	Clean Water Act
DEQ	Department of Environmental Quality
EPA	Environmental Protection Agency
IOGCC	Interstate Oil and Gas Compact Commission
KCC	Kansas Corporation Commission
KDHE	Kansas Department of Health and Environment
KDWP	Kansas Department of Wildlife and Parks
K.S.A.	Kansas Statutes Annotated
KSHS	Kansas State Historical Society
NHPA	National Historic Preservation Act
NMOCD	New Mexico Oil Conservation Division
NOI	Notice of Intent
NPDES	National Pollutant Discharge Elimination System
OAC	Oklahoma Administrative Code
OAS	Oklahoma Archeological Society
OCD	Oil Conservation Division
OSU	Oklahoma State University
OWRB	Oklahoma Water Resources Board
RCRA	Resource Conservation and Recovery Act
RRC	Railroad Commission
SHPO	State Historic Preservation Office
SSEASC	Storm Water, Soil Erosion, and Sediment Control
SWPPP	Storm Water Pollution Prevention Plan
USF&W	United State Fish & Wildlife

EXECUTIVE SUMMARY

IOGCC NPDES STORM WATER DISCHARGE WORKGROUP

This working group has been tasked with determining how to best meet the Environmental Protection Agencies (EPA's) needs and develop appropriate documents. After thorough review of storm water issues and concerns, the members of this multi-state group find that existing state programs currently have statutory and regulatory authority and sufficiently address any concerns regarding the impact of clearing, grading and excavating (CGE) activities that take place at exploration and production sites. Therefore there is no need for EPA to attempt to solve a problem that does not exist.

Congress specifically exempted those who explore for domestic energy resources from obtaining storm water discharge permits under the Clean Water Act. There is no definition in the Act that states that CGE activities should be considered separate and apart from other exploration and production activities. It would be an expansion of EPA's jurisdiction to include CGE activities where there is no need shown for such expansion.

Our review has indicated a "storm water incidence" of less than 2 per state per year over the last three years. The additional costs on the industry are estimated to be in the hundreds of millions of dollars.[1] There is no need to place an additional burden on exploration and production companies in an arena that has not shown any historical need for increased regulation. Such exorbitant costs would negatively impact oil and gas exploration activities that are critically needed for increased domestic energy production.

In summary, all evidence reviewed by the workgroup indicates that the environmental impacts of storm water discharges from CGE activities are minimal, and are currently being well managed by one or more regulatory agencies within a state. Any expansion of jurisdiction by the EPA would impose a huge regulatory burden on this nation's oil and gas producers without benefit to the environment.

[1] *July 17, 2000 letter from Congressman Ernest Istook to Dr. John D. Graham, Administrator, Information and Regulatory Affairs, Office of Management and Budget, Executive Office of the President*

Guidelines for Storm Water Discharge Management
For
Oil and Gas Exploration and Production
Clearing, Grading, and Excavating Activities

The EPA has implemented a 2-year moratorium on requirements for permitting storm water discharges associated with the clearing, grading, and excavating (CGE) including archaeological, historic, and endangered species surveys of small (1 to 5 acre) exploration and production sites. After this moratorium, it is the EPA's position that a NPDES storm water discharge permit would be required for the CGE activity phase of essentially all oil and gas drilling activity. CGE activities associated with exploration and drilling are conducted in 33 states across a wide variety of geographic, environmental, and operational settings.

The DOE contract with the Interstate Oil and Gas Compact Commission (IOGCC) tasked the Storm Water Workgroup (Workgroup) (*Appendix I-- list of workgroup members*) to determine how to best meet EPA's needs regarding NPDES storm water management practices and to develop appropriate guidance based on existing state programs. It is the conclusion of our analysis that both delegated and existing state programs already sufficiently address these areas and additional federal guidelines are inappropriate and unnecessary.

The subsequent sections of this report address the issue of current state water protection storm water programs and examine the appropriateness of developing guidance documents based on those programs.

Existing State Storm Water Programs

The duration of the contract precluded the Workgroup from extensively reviewing existing state storm water programs or developing management practices that could be applied to all possible exploration and production sites in the United States. The Workgroup believes that developing specific storm water management practices would be impractical because of the diversity of site-specific factors that need to be considered. The Workgroup remains convinced the states are appropriately managing storm water discharges. The very low level of complaints and actual pollution problems associated with such discharges is evidence that the states are properly managing storm water.

The Workgroup evaluated the scope and effectiveness of existing state water protection programs by (1) employing a web-based search for state-based management practices for storm water, soil erosion, and sediment control (SSEASC), (2) surveying management practices for SSEASC in IOGCC member states and (3) surveying the extent of storm water incidents (*Appendix II--a table of number of incidents in states*) in Kansas, New Mexico, Oklahoma, and Texas, which comprise 45% of onshore drilling activity in the US during the last three years.

Existing State Guidelines for Storm water

Manuals and guidelines that describe management practices for storm water SSEASC are widespread among the states (*Appendix III--annotated listing of URL sites for state storm water management practices*). A single website (www.agc.org) lists soil erosion and sediment control manuals for 33 states. However, the majority of such manuals are developed by state environmental agencies and are designed for construction activities at sites, not specific to exploration and production. Significant differences exist between management practices designed to address storm water management issues at large, long-lived commercial, residential, or industrial construction sites and those designed for exploration and production CGE activities. Some of the differences are as follows:

- There are substantial differences between the oil and gas industry and the models used for the Phase II regulations – commercial/industrial/residential construction activities. These facilities buy their land, undertake extensive design efforts, construct over many months, and disturb the ground during construction. The permit is not a critical path item for their projects. Oil and gas exploration and production facilities access land through leases, construct over a few weeks, stabilize the area as quickly as possible, and must be ready when a leased drilling rig is delivered. Permit timing is crucial and delays could cause the loss of hundreds of thousands of dollars or the loss of an opportunity to drill altogether.
- Unlike commercial/industrial/residential construction, typical oil and gas activities do not disturb large contiguous areas that enhance storm water runoff and promote sediment erosion.
- Unlike the commercial/industrial/residential construction project, oil and gas exploration and development is highly uncertain and contingent on geological and market factors. A mineral owner or lessee does not necessarily know at the outset how many wells or how much development will be justified
- The majority of oil and gas activities located in western Oklahoma, Texas, Kansas, and New Mexico receive very low rainfall amounts and in some instances may not see any rainfall during the dry season. In addition, the flat topography of these areas significantly reduces the potential of storm water runoff from ever reaching waters of the U. S.
- Oil and gas activities are typically situated in rural areas (accessed by existing dirt roads) surrounded by private cultivated agriculture (exempt from the requirements) or ranch land.

Essentially, EPA would require the majority of oil and gas drilling activity to be subject to NPDES discharge requirements after the 2-year moratorium expires. Exploration and production locations are characterized by short CGE periods (5 to 15 days) and typically cover 1 to 2 acres for the individual well site, not including related roads and pipelines (see Compilation of State Responses to Williamsburg Meeting "Identified Needs" document included herein). The usefulness of requiring the same permitting standards for large, long-lived commercial, residential, or industrial construction projects is not economically justified or appropriate for the level of

environmental effects potentially posed by storm water discharge from small exploration and production sites.

Survey of State Program Elements Relevant to Storm Water

The IOGCC developed and submitted a questionnaire to all the IOGCC member states to solicit information regarding state program elements relevant to storm water management practices *(Appendix IV)*. Of the 27 member states that have primacy for NPDES permitting, approximately 11 have internal management practice documents for access roads and drill locations. Clearly, a wide variety of management practice manuals and guidelines are available in the oil and gas producing states.

This survey of member states revealed that current storm water regulations and practices are adequate. Four states reported having significant problems with storm water discharges from exploration and production activities prior to the implementation of additional regulations. Those states —Louisiana, West Virginia, Pennsylvania, and Kentucky—could be characterized as states having relatively high rainfall amounts. Twenty-six states affirmed that their oil and gas regulations, or regulations of other agencies within their states, are currently adequate to address EPA NPDES storm water-discharge concerns. Some states indicated they did not have specific rules requiring management practices for storm water discharge issues, but currently address the issues either through general "no pollution" clauses in their rules or through referral to another state agency with NPDES primacy.

Those states without NPDES primacy utilize broad enforcement powers regarding pollution associated with storm water discharges. Texas is typical of the producing states in clearly expressing a "No Pollution" clause in its environmental water protection statutes and statewide rules.

Survey of Storm Water Incidents

The Workgroup includes representatives of oil and gas regulatory agencies from four major oil and gas producing states—Kansas, New Mexico, Oklahoma, and Texas. In order to better determine if there is a significant pollution problem with storm water discharges, the Workgroup contacted district staff of the regulatory agencies in their respective states to determine the number of pollution incidences or complaints. From 2000 through 2003, the number of incidences in all 4 states averaged approximately 2 per state per year. Clearly, the number of incidents associated with storm water discharges is small when compared to the amount of exploration and production activity in these states.

Analysis

Management practices tailored for SSEASC at small (1 to 5 acres) CGE associated with exploration and production would be very difficult to apply nationally. A management practice for a single state or region within a state is a much more practical undertaking than such a plan for the entire nation. Currently, a wide variety of manuals are utilized by member states. Typically, the manuals provide guidance to cover various project stages including: pre-construction planning and activities,

construction, reclamation, re-vegetation, and maintenance. As always, site-specific conditions will determine which practices are best or most appropriate. Key factors that influence the suitability of a particular management practice include:

- drainage area
- distance to drainages
- soil conditions
- rainfall characteristics
- land use, and
- land and water sensitivity.

Storm water management issues of concern are largely associated with CGE at oil and gas drilling locations and access roads. Under EPA's current interpretation, most such activities would become subject to the new NPDES storm water requirements in March 2005, since the size of such sites typically exceed 1 acre. Storm water management activities associated with CGE at exploration and production sites are distinguished from other construction sites by the relatively short duration of CGE (average of 1 week) before the site is "stabilized" sufficiently for its purpose and use, and by the extreme time sensitivity of any permitting delays. Such delay and uncertainty in the permitting process would have a significant negative effect on exploration and production activity. Notwithstanding the efficacy or appropriateness of federal storm water requirements at drilling locations and access roads, the short duration of CGE would seem to obviate the need for additional protective measures. The extent to which such measures are necessary and appropriate is best determined based upon local and seasonal conditions.

A concern expressed by EPA with respect to storm water management associated with CGE at small exploration and production sites is focused on threatened and endangered species and historic and archeological site issues. The evaluation of and procedures associated with determining whether or not a drill site could impact threatened and endangered species or historic and archeological sites is both expensive and time consuming. Approvals would need to be obtained from two additional bureaucracies not otherwise involved in exploration and production permitting. The small and ephemeral footprint of exploration and production CGE does not support the need for extensive surveys for threatened and endangered species and historic and archeological sites without prior indication that such sites are located nearby. Endangered species or historic and archeological site requirements attached to permits are not necessary since such requirements are already mandated by state and federal laws.

CONCLUSIONS

The Workgroup has not found justification for requiring a storm water discharge permit for small exploration and production CGE. The documented number of storm water discharge complaints and actual pollution incidents is very small. Federal NPDES permitting requirements are onerous and inappropriate given the level of risk to the environment. The development of concise guidelines that cover exploration and production CGE is complicated by the wide variety of possible terrains and

conditions found at exploration and production sites across the United States. It is not feasible for a single standard to fit the diverse requirements for appropriate storm water discharge management throughout the United States. States have been managing discharges at large sites and there is no indication of a significant threat to the environment from storm water discharges by small exploration and production CGE.

The EPA did not adequately address the impact of such regulations on drilling activity. Neither did EPA conduct an adequate cost benefit analysis. All evidence indicates that the environmental impact of storm water discharges from CGE associated with exploration and production activity is minimal, whereas the increased regulatory burden would negatively impact critically needed domestic energy production.

NPDES PHASE II STORM WATER DISCHARGE WORKGROUP

Compilation of State Responses
To
Williamsburg Meeting "Identified Needs"

Disclaimer

Our response is made to the following questions notwithstanding the position of the NPDES Phase II Storm Water Discharge Workgroup believes that the NPDES storm water permitting requirements should not apply to exploration and production activities. First, the workgroup member states take this position based upon the contention that the exploration and production exemption contained in the Clean Water Act (33 USC Section 1342(l)(2)) should be applied generally to all NPDES permitting activities under the Clean Water Act (CWA). There should be no distinction drawn between point source NPDES permitting requirements and NPDES "construction permitting" under non-point source regulations. The Environmental Protection Agency asserts as its basis for regulation under NPDES Phase II that any construction activity, regardless of the Section 1342 (l)(2) exploration and production exemption, requires a NPDES storm water permit. Second, the workgroup contends that regardless of the controversy regarding the general CWA exploration and production exemption and NPDES construction permitting, the imposition of NPDES storm water permitting requirements on oil and gas construction activities is a needless exercise of federal authority in a field being appropriately administered by the states. State water quality standards and related means of monitoring the level of particulate matter in surface water should be used as the primary method of regulating the problem of storm water runoff. Additionally, the states are better equipped to determine the management practices available for a particular region and to control erosion caused by storm water runoff from exploration and production sites.

1. ***What is the amount of oil and gas activity (number of sites) that fall within the 1-5 acre limits?***

	KANSAS		NEW MEXICO		OKLAHOMA		TEXAS	
Calendar Year	Permits Issued	Wells Drilled	Permits Issued	Wells Drilled	Permits Issued	Wells Drilled	Permits Issued	Wells Drilled
2000	1872	1490	2098	1612	4501	1531	8949	6894
2001	2287	1697	2008	1340	4528	2348	9477	8080
2002	1716	1366	1476	782	4099	2339	7420	8271

NOTE: Numbers do not include workovers or re-completions

KANSAS

Kansas drilling operations that would be effected by expansion of the NPDES Storm Water permitting requirements can be evaluated as follows: In Eastern Kansas most drilling operations are for exploration targets of less than 2,000 feet in depth. In Western Kansas the drilling depths may be categorized as greater than 2,000 feet but generally less than 7,500 feet. In Eastern Kansas, as the wells are drilled with considerably smaller equipment, in terrain which requires only minimal construction operations prior to drilling, it is assumed that only approximately 20% of wells drilled within that area will fall within the 1 to 5 acre limit. In Western Kansas some operations may be able to limit construction activity below the 1 acre threshold. For analysis purposes it is assumed that all drilling operations in Western Kansas will exceed that threshold.

The table below shows the number of drilling permit applications filed and approved by the Kansas Corporation Commission Conservation Division over the past 3 years and the number of wells drilled during those years. The yearly average for the 3 year period is also shown.

	Drilling. Permits Issued	Wells Drilled *	Wells Drilled W. Kansas	Wells Drilled E. Kansas
2000	1872	1490	1014	476
2001	2287	1697	1170	527
2002	1716	1366	701	665
Totals	5875	4553	2885	1668
3 Year Avg.	1958	1518	962	556

*(Wells drilled is the number of drilling operations commenced as indicated by notice to the Division by operators with authorized permits.)

If all drilling operations in Western Kansas are assumed to exceed the 1 acre threshold and if 20% of Eastern Kansas drilling operations are expected to exceed the threshold, then the total number of sites in Kansas which would be affected by an expansion of NPDES permitting requirements would approach 1100 sites per year [962 sites in Western Kansas + (.20 x 556) 111 sites in Eastern = 1073 total sites]. This of course assumes that drilling activity will be consistent with the trend developed over the past 3 year period. It is important to note that permitting activity for drilling operations has increased by approximately 57% during the first five months of 2003 as compared to the same period of 2002. If the trends in number of wells drilled per permits issued holds and if the ratio of drilling in Eastern Kansas verses Western Kansas remains relatively consistent then the number of sites affected could rise to in excess of 1300 sites per year.

OKLAHOMA

The number of oil and gas wells drilled in Oklahoma during the past few years has varied from 2300-2350 (this figure does not include well workovers and re-completions). The total approved permits/intents to drill, including re-completions,

amended/additional zone completions, etc. has averaged 4376 per year for the last three years.

Building access roads and drilling pads/work areas for the new wells usually disturbs between 1 and 3 acres of land. The construction of gathering lines to connect to a pipeline may disturb an additional narrow corridor of land if a well is found to be productive. Shallow wells in relatively flat-lying areas that have a short access road are the only sites likely to disturb less than one acre. Most drill pads alone are at least 225' x 225', which exceeds the 1 acre threshold. Therefore a drill site consisting of a drill pad, pit, and road under 1 acre in size is almost nonexistent in Oklahoma. A few of the deepest wells (>10,000 feet), which include sites from which multiple directional wells will be drilled, and sites in rough or very remote terrain requiring long access roads, will disturb greater than 5 acres.

The pad preparation time and depth statistics listed in the Texas response would also generally apply to drilling operations in Oklahoma. More time is needed in remote/rugged terrain areas (such as the Arkoma basin in southeast Oklahoma, where the time and effort needed to build access roads and pads is much greater) and for large pads intended to support several wells. The timeframe for construction activity could be extended in the event of weather delays, equipment failure, etc.

NEW MEXICO

All oil and gas drill site pads disturb greater than 1 acre of land.

YEAR	APD	COMPLETED
1998	1464	1035
1999	1196	956
2000	2098	1612
2001	2008	1340
2002	1476	782

APD means application for permit to drill.

TEXAS

Essentially all oil and gas drill site pads disturb greater than 1 acre of land, especially when the average length of new road is considered. The pad size, pad preparation time, and drill time increases exponentially as the depth of the well increases. For well less than 10,000 ft deep, average pad preparation times are less than 1 week. A survey of district directors determined the following statistics with respect to average and range:

Attribute	Average	Range
Road length (miles)	.5	.25 to 2
Drill Pad (acres)		
Shallow (<4000 ft)	1	.3 to 1
Intermediate (4-10000 ft)	2	1 to 3

Deep (>10000 ft)	4	2 to 8.5
Pad Preparation Time (days)		
Shallow (<4000 ft)	2	1 to 5
Intermediate (4-10000 ft)	5	2 to 9
Deep (>10000 ft)	10	2 to 25
Drill Time (days)		
Shallow (<4000 ft)	7	1 to 14
Intermediate (4-10000 ft)	22	6 to 42
Deep (>10000 ft)	113	14 to 280

2. What are the current state requirements and who has regulatory oversight?

KANSAS

The Kansas Department of Health and Environment (KDHE), Division of Environment has regulatory oversight for NPDES permitting in Kansas. The Bureau of Water, Industrial Programs Section administers the storm water program and manages permits for storm water discharges associated with construction activities. The office of this section is located in Topeka, Kansas.

The principal requirement under this program is for the owner / operator to develop and implement a Storm Water Pollution Prevention plan.

As of January 9, 2003, owners or operators of any project or combination of projects which disturb one or more acres must apply for authorization to discharge under a general Kansas NPDES permit. Anyone who disturbs less than one acre may also require authorization to discharge storm water runoff when KDHE believes the water quality impact warrants consideration.

Application for the construction storm water permit is made by completing a Notice of Intent (NOI) form at least 60 days before starting construction. The permit fee for this general permit for storm water runoff from construction activity is $60 per year. The primary requirement of the general permit is for the permittee to develop and implement a Storm Water Pollution Prevention plan. When the soil disturbing activity is completed and final stabilization of the site is achieved, the permittee must notify KDHE to terminate the authorization to discharge.

As the Environmental Protection Agency (EPA) has postponed NPDES storm water runoff permit requirements associated with small construction activities for the oil and gas industry for two years, KDHE will not require storm water permit authorization to discharge storm water runoff from construction sites of 1 or more acres and less than 5 acres if such sites are found to be related to certain oil and gas activities. This delay in implementation of permitting requirements applies specifically to small construction activities associated with exploration, production, processing, and treatment operations or transmission facilities.

OKLAHOMA

The EPA asserts authority of the NPDES storm water program for Oklahoma for activities associated with the exploration, development, and production of oil, gas, coal bed methane or geothermal resources (see disclaimer section for the statutory exemption discussion). The Oklahoma Department of Environmental Quality (DEQ) has regulatory authority over discharges from refineries and gas plants as part of their delegated authority over commercial/industrial/residential activities.

NEW MEXICO

In New Mexico, EPA retains authority of the NPDES storm water program over activities associated with the exploration, development, and production of oil, gas, or geothermal resources. The Oil Conservation Division issues state permits for discharge of wastewater from oil and gas activities, however, permits for discharge of storm water are issued only for associated facilities not individual well sites. The New Mexico Environment Department reviews draft NPDES permits and issues Section 401 Water Quality Certifications of those draft permits and has regulatory authority over discharges not associated with the exploration, development, and production of oil, gas, or geothermal resources.

TEXAS

In Texas, the EPA retains authority of the NPDES storm water program over activities associated with the exploration, development, and production of oil, gas, or geothermal resources because the Railroad Commission has not obtained NPDES authorization. The Railroad Commission (RRC) issues state permits for discharge of wastewater from oil and gas activities, however, the Commission does not issue permits for discharge of storm water from construction activities unless it is contaminated with oil and gas waste. The Railroad Commission also reviews draft NPDES permits and issues Section 401 Water Quality Certifications of those draft permits. The Texas Commission of Environmental Quality has regulatory authority over discharges not associated with the exploration, development, and production of oil, gas, or geothermal resources.

3. ***What are the states' current management practices or BMPs and other legal instruments that deal with storm water?***

KANSAS

The Kansas Department of Health and Environment, Division of the Environment has not developed any specific best management practices (BMPs) for construction activities in Kansas. The KDHE storm water website does however provide Internet links to sites where assistance is available in evaluating and determining if any BMPs might be effective for a particular construction activity.

A link to the US Environmental Protection Agency's National Pollution Discharge Elimination System (NPDES) - Storm Water Policy and Guidance Document website lists a number of sources for BMP guidance. These include:

- *Storm Water Management for Construction Activities: Developing Pollution Prevention Plans and Best Management Practices*

  This manual provides detailed guidance on the development of storm water pollution prevention plans (SWPPP) and identification of best management practices (BMPs) for construction activities. It provides technical assistance and support for all construction activities subject to pollution prevention requirements established under NPDES permits for storm water point source discharges. It includes a set of worksheets, a checklist, and a sample SWPPP (EPA 832-R-92-005). Date Published: 09/01/1992

- *Storm Water Management for Construction Activities: Summary Guidance on Developing Pollution Prevention Plans and Best Management Practices*

  This summary provides guidance on the development of storm water pollution prevention plans (SWPPP) and the identification of best management practices (BMPs) for construction activities (EPA 832-R-92-001). Date Published: 10/01/1992

OKLAHOMA

The Corporation Commission, in cooperation with the Oklahoma Cooperative Extension Service and Oklahoma State University's Department of Biosystems and Agricultural Engineering, produced a 42 page illustrated booklet on "Pollution Prevention at Exploration and Production Sites in Oklahoma" (OSU Water Quality Series publication E-940). The booklet covers erosion prevention, streamside management, building and stabilizing access roads (including culverts, water bars, ditches, and other drainage issues), site re-vegetation, road and production site maintenance, and site and pit closure. The Commission also publishes a 13 page "Oilfield Pollution Prevention" brochure dealing with produced water disposal, spill and leak prevention, and the minimization and handling of exempt (drilling muds, frac and acidizing fluids, tank sludges) and non-exempt (Resource Conservation and Reclamation Act (RCRA)) wastes. The first publication is available through the Extension Service office in each Oklahoma County; both are available at the Commission's Central and four District Offices, and have been provided to oil and gas operators at Oklahoma Independent Petroleum Association and Mid-Continent Oil and Gas Association meetings.

The Commission has numerous pollution-prevention rules in Oklahoma Administrative Act (OAC) 165:10 regarding waste (exempt and non-exempt) and produced fluid handling and disposal, spill reporting and cleanup, drilling and testing, injection well practices, pit construction and closure, storm water, and well plugging. Those dealing with surface/storm water include:

- OAC 165:10-7-18 prohibits discharges of deleterious substances to streams or other surface waters without an EPA NPDES permit or a specific Commission order;
- A general pollution prevention prohibition requirement (OAC 165:10-7-5);
- OAC 165:10-7-7 allows the Commission to shut down a lease or facility if "subsurface or surface pollution is apparent";
- OAC 165:10-7-17deals with surface discharge of fluids. This rule requires that storm water collected on site may be discharged only if there is no hydrocarbon sheen or evidence of hydrocarbon contamination, and specifies maximum chloride levels; and
- OAC 165:10-7-6 states that the Commission can enact special field rules (in a watershed) when a governmental entity (e.g. a city) requests special protection of its water supplies.

In addition, the Commission enforces the Oklahoma Water Resource's Boards (OWRB) water quality standards (OAC 785:45) as required by Subsection B, 27A O.S. Supp 1998, Section 1-1-202, (enacted through Senate Bill 549, 1999). These water quality standards specify numerical and narrative criteria for many pollutants in order to protect beneficial uses assigned to Waters of the State. However, neither the Commission nor the OWRB have enacted explicit numerical standards for sediment, which have only the narrative anti-degradation requirements.

NEW MEXICO

New Mexico has developed a Pollution Prevention BMP manual that is available on the Oil Conservation Division web site. A section for construction practices is in a workgroup now and will be added shortly. BMPs are typically employed as an informal part of the Division practices for oil and gas sites and facilities.

A large portion of the land on which oil and gas development occurs is administered by the Bureau of Land Management (BLM). The BLM's Environmental Assessment Checklist and the BLM APD process are included herein as *Appendix V and VI*, respectively.

TEXAS

In Texas, BMPs are not typically employed as a formal or informal part of the RRC rules and practices for discharges. The RRC relies on formal statewide rules and occasionally on guidance documents that explain what is needed to comply with the rules and what options are available.

4. What legal authority do states have to enforce against storm water contamination?

KANSAS

The regulation of environmental impacts to surface and subsurface waters from oil and gas operations in Kansas is divided, by statute and agency agreement, between the Kansas Corporation Commission (KCC) and the Kansas Department of Health

and Environment (KDHE). As noted above the KDHE does operate the state primacy NPDES program and is the primary environmental regulatory agency within the State.

Kansas Statutes Annotated (K.S.A.) 74-623, however, gives the KCC exclusive jurisdiction to regulate "oil and gas activities" including:

> "(1) All practices involved in the exploration and gathering of oil and gas and the drilling, production, lease storage, treatment, abandonment and post abandonment of oil and gas wells;
> (2) underground porosity storage of natural gas, as defined in K.S.A. 2001 Supp. 55-1,115, and amendments thereto; and
> (3) prevention and cleanup of pollution of the soils and waters of the state from oil and gas activities described in (1) and (2)."

The KCC's Oil and Gas Conservation Division controls the oil and gas development process from the pre-drilling stage to abandonment. Each oil and gas contractor or operator must be licensed annually by the KCC pursuant to K.S.A. 55-155.

Before any well can be drilled, the operator must file with the KCC an application of "intent to drill". "No drilling shall be commenced until the authorized agents of the commission have approved the application. **The agent, in giving approval, shall determine that the proposed construction of the well will protect all usable waters.** Such approval shall include the amount of pipe necessary to protect all usable water, plugging requirements upon abandonment and such other requirements deemed appropriate by the commission."

K.S.A. 55-151(a). The KCC's approval will specify how the well should be constructed to protect usable waters.

K.S.A. 55-162 sets out the Commission's powers with respect to enforcement of its rules and regulations. The statute states in part, "if the commission finds that such person violated any provisions of this act or the rules and regulations adopted pursuant to this act, the commission shall take any appropriate action necessary to prevent pollution and protect water quality." K.S.A. 55-164 authorizes the KCC to impose a penalty of $10,000 per day for each day the violation continues.

K.S.A. 55-172 states that "It shall be unlawful for any person having possession or control of any well drilled or being drilled for oil or gas, either as contractor, owner, lessee, agent or manager, or in any other capacity, to permit salt water, oil or refuse from any such well to escape by overflow, seepage or otherwise from the vicinity of such well, and it shall be the duty of any such person to keep such salt water, oil or refuse safely confined in tanks, pipelines or ponds, so as to prevent the escape thereof." The term "refuse" is not defined in statute but the commission has proposed by regulation that "produced and non-produced" accumulated water from rainfall or otherwise be considered "refuse".

Kansas Administrative Regulation 82-3-603 works in tandem with K.S.A. 55-172 to require operators to notify the KCC within 24 hours of any escape of saltwater, oil or refuse not confined in a surface pond. Failure to report and clean up the environmental damage will result in fines up to $5,000 and loss of the operator's license.

In addition K.S.A. 55-180 (b) states in part, "the commission, on its own motion, may initiate an investigation into any pollution problem related to oil and gas activity."

It has not been determined that storms events which result in substantial rainfall on lands utilized in exploration have produced erosion or sedimentation which might impact waters of the State. In the event that this might change the KCC would appear to have substantial statutory authority to protect the state's waters.

OKLAHOMA

Operators can be fined or red-tagged (shut down) for violating Commission rules. Fines for illegal fluid/storm water discharge range from $1,000 to $5,000; in addition, a daily fine of $5,000 is levied for failure to comply with a red-tag (shut down) notice. Other penalties can be assessed if the Commission enacts special field rules under OAC 165:10-7-6, or chooses to take an operator before the Commission.

NEW MEXICO

Title 19 and 20 of the New Mexico Administrative Code provide the Oil Conservation Division (OCD) with the authority to regulate discharge associated with exploration and production activities. Pollution of surface or subsurface waters by contaminated storm water runoff would violate the provisions of 20.6.2.3104 NMAC (New Mexico Administrative Code) "*DISCHARGE PERMIT REQUIRED: Unless otherwise provided by this Part, no person shall cause or allow effluent or leachate to discharge so that it may move directly or indirectly into ground water unless he is discharging pursuant to a discharge permit issued by the secretary.*"

TEXAS

In Texas, Chapter 91 of the Texas Natural Resources Code and Chapter 26 of the Texas Water Code provide the RRC with the authority to regulate discharges associated with exploration and production activities. Statewide Rule 8 is the primary rule designed to protect surface and subsurface waters. A pollution of surface or subsurface waters by contaminated storm water runoff would violate a "no pollution" provision §8.(b)—*No person conducting activities subject to regulation by the Commission may cause or allow pollution of surface or subsurface water in the state.*

5. ***What is the definition of when the Clean Water Act exemption begins?***

KANSAS

Commission staff believe that certain exemptions granted to the exploration and production activities under specific sections of the Clean Water Act should also apply

with respect to permit requirements for the NPDES storm water program. Staff considers these exploration and production exemptions to begin when exploration and production activities begin. This would include all activities after a drilling permit is issued, including construction of access roads and drilling pads and the laying of production lead lines and the building/installation of production facilities. It would seem unrealistic to exclude actual drilling activities under these exemptions but include related activities, particularly construction activities, which are necessary for such drilling to take place.

OKLAHOMA

The Clean Water Act (Section 402 - 33 USC Section 1342 (l)(2)) specifically states that a permit shall not be required for uncontaminated discharges of storm water runoff from exploration, production, processing, or treatment operations, or transmission facilities. This is similar to section 3001(b)(2)(A) of the 1980 Amendments to the Resource Conservation and Recovery Act (RCRA), where Congress exempted several types of solid wastes from regulation as hazardous wastes including "drilling fluids, produced waters, and other wastes associated with the exploration, development, and production of crude oil or natural gas..". It is obvious from these exemptions that Congress intended to exempt ALL oil and gas industry exploration and production activities from typical EPA permits.

The Corporation Commission considers these exploration and production exemptions to begin when exploration and production activities commence. This would include all activities after a drilling permit is issued, including construction of access roads and drilling pads and the laying of pipelines and the building/installation of production facilities. It would also include certain exploration activities such as seismic exploration that occur before any specific drilling locations are even contemplated. We believe that these activities, including construction, are intrinsic to exploration, development, and production of oil, gas, coal bed methane, and geothermal resources. Exploration and drilling and production related construction activities, including storm water runoff that may occur during construction activities, would thus be covered by the exemption.

NEW MEXICO

New Mexico believes the exemption includes all construction activities necessary for the drilling and completion of a well, including access construction.

TEXAS

RRC staff believe the Clean Water Act exemption extends to cover construction activity associated with the exploration, development, and production of oil or gas or geothermal resources. We believe this construction activity is intrinsic to exploration, development, and production of oil, gas, and geothermal resources.

6. What are the BMP requirements for BLM lands and how much area does this encompass?

(Comment: With respect to the BLM "Gold Book" (see Appendix VII), it is referenced frequently for management practices on federal lands, in response to specific questions about the type of management practices used on federal lands. There are both procedural (e.g., plan submittal) and technical (management practice) requirements contained in the BLM "Gold Book." The procedural requirements are not relevant to development on private lands. As to the management practices set out in the "Gold Book," it is a technical question for industry operators as to how difficult the BLM Gold Book practices would be for industry to implement on private lands. Many operators would consider the BLM requirements too onerous on private lands.)

KANSAS

Commission staff checked with the Tulsa BLM office and was advised that such requirements were covered under a BLM manual titled the "Gold Book" for Exploration and Development (Surface Operating Standards for Exploration and Development). Staff was advised that BLM is in the process of revising this document.

In Kansas, lands under the control of BLM with respect to oil and gas operations are primarily located in the area of the Cimarron National Grasslands in southwestern Kansas along with some isolated federal and tribal lands. The Cimarron National Grasslands area covers approximately 108,000 acres in Morton and Stevens Counties. The total number of leases under BLM oversight in Kansas exceeds 450 total leases.

OKLAHOMA

The BLM "Gold Book" for Exploration and Development (Surface Operating Standards for Oil and Gas Exploration and Development) covers the requirements for BLM lands. BLM is revising this document; the new draft documents for the revised Gold Book, with best management practices for minimizing environmental effects of oil and gas operations, are due out March 2004.

The four-state area (New Mexico, Oklahoma, Kansas, and Texas) contains over 47 million acres of federal mineral estate and over 2 million acres of American Indian mineral estate. There are over 6,500 producing oil and gas leases in New Mexico, 2,600 in Oklahoma, 500 in Texas and 450 in Kansas. However, the BLM only has 12.8 million surface acres in New Mexico and 2,100 surface acres in Oklahoma.

NEW MEXICO

As stated above, a large portion of the land on which oil and gas development occurs is administered by the BLM. Attached is a map (see *Appendix VIII*) defining the extent of BLM and other federal lands. As noted previously, the BLM Environmental Assessment Checklist and application for permit to drill (APD) process are included herein as *Appendix V* and *VI*, respectively.

TEXAS

This question is best answered by another state with more extensive BLM lands.

7. What are the current state requirements for archaeological studies and endangered species?

KANSAS

Owner /Operators who are regulated under the permit requirements of the NPDES Storm water Program administrated by the Kansas Department of Health and Environment, Division of Environment are advised to check for potential archaeological / historical sites as well as threatened and endangered species. Applicants are advised to contact the Kansas State Historical Society (KSHS) and the Kansas Department of Wildlife and Parks (KDWP) early in the planning process.

The Kansas Department of Wildlife and Parks (KDWP) determines whether proposed construction projects will adversely affect threatened or endangered species in any way. If there are threatened or endangered species associated with the project site, KDWP may require the owner / operator to meet certain conditions prior to granting approval to the construction project.

OKLAHOMA

Archaeological Studies

The only state requirements are that site excavations on state land must be done by trained researchers who have been issued a permit from the State Archeologist, and that human remains and associated burial goods in unmarked graves on either state or privately owned land are protected from desecration and looting. However, there is no mandated review process.

Section 106 of the National Historic Preservation Act requires that federal agencies "consider the effects of their actions, and actions they fund, permit, or license, on archeological and historic properties, both listed and eligible to be listed". The Federal NPDES permitting program is subject to Section 106. For possible pre-historic archeological sites, there is generally a review by the Oklahoma Archaeological Survey (OAS); the State Historic Preservation Office (SHPO) considers whether or not the projects will affect historic properties that are listed on, or eligible for, the National Register of Historic Places. These properties can include buildings, structures, sites, districts, objects, and landscapes. Necessary tasks may include surveying a site prior to beginning any construction activities, halting work if an archeological site is uncovered, and notification to the OAS.

Staff has been advised that under Phase I (sites of 5 acres or more) the OAS has been taking 30 days to simply respond to an information/permit review request. For eighty percent of the permits they then require an archeological evaluation, which may take another 90 days. Under Phase II, the current level of 200 Oklahoma intents to drill per month may generate over 150 Notice of Intents (NOI) and/or permits per month being required under the NPDES permit process. Since neither OAS nor SHPO have

even begun to revamp their processes or hire the additional personnel needed to cope with a flood of new Phase II NPDES construction permits, even greater delays could be expected. In addition, an NHPA study often costs $3,000 - $5,000 (using the required approved archaeologists to conduct the site visit, complete the paperwork, and perform field work to obtain clearance of the site or coordinate on location changes), which would be a cost burden for many small operators.

Endangered Species

The federal NPDES permitting program also requires a review by the US Fish and Wildlife (USF&W) service when endangered species may be present, with the same types of delays and potential costs as listed above for the archaeological requirements. On non-federal projects, operators are required to use due diligence (varies by the type of species) to avoid a "take" of a listed species. This may include lengthy site survey prior to beginning any construction activities, halting work if an endangered species is found, and/or notification to the USF&W.

Both endangered species and archeological issues can have a detrimental impact on exploration and production activities. Leases are only available for drilling for a specified period of time. Weather and the availability of construction equipment, drilling equipment and crew availability must all be considered. Permit timing is crucial and delays could cause the loss of hundreds of thousands of dollars or the complete loss of an opportunity to drill. Since exploration and production is essential to producing states' economies, and is a strong component of the President's Energy Plan, the loss of potential production must be considered.

NEW MEXICO

The New Mexico Oil Conservation Division (NMOCD) does not have any requirements for archaeological studies and endangered species. However, the New Mexico Game and Fish Department enforces regulations for the protection of endangered species.

TEXAS

The Railroad Commission does not have any requirements for archaeological studies and endangered species. However, the Coastal Management Area is a critical area that requires special protective provisions including a consistency determination by the RRC that oil and gas activities will not affect water quality and notification of to the Texas Commission of Environmental Quality and Texas Parks and Wildlife upon receipt of applications for oil and gas permits. In addition, the Texas Historical Commission enforces regulations for the protection of archeological sites and the Texas Parks and Wildlife Department enforces regulations for the protection of endangered species. Further, because Texas currently does not have authorization for the NPDES program for activities associated with the exploration and production of oil and gas, the Federal NPDES permitting program would apply with respect to archaeological sites and endangered species.

8. What is the timeframe from the beginning of construction to the start of drilling operations/point of exemption?

KANSAS

Timeframes from the beginning of construction to the start of actual drilling operations vary in general with the depth of wells and the area of drilling operations and / or specific site conditions encountered. General pre-drilling construction timeframes for Kansas operations are:

Shallow depth wells	<2,000 feet.	.5 to 2 days
Moderate depth wells	>2,000 <5,000 feet	1 to 4 days
Deep wells	>5,000 feet	2 to 5 days

OKLAHOMA

As stated above, the Commission considers the *point of exemption* to be BEFORE the beginning of oil and gas drilling-related construction activities. From the beginning of construction until drilling can commence:

- For shallow depth wells (<4000 ft) OCC staff estimates 2-4 days for construction of the access road and drill pad;
- For intermediate depth wells (4000 to 10000 ft) and for wells in remote areas without a nearby county or other access road the estimate is 5-8 days;
- For deep wells (>10000 ft), and for wells in rugged terrain, preparation/construction time is often 10 days plus.

NEW MEXICO

Average pad preparation time is 1 to 2 days.

TEXAS

Average pad preparation times as outlined in the response to question 1 are:. For shallow depth wells (<4000 ft) average pad preparation time is 2 days; for intermediate depth wells (4000 to 10,000 ft) average pad preparation time is 5 days; for deep wells (>10,000 ft) average pad preparation time is 11 days.

APPENDIX I

WORKGROUP MEMBER
And
PARTICIPANTS LIST

NPDES Phase II Workgroup
Contact Information

MEMBERS

Robert Krehbiel, Workgroup Chair
Kansas Corporation Commissioner
Phone – (785) 271-3350
E-Mail – r.krehbiel@kcc.state.ks.us

Linda Guthrie
Administrative Aide to Chairman Denise Bode, Oklahoma Corporation Commission
Phone – (405) 521-2267
E-Mail – l.guthrie@occmail.occ.state.ok.us

Dr. Robert Lee
New Mexico Oil Conservation Commissioner and Director of Petroleum Recovery Research Center and Professor of Petroleum and Chemical Engineering-New Mexico Institute of Minerals and Technology
Phone – (505) 835-5408
E-mail – lee@prrc.nmt.edu

Steve Seni
Assistant Director of Environmental Services for the Texas Railroad Commission, Oil and Gas Division
Phone – (512) 475-4439
E-mail – steven.seni@rrc.state.tx.us

STATE WORKGROUP LIASIONS

Roger Anderson
Environmental Bureau Chief for Energy, Minerals & Natural Resources Department, New Mexico Oil Conservation Commission
Phone – (505) 476-3490
E-mail – rcanderson@state.nm.us

M. L. Korphage
Director, Oil and Gas Conservation Commission of the Kansas Corporation Commission
Phone – (316) 337-6200
E-Mail – m.korphage@kcc.state.ks.us

Bart Sims
Manager, Hazardous Waste & Waste Minimization, Texas Railroad Commission, Oil & Gas Division
Phone – (512) 463-5405
E-Mail – burt.sims@rrc.state.tx.us

Patricia Billingsley
Oil and Gas Specialist, Non-Point Source Pollution Coordinator, Pollution Abatement Department, Oklahoma Corporation Commission
Phone – (405) 522-2758
E-mail – p.billingsley@occmail.occ.state.ok.us

IOGCC LIASION

Mark Carl
Federal Projects Director for the Interstate Oil and Gas Compact Commission
Phone – (405) 525-3556x119
E-mail – mark.carl@iogcc.state.ok.us

FEDERAL LIASIONS

David Alleman
Project Manager, U.S. Department of Energy – National Environmental Technology Laboratory
Phone (918) 699-2057
E-Mail – david.alleman@npto.doe.gov

Benita Best-Wong
Chief of the Municipal Branch at the U.S. Environmental Protection Agency Headquarters
Phone – (202) 564-0612
E-mail – best-wong.benita@epa.gov

APPENDIX II

STORM WATER INCIDENT AVERAGE For TEXAS, NEW MEXICO, OKLAHOMA AND KANSAS FROM 2000-2002

APPENDIX II

THREE YEAR SUMMARY OF STORM WATER INCIDENTS For WORKGROUP MEMBER STATES		
State	No. of CGE Storm Water Incidents (2000 thru 2002)	No. of Wells Drilled (2000 thru 2002)
Kansas	3	4553
New Mexico	0	3734
Oklahoma	15	6218
Texas	5	23245
Three Year Total =	23	37750
Three Year Annual Average per State	**1.6**	**9438**

Note: CGE = Construction, Grading, and Excavation

APPENDIX III

WEBSITE REFERENCES BY IOGCC MEMBER STATES

EROSION AND SEDIMENTATION CONTROL AT E&P CONSTRUCTION SITES
REFERENCES AVAILABLE ON THE INTERNET

U.S. Environmental Protection Agency		
Guidance Document	**Web Page URL**	**Comments**
US EPA, "National Menu of Best Management Practices for NPDES Storm Water Phase II Downloadable Files,-" Construction Site Storm Water Runoff Control"	http://cfpub.epa.gov/npdes/stormwater/menuofbmps/bmp_files.cfm	
US EPA, "Sediment and Erosion Control; An Inventory of Current Practices," U.S. Environmental Protection Agency Publication W-278 (April 20, 1990)	http://www.epa.gov/npdes/pubs/owm0192.pdf	
US EPA, "Storm Water Management For Construction Activities, Developing Pollution Prevention Plans and Best Management Practices," U.S. Environmental Protection Agency Publication EPA-832-R-92-005 (September 1992)	http://www.epa.gov/npdes/pubs/contents_conguide.pdf	
Kearley, Gene, and McCallister, Lawrence, "Recommended Practices Manual – A Guideline for Maintenance and Service of Unpaved Roads," Choctawhatchee, Pea and Yellow Rivers Watershed Management Authority and Polyengineering, Inc.(February 2000)	http://www.epa.gov/nps/unpavedroads.html	

Interstate Oil and Gas Compact Commission Member States and Associate States			
Member States:			
	Guidance Document(s)	**Web Page URL**	**Comments**
Alabama	Alabama Soil and Water Conservation Committee, "Alabama Handbook for Erosion Control, Sediment Control, and Stormwater Management on Construction Sites and Urban Areas" (July 2002)	http://swcc.state.al.us/erosion_handbook.htm	
Alaska		http://www.dog.dnr.state.ak.us/oil/ http://www.state.ak.us/local/akpages/ENV.CONSERV/dspar/dec_dspr.htm http://www.state.ak.us/local/akpages/ADMIN/ogc/homeogc.htm http://www.akrrt.org/	EPA has NPDES authority.
Arizona			Links to EPA guidance.
Arkansas			
California	State of California, Department of Transportation, "Construction Site Best Management Practices (BMPs) Manual," (March 2003)	http://www.dot.ca.gov/hq/construc/stormwater/CSBMPM_303_Final.pdf	

Nebraska			
Nevada	Nevada Division of Environmental Protection, "BMP Fact Sheets."	http://ndep.nv.gov/bwpc/bmp_fac02.pdf	
New Mexico	New Mexico Oil Conservation Division Website	http://www.emnrd.state.nm.us/ocd/ (Click on "Publications", then click on "Pollution Prevention Best Management Practices")	
New York	New York State Department of Environmental Conservation, "New York State Stormwater Management Design Manual." (Note: This manual is cited by the DEC as a resource for construction stormwater control, but emphasizes urban stormwater control in developments.)	http://www.dec.state.ny.us/website/dow/swmanual/swmanual.html Also, see http://www.dec.state.ny.us/website/dow/toolbox/swguid.html. http://www.dec.state.ny.us/website/dow/mainpage.htm#top http://www.cwp.org/croton_0702.htm http://www.ecarcenter.org/ny/ny-stormwater.htm http://www.history.rochester.edu/class/storm/storm.html http://www.sara-lake.org/ul/links.htm http://www.dot.state.ny.us/eab/epm.html#chap4-3 http://www.oswego.edu/bioesc363/Links.htm http://www.gflrpc.org/Cayuga%20Lake/RPP/caystormwaterregs.htm	
North Dakota	North Dakota Department of Health Division of Water Quality, "A Guide to Temporary Erosion-Control Measures for Contractors, Designers and Inspectors" (June 2001)	http://www.health.state.nd.us/wq/WasteWater/pubs/BMPManual.pdf	North Dakota also links to EPA guidance.
Ohio		www.dnr.state.oh.us/news/mar99/nps.html http://onlinedocs.andersonpublishing.com/oh/lpExt.dll/PORC/8808/8b67/8b88?f=templates&fn=document-frame.htm&2.0 www.epa.state.oh.us/dsw/permits/final_constr_GP.html www.epa.state.oh.us/dsw/permits/npdeslist.html www.dnr.state.oh.us/news/mar00/npsgrants-list.htm	

Oklahoma	Oklahoma Cooperative Extension Service, Oklahoma State University, and Oklahoma Corporation Commission, "Pollution Prevention at Exploration and Production Sites in Oklahoma: Best Management Practices for Prevention and Control of Erosion and Pollution," Water Quality Series E-940 (April 2002) City of Oklahoma Public Works Department, "Best Management/Practices Manual for the Storm Water Quality Management Department" (April 2000)	http://pearl.agcomm.okstate.edu/e940/e-940.pdf http://www.ci.okc.ok.us/pw/index1.html	
Pennsylvania	"Oil and Gas Operator's Manual," (December 2001) and "Interim Policy for NPDES Permits for Stormwater Discharges Associated with Construction Activities at Oil and Gas Wells," (April 12, 2003) From this web page, select "Policies and Manuals" to access these documents.	http://www.dep.state.pa.us/dep/deputate/minres/oilgas/oilgas.htm http://www.dep.state.pa.us/eps/default.asp?P=fldr200149e0051190%5Cfldr200149e10561a8%5Cfldr20026f8082801d http://www.dep.state.pa.us/eps/default.asp?P=fldr200149e0051190%5Cfldr200149e32221af%5Cfldr20027qa192500b http://www.pacode.com/secure/data/025/chapter78/s78.53.html http://www.pacode.com/secure/data/025/chapter102/chap102toc.html http://www.dep.state.pa.us/eps/docs/cab200149b1126000/fldr200149e0051190/fldr200149e10561a8/doc20033aa5228013/550-2100-008.pdf	
South Dakota		http://www.state.sd.us/denr/DES/surfacewater/stormcon.htm http://www.state.sd.us/denr/DES/Mining/mineprg.htm	
Texas	Texas Commission on Environmental Quality and Texas Soil and Waster Conservation Board, "Texas Nonpoint Source Pollution Assessment Report and Management Program, Chapter 7: Best	http://www.tnrcc.state.tx.us/admin/topdoc/sfr/068-99/	

	Activities November 2002" Oregon Department of Environmental Quality, "Recommended Best Management Practices for Storm Water Discharges."	http://www.deq.state.or.us/wq/wqpermit/StormWaterBMPs.pdf	additional guidance (see Section 3, Additional Resources). This guidance is for industrial activities, but contains guidelines useful for E&P construction sites.
South Carolina			
Washington	Washington State Department of Ecology Water Quality Program, "Stormwater Management Manual for Western Washington," Volume II: "Construction Stormwater Pollution Prevention" Publication No. 99-12 (A revised portion of Publication No. 91-75) (August 2001)	http://www.ecy.wa.gov/programs/wq/stormwater/manual.html	

Other Resources			
Organization	**Guidance Document**	**Web Site URL**	**Comments**
iCivilEngineer.com,	"Erosion Control Pictorial Dictionary" (Note: This web site provides additional erosion control information.)	http://www.icivilengineer.com/Geotechnical_Engineering/Engineering_Geology/Soil_Erosion_Control/	
Associated General Contractors of America	"Soil Erosion & Sediment Control Manuals for Contractors: A List of Online Resources," (May 2002)	http://ndep.nv.gov/bwpc/bmp02.pdf	
Stormwater Manager's Resource Center	(Offers the Watershed Protection Library, which compiles bibliographic information and summaries on more than 600 various stormwater references.)	http://www.stormwatercenter.net/	
DBSP, Inc.	A resource site apparently sponsored by several eastern and Midwestern states. This site provides useful Phase II NPDES documents and links.	http://www.asist.net/	

Note: The web sites listed above were found by Internet search. Also, each IOGCC member state's and associate member state's web site was searched for available guidance documents. Both oil and gas regulatory agency and environmental regulatory agency sites were searched.

APPENDIX IV

WORKGROUP STORM WATER QUESTIONNAIRE SUMMARY SHEET

NPDES STORM WATER DISCHARGE QUESTIONNAIRE RESULTS

For

OIL AND GAS EXPLORATION AND PRODUCTION ACTIVITIES

STATE	STATE OIL & GAS CONTACT	PRIMACY	PRIMACY AGENCY	CONSTRUCTION, GRADING & EXCAVATION DISCHARGE PROBLEMS	ADEQUATE STATUTORY OR REGULATORY AUTHORITY *
Alabama	Nick Tew	Yes	AL DEM	No	Yes
Alaska	Cammy Taylor	No	N/A	No	Yes
Arizona	Larry Fellows	Yes		No	Yes
Arkansas	Grant Black	Yes	AR DEQ	No	No****
California	Ken Henderson	Yes	SWRCB	No	Yes
Colorado	Richard Griebling				
Florida	Walter Schmidt	Yes	FL DEP (Less Class 2)	No	Yes
Georgia (A)	William McLemore				
Idaho (A)	Jim Brady	No	N/A	No	Yes
Illinois	Larry Bengal	Yes	Ill. EPA	No	Yes
Indiana	Mike Nicholaus	Yes	IN DEM	No	No****
Kansas	M. L. Korphage	Yes	KS Dept. Of Hlh & Env.	Rarely	Yes**
Kentucky	Rick Bender	Yes	Div. of Water	Yes***	Yes
Louisiana	Jim Welsh	Yes	LA DEQ	Yes***	Yes
Maryland	Edmon Larrimore	Yes	Maryland DEQ	No	Yes
Michigan	Hal Fitch	Yes	MI DEQ - Water Div.	No	Yes
Mississippi	Walter Boone	Yes	MS DEQ	No	Yes
Missouri (A)	Mimi Garstang	Yes	DNR-WPSC-WPCP	No	No****
Montana	Tom Richmond	Yes	MT DEQ	No	No****
Nebraska	Bill Sydow	Yes	NE DEQ	No	Yes
Nevada	John Snow				
New Mexico	Lori Wrotenbery	No	N/A	No	Yes
New York	Bradley Field	Yes	DEC - Div. of Water	No	Yes
North Carolina (A)	Charles Gardner				
North Dakota	Lynn Helms	Yes	ND Dept. of Health	No	Yes
Ohio	Michael Sponsler	Yes	OH EPA	No	No****
Oklahoma	Larry Fiddler	No	OK DEQ (except O&G)	No	Yes
Oregon (A)	Robert Houston	Yes	OR DEQ	No	Yes
Pennsylvania	Jim Erb	Yes	PA DEP	Yes***	Yes
South Carolina (A)	Kendal Taylor				
South Dakota	Fred Steece	Yes	Surf. Wtr. Qual. Prog.	No	Yes
Tennessee	Michael Burton	Yes	Wtr. Poll. & Control	No	Yes
Texas	Leslie Savage	No	TCEQ	No	Yes
Utah	Lowell Braxton	Yes	UT Div. of Water Qual.	No	Yes
Virginia	Bob Wilson	Yes	VA DEQ	No	Yes
Washington (A)	Ron Teissere				
West Virginia	James Martin	Yes	DEP - Div. of Wtr. Res.	Yes*** (If no BMP's)	Yes
Wyoming	Don Likwartz	Yes	DEQ	No	Yes

* - Statutory and regulatory authority resides in a minimum of one, and typically multiple state and federal agencies

** - In addition to existing KDHE regulations, adequate statutory authority exists to allow regulation of storm water discharge by the Oil and Gas Conservation Division of the KCC. KCC regulations specific to erosion and sedimentation have not been promulgated, but could be if such erosion and sedimentation from oil and gas operations were found to effect fresh and usable waters.

*** - State answering yes indicated that there would be erosional problems if they did not have any guidance or regulations to prevent them

**** - States answering "No" indicated that regulations and guidance resided within another state agency that has NPDES primacy.

NOTE: States without information included under any column did not respond to the questionnaire

ENVIRONMENTAL ASSESSMENT CHECKLIST

EA NUMBER:NM-080-2003- LEASE NUMBER: PREPARER:Barry Hunt	ACTION TYPE: PROJECT NAME: APPLICANT:	DATE TO MINERALS: DATE TO MULTI: DATE TO RANGE:

RESOURCE / ACTIVITY	NOT PRESENT	NOT AFFECTED	NO SIG. AFFECT	**MAY BE AFFECTED	REVIEWER SURNAME	DATE
Air Quality*						
Floodplains*						
Water Quality Drinking/Ground*						
Soils/Watershed					SOIL CONSERVATIONIST	
Vegetation						
Livestock Grazing					RANGE CONSERVATIONIST	
Fire Management					FIRE CONTROL OFFICER	
Wastes, Hazardous or Solid*						
Prime or Unique Farmlands*						
Lands/Realty, ROW						
Access/Transportation					REALTY SPECIALIST	
Fluid Minerals					PETROLEUM ENGINEER	
Mineral Materials					GEOLOGIST	
Non-Energy Materials					MINING ENGINEER	
Federally Threatened or Endangered Species*				*1 | *2		
USFWS Concurrence				YES| NO		
Wetlands/Riparian Zones						
Special Status Species					WILDLIFE BIOLOGIST	
Wildlife Habitat						
Native American Religious Concerns*						
Cultural Resources*					ARCHAEOLOGIST	
Areas of Critical Environmental Concern*						
Wild/Scenic Rivers*						
Wilderness*						
Cave/Karst Resources						
Outdoor Recreation					OUTDOOR RECREATION PLANNER	
Visual Resources						

* "Critical Element" — must be addressed in all NEPA documents.

** "Affected Element" — must be addressed in the attached EA. *1 May Affect T&E, Not Likely to be Adversely Affected *2 May Affect T&E, Likely to be Adversely Affected

APPENDIX VI

BLM APD PROCESS
(CARLSBAD FIELD OFFICE)

BLM APD PROCESS (Carlsbad Field Office)

1. APD is received and recorded.

2. APD is assigned to a BLM field specialist for the area where the well or production site is to be drilled or located.

   The specialist becomes the lead person for this APD. Duties include preparing an Environmental Analysis Document, making a field trip to anticipated site, taking photos or field notes, noting any possible issues. For Example, if proposed site is located in proximity of a watercourse, playa, etc. then the field inspector may recommend that the location be moved/changed. Other examples of mitigation measures might include recommending berming, fencing, etc.

3. The APD is then routed through a multi-disciplinary team using an Environmental Assessment Checklist (attached). There is a specialist assigned to each topic or group of topics on the checklist to confirm the field specialist's findings and/or to add additional conditions to the permit.

4. Once the APD is completed, then it is approved by a BLM manager.

APPENDIX VII

BLM BMP GOLD BOOK

Patricia: Here is the BLM Gold Book for Oil and Gas Exploration and Development.

Return to the Operating Requirements Menu

Gold Book Cover

Surface Operating Standards for Oil and Gas Exploration and Development "Gold Book"

CONTENTS

LIST OF FIGURES/PHOTOGRAPHS

Figures
Page

INTRODUCTION

Federally owned oil and gas resources are located on lands administered by the Bureau of Land Management (BLM), the Forest Service (FS), other Federal Surface Management Agencies (SMAs), and on lands with non-Federal surface owner (split estate lands). Federal oil/gas lease operations are managed by the BLM in cooperation with the appropriate SMA or surface owner. On National Forest System lands, the FS has approval authority for the surface use portion of the Federal oil/gas operation.

Maps of Federal Jurisdiction:

Maps of the BLM State Offices and Regional Forest Service Offices are shown on page 45. The addresses and telephone numbers are also listed on page 45.

Purpose of Brochure

This brochure has been developed to aid the operator in permit approval and conduct of oil and gas operations on federal lands, from exploration to development and production, to abandonment. Information is provided for preparation of the surface use and drilling programs. This brochure also will prove useful in guiding oil and gas operators on Indian lands. However, early coordination

with the BLM, and appropriate Bureau of Indian Affairs agency office is encouraged as situations vary by reservation or agency. This brochure is intended to give the operator general informational guidance on compliance with the operating requirements given in 43 CFR 3000, 36 CFR 228 E and any Onshore Oil and Gas Orders or Notice to Lessees (NTLs) which have, or will be, promulgated or issued. For a more detailed discussion of specific procedures and requirements, the reader is directed to the Regulations, Onshore Orders, NTLs, and other agency direction currently in effect.

Every operation authorized under a federal oil and gas lease should conform to Bureau and Forest Service standards and reflect the relevant site specific conditions. Knowledge of the BLM Resource Management Plans and FS Forest Plans, as well as agency operational standards, procedures and environmental protection requirements, will help an operator meet these standards.

Surface Management Agency

The lease will indicate whether the SMA is the BLM, FS or some other agency. When this information is not provided in the lease, the lessee should contact the BLM to determine the SMA involved.

Development on Privately Owned Surface

Where the surface is privately owned, the operator is responsible for reaching an agreement with the private surface owner. The agreement should set forth the requirements for the protection of surface resources and/or damages in lieu thereof. The BLM may request submission of the private agreement in areas where the surface of federal or Indian-owned lands in proximity to the proposed well site or access road would be significantly affected by actions on the private surface. If the agreement is not adequate to protect adjacent federal or Indian lands, the SMA may require additional protective measures. The SMA will not require construction standards or mitigation measures more stringent than those otherwise provided by applicable agency standards or plans. Each Application for Permit to Drill (APD) or application to conduct other surface disturbing activities shall contain the name, address, and, if known, telephone number of the private surface owner. The BLM shall invite the surface owner to participate in any onsite inspection that is held. In the absence of any agreement, the authorized officer may permit the operations provided the operator has complied with the provisions of the law and Federal regulations.

The operator is responsible for making access arrangements with the private surface owner prior to entry upon the lands for the purposes of surveying and staking of the well site location and/or access road. The operator may be required to obtain any necessary cultural resource or threatened and endangered species clearances. Any necessary inventories will be undertaken only with the consent of the private surface owner. However, if the private surface owner objects to either an inventory or any necessary mitigation, a written statement to that effect should be obtained from the surface owner. In any event, documentation of the reasons for the lack of survey and mitigation will be submitted by the operator to the BLM or the involved SMA. The operator should be aware that inability to obtain permission to conduct a survey when required or to perform necessary mitigation does not relieve the SMA or BLM from its responsibilities as required by the National Environmental Policy Act (NEPA), the National Historic Preservation Act or the Endangered Species Act. The SMA must still prepare any necessary environmental document and initiate any necessary consultation with appropriate state or federal agencies. Operators should be aware of the potential for delays in project approval if extended consultation is required.

Filing Plans

Onshore Oil and Gas Order No. 1 describes the procedure for filing of either an Application for Permit to Drill (APD) or a Notice of Staking (NOS) followed by an APD. Early contact with the BLM and the SMA will expedite approval of the APD. This contact should be made prior to commitment of dates, equipment, access route acquisition and preparation of the APD.

Each APD must include a drilling plan and a surface use plan of operations. No operations are allowed without an approved APD. Request for changes from the approved APD must be submitted to the BLM.

Environmental Analysis

Upon receipt of a proposal for action, the BLM or SMA will conduct an environmental analysis and prepare an environmental document in compliance with the requirements of the NEPA and the regulations promulgated by the Council on Environmental Quality. The timing of the approval of the proposed action may be dependent upon the complexity of the analysis and the documentation required.

Onsite Inspection

An onsite predrill inspection may be conducted with the operator to identify resource protection concerns and requirements. Prior to, or in conjunction with, the onsite inspection, the SMA will advise the operator if any special inventories or studies are required, such as for cultural resources or threatened and endangered species.

Abandonment

All areas no longer needed for operations are to be reclaimed. All wells determined to be no longer productive or useful are to be properly plugged and abandoned. The BLM will not approve final abandonment until all terms and conditions have been met to the satisfaction of the BLM and the SMA.

Constraints

Constraints may be imposed on the location or timing of exploration, drilling or other operations. Constraints may result from lease stipulations or the SMA's review of the proposed operations. When consultation with the State Historic Preservation Office and/or the U.S. Fish and Wildlife Service is required, the time needed for APD review may be extended and may result in constraints on operations.

Other Federal, State, or Local Permits or Authorizations

A permit or authorization from the BLM or SMA will be required unless otherwise exempted by order or NTL for on-lease uses such as disposal of produced water, sand or gravel use, gas flaring, etc. Off-lease uses will require a permit or authorization by the SMA. All facilities on the lease owned by parties other than the operator also require a permit or authorization by the SMA.

Other Authorizations - BLM and SMA approval of an APD does not relieve the operator from obtaining any other authorizations required for drilling or subsequent operations. This includes requirements of other federal and state or local authorities.

CHAPTER 1
GEOPHYSICAL OPERATIONS

Introduction

Geophysical operations may be conducted on most federal lands by bonded geophysical operators, regardless of whether the federal lands are leased.

Prior to conducting operations, the operator must contact the SMA. With prior approval, lessees may conduct geophysical operations on their lease as a lease right.

BLM Requirements

The responsibilities for geophysical operations on public lands are as follows:

Geophysical Operator

An operator is required to file with the BLM authorized officer a "Notice of Intent to Conduct Oil and Gas Exploration Operations" (Form 3040-1) and be apprised of practices and procedures to be followed prior to commencing operations on BLM administered lands. The "Notice of Intent" shall include a map showing the location of the line, all access routes, and ancillary facilities. The map should be a minimum scale of one-half inch equal to one mile. A 1:24,000 U.S.G.S. topographic map is recommended. The party filing the "Notice of Intent" (named on the top of the Notice) shall be bonded. A copy of the bond or other evidence of satisfactory bonding shall accompany the Notice. Holders of statewide or nationwide oil and gas lease bonds may obtain a rider to include coverage of geophysical operations. For geophysical operation methods involving surface disturbance, a cultural resources survey may also be required.

The completion and signing of the "Notice of Intent" signifies agreement to comply with the terms and conditions of the Notice and subsequent practices and procedures specified by the Authorized Officer. A prework field conference may be conducted. Earth moving equipment shall not be used without prior approval. Upon completion of operations, including any required rehabilitation, the operator is required to file a "Notice of Completion of Oil and Gas Exploration Operations" (Form 3045-2).

Authorized Officer

The authorized officer shall contact the operator after the "Notice of Intent" is filed and apprise the operator of the practices and procedures to be followed.

The authorized officer shall complete a final inspection and notify the operator if the terms and conditions of the "Notice of Intent" have been met or that additional action is required. Consent to release the bond or termination of liability shall not be granted until the terms and conditions have been met.

FS Requirements

Geophysical operations on National Forest System lands are authorized under a Prospecting Permit issued by the FS. The sequence of actions by the geophysical operator and the FS authorized officer is as follows:

Geophysical Operator

The operator is required to file an application for a Prospecting Permit detailing all proposed operations on National Forest System lands. The application will include map(s) showing access routes and location of lines and all other activities. The map should be a minimum scale of one-half inch equal to one mile. A 1:24,000 U.S.G.S. topographic map is recommended. After the application has been reviewed by the FS, a permit will be sent to the applicant for review. The operator will sign and return the permit with any fee (if applicable) and bond requested.

The operator must have an approved Prospecting Permit prior to initiating operations on National Forest System lands and must comply with all stipulations. The operator must notify the authorized officer of scheduled entry and receive prior approval of any changes in the original plans. A prework conference may be required. For geophysical exploration methods involving surface disturbance, a cultural resources survey may also be required.

The operator is required to notify the authorized officer when operations are completed.

FS Authorized Officer

Upon receipt of the application, the FS will review the proposed activities to determine the stipulations necessary to

protect surface uses and resources. The operator will be sent the resulting Prospecting Permit indicating the stipulations, any fee to be paid (if applicable) and amount of bond required.

The FS makes final inspections prior to approval of termination of the permit and release of bond.

State and Local Requirements

There may be State or local requirements for geophysical operations. It is the operator's responsibility to be aware of these requirements.

Other Federal SMA Requirements

The requirements of other Federal SMA's may vary. Authorization of the SMA is normally required prior to entry on the land.

Split Estate Minerals Administered by the BLM

Where the minerals are federally owned and the surface is private or state owned, no authorization is necessary from the Federal Government. Operators must work with the surface owner to obtain access.

CHAPTER 2
PROCEDURAL GUIDELINES FOR OIL AND GAS OPERATIONS

The summary on the following pages is provided to acquaint the operator with the basic procedures for approval of lease operations. The procedures are presented in chart form which summarize the federal agency requirements and responsibilities contained in Onshore Oil and Gas Order No. 1. It also contains a synopsis of the timeframe requirements and corresponding field activities associated with the federal and operators' responsibilities. The major actions are presented in relative order and time perspective to assist the coordination efforts of both the operator and Federal agencies.

Two procedure options, namely the Notice of Staking (NOS) and Application for Permit to Drill (APD) (see table below), are available to the operator for securing approval to drill. Although timeframes set forth in the regulations are the same

for both options, they do contain individual advantages. The NOS system, H properly coordinated at the beginning of the action, may expedite final permit approval; however, the APD system is the most familiar to the oil and gas operators and often requires less upfront coordination effort. The choice is the operator's as to which option to use.

On National Forest System lands the FS has approval authority on the surface use plan of operations.

Access roads and pipelines located on federal surface outside of the leasehold or the unitized area, require a right-of-way (ROW) for BLM lands or a Road Use Permit or Special Use Permit (SUP) for FS lands. The NOS or APD for BLM land will be accepted as a ROW application for these offlease facilities and the application should, therefore, detail the entire development proposal. At the NOS or APD onsite inspection, the operator will be provided form 2800-14 (ROW/Temporary Use Permit) containing standard terms and conditions, and form 1323-2 (ROW cost recovery and fee determination record) for any involved ROWs on BLM land. Complete APDs involving a BLM ROW should include a signed form 2800-14 and any required ROW cost recovery fees. APD conditions of approval will also apply to ROW portions of the permit.

Bonding

Bonding is required (43 CFR 3104, 36 CFR 228 E) for oil and gas lease operations in order to indemnify the United States against losses associated with failure to meet royalty obligations, plugging wells not properly abandoned on a lease, and/or surface restoration and cleanup on abandoned operations. Bond coverage for operations is to be provided by the operator. The operator may post the bond itself, or obtain a consent of the surety under an existing lessee's bond or operating rights owner's bond, extending coverage under that existing bond to include such operations. The bond may be a surety or personal bond backed by cash, negotiable securities, Certificate of Deposit, or Letters of Credit in the minimum amount of $10,000. In lieu of a $10,000 lease bond, a bond of not less than $25,000 for statewide operations or $150,000 for nationwide operations may be furnished. When submitting APDs, operators should state the bond they will utilize. In extraordinary cases, the authorized officer may require additional bonding coverage. Bonded principals may request partial bond releases when portions of the abandonment or

reclamation process are deemed complete by the authorized officer. Upon the completion of all leasehold abandonment and reclamation, the operator should notify the authorized officer.

	NOS OPTION	APD OPTION
STEP I	Staking Notice Submitted	Application for Permit to Drill
STEP II	Onsite Inspection	Onsite Inspection
STEP III	APD Submission and Processing	APD Review and Processing

APPROVED DRILLING PLAN

STEP IV Operations Conducted Under an Approved Plan

STEP V Production/Dry Hole-Subsequent Actions

STEP VI Abandonment

NOTICE OF STAKING PROCEDURES GUIDELINES (NOS OPTION)

	Step I Staking Notice	Step II Onsite Inspection	Step III APD Review and Processing
Operator Action:	1. Contact SMA prior to staking for potential conflicts and concerns. (Operator's option)	1. Arranges participation of drilling and dirt contractors, and if necessary, surveyors and archaeologist at inspection. To be scheduled by the BLM or Forest Service.	1. Prepares surface use & drilling programs. Incorporates onsite inspection information.
	2. File Notice of Staking with BLM and SMA.	2.Participates in inspection, secures information for surface-use program or develops program onsite.	2. Files complete APD with BLM.
			3. If necessary, files private surface agreement & archaeological report with

			SMA. 4. Files application for off lease permit with SMA, if other than BLM. APD serves as formal ROW application for BLM lands.
Federal Action:	1. Upon initial contact, SMA apprises operator of conflicts and concerns.	1. BLM/FS schedules and conducts inspection with operator, contractors and SMA.	1. BLM & FS upon receipt of APD, reviews surface use and drilling programs for complete-ness. Returns incomplete APDs.
	2. Upon receipt of NOS, schedules onsite inspection with operator.	2. BLM/FS apprises operator of requirements for a complete APD at onsite or within 5 days.	2. Completes environmental analysis and completes neces-sary documentation.
	3. BLM and SMA initiates environmental review. Posts notice of proposal action.	3.Identifies on lease ROW or other permit needs.	3. BLM consults with or obtains FS/SMA approval of surface-use program. 4. Completes conditions of approval. 5. APD and permits approved or rejected. 6. Ensure adequate bonding or surety to cover

			approved operations.
Field Activities:	1. Operator surveys and stakes well, access road and ancillary facilities prior to inspection.	1. Conduct onsite inspection.	
		2. Stake location of well site, roads, and ancillary facilities as agreed at onsite.	
		3. Operator secures cultural resource inventory, if required.	
Timeframe:	1. Onsite inspection to be scheduled within 15 days of NOS receipt.	1. Onsite inspection conducted within 15 days of receipt of NOS.	1. Operator submits complete APD within 45 days of inspection.
		2. Furnish operator with additional requirements at the onsite or within 5 working days of inspection.	2. BLM advises operator within 7 days as to completeness of APD.
			3. BLM processes complete APD and either approves or rejects within 10 days of receipt.

APPLICATION FOR PERMIT TO DRILL PROCEDURES GUIDELINES (APD OPTION)

	Step I Application for Permit to Drill	Step II Onsite Inspection	Step III Final APD Review and Processing
Operator Action:	1. Contacts SMA for potential land-use conflicts, areas of concern and permit needs. (Operator's option.)	1. Arranges participation of drilling and dirt contractors and others, as applicable.	1. Corrects, revises and/or amends APD and permit applications, as needed.
	2. Prepares APD (surface-use and drilling programs) and files with BLM.	2. Participates in the onsite inspection.	2. Files revised and completed APD with BLM and permit application amendments with the SMA.
	3. Files for permits required by SMA. On BLM lands APD serves as rights-of-way (ROW) application.		3. If necessary, files private surface agreement & archaeological report with SMA.
			4. Files application for off-lease permit with SMA, if other than BLM. APD serves as formal ROW application for BLM lands.
Federal Action:	1. Upon initial contact, SMA apprises operator of conflicts or concerns and other permit needs.	1. BLM/FS conducts onsite predrill inspection with operator, contractors and SMA.	1.Upon receipt of any APD revisions, reviews for completeness and approvability.

	2. Uponreceipt of APD, BLM conducts preliminary review for completeness.	2. Location of well, access road and facilities and construction standards agreed upon.	2. Completes environmental analysis and prepares necessary documentation.
	3. Posts Notice of Proposed Action.	3. Additional permit needs identified.	3. Consults with SMA or obtains FS approval of SUP and conditions of approval.
	4. BLM sendssurface-use - plan to SMA.	4. Operator advised of any deficiencies in surface use or drilling programs and provided with additional requirements.	4.Completes conditions of approval.
	5. Upon receipt of APD, BLM/FS schedules onsite inspection.		5. APD and permits approved or rejected.
	6. BLM/SMA initiates environmental analysis.		6. Ensure adequate bonding or surety to cover approval operations.
Field Activities:	1. Operator surveys and stakes well, access road and ancillary facilities for onsite inspection.	1. Conducts inspection.	
		2. Operator secures cultural	

		resource inventory, if required.	
Timeframe:	1. BLM advises operator within 7 working days asto completeness of APD.	1. Onsite inspection conducted within 15 days after receipt of complete APD.	1. Operator submits complete APD within 45 days of inspection.
	2. Onsite inspection to be scheduled within 15 days after receipt of complete APD.	2. Operator furnished with additional requirements onsite or within 5 working days of onsite inspection.	2. BLM advises operator within 7 days as to completeness of APD
			3. BLM processes APD and either approvesor rejects within 30 days of receipt of a complete APD.

APPROVED DRILLING PLAN

	Step IV Operations Conducted Under Approved Plan	Step V Producer/Dry Hole Actions	Step VI Abandonment
Operator Action:	1. Conducts operations in accordance with approved plan etc. (See Chapter 3.)	1. Files Well Completion Report (WCR) and, if needed, proposed modification to the surface-use plan if well is productive. (See Chapter 3.)	1. Files Subsequent Report of Abandonment (SRA) following plugging of well.
	2.Files necessary	2. Files Notice of Intent	2. Files FAN (Final

	reports and Sundry Notices.	to Abandon (NIA) if well is dry hole or well no longer productive. Prepares abandonment plan for wells which do not have an approved abandonment plan.	Abandonment Notice) upon completion of reclamation and site is ready for inspection.
	3. Files monthly report of operations.	3. Participates in onsite inspection if requested.	3. Applies for release of the period of bond liability, if appropriate.
		4. Files required reports & applications related to production oper. (e.g., 5 day stan upnotice: site security diagrams, etc.)	
Federal Action:	1. Conducts Compliance Inspections.	1. Reviews WCR/NIA and proposed plans.	1. Performs compliance checks of final reclamation.
	2. Reviews, and when applicable, approves Sundry Notices.	2. Conducts field review or requests joint field exam with operator and SMA, if needed. Develops conditions of approval or additional reclamation measures for abandonment.	2. Obtains FS approval of abandonment on FS lands.
		3. Requests information/revision of plans, as needed.	3. Approves final abandonment and release of bond liability, as appropriate.

		4. Prepares environmental documen- tation, if necessary.	
		5. Consults with SMA as to approv- ability of plan or obtains FS approval.	
		6. Approves or rejects plan.	
Field Activities:	1. Operator begins construction and drilling operations.	1. Field review or joint field exam conducted.	1. Operator completes all work and well site, road, etc., are reclaimed and ready for inspection.
	2. Federal agencies conduct compliance inspections.	2. Operator begins construction, completes well and installs produc- tion facilities.	2. Field inspection conducted by BLM and SMA
		3. Operator plugs well.	
		4. Operator initiates reclamation of well site, etc., in accordance with abandonment plan.	
Timeframe:	1. APD approval is valid for 1 year.	1. Required timeframes for various production related reports and applications are detailed in Chapter 3.	1. Files SRA within 30 days following completion of plugging.
		2. Review, approve or	2. Final

	reject plans or applications normally within 30 days.	abandonment approval timeframe variable, usually 1 to 2 years, depending on acceptable revegetation.
		3. Inspection and bond release normally completed within 30 days (if final abanonment approved).

CHAPTER 3
SURFACE USE

Well Sites

Locations

To the extent permitted by the geologic target, the locations selected for well sites, tank batteries, pits, and pumping stations, etc., should be planned so as to minimize long-term disruption of the surface resources. Design and construction techniques and other practices should be employed that would minimize surface disturbance and effects on other resources, and maintain the reclamation potential of the site. The following guidelines can be used to assist in meeting these objectives and reduce the overall impacts from well sites and other construction areas.

Well sites should be located on the most level location available that will accommodate the intended use. The site layout should be oriented to conform to the best topographic situation given the geologic target and any safety considerations. However, safety considerations may be an overruling factor (such as operations in a hydrogen sulfide area). Steeply sloping locations which require deep nearly vertical cuts and steep, fill slopes should be avoided or appropriately mitigated. The location of the well site should also be reviewed to determine its effect upon the location of the access road. Advantages gained on a good well site or tank battery location may be negated by adverse effects of the access road location. A well constructed drillsite is shown in Photograph 1.

Photograph 1 - Properly Constructed Drillsite

Construction

Construction procedures must conform to the approved surface use plan of operations. Generally, all surface soil materials shall be removed from the entire cut and fill area and stockpiled. The depth of topsoil to be removed and

stockpiled should be determined at the predrill inspection and should be stated either in the proposed surface use plan of operations or specified in the conditions of approval. Surface soil material stockpiles should be located to avoid mixing with subsurface materials during construction and reclamation. Stockpile locations should be located so wind and water erosion are minimized and reclamation potential is maximized.

Normally, excavation of the cut and fill slopes is guided by information on the slope stakes. Fills should be compacted to minimize the chance of slope failure. If appropriate, terraces can be used on cut and fill slopes to reduce land impacts, such as length of slope, to prevent excessive water accumulation and erosion. If excess cut material exists after fill areas have been brought to grade, the excess material will be disposed of or stockpiled at approved locations. Snow and frozen soil material shall not be used in the construction of fill areas and

The area of the well pad that supports the drilling rig substructure should be level and capable of supporting the rig. The drill rig, tanks, heater-treater, etc., are not to be placed on uncompacted fill material. The area used for mud tanks, generators, mud storage, and fuel tanks, etc., should be slightly sloping to provide surface drainage from the work area. Runoff water from offsite areas should be diverted away from the well site by ditches, waterbars, or terraces above and below the cut slopes.

Reserve or "mud" pits are normally a part of a well site and are used for storage or disposal of water, drill mud, and cuttings. The reserve pit should be located in cut material. If this is not possible, at least 50 percent of the reserve pit should be constructed below original ground level to prevent failure of the pit dike. Fill dikes should be properly compacted in lifts (i.e., by rubber-tired construction equipment, sheeps foot roller, etc.). The necessary degree of compaction depends on soil texture and moisture content.

Pits improperly constructed on slopes may leak along the plane between the natural ground level and the fill. There is a significant potential for pit failure in these situations. When constructing impoundments by fill embankment, a keyway or core trench 10- to 12-feet wide should be excavated to a minimum depth of 2- to 3-feet below the original ground level. The core of the embankment is then constructed with water-impervious material. An alternative method of reserve pit construction on steeply sloping sites is to locate the pit on the drill pad next to the high wall. The pits are constructed totally in cut at such locations.

It may be necessary to line reserve pits to prevent contamination of ground water and soil. Bentonite, plastic, or other synthetic liners are most commonly used. In some environmentally sensitive areas, self-contained mud systems may be required with the drilling fluids, mud and cuttings being transported to approved offsite disposal areas. Fencing of reserve pits may be required to prevent access by persons, wildlife, or livestock. A plan of a typical, reserve pit is shown in Figure 1.

The operator's representative shall ensure compliance with all plans and designs. The representative should be designated prior to construction and have immediate access to an approved copy of all maps, drawings, templates, and construction standards and authority to order changes prior to initiating dirt work.

FIGURE1. RESERVE PIT CONSTRUCTION

Roads and Access Ways

INTRODUCTION

These guidelines have been developed to provide oil and gas operators with BLM and FS policy and standards relative to planning, location, design, construction, maintenance and operation of roads and access ways on public and National Forest System lands. This chapter provides minimum guidelines. It is the policy of the BLM and FS that all permanent roads constructed by nongovernment entities across public or National Forest System lands must be designed by, or constructed under the direction of, a licensed professional engineer.

Special concerns such as steep slopes, erosion hazards, visual resources and other concerns require special consideration when roads and access ways are involved. In areas of high environmental sensitivity, special road location, design and construction techniques may be required. The operator is encouraged to contact local offices of the appropriate SMA prior to submission of an APD or NOS. This early contact will provide the operator with specific requirements and identify any special access needs.

Figure 2 illustrates commonly used terms in road design, and should bereferred to when reviewing this chapter.

FIGURE2. ILLUSTRATION OF COMMONLY USED TERMS IN ROAD DESIGN
AND POTENTIALLY DISTURBED AREA WITHIN THE RIGHT-OF-WAY

TRANSPORTATION PLANNING

The goal of transportation planning is to identify and analyze feasible alternatives for access which meet the objectives of the SMA and include the needs of users of federal lands. The planning process considers other resource values, public access needs, and future use of the road and avoids ~leapfrogging~ from one well site to another. Transportation planning can prevent the unnecessary expenditure of time and money and prevents unnecessary surface disturbance.

It is the policy of the BLM and FS that existing roads will be considered for use as access routes and may be used when they meet agency standards and transportation objectives. When access involves use of existing agency roads, operators may be required to contribute to road maintenance. Existing multiple use roads may be used by oil and gas operators when approved by the SMA, usually this is authorized by a joint use agreement in which each user's pro rata share of costs is based upon the anticipated use of the road.

Road locations and design criteria are developed to implement the goals of transportation planning. New road construction, or reconstruction, by the operator will be done to BLM/FS standards consistent with the needs of the users.

Road Location

Road location is the most critical stage for the engineering and environmental success of a road construction project. The surface and subsurface conditions of a road location largely determine the cost to survey, design, construct, and maintain a road.

Operators are strongly encouraged to contact the SMA about possible route locations before surveying and staking. Early SMA contact will inform the operator of any environmental concern that may affect road location.

The initial steps in road location are (1) determination of the intended use of the road, planned season of use, type of vehicles to be used, and road class, (2) examination of the SMA's transportation plan which may already have identified feasible routes for the area, and (3) examination of existing data, including maps and air photos, of administrative, biological, physical, and cultural conditions of the area.

Geotechnical Factors

The field reconnaissance of alternative routes should provide information on such factors as type of excavation, landslide areas, subgrade conditions indicating the need for surfacing, potential cut slope problems, surface or subsurface water problem areas, suitability of fill material, potential gravel pits or quarries for road aggregate, potential borrow and waste sites. A good road location analysis may avoid costly problems and identify cost-saving opportunities.

Other factors to be considered that are unique to the oil and gas industry include:

1. The prevailing wind direction in relation to the potential for encountering sour gas (H2S) and the need for a clear escape route from the drillsite.

2. The potential for year-round operation: drill sites and producing locations may require all-weather access and special maintenance considerations for snow removal.

3. The potential for exploratory drilling to result in a producing operation. Usually the initial road alignments will be such that the road can be upgraded.

When the road location information is submitted to the SMA, the acceptability of the proposed route, and if applicable, alternative routes, can be evaluated. Final selection of the road location will be approved by the SMA at the predrill inspection or during final APD processing.

DESIGN AND CONSTRUCTION

Road Classes

BLM Temporary or FS Short-term Roads

These are low volume, single-lane roads built for a specific purpose or use. They normally have a 12-foot wide travelway and are located, designed, and

constructed for temporary use. In many cases they may be constructed with little or no grading or blade use. They are usually built for dry weather use, but may be surfaced, drained, and maintained for all-weather use if the SMA concurs. Such roads are to be made impassable to vehicle travel and returned to a near natural condition upon completion of use.

BLM Resource or FS Local Roads

These are low volume, single-lane roads, which may be reclaimed after a particular use terminates. These roads normally have a 12-14 foot travelway with intervisible turnouts. They are usually used for dry weather, but may be surfaced, drained and maintained for all weather use. These roads connect terminal facilities, such as a well site, to collector, local, arterial, or other higher class roads. They serve low average daily traffic and are located on the basis of the specific resource activity need rather than travel efficiency. They may be developed for either long- or short-term service and operated either closed or open to use as determined by the SMA.

BLM Local or FS Collector Roads

These roads may be single- or double-lane with travelways 12-24 feet in width, with intervisible turnouts. They are normally graded, drained, and surfaced and are capable of carrying highway loads. These roads provide access to large areas and for various uses. They collect traffic from resource or local roads or terminal facilities and are connected to arterial roads or public highways. The location and standard are based on both long-term resource needs and travel efficiency. They may be operated for either constant or intermittent service, depending on land use and resource management objectives for the area being served.

BLM Collector or FS Arterial Roads

These roads are usually double-lane, graded, drained and surfaced, with a 20-24-foot travelway. They serve large land areas and are the major access route into development areas with high average daily traffic rates. The locations and standards are often determined by a demand for maximum mobility and travel efficiency rather than a specific resource management service. They usually connect with public highways or other arterials to form an integrated network of primary travel routes and are operated for long-term land and resource management purposes and constant service.

DEFINITIONS

Design Criteria. Requirements that govern the selection of elements andstandards for a road, such as resource management objectives, road management objectives, safety requirements, and traffic characteristics.

Design Elements. Physical characteristics such as the traveled way clearing limits, curve widening, slopes, and drainage characteristics.

Design Standards. Lengths, widths, and depths of design elements, such as 14-foot wide traveled way. The design terms are illustrated in Figure 2.

Design Vehicle. This is the vehicle that the road is designed to carry. Usually it is a low-boy, with dimensions and typical use patterns.

Critical Vehicle. At times a limited number of vehicles wider than the design vehicle may use the road. The travelway and shoulder width should be large enough to accommodate this occasional use, however, these vehicles will usually be unable to traverse the road at the design speed of the road.

DESIGN SPECIFICATIONS:

BLM Temporary or FS Short-term Roads

1. Design Requirements

a. Design speed is 15 miles per hour or less.

b. Travel width is normally 12 feet.

c. Recommended minimum horizontal curve radius, 100 feet. Where terrain will not allow 100 foot curve radii, curve widening is necessary. Specifications are available from SMA offices.

d. Normal road gradients should not exceed 8 percent except for short pitches of 300 feet or less. In mountainous terrain, grades greater than 8 percent may be allowed with prior approval of SMA.

e. Turnouts are generally naturally occurring, such as additional widths on ridges or other available areas on flat terrain.

f. Drainage must be provided over the entire road. Usually this is accomplished by use of drainage-dips insloping, and naturally rolling topography. Ditches and culverts may be required in some situations, but are not expected as the norm.

g. Generally, gravel surfacing is not required, but if all weather access is needed, it may be necessary.

2. Field Survey Requirements. These vary with topography, geologic hazard, or other concerns. Each SMA has survey requirements based upon the design requirements and concern specific to the area. The SMA should be contacted as early as possible to determine survey requirements. The following general requirements are imposed to control the work and produce the desired road:

a. A flagline is established along the construction route. Flags should be placed approximately every 100 feet, or be intervisible, whichever is less.

b. Construction control staking may be required depending on conditions of the site.

c. Culvert installations are located and flagged.

3. Construction.

a. Drainage Dips. Drainage dips are an integral part of temporary and short-term roads. They should be located and spaced according to directions of SMA for the locale. Construction of drainage dips is described and illustrated in Figures 5 and 6.

b. Construction Standards. Standards for each road are provided by the SMA. The operator is responsible for ensuring that each road is constructed according to plans and specifications approved by the SMA. The degree of construction control should complement the survey and design methods. Lower standard surveys and design may require more intensive construction control and inspection to assure acceptability of the end product. An inspector designated by the operator and acceptable to the SMA should be readily available during construction to provide quality control.

BLM Resource and FS Local Roads

1. Design Requirements.

a. Design speed 15 miles per hour.

b. Travelway width--minimum 12 feet with turnouts.

c. Recommended minimum horizontal curve radius, 100 feet. Where terrain will not allow 100-foot curve radii, curve widening is necessary. Specifications are available from appropriate SMA offices.

d. Normal road gradients should not exceed 8 percent except for pitch grades (i.e., 300 feet or less in length). In mountainous terrain grades greater than 8 percent may be possible with prior approval of the SMA.

e. Turnouts are required on all single lane roads (travelway of 12-14 feet). Turnouts must be located at 1,000-foot intervals or be intervisible, whichever is less.

f. Drainage control shall be ensured over the entire road through the use of drainage dips, insloping, natural rolling topography, ditch turnouts, or culverts. Culverts, drainage crossings, and other controls should be designed for a 10-year frequency or greater storm, with an allowable head of one foot at the pipe inlet.

g. Roadbed culverts should be used to drain inside road ditches when drainage dips are not feasible.

h. Surfacing with gravel should be required where all weather access is needed.

i. At times a limited number of oil field vehicles (critical vehicles) larger than the design vehicle may make occasional use of the road. The operator should consider these needs in road design.

2. **Field Survey Requirements.** These are the same as for Temporary and Short-term roads.

3. **Design Drawings and Templates.**

a. On slopes of 0-20 percent, where horizontal and vertical alignment can be worked out on the ground, a plan and profile drawing may not be required. Standard templates, drainage dip spacing, culvert locations, and turnout spacing guides would be acceptable.

b. A plan and profile view would be the minimum drawing required on steeper slopes and in areas of environmental concern. This would identify grade, alignment, stationing, turnouts, and culvert locations.

c. Standard templates of road cross-sections and drainage dips are required for all Resource, Local, and higher class roads. Figures 2 and 3 illustrate these sections.

d. Additional information may be required in areas of environmental or engineering concern.

4. **Construction.** The lessee or operator's representative shall ensure compliance with all plans and designs. The representative should be designated prior to construction and have immediate access to an approved copy of all maps, drawings, templates, and construction standards and authority to order changes prior to initiating dirt work.

The operator must take all necessary precautions for the protection of the work and safety of the public during construction of the road. Warning signs must be posted during blasting operations.

a. Clearing and Grubbing: Clearing and grubbing will normally be required on all sections of the road. Exceptions would be allowed in areas of sparse, nonwoody vegetation.

All clearing and grubbing should be confined to a specified clearing width (see Figure 2) which is usually somewhat wider than the limits of actual construction (roadway). Branches of all trees extending over the roadbed should be trimmed to give a clear height of 14 feet above the roadbed surface. All vegetative debris must be disposed of as specified by the SMA.

b. Excavation: All soil material and fragmented rock removed in excavation is to be used as directed in the approved plan. Excess cut material shall not be wasted unless specified in the approved plan.

c. Roadbed Construction: Roadbed material should never be placed when the materials or the surface are frozen or too wet for satisfactory compaction. Equipment should be routed over the layers of roadbed material already in place to help avoid uneven compaction anywhere along the travel route.

Borrow material shall not be used until material from roadway excavation has been placed in the embankments, unless otherwise permitted. Borrow areas used by the operator must be approved prior to the start of excavation.

Roadside ditches should conform to the slope, grade, and shape of the required cross-section with no projections of roots, stumps, rocks, or similar debris. Side ditches must be excavated to a depth of one foot minimum below finished road surface. Backslopes on the road ditches should not be cut flatter than two to one. Drainage turnout spacing on these ditches should not exceed 500 feet; slopes greater than 5 percent would require closer spacing of turnout furrows (wing ditches or relief ditches).

BLM Local and FS Collector Roads

1. Design Requirements.

a. Design speed 15-25 miles per hour.

b. Traveled way minimum 12 feet (single lane), maximum 24 feet (double lane) with intervisible turnouts as may be required.

c. Recommended minimum horizontal curve radius 100 feet. Where terrain will not allow 100-foot curve radii, curve widening is necessary. Specifications are available from SMA engineering offices.

d. Maximum grades should not exceed 8 percent. Pitch grades for lengths not to exceed 300 feet may be allowed to exceed 8 percent in some cases.

e. All culverts must be sized in accordance with accepted engineering practices and any special environmental concerns. The minimum size culvert in any installation must be 18 inches. Drainage crossings and culverts should be designed for a 1 O-year frequency or greater storm.

f. Turnouts will be required on all single-lane roads. Turnouts must be located at 750-foot intervals or be intervisible, whichever is less. The length should not be less than 100 feet with additional 25-foot transitional tapers at each end.

g. Surfacing is required for all weather access. Aggregate size, type, amount, and application method would be specified by the local office of the SMA. Subgrade analysis may be required to determine load bearing capacities.

2. Field Survey Requirements. Generally, the survey requirements for these roads are similar to those for Short-Term and Resource roads. However, these roads are designed for higher average daily traffic (ADT) rates and greater speeds. Thus, in addition to flagline and culvert survey requirements, a transit survey with preliminary center line staking and cross-sectioning is usually required on steep terrain and in areas requiring special engineering. Specific survey requirements are available at the local office of the SMA.

3. Design Drawings and Templates.

a. Generally, a plan and profile view would be the minimum required drawings for this road class (see Figure 3). This would identify grade, location, stationing, turnouts, culvert locations, and drainage dip spacing.

b. Standard templates of the proposed road cross-section(s), (see Figures 2 and 3) and drainage dip design are required for these roads.

c. Additional information may be required in areas of environmental or engineering concern.

4. Construction.

a. Drainage dips, construction, and spacing is the same as for resource and forest local roads.

b. Culvert cross-drains should be used in lieu of drainage dips for road grades in excess of 10 percent. Culvert installation is discussed in the Drainage and Drainage Structure Section and is illustrated in Figures 7 and 8.

c. Construction standards are the same as given in the BLM Resource and FS Local Roads Section.

BLM Collector and FS Arterial Roads

1. Survey and Design Requirements.

a. Vertical, horizontal, and topographic data as well as significant features should be plotted on standard plan profile sheets to a scale of 1" = 100' or as otherwise directed by the SMA.

b. Plot "L" (layout) line along "P" (preliminary) line using the following design standards criteria:

1. Design speed 20 miles per hour minimum unless otherwise directed.

2. Travel width--minimum 20 feet, maximum 24 feet.

3. Minimum horizontal curve radius, 200 feet width unless shorter radius is approved.

4. Design vertical curves for a maximum change of 2 percent per 50 feet of road length.

5. Maximum grade 8 percent (except pitch grades not exceeding 300 feet in length and 10 percent in grade).

6. Mass diagrams and earthwork balancing may be required. Obvious areas of waste or borrow shall be noted on the plan

and profile as well as proposed locations of borrow or waste disposal areas.

7. All culverts would be designed for a minimum 25-year frequency storm with an allowable head of one foot at the pipe inlet. However, the minimum acceptable size culvert diameter is 18 inches. Show all culverts planned to accurate vertical scale on plan profile sheets.

FIGURE 3. CROSS-SECTIONS AND PLANS FOR TYPICAL ROAD SECTIONS. REPRESENTATIVE OF BLM RESOURCE OR FS LOCAL, AND HIGHER CLASS ROADS.

2. Design Drawings and Templates

a. Complete plan and profile drawings are required for any BLM Collector or FS Arterial road. (See Figure 4 for example.) These identify grade, location, stationing, and all culvert sizes and location. (See Figures 7 and 8 for examples).

b. Standard templates of road cross-sections, drainage design, and culvert location and installation are required (see Figures 3 through 9 for examples).

c. Mass diagrams and materials investigation and classification may be required.

3. Construction. Except for the specific items provided below,constructionstandards are given in the BLM Resource/FS Roads or the BLM Local/FS Collector Roads Sections.

Excavation and fill construction will be performed to secure the greatest practicable degree of roadbed compaction and stability. Roadbed materials shall be placed parallel to the axis of the roadway in even, continuous, approximately horizontal layers not more than eight inches in thickness. The full cross-section of the fill must be maintained as each successive layer is placed. Place successive layers of material on embankment areas so as to produce the best practical distribution of the material. The materials throughout the roadbed shall be free from lenses, pockets, streaks, or layers of material differing substantially in texture, gradation, or compaction from the surrounding material.

FIGURE 4. TYPICAL ROAD PLAN AND PROFILE DRAWING FOR OIL AND GAS ROAD.

Ordinarily stones coarser than a three-inch square mesh opening should be buried at least four inches below the finished surface of the roadway.

The operator should route construction equipment over the layers of roadbed material already in place and shall distribute the gravel evenly over the entire width of the embankment so as to obtain the maximum compaction while placing the material and to avoid uneven compaction anywhere along the travel route.

Use excess excavation material, insofar as practical, to improve the road grade line or "flatten" fill slopes. Other waste areas must be approved prior to placement of waste material.

Drainage and Drainage Structures

The proper design and construction of structures for the drainage of water from or through the roadway often contributes the most to the long-term success of the structure and minimizes the maintenance and adverse environmental effects, such as erosion and sediment production.

Road Drainage Design. The most economical control measure should be designedto meet resource and road management objectives and constraints. The economic considerations shall include construction and maintenance costs. The need for drainage structures can be minimized by proper road location. However, adequate drainage is essential for a stable road. A proper drainage system should be the best combination of various design elements, such as ditches, culverts, drainage, dips, crown, in-slope or out-slope, low-water crossings, subsurface drains, and bridges.

a. Surface Drainage. Surface drainage provides for the interception,collection, and removal of water from the surface of roads and slope areas. The design may need to allow for debris passage, mud flows, and water heavily laden with silt, sand, and gravel.

b. Subsurface Road Drainage. Subsurface drainage is provided tointercept, collect, and remove groundwater that may flow into the base course and subgrade, lower high water tables, and drain locally saturated deposits or soils.

Drainage Structures. Proper location and design can provide economical andefficient drainage in many cases. However, structural measures are often required to ensure proper and adequate drainage. Some of the most common structures are drainage dips, ditches, culverts, and bridges.

a. Drainage Dips. The primary purpose of a drainage dip is to interceptand remove surface water from the traveled way and shoulders before the combination of water volume and velocity begins to erode the surface materials. Drainage dips should not be confused with water bars which are normally used for drainage and erosion protection of closed or blocked roads. See Figures 5 and 6 for illustration and construction specifications.

FIGURE 5. DRAINAGE DIP ILLUSTRATION FOR SLIGHT TO MODERATE SLOPE FOR ACCESS ROADS.

Spacing of drainage dips depends upon local conditions such as soil material, grade, and topography. The SMA should be consulted for spacing instructions.

b. **Ditches.** The geometric design of ditches must consider theresource objectives for soil, water, and visual quality, maintenance capabilities and associated costs, and construction costs. Ditch grades should be no less than 0.5 percent to provide positive drainage and to avoid siltation.

The types of ditches normally used are: drainage, trap, interception, and outlet.

c. **Road Crowning.** Roads which use crowning and ditching are commonand can be used with all road classes. This design provides good drainage of water from the surface of the road. Drainage of the inside ditch and sidehill runoff is essential if the traveled way is to be kept dry and passable during wetweather. Snow removal becomes a simple task for common road maintenance equipment. Because the roadbed is raised, wind often blows the snow off the travelway. Photograph 2 illustrates a properly constructed and maintained,crowned and ditched road.

FIGURE 6. PROFILE VIEW OF BROAD BASED DRAINAGE DIP USE FOR PERMANENT ROADS WHERE ROAD GRADIENT DOES NOT EXCEED 10 PERCENT.

Photograph 2 illustrates an example of a properly maintained roadway. The crownis well defined, the roadbed is smooth, and there is no disturbance outside of the roadway. This level of maintenance is much more cost efficient in the long- term due to reduced travel time, wear on vehicles, emergency road work, and driver fatigue.

PHOTOGRAPH 2. A WELL-CONSTRUCTED AND MAINTAINED CROWNED AND DITCHED ROAD.

d. **Culverts.** Culverts are used in two applications on oil and gasaccess roads; (1) in streams and gullies to allow normal drainage to flow under the traveled way, and (2) to drain inside road ditches. The latter may not be required H drainage dips are used.

The location of each culvert should be shown on the plan and profile or similar drawings submitted with the APD or ROW application. All culverts should be laid on natural ground or at the original elevation of any drainage crossed. Culverts should be placed on a 3 percent minimum grade; reverse camber is not allowed. See Figures 7 and 8 for installation details.

The outlet of all culverts should extend at least one foot beyond the toe of any slope. Culverts should be installed as shown in Photograph 3.

All culverts used in construction of oil and gas access roads should be concrete or corrugated metal pipe (CMP) made of steel or aluminum. Only undamaged culverts are to be used, and any culvert should be inspected for damage prior to installation. All spots on the pipes where the zinc coating has been injured should be painted with two coats of zinc-rich paint or otherwise repaired as approved by the surface managing agency.

Excavation, bedding and backfilling of culverts should be conducted according to requirements of the SMA and good engineering practices.

PHOTOGRAPH 3. ACCEPTABLE CULVERT INSTALLATION.

FIGURE 7. DIAGRAMS FOR PROPER CULVERT INSTALLATION.

FIGURE 8. TYPICAL CULVERT CONSTRUCTION.

e. **Ditch Relief Culverts.** Ditch relief culverts are installed toperiodically relieve the ditch line flow by piping water to the opposite side of the road where the flow can be dispersed away from the roadway. The spacing of ditch relief culverts is dependent on the road gradient, soil types, and runoff characteristics.

A culvert with an 18-inch diameter is the minimum for ditch relief to prevent failure from debris blockage.

The depth of culvert burial must be sufficient to ensure protection of the culvert barrel for the design life of the culvert. This requires anticipating the amount of material that may be lost due to road use and erosion.

Ditch relief culverts can provide better flow when skewed 15 to 30 degrees downgrade from a line perpendicular to the centerline of the road. This improves the flow hydraulics and reduces siltation and debris plugging the culvert inlet. Culverts placed in natural drainages can also be utilized for ditch relief. The design of culverts for later removal may be beneficial for intermittent use roads that will be closed for extended periods of time.

f. **Bridges and Major Culverts.** The BLM and FS Manuals require that allsingle or multiple culvert installations with end- or aperture-openings totalling more than 35-square feet have engineering approval at Regional or State Offices. This is also true of all bridge installations. Operators are encouraged to prepare applications requiring major culverts or bridges in sufficient time to allow for agency engineering evaluations.

g. **Wetland Crossings.** Wetlands are especially sensitive areas.Generally, these areas require crossings which prevent unnatural fluctuations in water level. Marshy and swampy terrain may contain bodies of water with no discernible current. The design of culverts for roads crossing these locations requires some unique considerations. Construction of some stream and wetland crossings may require a section 404, Corps of Engineers permit, in addition to the approval of the SMA.

The culvert should be designed with a flat grade so water can flow either way and maintain its natural water level on both sides. The culvert may become partially blocked by aquatic growth and should be installed with the flow line below the standing water level at its lowest elevation. Special attention must be given to the selection of culvert materials that will resist corrosion.

h. **Low-Water Crossings.** Roads commonly cross small drainages andintermittent streams. Here culverts and bridges are often unnecessary. The crossing can be effectively accomplished by dipping the road down to the bed of the drainage. Material moved from the banks of the crossing should be stockpiled near the right-of-way. Gravel, riprap, or concrete bottoms may be required in some situations. In no case should the drainage be filled so that water will be impounded. See Figure 9 for acceptable and unacceptable low-water crossings.

i. **Subdrainage.** If water is not removed from the subgrade or pavementstructure, it may create instability, reduce load bearing capacity, increasepossible damage from frost action, and create a safety hazard by freezing on the traveled way.

Perforated pipe drains and associated filter fabric or aggregate filters may be used when necessary to provide subdrainage. Other methods may be approved by the authorized officer.

Subdrainage systems may effectively reduce final road costs by decreasing the depth of basecourse needed, thereby reducing subgrade widths. This, in turn, results in less clearing and excavation. Maintenance savings may also be realized as the result of a more stable subgrade.

The solutions to subdrainage problems can be expensive. Road management techniques, such as reducing traffic loads or removing traffic until a subgrade dries out, should be considered as an alternative.

FIGURE 9. LOW-WATER/DRY CREEK DRAINAGE CROSSING.

ROAD MAINTENANCE

Users may perform their share of road maintenance or may be required to deposit sufficient funds with the SMA to provide for their share. If the road has only one permitted user, other than incidental use, that user has the total responsibility for maintenance.

When required, the operator shall submit a road maintenance plan for all roads which will be constructed or used in conjunction with the drilling program. The maintenance plan will contain provisions for perpetuating the traveled way, protection of the roadway appurtenances, requirements for road management, and the method to be used in carrying out the maintenance activities. The activities normally required include: blading, surface replacement, dust abatement, spot repairs, slide removal, ditch cleaning, culvert cleaning, brush removal, litter cleanup, weed control, and snow removal. Specific areas shall be identified in the road maintenance plan for disposal of slide material, borrow or quarry sites, stockpiles, or other uses which are needed for the project.

PIPELINES AND FLOWLINES

Construction. Steep hillsides and water courses should be avoided in thelocation of pipelines and flowlines. Flowline routes should take advantage of road locations wherever practicable to minimize surface disturbance.

Blading of pipeline routes located on gentle topography should be limited to removal and smoothing of brush and surface irregularities, leaving most of the understory vegetation undisturbed. When clearing is necessary, the width disturbed should be kept to a minimum. Bladed materials should be placed back into the cleared route upon completion of construction. Surface soil material should be stockpiled to the side of the routes where cuts and fills or other surface disturbance occur during pipeline construction. Surface soil material should be segregated and should not be mixed or covered with subsurface material.

Pipeline trenches should be compacted during backfilling. These pipeline rights-of-way should be maintained in order to correct backfill settling and prevent erosion.

Pipeline routes should be graded to conform to the adjacent terrain. Cuts and fills on pipelines should be made only where necessary. After construction cutand fill slopes may need to be waterbarred or regraded to conform to the adjacent terrain.

Pipeline construction should not block, dam, or change the natural course of any drainage. Suspended pipelines should provide adequate clearance for runoff debris, wildlife, or livestock.

CHAPTER 4
DRILLING OPERATIONS

All proposed drilling operations and related surface disturbance activities, as well as any change from an approved Application for Permit to Drill (APD), must be approved before such activities are conducted. Approval will be in accordance with: (1) lease terms and conditions of approval, (2) 43 CFR 3160, (3) appropriate Onshore Oil and Gas Orders, and (4) Notices to Lessees (NTLs). For NFS lands, approval must also be in accordance with 36 CFR 228 E.

Initiating the Process

The process of obtaining approval to drill is initiated by filing either a Notice of Staking (NOS) or an APD. The choice of options is the operator's, but eventually a complete and acceptable APD must be filed. By filing a NOS, the operator triggers an onsite inspection prior to filing an APD and is then furnished appropriate surface use and reclamation requirements for incorporation into their APD. NOS or APD filing also triggers the mandatory BLM/FS 30-day public notification requirement. This may result in a more complete and readily approvable APD at an earlier time. There is no required form for a NOS but the informational requirements are specific. See Figure 12 for an example. If the APDoption is selected, the onsite inspection is held after the filing of the APD with the BLM. The APD form is shown in Figure 13. When the lands involved aremanaged by a Federal agency other than the BLM, the NOS must be filed with the appropriate SMA **and** the BLM.

Surveying and Staking

Regardless of the option selected, the well location must be staked and access roads to be constructed flagged **prior** to the onsite predrill inspection.Surveying and staking may be done without advance approval from BLM or the SMA except for lands used for military purposes, Indian lands, or where significant surface disturbance is likely during the staking process. Operators are strongly encouraged to notify the SMA prior to entry to allow the SMA to advise them of difficult or problem conditions. With respect to private or state surface, the operator is responsible for making access arrangements with the surface owner prior to entry thereon (see Chapter 6).

Staking includes the well location, two 200-foot directional reference stakes, the exterior dimensions of the drill pad, reserve pit, other areas of surface

disturbance, cuts and fills, and centerline flagging of new roads with road stakes being visible from one to the next. Cut and fill staking is required for the well site, reserve pit, and any ancillary facilities. Slope staking may subsequently be required for road locations on steep terrain, stream crossings, and for other environmentally sensitive locations.

Application for Permit to Drill (APD)

No drilling operations or related construction activities may be conducted without an approved APD. The APD must be approved by the authorized officer of BLM, in consultation with the SMA as appropriate. On National Forest System Lands, the FS must approve the surface use plan of operations of the APD. A complete APD consists of a drilling plan (comprised of a surface use program and a drilling program), evidence of bond coverage, and such other information as may be required by applicable Orders and NTLs (e.g., H2S Contingency Plans whereneeded). Onshore Order No. 1 describes the specific informational requirements of the drilling plan. Operators are strongly encouraged to consult with theappropriate SMA as early as possible to identify potential concerns. Prior to beginning construction activities, the operator may be required to contact the BLM and appropriate SMA. Approved APDs are generally valid for 1 year.

Onsite Inspection - Environmental Review

An onsite, predrill inspection will normally be conducted within 15 days of BLM's receipt of a NOS, or an APD if no NOS was previously filed. The inspection team will include a BLM/SMA representative, the operator or agent, and other interested parties, such as the operator's principal dirtwork contractor and, if known, the drilling contractor. When the inspection is on private surface, the surface owner will be invited by BLM.

The purpose of the onsite inspection is to identify problems and potential environmental impacts associated with the proposal and methods for mitigating these impacts. The BLM/FS, with the assistance of any other involved Federal agencies, will complete the environmental analysis process.

Other Authorizations

The BLM approval of an APD does not relieve the operator from obtaining any other authorizations required for drilling or subsequent operations. This includes requirements of other Federal, State, or local authorities.

CHAPTER 5
PRODUCING OPERATIONS

General Operating Standards and Objectives

Onshore oil and gas lease operations are subject to applicable laws, regulations, lease terms, Onshore Oil and Gas Orders, NTLS, written orders, and instructions of the authorized officer. These include but are not limited to, conducting operations in a manner which ensures the proper handling, measurement, disposition, and site security of leasehold production; protecting other natural

resources, environmental quality, life and property. The objective is to maximize ultimate recovery of oil and gas with minimum waste and with minimum adverse effect on ultimate recovery of other mineral resources.

Drilling and production reports are required to be submitted to Minerals Management Service (MMS) pursuant to their regulatory requirements (form MMS 3160).

Well Completion Report

A Well Completion or Recompletion Report and Log, Form 3160-4, is required to be filed within 30 days after completion of a well either for abandonment or production. The completion report is to reflect the mechanical and physical condition of the well. Geologic information and, when applicable, information on the completed interval and production is required.

Subsequent Well Operations

Producing wells in active oil and gas fields will periodically require repair and workover operations. Operations involving no new surface-disturbance to redrill, deepen, and plug-back require the submission and prior approval of the authorized officer of the BLM. And in some cases, these operations may require the approval of the FS. Proposals to perform casing repair, alter casing, perform nonroutine fracturing jobs, recomplete a different interval, perform water shut-off, commingling production between intervals and/or conversion to injection or disposal well, etc., will require the submission of a Sundry Notice (Figure 14) for prior approval of the authorized officer.

Unless additional surface disturbance is involved and if the operations conform to standard and prudent operating practice, prior approval is not required forroutine fracturing or acidizing jobs, or recompletion in the same interval. A subsequent report of these operations must be filed on Sundry Notices and Reports of Wells, Form 3160-5 (Sundry Notice) or Form 3160-4 for recompletion within 30 days of completion of the operations.

No prior approval or subsequent report is required for well cleanout work, routine well maintenance, bottom hole pressure survey or for repair, replacement, or modification of surface production equipment provided no additional surface disturbance is involved.

Approval Procedures

When prior approval is required, the operator must submit a Sundry Notice, or APD, as applicable. With the appropriate form, a detailed written statement of the plan of work is to be provided to the authorized officer. When additional surface disturbance will occur, a description of any subsequent new construction, reconstruction, or alteration of existing facilities, including roads, damsites, flowlines and pipelines, tank batteries, or other production facilities on any lease, must be submitted to the authorized officer for environmental reviews and approval. On NFS lands the BLM will coordinate with the FS to obtain their approval on surface disturbing activities. Emergency repairs may be conducted without prior approval provided the authorized officer is promptly notified.

Production Startup Notification

Operators will notify the authorized officer no later than the 5th business day after any well begins production anywhere on a lease site or allocated to a lease site, or resumes production in the case of a well which has been off production for more than 90 days. The date on which a well commences production, or resumes production after having been off production for more than 90 days, is defined as follows:

1. Oil Wells. The date on which liquid hydrocarbons are first sold or shipped from a temporary storage facility, such as a test tank, and for which a run ticket is required to be generated or, the date on which liquid hydrocarbons are first produced into a permanent storage facility, whichever first occurs.

2. Gas Wells. The date on which associated liquid hydrocarbons are first sold or shipped from a temporary storage facility, such as a test tank, and for which a run ticket is required to be generated or, the date on which gas is first measured through permanent metering facilities, whichever first occurs. For purposes of this requirement, a gas well shall not be considered to have been out of production unless it is incapable of production.

Painting of Facilities

As specified in the Conditions of Approval (COA) of an APD, or a Sundry Notice for approval or modification of additional production facilities, a standard color may be specified. Standardized color charts are available from RMRCC member offices and most FS and BLM District offices.

Measurement of Production

If economically feasible, all oil, other hydrocarbons and gas produced from the leased lands are to be put in a marketable condition.

Oil production is to be measured by tank gauging, positive displacement metering system, or other methods acceptable to the authorized officer. In the absence of prior approval from the authorized officer, no oil is to be diverted to a pit except in emergency situations.

Gas production is to be measured by orifice meters or other methods acceptable to the authorized officer. The flaring/venting of gas from leasehold operations must meet the requirements of Notice to Lessees-4A, (NTL-4A) Royalty or Compensation for Oil and Gas Lost, or an applicable Onshore Oil and GasOrder.

Disposal of Produced Water

Produced water from leasehold operations will be disposed of by subsurface injection, lined pits or other methods acceptable to the authorized officer in accordance with the requirements of Notice to Lessees-2B (NTL-2B), Disposal of Produced Water, or an applicable Onshore Oil and Gas Order. Disposal of produced water by disposal/injection wells requires permit(s) from the primacy state or EPA. In some instances, an additional SMA authorization may be necessary. In most cases, water disposal pits should be fenced and flagged.

Pollution Control/Hazardous Waste

All spills or leakages of oil, gas, produced water, toxic liquids or waste materials, blowouts, fires, personal injuries, and fatalities shall be reported by the operator to the BLM and the SMA in accordance with the requirements of Notice to Lessees-3A, (NTL-3A), Reporting of Undesirable Events, or an applicable Onshore Oil and Gas Order. The BLM requires immediate reporting of all Class I events (more than 100 barrels of fluid/500 MCF of gas released or fatalities involved). Volumes discharged during any of the above incidents will be estimated as necessary. An example of the information normally required in reporting of spills, blowouts, fires, etc. is shown in Figure 15.

Firewalls/containment dikes are to be constructed and maintained around all storage facilities/ batteries. The containment structure must have sufficient volume to contain, at a minimum, the entire content of the largest tank within the facility/battery, unless more stringent protective requirements are deemed necessary by the authorized officer. (See Photographs 4 and 5).

Inspection and Enforcement

The BLM and FS have developed procedures to ensure that leaseholds which are producing or expected to produce significant quantities of oil or gas in any year, or have a history of noncompliance, will be inspected at least once a year. Other factors such as health and safety, environmental concerns, and potential conflict with other resources also determine inspection priority. Inspections of leasehold operations are made to ensure compliance with applicable laws, regulations, lease terms, Onshore Oil and Gas Orders, NTLs, and other written orders of the authorized officer.

PHOTOGRAPH 4. TYPICAL ONSITE PRODUCED WATER DISPOSAL PITS.

PHOTOGRAPH 5. TYPICAL PRODUCTION FACILITY FIREWALL.

CHAPTER 6
RECLAMATION AND ABANDONMENT

Reclamation Plan

A reclamation plan will be a part of the surface use plan of operations. Reclamation may be required of any surface previously disturbed that is not necessary for continued well operations. When abandoning well and other facilities that do not have a previously approved reclamation plan, a plan should be submitted with a Notice of Intent to Abandon (NIA). Additional reclamation measures may be required based on the conditions existing at the time of abandonment. Any additional reclamation requirements would be made a part of the condition of approval of the NIA. The following are generally components of the reclamation plan.

Pit Reclamation

All pits must be reclaimed to a natural condition similar to the rest of the reclaimed pad area. In addition, the reclaimed pit must be restored to a safe and

stable condition. In most cases, if it was necessary to line the pit with a synthetic liner, the pit should not be trenched (cut) or filled while still containing fluids (squeezed). Pits must be allowed to dry, be pumped dry, or solidified in situ prior to filling. The pit area should usually be mounded to allow for settling. The mounding will also allow for positive surface drainage off the reclaimed pit, to help lessen the leaching or lateral movement of undesirable substances from the wellpad area into surface streams or shallow aquifers.

The concentration of hazardous substances in the reserve pit at the time of pit backfilling must not exceed the standards set forth in the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA). All oil and gas drilling-related CERCLA hazardous substances removed from a location and not reused at another drilling location must be disposed of in accordance with applicable state and federal regulation.

Prior Approval of Abandonment

Well abandonment operations may not be started without prior approval of the "Sundry Notices and Reports on Wells," Form 3160-5, by the authorized officer. The Sundry Notice serves as the operator's Notice of Intention of Abandon (NIA). In the case of newly drilled dry holes, failures, and in emergency situations, oral approval may be obtained from the authorized officer subject to written confirmation by application. In such cases, the surface reclamation requirements will have been discussed with the operator and stipulated in the approved APD. Additional surface reclamation measures may be required. For older, existing wells not having an approved surface use plan of operations, a reclamation plan must be submitted with the NIA. Reclamation requirements will be made part of approval of abandonment. The operator must contact the BLM prior to plugging a well to allow for approval and witnessing of the plugging operations.

Revegetation

Disturbed areas should be revegetated after the site has been satisfactorily prepared. Site preparation may include ripping contour furrowing, terracing, reduction of steep cut and fill slopes, waterbarring, etc. The operator will be advised as to species, methods of revegetation and seasons to plant.

Seeding should be done by drilling on the contour whenever practical or by other approved methods. Seeding and/or planting should be repeated until satisfactory revegetation is accomplished, as determined by BLM/FS. Mulching, fertilizing, fencing, or other practices may be required.

Visual Resources

For all activities which alter landforms, disturb vegetation or require temporary or permanent structures, the operator may be required to comply with visual resource management objectives for the area. Site-specific practices may be required by BLM or FS.

Additional Guidelines

Supplemental guidelines and methods may be available that reflect local site and geographic conditions. These guidelines or methods may be obtained from the

local BLM/FS office. Technical advances in reclamation practices are continually being developed that may be successfully applied to oil and gas construction practices.

Pipeline and Flowline Reclamation

Reclamation and abandonment of pipelines and flowlines may involve replacing fill in the original cuts, reducing and grading cut and fill slopes to conform to the adjacent terrain, replacement of surface soil material, waterbarring and revegetating in accordance with a reclamation plan.

Pipeline trenches are to be compacted during backfilling and must be maintained to correct backfill settling and prevent erosion. Waterbars and other erosion control devices must be repaired as necessary. Pipeline routes shall not be used for roads unless they are properly constructed and authorized for such purposes.

Abandoned pipeline routes must be waterbarred as shown in Figure 10. Supplementalguidelines and methods may be available that reflect local site and geographic conditions. These guidelines or methods may be obtained from the local BLM/SMA office.

FIGURE 10. WATERBREAK CONSTRUCTION FOR PIPELINE AND BURIED CABLES.

Well Site Reclamation

Reclamation Procedures: Recontouring involves bringing all construction material back onto the well pad and reestablishing the natural contours where desirable and practical. Figure 11 illustrates this type of restoration on a typical sidehill section. In recontouring areas which have been surfaced with gravel, the gravel is to be buried deep in the recontoured cut to prevent possible surface exposure.

FIGURE 11. WELL SIRE RESTORATION AND STABILIZATION BY TERRACING CUTSLOPES.

Well site reclamation should be planned on both producing and abandoned well sites. The entire site or portion thereof, not required for the continued operation of the well, should be reclaimed. Final grading of backfilled and cut slopes should be done to prevent erosion and encourage establishment of vegetation. (See Photographs 6(A-E)).

Cut and fill slopes should be reduced and graded to blend the site to the adjacent terrain. The disturbed sites should be prepared to provide a seedbed for reestablishment of desirable vegetation and reshaped to blend with the natural contour. Such practices may include contouring, terracing, gouging, scarifying, mulching, fertilizing, seeding, and planting.

All excavations, pits, or drillholes should be closed by backfilling when they are dry and graded to conform to the surrounding terrain. Waterbreaks and terracing may be installed to prevent erosion of fill material.

PHOTOGRAPHS 6(A-E). WELL SITE RECLAMATION

Road Reclamation

Roads not on the SMA Transportation System shall be abandoned, closed, and obliterated. Reclamation of abandoned roads will involve one or more of the following techniques: (1) recontouring to the original contour; (2) recontouring to blend with natural contours; (3) recontouring only selected section of the roadway; and (4) obliteration of the roadway surface with no other modification of the profile.

PHOTOGRAPHS 7(A-B). COMPLETED RECLAMATION OF ROADBED. ROADWAY RESTORED TO THE APPROXIMATE ORIGINAL CONTOUR AND REVEGETATED.

Reclamation may include ripping, scarifying, waterbarring, and barricading. See Figure 10 for details on waterbreak construction. Stockpiled soil, debris, and fill materials should be replaced on the roadbed and cut slopes so as to conform to the approved reclamation plan.

Spacing of the waterbreaks is dependent on slope and soil type. For most soil types, the following table may be used for determining the space needed.

SLOPE	SPACING
2%	200 feet
2-4%	100 feet
4-5%	75 feet
+5%	50 feet

All disturbed areas should be revegetated where practical. Native perennial species, or other plant materials specified by the SMA, will be used.

Inspection

Final abandonment will not be approved until the surface reclamation work required by the APD or NIA has been completed and the required reclamation is acceptable to the SMA.

Water Well Conversion

In some instances, the SMA or private landowner may wish to acquire a well that has encountered usable fresh water. In those cases, requirements for abandonment may be modified. The operator will be reimbursed for any expenses incurred solely because the well is to be completed as a water well.

Final Abandonment Approval

The operator must file a Subsequent Report of Abandonment (SRA) following the plugging of a well. A Final Abandonment Notice (FAN) must be filed upon completion of reclamation operations which indicates that the site is ready for inspections. Upon receipt of the FAN, the SMA will inspect the site. A water supply well drilled in association with drilling an oil and gas well must be

plugged and abandoned before the FAN is approved, if the water well is not acquired by the SMA or private landowner.

Release of Bonds

If the well is covered by an individual lease bond, the period of liability on that bond can be terminated once the final abandonment or phased bonding release has been approved. The principal can request termination of the period of liability from the State Office holding the bond. If the well is covered by a statewide or nationwide bond, termination of the period of liability of these bonds is not approved until final abandonment of all activities conducted under the bond have been approved.

CHAPTER 7
APPEALS

Administrative Relief (BLM)

State Director Reviews (SDRs) are conducted according to 43 CFR 3165.3. Appeals are processed according to 43 CFR 3165.4. All actions and decisions of the BLM pursuant to the oil and gas program as governed by 43 CFR 3160, and all Onshore Oil and Gas Orders and Notices to Lessees promulgated therefrom, are subject to SDRs, appeals, or both upon request. Note that before pursuing an appeal under this set of regulations, a SDR must be conducted first. SDRs apply to decisions related to APD conditions of approval or stipulations, inspection and enforcement actions, APD or Sundry Notices, etc. SDRs and appeals must be filed in the appropriate office according to the regulatory timeframes prescribed.

Forest Service Appeals

Forest Service appeals are conducted according to currently approved regulation. Decisions requiring FS consent or approval for use of National Forest System Lands are generally subject to appeal under these regulations subject to the additional provisions and limitations given in 36 CFR 228 E.

INDEX

ACRONYMS
USED IN THIS TEXT

ADT - Average Daily Traffic

APD - Application for Permit to Drill

BLM - Bureau of Land Management

CA - Communitization Agreement

CERCLA - Comprehensive Environmental Response, Compensation, and Liability Act of 1980

CFR - Code of Federal Regulations

CMP - Corrugated Metal Pipe

COA - Condition of Approval

EPA - Environmental Protection Agency

FAN - Final Abandonment Notice

FS - Forest Service

MLA - Mineral Leasing Act

NEPA - National Environmental Policy Act of 1969

NIA - Notice of Intention to Abandon

NOI - Notice of Intent

NOS - Notice of Staking

NTL - Notice to Lessee, National, State or District

POD - Plan of Development

RMP - Resource Management Plan

ROD - Record of Decision

ROW - Rights-of-Way

SDR - State Director Review

SMA - Surface Managing Agency

SN - Sundry Notice

SRA - Subsequent Report of Abandonment

SUP - Special Use Permit

SWD - Salt Water Disposal

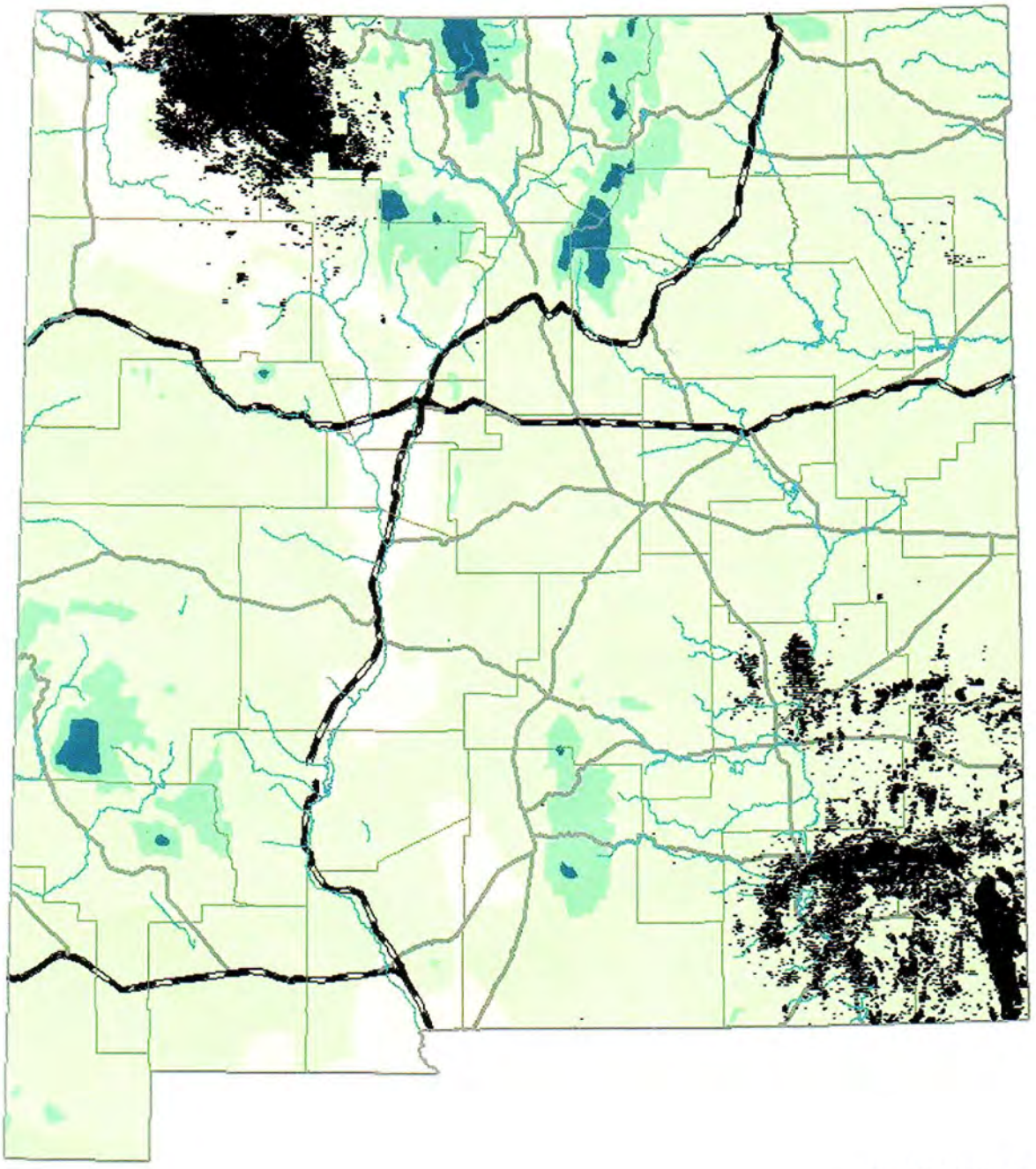
UA - Unit Agreement

BLM/FS OFFICE LOCATIONS

NOTES

APPENDIX VIII

NEW MEXICO BLM
AND
FEDERAL LANDS MAP

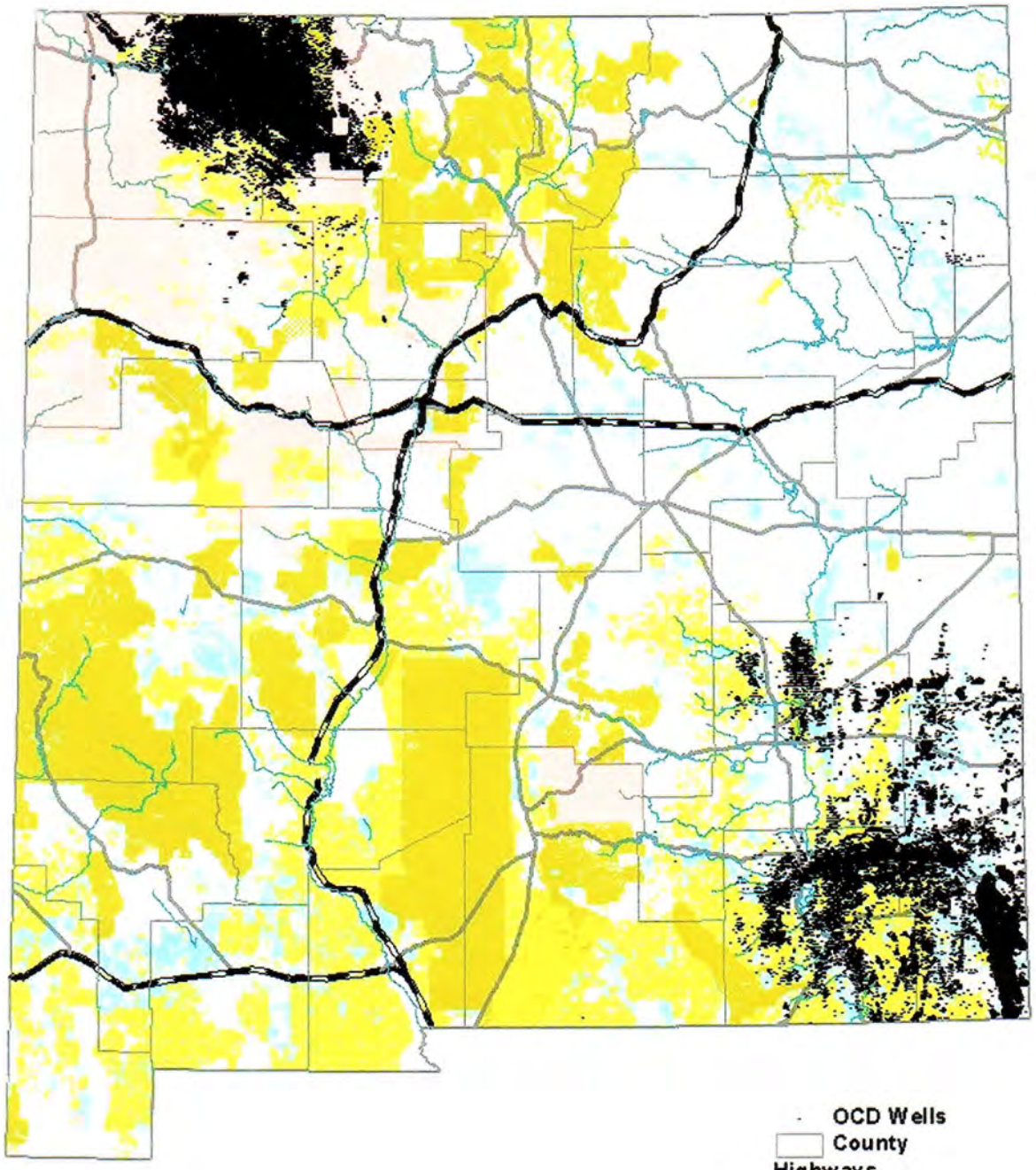


OCD Wells
County
Highways
Interstate
U.S.
Precip, inches/yr
7 - 10
11 - 20
21 - 30
31 - 47

Yearly Precipitation in Inches with NM OCD Well Locations

50 0 50 100 150 Miles

N
W E
S



OCD Wells
County
Highways
Interstate
U.S.
Land Status
P
BLM
BR
DOA
DOD
DOE
FS
FWS
NPS
I
S
SGF
SP

Generalized NM Land Status with NM OCD Well Locations

50 0 50 100 150 Miles

N
W E
S

platts

IPAA Attachment 5

www.platts.com

Gas Daily

Originally published January 26, 2006

State storm-water runoff regulations vary widely

State agencies that regulate gas and oil drilling are taking a widely varied approaches to regulating storm-water runoff from drilling construction sites in the wake of last year's national energy bill that removed federal oversight.

Recently, the Colorado Water Quality Control Commission re-asserted its authority to regulate storm-water runoff on gas and oil construction sites of between one and five acres. Following a Jan. 9 rulemaking hearing, the commission tentatively accepted the recommendation of its staff to continue a program "where storm-water discharges that disturb one acre or more of land are all subject to the storm-water permit program under our Water Quality Control Division," Commission Administrator Paul Frohardt told *Gas Daily*.

The issue arose last year when Congress passed the Energy Policy Act of 2005, a portion of which declared that the Environmental Protection Agency did not have jurisdiction under the Clean Water Act to regulate storm-water runoff from gas and oil construction sites of between one and five acres.

Groups representing the exploration-and-production industry hailed that part of the law, saying it freed them from burdensome federal regulation. But this month's Colorado decision left open the question of whether states have the authority to impose their own storm-water regulations on the industry.

States' approach to runoff represents a patchwork of regulations, with some, like Colorado, placing the responsibility on an agency that regulates other environmental issues. Other states have put the onus of regulation on state agencies that oversee other aspects of gas and oil development.

In addition, some producing states follow the former federal guidelines for runoff while others pursue a form of light-handed regulation, letting operators conform to industry "best practices."

"At this point I don't see a need to regulate storm water in Texas because we're not seeing water quality impacts," said Leslie Savage, a planner with the Texas Railroad Commission, which regulates gas and oil operations in the state. "We've not seen any evidence that either construction or the E&P facilities themselves ... are causing a violation of the water quality standards."

"A lot of the production in Texas is in an arid area where they don't have a problem with storm-water runoff," Savage said. "If we see there are some areas we need to address, we might consider some regulations."

In Wyoming, the state's Dept. of Environmental Quality requires water runoff permits of all construction activities, including gas and oil construction sites. Barb Sahl, DEQ storm-water program coordinator, said that in March 2005 the state revised its storm-water rules to require permits for all oil and gas construction sites of one acre or more—following the lead of the EPA regulations at that time.

"When we promulgated them they were up-to-date," she said. "We decided to continue with the program and see how it works."

John Robitaille, vice president of the Petroleum Assn. of Wyoming, said he thought it was a mistake for DEQ to implement its storm-water rules. "At the time we suggested that things were changing in Washington and it may not be something that would be regulated in terms of the oil and gas industry. They decided to go forward and continue to regulate it regardless of what was possible."

Robitaille views the permits as a needless bureaucratic red tape for drillers. "It's just another permit that we need to go through," he said. "It's got the possibility of delaying any kind of activity we may be going to do."

He added that the Wyoming storm-water regulation, which was first implemented in 2004, will be up for review in 2007 and "we may be able to have it removed at that time."

Some regulators, particularly in states with drier climates, have little appetite to take on the storm-water runoff issue. "We have looked at it and overnight that would add 50,000 some-odd sites that we would be responsible for," said Mark Fesmire, director of the Oil Conservation Division of the New Mexico Energy, Minerals and Natural Resources Dept. "We're short of folks now and that would add a tremendous burden."

Fesmire noted that "New Mexico is one of the few states that already has the environmental regulation in the oil and gas division." He said the division might look into the issue of storm-water runoff from oil and gas sites some time in the future, "but as of right now, unless the governor tells us to, we don't have the people to do that."

In the Appalachian Basin, gas and oil production sites tend to be smaller than those in the West, and therefore a greater percentage of construction sites tend to fall under the old EPA rules for one- to five-acre oversight.

Thomas Stewart, executive vice president of the Ohio Oil

and Gas Assn., asserted that Congress never intended for the EPA to have the power to regulate storm-water runoff from those sites. The EPA, "on their own and without statutory authority took a contrary view," he said. "Congress didn't intend that and Congress told them again" in last year's energy bill.

"In the state of Ohio, the Oil and Gas Division of Mineral Resources Management has authority over all aspects of oil and gas drilling and production, including siting and permitting," Stewart said. That agency "has always regulated site runoff. It's not a separate permit, but all tied to the drilling permit."

He said his group supports Ohio's form of regulation, which encourages operators to adopt best industry management practices to avoid runoff problems. For example, he said the agency wants to prevent mud from drilling operations from finding its way into streams.

"We agree with that. You shouldn't be putting mud in streams. There are things you can easily do under best management practices to ensure that doesn't happen." JM

platts *Gas Daily*

Volume 23 / Issue 14 / Originally published Monday, January 23, 2006

ISSN: 0885-5935

Gas Daily is published daily by Platts, a division of The McGraw-Hill Companies. Registered office Two Penn Plaza, 25th Floor, New York, NY 10121-2298

Officers of the Corporation: Harold McGraw III, Chairman, President and Chief Executive Officer; Kenneth Vittor, Executive Vice President and General Counsel; Robert J. Bahash, Executive Vice President and Chief Financial Officer; John Weisenseel, Senior Vice President, Treasury Operations.

To reach Platts

E-mail: support@platts.com

North America
Tel: 800-PLATTS-8 (toll-free)
+1-212-904-3070 (direct)

Latin America
Tel: + 54-11-4804-1890

Europe & Middle East
Tel: +44-20-7176-6111

Asia Pacific
Tel: +65-6530-6430

Advertising
Tel: +1-212-904-4367

The McGraw Hill Companies

McQuaid, Janet

From: Keener, James [James_Keener@platts.com]
Sent: Tuesday, February 21, 2006 12:37 PM
To: McQuaid, Janet
Subject: FW: Gas Daily reprint

GD_Jan2306_reprin tfulbright.pd...

Janet:
My apologies. For what it's worth, I did try to send this to you last Friday, but I mistakenly added an "e" to the end of your last name. Hope this one makes it over successfully.

All the best,

Jim

-----Original Message-----
From: Keener, James
Sent: Friday, February 17, 2006 9:42 AM
To: 'jmcquaide@fulbright.com'
Subject: Gas Daily reprint

Janet:
Per your request, here is the reprint of the Gas Daily article. Please allow this email to serve as permission to submit this article electronically to the U.S. Environmental Protection Agency rulemaking docket.

Call with any questions.

Best, <<GD_Jan2306_reprintfulbright.pdf>>

Jim Keener
platts
A Division of The McGraw-Hill Companies
tel: +1 720-548-5624
fax: +1 720-548-5001
james_keener@platts.com
www.platts.com

03-2908
(and consolidated cases)

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

WISCONSIN BUILDERS ASSOCIATION, ASSOCIATED GENERAL CONTRACTORS OF AMERICA, et al., **Petitioners,**	§	**Petitions for Review of an Order of the Environmental Protection Agency**
Nos. 03-2908, 03-3276, 03-3277, 03-3278, 03-3279, 03-3280, 03-3281, 03-3282, 03-3283 and 03-3865	§	**No. 02-OW-55**
ENVIRONMENTAL PROTECTION AGENCY, **Respondent,**	§	
and	§	
THE STATE OF NEW YORK and THE NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION, **Intervening Respondents.**	§	

AMICUS BRIEF OF THE RAILROAD COMMISSION OF THE STATE OF TEXAS

In Support of Oil and Gas Petitioners' Request to Remand Certain Definitions Contained in the Environmental Protection Agency's Construction General Permit and Fact Sheets, Along with Certain Other Requirements Applicable to Oil and Gas Operations

DAVID W. COONEY, JR.
Texas State Bar No. 04769860
LINDIL FOWLER
Texas State Bar No. 00795807
1701 N. Congress
P. O. Box 12967
Austin, Texas 78711-2967
PHONE (512) 463-6977
FAX (512) 463-6684

Counsel for the Railroad Commission of the State of Texas

03-2908
(and consolidated cases)

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

WISCONSIN BUILDERS ASSOCIATION, ASSOCIATED GENERAL CONTRACTORS OF AMERICA, et al.,	§	
Petitioners,	§	**Petitions for Review of an Order of the Environmental Protection Agency**
Nos. 03-2908, 03-3276, 03-3277, 03-3278, 03-3279, 03-3280, 03-3281, 03-3282, 03-3283 and 03-3865	§	**No. 02-OW-55**
ENVIRONMENTAL PROTECTION AGENCY,	§	
Respondent,	§	
and	§	
THE STATE OF NEW YORK and THE NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION,	§	
Intervening Respondents.	§	

AMICUS BRIEF OF THE RAILROAD COMMISSION OF THE STATE OF TEXAS

In Support of Oil and Gas Petitioners' Request to Remand Certain Definitions Contained in the Environmental Protection Agency's Construction General Permit and Fact Sheets, Along with Certain Other Requirements Applicable to Oil and Gas Operations

DAVID W. COONEY, JR.
Texas State Bar No. 04769860
LINDIL FOWLER
Texas State Bar No. 00795807
1701 N. Congress
P. O. Box 12967
Austin, Texas 78711-2967
PHONE (512) 463-6977
FAX (512) 463-6684

Counsel for the Railroad Commission of the State of Texas

CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal:

The Parties:

1. The Oil and Gas Petitioners are Texas Independent Producers and Royalty Owners Association, Independent Petroleum Association of America, U.S. Oil and Gas Association, Texas Alliance of Energy Producers, Louisiana Oil and Gas Association, Independent Gas and Gas Association of Pennsylvania, Ohio Oil and Gas Association, and Oklahoma Independent Petroleum Association.
2. The Construction Petitioners are National Association of Homebuilders, Wisconsin Homebuilders Association and The Associated General Contractors of America.
3. The Environmental Petitioner is National Resources Defense Counsel.
4. Intervenor-Respondents are the State of New York and New York State Department of Environmental Conservation.
5. Respondent is the United States Environmental Protection Agency.
6. Amicus Curiae is Railroad Commission of Texas

Counsel:

7. Counsel for Oil and Gas industry Petitioners: Janet L. McQuaid, and Marcy Hogan Greer of Fulbright & Jaworski L.L.P., Austin, Texas, and L. Poe Leggette, of Fulbright & Jaworski L.L.P., Washington, D.C.

8. Counsel for Petitioners National Association of Homebuilders and Wisconsin Homebuilders Association: Ellen B. Steen, R. Timothy McCrum, Crowell & Moring, LLP, 1001 Pennsylvania Avenue, N.W., Washington, D.C.

9. Counsel for Petitioner Associated General Contractors of America: Fredric P. Andes, Jeffrey Longsworth, Barnes & Thornburg, 750 17th Street, NW, Suite 900, Washington, D.C.

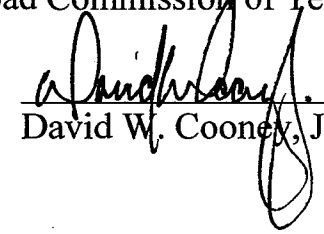
10. Counsel for Natural Resources Defense Council: Barry Sullivan, Jeffrey T. Shaw, Daniel E. Shaw, Jenner & Block, LLC, One IBM Plaza, Chicago, Illinois.

11. Counsel for Intervenors: Philip Bein, Assistant Attorney General, The Capitol, Albany, New York.

12. Counsel for Respondent: Thomas L. Sansonetti, Assistant Attorney General, Environment and Natural Resources Division, U.S. Department of Justice, Washington, D.C., and Alan D. Greenberg,

Environmental Defense Section, U.S. Department of Justice, Denver, Colorado.

13. Counsel for Amicus Curiae Railroad Commission of the State of Texas: David W. Cooney, Jr., Special Counsel, and Lindil Fowler, General Counsel, Railroad Commission of Texas, Austin, Texas.



David W. Cooney, Jr.

TABLE OF CONTENTS

PAGE

INDEX OF AUTHORITIES

INDEX OF AUTHORITIES
(continued)

PAGE

IDENTITY, INTEREST, AND AUTHORITY OF AMICUS CURIAE

The Railroad Commission of the State of Texas (the "Commission" or "RRC" herein) submits this Brief as amicus curiae in support of Oil and Gas Petitioners in this matter. Due to the definitions of "common plan" and "final stabilization" adopted by the EPA in the CGP and the Fact Sheet, no oil and gas operator can possibly have reasonable certainty as to whether or not CGP coverage is required. Further, the RRC supports the Oil and Gas Petitioners' contention that those definitions, along with the SWPPP, management practices, and related inspection and recordkeeping requirements adopted by the EPA, fail to account for the realities of oil and gas operations.

The RRC is the oldest regulatory agency in the State of Texas and one of the oldest in the country, having originally been established in 1891 to regulate the rail industry. *See* Act of April 3, 1891, 22d Leg., R.S., ch. 51, 1891 Tex. Gen. Laws 55. The RRC has since been given regulatory authority over the oil and gas industry and fulfills many roles in that function, including both protecting the environment and doing "all things necessary for the conservation of oil and gas and prevention of waste of oil and gas." TEX. NAT. RES. CODE ANN. § 85.202(b); *see also id.* § 91.101 (relating to pollution prevention); *Gulf Land Co. v. Atlantic Refining Co.*, 131 S.W.2d 73, 80 (Tex. 1939). With respect to water pollution, the RRC has been tasked by the Texas Legislature to "adopt and enforce rules and

orders and may issue permits" to "prevent pollution of surface water or subsurface water in the state," including pollution from storm water from oil and gas activities. TEX. NAT. RES. CODE ANN. § 91.101. The RRC's companion agency, the Texas Commission on Environmental Quality (TCEQ), has equally broad duties as they relate to storm water runoff from activities other than oil and gas activities.

The RRC has a substantial interest in the EPA's CGP and Fact Sheet that the Court is reviewing. Texas remains the most active oil and gas drilling state in the nation with about 47% of all of the active drilling rigs in the nation as of June 4, 2004, and the RRC receives between 600 and 1,000 new well drilling permits per month (April 2004 had 798 well completions). The CGP and Fact Sheet will impact many of the wells that are the subject of these permits.[1] *See, e.g.*, Railroad Commission of Texas, Summary of Drilling, Completion, and Plugging Reports (April 2004) (Addendum A).[2]

---

[1] In a related proceeding in the Fifth Circuit (*Texas Independent Producers & Royalty Owners Ass'n, et al. v. E.P.A.*, No. 03-60506 (5th Cir. filed June 9, 2003)), Petitioners are challenging the "Deferral Rule," 40 C.F.R. § 122.26(e)(8), contending that it exceeds the EPA's statutory authority to require a permit for uncontaminated discharges from oil and gas construction activities. The RRC has filed an amicus brief in that matter in support of Petitioners there.

[2] Excerpts of key data and authorities cited in this Brief are provided in an attached Addendum. Additional information is available on the Commission's Internet site at the URL address provided in footnotes to this Brief. For example, the Commission's summary of well reports is available at www.rrc.state.tx.us/divisions/og/information-data/wkly-qtry-monthly-reports/prod-drill/ogdcstat.html.

SUMMARY OF THE ARGUMENT

The RRC submits this amicus brief to emphasize the importance of the oil and gas industry and to provide the Court with the RRC's views and concerns about the implications that the CGP and Fact Sheet under review may have on the Texas oil and gas industry. The RRC's interest is longstanding.

In the event it is determined that the EPA has the statutory authority to require a permit for uncontaminated discharges from oil and gas clearing and grading activities—an issue which is currently before the Fifth Circuit—then the EPA must modify its definitions of "common plan" and "final stabilization" so that those terms make sense given the realities of oil and gas operations, and so that an operator has fair notice of what conduct is prohibited. Further, the requirements of the SWPPP and related management practices, inspection and recordkeeping should be modified so that they bear a rational relationship to the nature, scope, progress, and practices of oil and gas operations. EPA's decision to impose current requirements on an estimated 30,000 oil and gas sites per year while deferring analysis of a significant element of the problem was arbitrary and capricious.

ARGUMENT

I. The Commission Has a Strong Vested Interest in EPA's Interpretation Because It Will Hinder Resource Development and the Commission Is Charged with Preventing Waste of Oil and Gas

The oil and gas industry is an integral part of the Texas economy. Texas ranks first out of all 50 states in terms of both oil and gas production and the number of wells drilled. The importance of this industry to the State has long been recognized. *Cf. Burford v. Sun Oil Co.*, 319 U.S. 315, 320-22 (1943) (United States Supreme Court noting the importance of oil and gas industry to Texas in determining whether federal abstention was proper).

The industry continues to contribute both revenue and jobs to the State. However, since 1995, statewide crude oil production has declined by 29% for the 8-year period as reservoirs mature and marginal production is lost. During 2003, over 350 million barrels of crude oil and 480 billion cubic feet of natural gas were produced in Texas.[3] To continue production of Texas' valuable oil and gas reserves, new wells must be drilled. As noted above, the Commission receives between 600 and 1,000 new well drilling permits per month. (April 2004 had 798 well completions). *See, e.g.*, Railroad Commission of Texas, Summary of Drilling, Completion, and Plugging Reports (April 2004).[4]

---

[3]Available at www.rrc.state.tx.us/divisions/og/information-data/stats/ogismcon.html.

[4]Available at www.rrc.state.tx.us/divisions/og/information-data/wkly-qtry-monthly-reports/prod-drill/ogdcstat.html.

EPA's storm water permitting requirements, which could apply to even small oil and gas sites under EPA's expansive definition of "common plan," seriously threaten this significant industry. EPA's estimates have grossly understated the economic impact of its Deferral Rule. 40 C.F.R. § 122.26(e)(8). EPA states that the potential economic impact is $1,206 to $8,709 per site to comply with Best Management Practices at small residential and commercial construction sites. *See* 67 Fed. Reg. 79828, 79829 (Dec. 30, 2002). EPA's costs do not address the more serious implication of the Deferral Rule and EPA's broad definition of "common plan," which are the potentially enormous economic losses from delayed and lost production. The existing CGP eligibility provisions, as well as the nullification of self-implementing processes such as those urged on the Court in the Brief submitted by NRDC, have a high potential to substantially delay the commencement of many drilling operations. These costs speak directly to the Commission's duty to do "all things necessary for the conservation of oil and gas and prevention of waste of oil and gas." TEX. NAT. RES. CODE ANN. § 85.202(b).

The economic burden the EPA's permit requirement and SWPPP, best management practices ("BMPs"), and attendant paperwork will place on Texas' production will certainly delay, and many times prevent, the drilling of wells. In addition, the procedural burden the storm water permit requirement will place on exploration and production, in terms of endangered species and similar eligibility

requirements, will unquestionably delay, and perhaps prevent altogether, the drilling of many new wells.

The RRC believes that the resulting impact on oil and gas exploration and production will be severe, while the resulting benefit to the environment will be minimal or non-existent. The CGP and related requirements were designed for traditional residential and commercial construction projects, and make little or no sense for an oil and gas operation. In light of the potential costs in terms of delayed or lost energy and the minimal environmental benefits, EPA's imposition of unnecessary and unreasonable requirements on oil and gas site preparation activities is particularly troublesome. There is ample reason to grant Oil and Gas Petitioners' requests for relief, and the RRC urges the Court to grant this relief.

II. EPA's Definition of "Common Plan" Does Not Make Sense in an Oil and Gas Context Because Oil and Gas Site Preparation Activities Are Different from Commercial/Residential Construction Activities

Storm water permit requirements do not fit with oil and gas site preparation activities. Congress recognized this when it exempted oil and gas activities of any size from the ambit of the CWA. EPA, however, has failed to account for differences between the oil and gas industry and the residential and commercial construction industry. In particular, its vague and inconsistent definitions of "common plan" and "final stabilization" will pull many small sites into the permit requirement that Congress surely intended to exempt. The RRC commented on the

inappropriateness of the "common plan" definitions during the comment period for the CGP and Fact Sheet. *See* OGR00144, 00147.[5] EPA failed to adequately respond or deferred response on these comments. *See* OGR00378-79 (referring to Response 96 for OGR00144 (Doc. ID 1009) and 00147 (Doc. ID 1007), respectively); *see also* OGR00492 (deferring response to OGR 00144).

Oil and gas drilling site preparation is very different from construction of a residential development, office building, or shopping mall. In Texas, oil and gas operations are typically located in remote, non-urban areas. Selection of these drilling sites is controlled by numerous factors not contemplated by EPA's model for civil construction. Surface and subsurface geology, RRC-imposed spacing requirements to protect correlative rights, mineral law, legal contracts, and terms and availability of oil and gas leases all factor into drilling site selection.

The mineral lease necessary to commence any exploration and production operation is a key factor. The vast majority of drilling in Texas occurs under an oil and gas lease. On private lands, these leases generally have short primary terms, and the operator must commence drilling or risk forfeiting the lease. The primary terms may be as long as two or three years, but many times are much shorter. A primary term of one month is not unusual in some parts of Texas. Most exploration projects take several years to acquire all of the necessary leases to drill.

[5] Cites to "OGR" are to the Separate Appendix of Oil and Gas Petitioners filed July 28, 2004.

In many cases, only a few days or weeks remain in the lease terms prior to the drill site being located and a drilling permit being issued from the RRC. But the due diligence process for eligibility under the EPA permit cannot effectively take place until the drill site is located with reasonable accuracy and certainty. The EPA permit eligibility requirements, therefore, and any nullification of self-implementing processes the Court may be asked to grant—such as those urged on the Court in the Brief submitted by NRDC—have a high potential to substantially delay the commencement of many drilling operations. Such delays cause wells *not* to be drilled and hamper development of the energy resource. All of this leads to diminished economic activity.

In addition, after drilling the first exploratory well, additional wells may be needed to develop and produce the reservoir and hold the lease(s). The continuous drilling obligations in most private leases have a similar potential to result in lease forfeiture if the delays and uncertainties associated with the EPA permitting and eligibility process are imposed on oil and gas activities. Any such forfeiture harms all parties involved, including the operator (who loses potential revenue), the mineral owner (who loses potential royalties), and the State (which loses all taxes attributable to that production). And most importantly, the State and nation lose the production of a valuable natural resource at a time when domestic production should be encouraged to decrease our growing dependence on foreign oil. In

contrast, most conventional residential and commercial construction projects have a lengthy planning process where securing a storm water discharge permit does not create undue delay or risk of forfeiture.

Each well site generally has a small amount of disturbed soil and is non-contiguous with other sites due to the Commission's spacing requirements. Lease provisions, as well as Texas common law, generally require an oil and gas operator to minimize its footprint on the land. Typically, within weeks of site preparation, as much land as possible is reclaimed as nearly as possible to its original condition. Unlike the construction industry, where the building or buildings themselves are the ultimate goal, oil and gas operators only conduct low-intensity construction as needed to facilitate their ultimate goal—drilling a well and producing oil and gas.

Under EPA's broad definition of "common plan," multiple, widely spaced oil and gas sites are counted together as one, like a large construction site, especially if there are interconnecting pipelines and roads. EPA's definition of "common plan" bears no rational relationship to the reality of oil and gas operations. The long, ribbon-like nature of pipelines and access roads typically span many acres of otherwise undisturbed or agricultural land. The widely spaced sites minimize run-off and have no parallel in the urban commercial and residential construction analyzed by EPA in promulgating its rule. It is not scientifically valid

to extrapolate environmental impacts associated with urban commercial/residential construction activities to oil and gas construction activities, as EPA has done.

III. The RRC Already Has Activity-Appropriate Controls in Place to Address Potential Water Quality Impacts From Oil and Gas Operations, Including Site Preparation Activities

EPA has offered no legitimate reason for the imposition of the additional burdens on oil and gas operations. Requiring an additional permit and imposing unnecessary paperwork requirements and inappropriate BMP requirements will not offer added protection for the environment. Rather, the prevention of contaminating storm water pollution is addressed through the regulatory and enforcement mechanisms already in place.

The RRC takes seriously its commitment to protect the State's surface and subsurface water from oil and gas activities. This emphasis on environmental protection is nothing new. The RRC first promulgated Rule 20 in 1919—over 50 years before the EPA was founded. Rule 20 (now known as Rule 8, codified in 16 TEX. ADMIN. CODE § 3.8) then provided:

> FRESH WATER TO BE PROTECTED - Fresh water, whether above or below the surface, shall be protected from pollution, whether in drilling or plugging.

See Railroad Commission's Surface Waste Management Manual, Chapter II (giving history of Rule 20) (Addendum B).[6] This environmental protection has

[6]Available online at www.rrc.state.tx.us/divisions/og/publications/SurfaceWasteManagementManual/chapter2.html

been steadily expanded to ensure the quality of the waters (and land) that could be potentially impacted by an oil and gas operator's activity. The Commission's current rule defines "pollution of surface or subsurface water" broadly:

> The alteration of the physical, thermal, chemical, or biological quality of, or the contamination of, any surface or subsurface water in the state that renders the water harmful, detrimental, or injurious to humans, animal life, vegetation, or property, or to public health, safety, or welfare, or impairs the usefulness or the public enjoyment of the water for any lawful or reasonable purpose.
>
> 16 TEX. ADMIN. CODE § 3.8.

The RRC has used its expertise and many decades of experience in regulating the oil and gas industry to carefully craft rules that ensure water quality yet do not arbitrarily stifle economic growth. In contrast, in developing its Deferral Rule and in adopting the CGP and Fact Sheet, EPA did not consider whether or not storm water discharge from oil and gas operations constitute sufficient threat to water quality to warrant permit requirements from a technical, practical, and economic basis. Further, in the particular context of this proceeding, the EPA refused to consider the many significant differences between traditional residential and commercial construction, on the one hand, and oil and gas clearing and grading, on the other hand, that render the terms "common plan" and "final stabilization" impractical in the oil and gas context.

IV. EPA's Decision to Impose Requirements on Oil and Gas Activities While Deferring Analysis of Those Requirements to the Future Was Arbitrary and Capricious

EPA is required to consider significant aspects of the problem before it, articulate a rational connection between the facts and the choice made, and give a reasoned response to significant comments. *See Motor Vehicle Mfr's Ass'n v State Farm Mut. Auto. Ins. Co.*, 463 U.S. 41, 43 (1983). But in the CGP and Fact Sheet, EPA imposed requirements today on an estimated 30,000 oil and gas sites per year while deferring until later analysis of a significant aspect of the problem, as follows:

> During the two-year postponement of this deadline, EPA plans to gather information about the area of land disturbed during construction of oil and gas exploration and production facilities. In evaluating the impact of this action, the Agency will work with States, industry, and other entities to gather and evaluate data on the development and use of appropriate best management practices for the oil and gas industry . . . The EPA will use the additional data and analysis produced during the two-year period to determine the appropriate NPDES requirements, if any, for small construction of oil and gas exploration and production facilities.[7]

By imposing current requirements while deferring necessary analysis, EPA failed to consider the significant differences between oil and gas activities and conventional, residential and commercial construction activities, which was a very important aspect of the problem before it. Moreover, by deferring response on

[7] 68 Fed. Reg. at 11327-28 (March 10, 2003); *see also* 67 Fed. Reg. 78116, 78118 (December 20, 2002) (recognizing that 30,000 oil and gas sites may be affected).

numerous comments to the two-year period before March 10. 2005, EPA failed to respond to significant comments submitted to it, including the comments of the Railroad Commission. *See, e.g.*, OGR00492 (RTC14-15) (deferring response to OGR00144). EPA thereby failed to articulate a rational connection between the reality of oil and gas operations and the definitions and requirements imposed, and its failure to do these things renders its actions arbitrary and capricious. *See State Farm*, 463 U.S. at 43.

CONCLUSION

For the reasons set out in this Amicus Brief, the RRC supports the relief requested in the Oil and Gas Petitioners' Brief, that this Court: (1) find EPA's definitions of "common plan" and "final stabilization" contained in its Construction General Permit ("CGP") and Fact Sheet unconstitutional and/or arbitrary and capricious, remand those definitions for further consideration, and enjoin the EPA from applying those definitions to require permits for oil and gas activities until an appropriate modification of the CGP and Fact Sheet has taken place; (2) find the EPA's Storm Water Pollution Prevention Plan ("SWPPP"), best management practices, inspection and recordkeeping requirements arbitrary and capricious in the context of the oil and gas industry, remand those requirements to the EPA for further consideration, and enjoin the EPA from enforcing those

requirements against oil and gas construction activities covered by the CGP until an appropriate modification of the CGP and Fact Sheet has taken place.

Respectfully submitted,

THE RAILROAD COMMISSION
OF THE STATE OF TEXAS

By: _____
DAVID W. COONEY, JR.
Texas State Bar No. 04769860
LINDIL FOWLER
Texas State Bar No. 00795807
1701 N. Congress
P. O. Box 12967
Austin, Texas 78711-2967
PHONE: (512) 463-6977
FAX: (512) 463-6684

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation of FED. R. APP. P. 32(a)(7)(B) because:

this brief contains 3,183 words, excluding the parts of the brief exempted by FED. R. APP. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of FED. R. APP. P. 32(a)(5) and the type style requirements of FED. R. APP. P. 32(a)(6) because:

this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2002 XP for Window in Times New Roman, Font Size 14, except for footnotes, which are in Times New Roman, Font Size 12 typeface.

Dated: August 5, 2004

David W. Cooney, Jr.
Counsel for Texas Railroad Commission

PROOF OF SERVICE

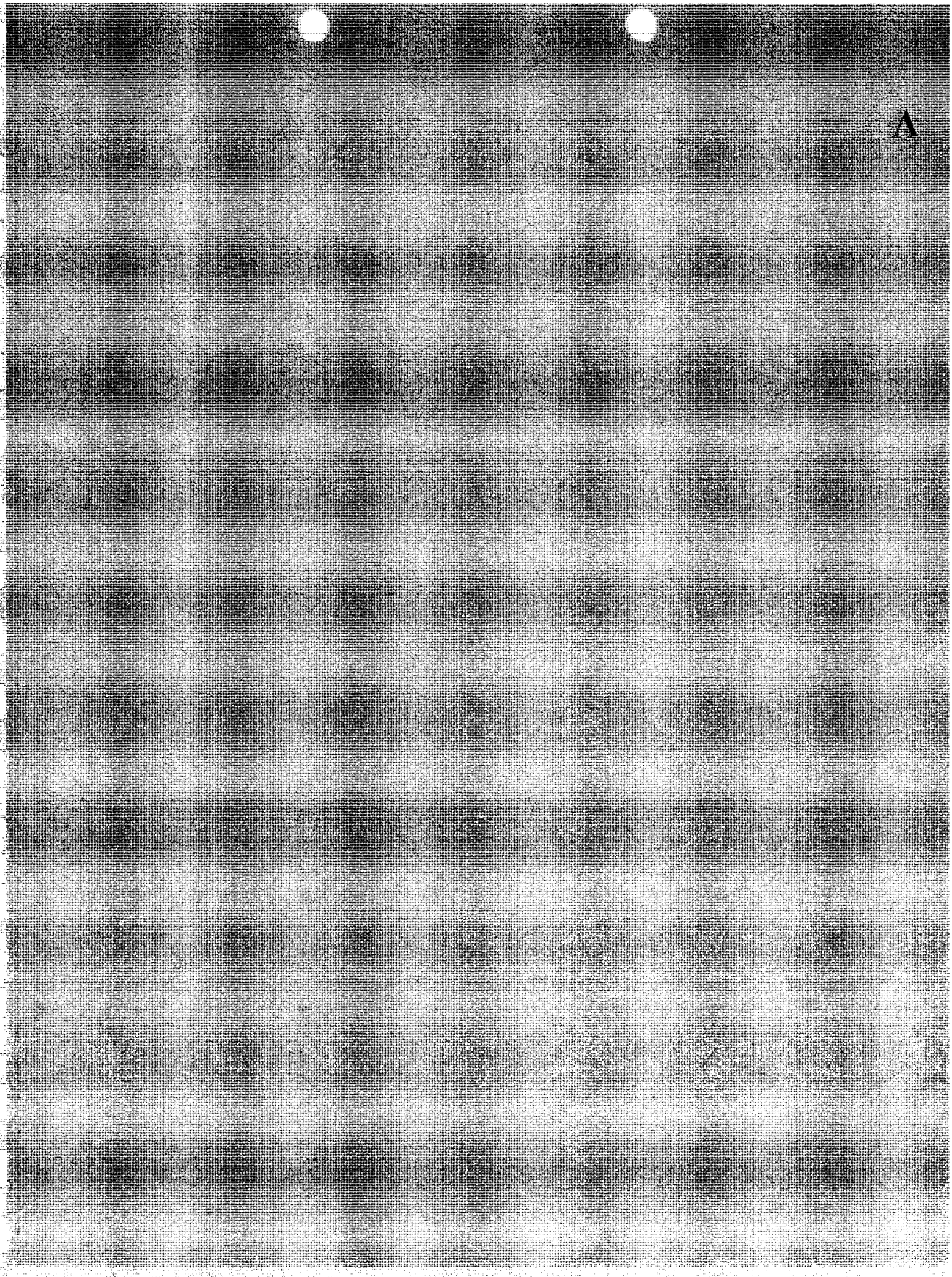
The undersigned, counsel for the Railroad Commission of Texas, hereby certifies that on August 5, 2004, the original plus fifteen copies of the Amicus Brief, as well as a diskette containing a PDF digital version of the brief, were dispatched to Gino J. Agnello, Clerk, U.S. Court of Appeals for the Seventh Circuit, Room 2722, 219 S. Dearborn Street, Chicago, IL 60604, via third-party commercial carrier for next-day delivery, and two copies of the Amicus Brief, as well as a diskette containing a PDF digital version of the brief, were dispatched by First Class Mail, postage prepaid, to counsel of record listed below:

Alan D. Greenberg Trial Attorney U.S. Department of Justice 999 18th Street, Suite 945 Denver, CO 80202 (303) 312-7324 telephone (303) 312-7331 facsimile Ellen B. Steen R. Timothy McCrum Crowell & Moring 1001 Pennsylvania Ave. NW Washington, D.C. 20004 Janet McQuaid Fulbright & Jaworski L.L.P. 600 Congress Ave., Suite 2400 Austin, Texas 78701	Frederic P. Andes Jeffrey Longsworth Barnes & Thornburg 750 17th Street, NW, Suite 900 Washington, D.C. 20006 Barry Sullivan Jeffrey T. Shaw Daniel Shim Jenner & Block, L.L.C. One IBM Plaza Chicago, Illinois 60611 Philip Bein Assistant Attorney General The Capitol Albany, New York 12224

RAILROAD COMMISSION OF TEXAS

By: _____
DAVID W. CO[illegible]NEY, JR

INDEX TO ADDENDUM


A

RAILROAD COMMISSION OF TEXAS

Summary of Drilling, Completion and Plugging Reports Processed

Apr-04

	State Totals			Activity by District For April												
April	2004	2004 (YTD)	2003	01	02	03	04	05	06	6E	7B	7C	08	8A	09	10
New field Discoveries*	20	79	87	1	2	6	6	0	2	0	0	1	0	1	0	1
Oil	3	16	29	0	0	1	0	0	1	0	0	1	0	0	0	0
Gas	17	63	58	1	2	5	6	0	1	0	0	0	0	1	0	1
Drilling Overview**																
New Drill Dry/Completions	701	3,292	2,596	20	44	39	72	35	48	0	26	105	127	70	79	36
Re-enter Dry/Completions	19	102	95	0	1	2	1	0	0	0	4	1	5	1	2	2
Re-Completions	129	600	609	3	21	19	19	1	13	0	5	2	26	12	3	5
Total Completions	798	3,585	2,994	21	60	51	84	35	61	0	31	103	155	74	80	43
Oil Completions	293	1,057	1,012	5	10	20	4	2	9	0	20	18	120	50	28	7
New Drill	228	807	715	3	7	11	2	1	5	0	16	17	94	42	24	6
Re-Enter	10	35	33	0	0	2	0	0	0	0	2	0	3	1	2	0
Re-Completion	55	215	264	2	3	7	2	1	4	0	2	1	23	7	2	1
Gas Completions	459	2,361	1,877	16	49	30	78	33	52	0	10	85	15	4	52	35
New Drill	386	1,987	1,541	15	31	18	61	33	43	0	7	83	10	4	51	30
Re-Enter	7	27	28	0	1	0	1	0	0	0	1	1	2	0	0	1
Re-Completion	66	347	308	1	17	12	16	0	9	0	2	1	3	0	1	4
Unperforated Completions	19	83	81	1	1	3	8	1	1	0	2	0	0	0	1	1
Injection/Other Completions	46	167	105	0	1	1	2	0	0	0	1	0	20	20	0	1
Injection	45	146	96	0	1	1	1	0	0	0	1	0	20	20	0	1
Other	1	21	9	0	0	0	1	0	0	0	0	0	0	0	0	0
Total Holes Plugged	741	3,168	2,594	56	39	106	75	14	19	31	68	29	113	58	124	9
Completed Holes	690	2,759	2,288	54	33	97	67	13	19	31	64	24	110	49	120	9
Oil	500	1,982	1,624	47	6	80	21	9	17	31	40	16	84	34	111	4
Gas	137	545	418	7	27	16	44	4	2	0	15	5	6	0	6	5
Other	53	232	246	0	0	1	2	0	0	0	9	3	20	15	3	0
Dry Holes Drilled.Plugged	52	410	306	2	6	9	8	1	0	0	4	5	3	9	4	1
New Drill	51	384	283	2	6	9	8	1	0	0	3	5	3	9	4	1
Re-Enter	1	26	23	0	0	0	0	0	0	0	1	0	0	0	0	0

*New Field Discoveries are included under oil and gas completions

**Drilling Overview includes oil, gas, injection, other completions and dry holes drilled/plugged.

Completion data is based on permit validation status on initial filing of completion papers.

Re-Completion is workover to separate zone; may include deepen, plugback, sidetrack, workover to successful, workover to Statewide Rule 10 and workover to multiple completion.

Injection includes water injection, salt water injection, gas injection, steam injection and disposal.

Other includes storage, water supply, service (testing tools, slim hole test, monitor, demostration, observation, etc.)

RAILROAD COMMISSION OF TEXAS

Monthy Drilling, Completion and Plugging Summary

Permits Issued for Drilling Activity

Apr-04

	State Totals			Activity by District For April												
April	2004	2004 (YTD)	2003	01	02	03	04	05	06	6E	7B	7C	08	8A	09	10
Original Permits Issued	1,233	4,689	4,197	44	84	94	124	70	123	0	78	164	127	87	149	89
New Drill	1,009	3,804	3,229	37	69	70	104	60	100	0	62	150	92	66	140	59
Re-enter	39	128	115	1	2	0	1	0	4	0	7	7	8	5	3	1
Re-complete	185	757	853	6	13	24	19	10	19	0	9	7	27	16	6	29
Other	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Permitted Well Types	1,233	4,689	4,197	44	84	94	124	70	123	0	78	164	127	87	149	89
Oil	270	1,034	988	6	13	8	1	6	15	0	15	26	72	70	32	6
Gas	417	1,595	1,432	11	26	12	27	44	59	0	14	100	8	1	84	31
Oil and Gas	501	1,903	1,680	21	45	72	92	11	47	0	42	36	39	14	30	52
Injection	14	114	69	0	0	2	0	0	2	0	1	0	5	1	3	0
Service	0	1	3	0	0	0	0	0	0	0	0	0	0	0	0	0
Other	31	42	25	6	0	0	4	9	0	0	6	2	3	1	0	0

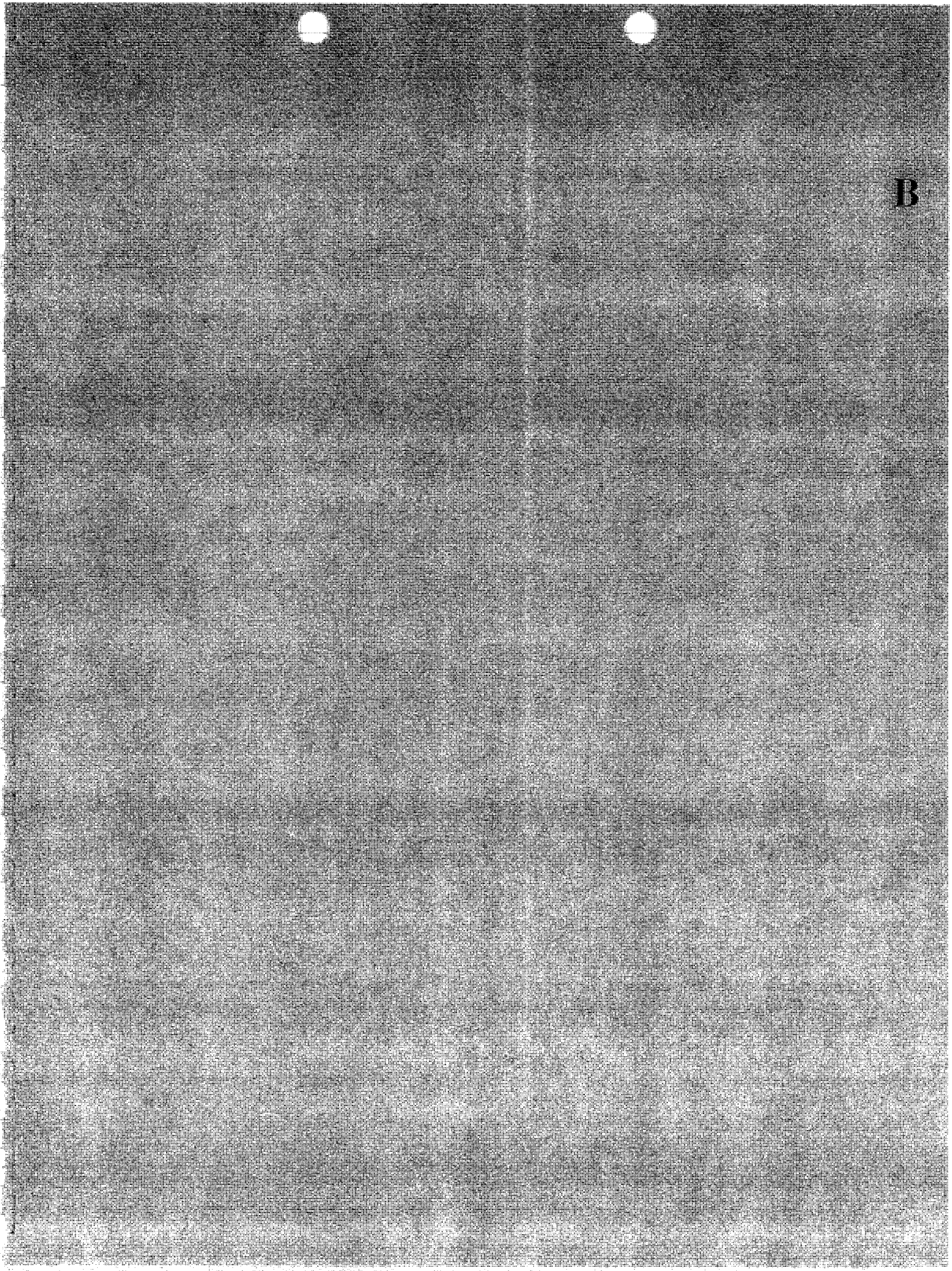
Orginal Permits Issued does not include amended permits, field transfers or re-class permits.

Permitted Well Type is based on primary well type when permit includes multiple well types.

Injection includes water injection, salt water injection, gas injection, steam injection and disposal.

Service includes testing, monitor, demonstration, observation, brine, etc.

Other includes storage, water supply, cathodic protection, etc.


B

Oil and Gas Division

Surface Waste Management Manual

CHAPTER II- STATEWIDE RULE 8 HISTORY

The Oil and Gas Division's Rule 8, Water Protection, had its origins in Rule 20 which became effective in 1919. Rule 20 then read as follows:

> FRESH WATER TO BE PROTECTED - Fresh water, whether above or below the surface, shall be protected from pollution, whether in drilling or plugging.

In 1933, the Commission amended Rule 20 to state that fresh water was also to be protected from pollution when disposing of produced salt water. During the 1964 revision of the Statewide Rules, Rule 20 and Rule 55 (a regulation on exploratory wells which became effective March 1956) were combined in Rule 8. Subsequently, the Commission amended Rule 8 to include the no-pit order (January 1969), regulations on preventing pollution from offshore facilities (May 1969), regulations on hauling salt water (January 1977), and regulations allowing administrative approval of applications for permits for impervious collecting pits (October 1980).

On March 5, 1984, the Commission adopted amendments to Rule 8 which became effective May 1, 1984. Almost all previously permitted pits had to be repermitted under new, more stringent standards. For the first time, Rule 8 applied new permit regulations to several types of pits and disposal methods. In addition, Rule 8 included three new subsections covering definitions, record keeping, and penalties. The amendments retained the salt water hauler regulations and offshore pollution prevention regulations without change. Also, the rule retained the heart of the provisions that were old Rules 20 and 55.

Perhaps the most important concept of the 1984 revision was that the rule itself or a permit must expressly authorize waste handling techniques. For example, reserve pits and basic sediment pits do not have to be permitted provided they are operated under conditions specified in the rule. However, an operator must seek a permit for an emergency saltwater storage pit, and the rule sets out the procedures for obtaining that permit.

Since 1984, the Commission amended Rule 8 to clarify the requirements for giving notice of a permit application (March 1986), to specify the waste-generating activities to which the rule applies (January 1987), to allow for staggered renewal of salt water hauler permits (January 1987), to adopt by reference the Memorandum of Understanding between the Railroad Commission of Texas, the Texas Water Commission, and the Texas Department of Health concerning the division of jurisdiction among the agencies (December 1987), to expand waste hauler requirements (January 1992), to adopt requirements relating to pollution control and oil and gas waste haulers (March 1996), and to include provisions to implement the portions of the Texas Coastal Management Program applicable to actions governed under Rule 8 (effective January 1997).

Table of Contents Home Page

Environmental Protection Home Page

| Site Map | Home | Webmaster |

NOS. 03-2908, 03-3276, 03-3277, 03-3278, 03-3279, 03-3280, 03-3281, 03-3282, 03-3283 and 03-3865

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

WISCONSIN BUILDERS ASSOCIATION, ASSOCIATED GENERAL CONTRACTORS OF AMERICA, et al.,	*	
Petitioners,	*	
VS.	*	
ENVIRONMENTAL PROTECTION AGENCY	*	**On Petition for Review of an Order of the**
Respondent	*	**Environmental Protection Agency**
and	*	**No. 02-OW-55**
THE STATE OF NEW YORK and the NEW YORKSTATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION	*	

AMICUS BRIEF OF THE STATE OF LOUISIANA, BY AND THROUGH ITS DEPARTMENT OF NATURAL RESOURCES

In Support of the Oil and Gas Petitioners' Request to Remand Certain Definitions and Other Requirements in the Construction General Permit And Fact Sheet Applicable to Oil and Gas Operations

Isaac Jackson, Jr.
Assistant Attorney General
Lands & Natural Resources Section/Civil Division
P.O. Box 94005
Baton Rouge, LA 70804-9005
Telephone: (225) 326-6085
Facsimile: (225) 326-6099

TABLE OF CONTENTS

Page

INDEX OF AUTHORITIES

CERTIFICATE OF INTERESTED PARTIES AND COUNSEL

The undersigned counsel certifies that, upon information and belief, the following listed persons have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal:

The Parties:

The Oil and Gas Petitioners are Texas Independent Producers and Royalty Owners Association, Independent Petroleum Association of America, U.S. Oil and Gas Association, Texas Alliance of Energy Producers, Louisiana Oil and Gas Association, Independent Gas and Gas Association of Pennsylvania, Ohio Oil and Gas Association, and Oklahoma Independent Petroleum Association.

The Construction Petitioners are National Association of Homebuilders, Wisconsin Homebuilders Association and The Associated General Contractors of America.

The Environmental Petitioner is National Resources Defense Counsel.

Intervenor-Respondents are the State of New York and New York State Department of Environmental Conservation.

Respondent is the United States Environmental Protection Agency.

Amicus Curiae is the State of Louisiana By And Through Its Department of Natural Resources

Counsel:

Counsel for Oil and Gas industry Petitioners: Janet L. McQuaid, and Marcy Hogan Greer of Fulbright & Jaworski L.L.P., Austin, Texas, and L. Poe Leggette, of Fulbright & Jaworski L.L.P., Washington, D.C.

Counsel for Petitioners National Association of Homebuilders and Wisconsin Homebuilders Association: Ellen B. Steen, R. Timothy McCrum, Crowell & Moring, LLP, 1001 Pennsylvania Avenue, N.W., Washington, D.C.

Counsel for Petitioner Associated General Contractors of America: Fredric P. Andes, Jeffrey Longsworth, Barnes & Thornburg, 750 17th Street, NW, Suite 900, Washington, D.C.

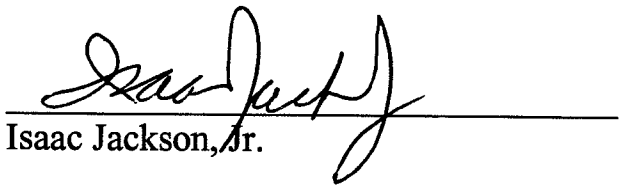
Counsel for Natural Resources Defense Council: Barry Sullivan, Jeffrey T. Shaw, Daniel E. Shaw, Jenner & Block, LLC, One IBM Plaza, Chicago, Illinois.

Counsel for Intervenors: Philip Bein, Assistant Attorney General, The Capitol, Albany, New York.

Counsel for Respondent: Thomas L. Sansonetti, Assistant Attorney General, Environment and Natural Resources Division, U.S. Department of

Justice, Washington, D.C., and Alan D. Greenberg, Environmental Defense Section, U.S. Department of Justice, Denver, Colorado.

Counsel for Amicus Curiae the State of Louisiana: Charles C. Foti, Attorney General of the State of Louisiana, and Isaac Jackson, Jr., Assistant Attorney General.



Isaac Jackson, Jr.

IDENTITY, INTEREST AND AUTHORITY OF AMICUS CURIAE

The State of Louisiana, by and through its Department of Natural Resources ("DNR"), through undersigned counsel,[1] submits this Brief as amicus curiae in support of the Oil and Gas Petitioners' request that this Court (1) remand the Construction General Permit ("CGP") for further consideration of the definitions of "common plan" and "final stabilization" and (2) enjoin the Environmental Protection Agency ("EPA") from enforcing those terms against oil and gas operators covered by the CGP until new definitions are fully implemented, and (3) remand the Storm Water Pollution Prevention Plan ("SWPPP"), best management practices, inspection and record keeping requirements to the EPA, and enjoin the EPA from enforcing those requirements against oil and gas construction activities covered by the permit until appropriate modification of the CGP and Fact Sheet has taken place.

DNR is one of the twenty departments in the Executive Branch of state government. It was created in 1976 by La. R.S. 36:351. The department is composed of the offices of the Secretary, Coastal Restoration and Management,

[1] In Louisiana, where it is necessary for the assertion or protection of any right or interest of the state, the attorney general is authorized to institute, prosecute, or intervene in any civil action or proceeding. La. Const. Art IV, §8.

Conservation, Management and Finance, and Mineral Resources. On behalf of the state, DNR exercises complex and various regulatory and permitting functions through the offices of Conservation and Coastal Restoration and Management. The department serves as one of state government's major revenue-generating agencies by way of oil and gas bonuses, rentals, and royalties. As stated on the homepage of Department's website, http://www.dnr.state.la.us/mission.ssi, the very mission of DNR is to preserve and enhance the nonrenewable natural resources of the state, consisting of land, water, oil, gas, and other minerals, through conservation, regulation, and management/exploitation, to ensure that the state of Louisiana realizes appropriate economic benefit from its asset base.

Among other duties, powers and authority given to DNR's Office of Conservation, the commissioner is empowered "to prevent the pollution of fresh water supplies by oil, gas, or salt water" and "to prevent wells from being drilled, operated, and produced in a manner to cause injury to neighboring leases or property." R.S. 30:4(C) (1); R.S. 30:4(C)(3). In Louisiana, no well, and indeed even no test well may be drilled in search of minerals without first obtaining a permit from the commissioner. R.S. 30:28(A). And as to each permit given, the commissioner is tasked with promulgating rules, regulations and orders necessary to require certification of water quality by the operator for surface water used in

conjunction with oil and gas drilling operations before drilling begins which ensure ground water aquifer safety. R.S. 30:28(G).

Because the oil and gas industry is so important to the state's economy, where possible the department strives to facilitate an excellent working relationship with industry, with a strong emphasis on reaching mutual goals. The State of Louisiana and DNR have a substantial interest aligned with that of the State's oil and gas industry in the EPA rule under review. And this interest is unmistakable. From a brief review of DNR published materials, excluding federal outer continental shelf ("OCS") production, Louisiana ranks fourth among all states in natural gas production, fourth in crude oil production and eighth in total energy production.[2] When Louisiana federal OCS production is added in, Louisiana ranks second in natural gas production, first in crude oil production and second in total energy production.[3] Excluding OCS, in 2003 Louisiana produced approximately 89 million barrels of oil,[4] and 1.3 Trillion Cubic Feet of gas.[5] And when Louisiana OCS production is added, those figures rise to approximately 619 million barrels of oil and 5 Trillion Cubic Feet of gas.[6]

---

[2] Louisiana Energy Facts Annual-2003, Louisiana Department of Natural Resources, Technology Assessment Division, Jan 14, 2004, p. E-8.
[3] *Id.*
[4] *Id.* at p. 7.
[5] *Id.* at 18.
[6] Online Energy Database, La. Dept. of Natural Resources - Technology Assessment Division,

Moreover, Louisiana currently ranks third in per capita energy consumption, third in natural gas consumption, fifth in petroleum consumption and eighth in total energy consumption.[7] In Louisiana approximately 43,800 people are employed in oil and gas production, with 10,500 of them in petroleum refining; 2,300 in oil & gas pipeline activities; and 25,400 in the petrochemical industry.[8] Thus it is clear that the oil and gas industry not only provides the energy support for Louisiana's economy, it also contributes both jobs and revenue.

In the 12 months ending in March 2004, drilling is up 20.0% in Louisiana at 91 operating rigs (excluding OCS) and up 20.6% in the United States at 1135 operating rigs.[9] In the 6 months ending in March 2004, drilling is up 21.6% in Louisiana (excluding OCS) and up 3.8% in United States.[10]

Louisiana, through the facilities in the state, moves 34% of the nation's natural gas supply and 29% of the nation's crude oil supply, and the volume of crude oil & natural gas flowing through Louisiana represents over $150 billion in annual energy sales.[11]

In 2003 Louisiana issued 1264 drilling permits,[12] and as of June of 2004, the

---

www.dnr.state.la.us/TAD

[7] Louisiana Energy Facts Annual-2003, *supra*, p. E-8.

[8] *Id.* at p. 49.

[9] Online Energy Database, *supra*.

[10] *Id.*

[11] Louisiana Energy Facts Annual-2003, *supra*, p. E-18.

[12] *Id.* at p. 32.

last month for which current figures are available, Louisiana has issued 825 permits this year alone.[13] Excluding the OCS, in 2003 Louisiana had 20,006 oil producing wells[14] and 12,661 gas producing wells.[15]

These figures emphasize the importance of the oil and gas industry to Louisiana. The EPA's vague and overbroad definitions of "common plan" and "final stabilization" will undoubtedly cause great concern and confusion regarding whether existing and future oil and gas activities meet the EPA's threshold acreage requirement for coverage by storm water permits. In order to avoid the substantial penalties that could be imposed if found to be not in compliance, it is likely that Louisiana's oil and gas operators would incur the enormous expense and delay of complying with the EPA's permitting requirements, even though all of Louisiana's wells are already subject to fully adequate state permitting requirements. The inevitable results would be a chilling effect on Louisiana's economy and on the development of the state's energy resources.

---

[13] Online Energy Database, *supra*.
[14] Louisiana Energy Facts Annual-2003, *supra*, p. 35.
[15] *Id.* at 37.

SUMMARY OF THE ARGUMENT and ARGUMENT

The State has reviewed the Oil and Gas Petitioners' Brief. Louisiana has a strong vested interest in the Environmental Protection Agency's Storm Water Permitting Program because it will hinder natural resource development and unnecessarily require additional permits in an area where adequate state regulatory and enforcement mechanisms are already in place. Thus the state supports the arguments set forth in parts I through III of the Oil and Gas Petitioners' brief.

CONCLUSION

For the reasons set out herein and in the Oil and Gas Petitioner's brief, the State of Louisiana, by and through its Department of Natural Resources, as amicus curiae, advises the Court of its support of Petitioners' request that this Honorable Court (1) find EPA's definitions of "common plan" and "final stabilization" unlawful and/or arbitrary and capricious, remand those definitions for further consideration, and enjoin the EPA from applying those definitions to require a permit for oil and gas activities until an appropriate modification of the CGP and Fact Sheet has taken place; (2) find the SWPPP, best management practices, inspection and recordkeeping requirements arbitrary and capricious in the context of the oil and gas industry, remand those requirements to the EPA for further

consideration, and enjoin the EPA from enforcing those requirements against oil and gas construction activities covered by the CGP until an appropriate modification of the CGP and Fact Sheet has taken place.

Respectfully Submitted,

CHARLES C. FOTI
ATTORNEY GENERAL
STATE OF LOUISIANA

BY: _____
Isaac Jackson, Jr. (La. Bar No. 19632)
Assistant Attorney General
Civil Division/Lands & Natural Resources
Post Office Box 94005
Baton Rouge, Louisiana 70804-9005
TEL.: (225) 326-6085
FAX.: (225) 326-6099

Attorney for Amicus, the State of Louisiana,
Department of Natural Resources

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation of FED. R. APP. P. 32(a)(7)(B) because:

This brief contains 1, 225 words, excluding the parts of the brief exempted by FED. R. APP. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of FED. R. APP. P. 32 (a)(5) and the type style requirements of FED. R. APP. P. 32 (a)(6) because:

This brief has been prepared in a proportionally spaced typeface using Microsoft Word 2000 XP for Windows in Times New Roman, Font Size 14, except for tables and footnotes, which are in Times New Roman, Font Size 12 typeface.

Dated: August 6, 2004

Isaac Jackson, Jr.
Assistant Attorney General

August ____, 2004

CERTIFICATE OF SERVICE

The undersigned, for counsel Amicus, the Department of Natural Resources of the State of Louisiana, hereby certifies that on August 20, 2004, the original plus fifteen copies of the Amicus Brief, as well as a diskette containing a PDF digital version of the brief, were dispatched to Gino J. Agnello, Clerk, U.S. Court of Appeals for the Seventh Circuit, Room 2722, 219 S. Dearborn Street, Chicago, Illinois, 60604, via Federal Express, a third-party commercial carrier for next-day delivery, and two copies of the Amicus Brief, as well as a diskette containing a PDF digital version of the brief, were dispatched by First Class United States Mail, postage prepaid, to counsel of record listed below:

Alan D. Greenberg
Trial Attorney
U.S. Department of Justice
999 18th Street, Suite 945
Denver, CO 80202

Richard H. Streeter
Frederic P. Andes
Barnes & Thornburg
750 17th Street, NW, Suite 900
Washington, D.C. 20006

R. Timothy McCrum
Ellen B. Steen
Crowell & Moring
1001 Pennsylvania Ave. NW
Washington, D.C. 20004

Barry Sullivan
Jeffery T. Shaw
Jenner & Block, L.L.C.
One IBM Plaza
Chicago, Illinois 60611

Janet L. McQuaid
Mary Greer
Marc B. Collier
Fullbright & Jaworski, L.L.P.
600 Congress Avenue
P.O. Box 12967
Austin, TX 78711-2967

Philip Bein
Assistant Attorney General
The Capitol
Albany, New York 12224

By: 
Isaac Jackson, Jr.
Assistant Attorney General

Nos. 03-2908, 03-3276, 03-3277, 03-3278, 03-3279
03-3280, 03-3281, 03-3282, 03-3283 and 03-3865

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

WISCONSIN BUILDERS ASSOCIATON, ASSOCIATED GENERAL CONTRACTORS OF AMERICA, et al.,	
Petitioners,	**On Petitions for Review of an Order of the Environmental Protection Agency**
v.	
ENVIRONMENTAL PROTECTION AGENCY	**No. 02-OW-55**
Respondent,	
and	
THE STATE OF NEW YORK and THE NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION,	
Intervening Respondents.	

AMICUS BRIEF OF THE OKLAHOMA CORPORATION COMMISSION IN SUPPORT OF OIL AND GAS PETITIONERS

Michael Decker
Oklahoma Bar No. 2267
Deputy General Counsel
Oil and Gas Conservation Division
Oklahoma Corporation Commission
P.O. Box 52000
Oklahoma City, Oklahoma 73152-2000
Telephone: (405) 521-4258

DISCLOSURE STATEMENT

The undersigned counsel certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal:

The Parties:

The Oil and Gas Petitioners are Texas Independent Producers and Royalty Owners Association, Independent Petroleum Association of America, U.S. Oil and Gas Association, Texas Alliance of Energy Producers, Association of Pennsylvania, Ohio Oil and Gas Association and Oklahoma Independent Petroleum Association.

The Construction Petitioners are National Association of Homebuilders, Wisconsin Homebuilders Association and The Associated General Contractors of America.

The Environmental Petitioner is National Resources Defense Counsel.

Intervenor-Respondents are the State of New York and New York State Department of Environmental Conservation

Respondent is the United States Environmental Protection Agency.

Amicus Curiae is the Oklahoma Corporation Commission.

Amicus Curiae is the Texas Railroad Commission.

Counsel:

Counsel for Oil and Gas Industry Petitioners: Janet L. McQuaid and Marcy Hogan Greer of Fulbright & Jaworski L.L.P., Austin, Texas, and L. Poe Leggette, of Fulbright & Jaworski L.L. P., Washington, D.C.

Counsel for Petitioners National Association of Homebuilders and Wisconsin Homebuilders Association: Ellen B. Steen, R. Timothy McCrum, of Crowell & Moring, LLP, 1001 Pennsylvania Avenue, N.W., Washington, D.C.

Counsel for Petitioner Associated General Contractors of America: Fredric P. Andes, Jeffrey Longsworth, Barnes & Thornburg, 730 17th Street, NW, Suite 900, Washington, D.C.

Counsel for Natural Resources Defense Council: Barry Sullivan, Jeffrey T. Shaw, Daniel E. Shaw, Jenner & Block, LLC, One IBM Plaza, Chicago, Illinois.

Counsel for Intervenors: Philip Bein, Assistant Attorney General, The Capitol, Albany, New York

Counsel for Amicus Curiae: Michael L. Decker, Deputy General Counsel for Oil and Gas Conservation Division, Oklahoma Corporation Commission

Counsel for Amicus Curiae: Davis W. Cooney, Jr. and Lindil Fowler, Counsel for the Texas Railroad Commission, Austin, Texas.

Counsel for Respondent: Thomas L. Sansonetti, Assistant Attorney General, Environment and Natural Resources Division, U.S. Department of Justice, Washington, D.C., Alan D. Greenberg, Environmental Defense Section, U.S. Department of Justice, Denver, Colorado.

Michael L. Decker

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **PAGE**

STATUTES

ADMINISTRATIVE CODE

RULES AND REGULATIONS

OTHER AUTHORITY

STATEMENT OF AMICUS CURIAE, INTEREST IN THE CASE, AND SOURCE OF ITS AUTHORITY TO FILE

Pursuant to the Oklahoma Environmental Quality Act (OEQA), the Oklahoma Corporation Commission (OCC) is the lead environmental agency in the regulation of the oil and gas industry in the State of Oklahoma.[1] Other Oklahoma environmental agencies[2] are required by statute to cooperate with the OCC's oversight and management of the environmental aspects of oil and gas exploration and production.[3] The United States Environmental Protection Agency (EPA) retains jurisdiction in Oklahoma over some Clean Water Act (CWA)[4] programs impacting the oil and gas industry.[5] Correspondingly, for other CWA programs, the OCC is the lead agency for implementation and enforcement of Oklahoma's water quality standards as they impact the oil and gas exploration and production industry.[6] In Oklahoma, under provisions of the Safe Drinking Water Act (SDWA)[7], the OCC shares primacy with the ODEQ over the state's underground injection control (UIC) program.[8]

The OCC has a substantial interest in the EPA's Construction General Permit (CGP) and Fact Sheet that the Court is reviewing. Currently, Oklahoma is the third largest natural gas producing state (by volume) in the United States. The state has experienced a significant

---

[1] OKLA. STAT. tit. 17, § 52 (2001), OKLA. STAT. tit. 27A, § 1-3-101 (2001) and OKLA. STAT. tit. 52, § 139 (2001).

[2] Oklahoma Department of Environmental Quality (ODEQ), Oklahoma Water Resources Board, Oklahoma Conservation Commission, Department of Agriculture, Department of Wildlife Conservation, and Department of Mines.

[3] OKLA. STAT. tit. 52, § 142 (2001).

[4] 33 U.S.C. § 1251 (2004).

[5] OKLA. STAT. tit. 17, § 52(A)(4) (2001), OKLA. STAT. tit. 27A, § 1-3-101(E)(4) (2001), and OKLA. STAT. tit. 52, § 139(B)(4) (2001).

[6] OKLA. STAT. tit. 17, § 52 (2001), OKLA. STAT. tit. 27A, § 1-3-101 (2001), OKLA. STAT. tit. 27A, §§1-1-201, 1-1-202, 1-1-203, 1-2-101 (2001), OKLA. STAT. tit. 27A, § 2-6-101, 3-2-107 (2001), OKLA. STAT. tit. 52, § 139 (2001); and OKLA. STAT. tit. 82, §§ 1020.16 and 1085.30 (2001).

[7] 42 U.S.C. § 300h (2004).

[8] OKLA. STAT. tit. 17, § 52 (2001), OKLA. STAT. tit. 27A, § 1-3-101(E)(1)(f) (2001), and OKLA. STAT. tit. 52, § 139(B)(1)(f) (2001).

increase in drilling activity since July 1, 2002. In FY 2003, the OCC processed 4,765 intents to drill, which was an increase of 876 from FY 2002. Through the end of the third quarter of FY 2004, the OCC has processed 3,795 intents to drill. The OCC accepted 4,326 well completion reports during FY 2003 compared to 4,019 completion reports filed through the end of the third quarter FY 2004. This amounts to 642 more well completions as compared to the same time in 2003. The OCC's UIC Department issued 264 permit orders in FY 2003 compared to 489 permit orders issued by the end of the third quarter of FY 2004. The CGP and Fact Sheet, applied by means of the Deferral Rule,[9] will impact many of the wells that are subject to these permits.

The OCC has a singular role in the regulation of the oil and gas industry in Oklahoma. As discussed above, the OCC has been delegated exclusive authority by the Oklahoma Legislature under the OEQA to regulate the oil and gas industry's environmental compliance regarding exploration and production sites and pipelines outside of the confines of refineries and processing facilities.[10] The OCC's sister environmental agency in Oklahoma, the ODEQ, received delegation from EPA in 1996 for a large part of the National Pollutant Discharge Elimination System (NPDES) permitting program, including much of the point source permitting authority and construction site stormwater permitting other than agriculture and oil and gas related activities.[11]

---

[9] EPA's final rule requiring "small oil and gas construction activities" to obtain a stormwater discharge permit by March 10, 2005. 68 Fed. Reg. 11325-11330 (March 10, 2003) codified at 40 C.F.R. § 122.26(e)(8)(2004). In a related proceeding pending in the Fifth Circuit (*Texas Independent Producers & Royalty Owners Association, et al. v. E.P.A.*, No. 03-60506 (5th Cir., filed June 9, 2003)) Petitioners are challenging the Deferral Rule, contending that the rule exceeds the EPA's statutory authority. OCC has filed an Amicus brief in that matter in support of the Petitioners there.

[10] See Footnote 1, OKLA. STAT. tit. 17, § 52 (2001) *supra.*

[11] 61 Fed. Reg. 65047-65052 (December 10, 1996). In the 2004 session of the Oklahoma Legislature, measures were enacted to position the Oklahoma Department of Agriculture, Food, and Forestry to seek primacy from EPA for NPDES permitting programs impacting the agricultural industry. See S.B. 1204, 49 Leg., 2nd Sess. (Okla 2004).

The OCC represents the interest of the State of Oklahoma in the implementation of this CWA program as it impacts the agency's area of jurisdiction; therefore, it is authorized to submit this brief in furtherance of that power as a representative of the State. In the course of exercising its regulatory responsibilities, the OCC has been authorized to maintain independent counsel separate from the state's Attorney General.[12] The OCC's powers delegated by the Oklahoma Legislature pursuant to the Conservation Act of 1933[13] to regulate oil and gas conservation in Oklahoma are a legitimate exercise of the state's police power, which have been upheld by the U.S. Supreme Court.[14]

SUMMARY OF THE ARGUMENT

The OCC submits this amicus brief to emphasize the importance of the oil and gas exploration and production industry to Oklahoma and to provide the Court with its views and concerns about the implications that the EPA CGP and Fact Sheet under review may have on the Oklahoma economy as a result of its impact on the oil and gas industry in the state.

The OCC asserts that because of the nebulous definitions for "common plan of development" (or "common plan") and "final stabilization" incorporated by reference into the Deferral Rule from EPA's CGP and Fact Sheet, it would be impossible for any oil and gas operator to have notice of what conduct at a wellsite is permitted or prohibited. The OCC asserts that the definitions of "common plan of development" and "final stabilization," as well as EPA's Storm Water Pollution Prevention Plan (SWPPP) and related control, inspection and

---

[12] OKLA. STAT. tit. 74, §§ 18b & 18c (2001), and *State ex rel. Howard v. Corporation Commission*, 1980 OK. 96 (1980), 614 P.2d 45 (Okla. 1980).
[13] OKLA. STAT. tit. 52, § 86.1 (2001).
[14] *See Cities Service Gas Co. v. Peerless Oil and Gas Co.*, 340 U.S. 179, 95 L. Ed. 190, 71 S. Ct. 215 (1950), *same case*, 220 P.2d 279 (Okla. 1950).

recordkeeping requirements, fail to recognize the realities of the oil and gas exploration and production industry.[15]

If the decision in the Fifth Circuit case affirms the statutory authority of EPA to require NPDES permits for uncontaminated discharges for oil and gas clearing and grading activities that do not impact water quality, it will be incumbent upon EPA to modify its definitions of "common plan of development" and "final stabilization" to accurately reflect the realities of oil and gas operations so that operators will have a fair opportunity to know what conduct is prohibited. The SWPPP and related inspection and recordkeeping requirements should be amended to have a rational relationship to the realities of oil and gas exploration and production activities.

The OCC has not briefed the legal issues with respect to EPA's definition of the terms in question and the imposition of the paperwork requirements. The OCC defers to the Petitioners' and Intervenors' Joint Brief on those questions, which it supports. The OCC desires, however, to make the Court aware of OCC's particular experience with oil and gas environmental regulations, including the results of extensive water quality testing which indicate a lack of impact on the environment by oil and gas exploration and production activities. This shows that prudent control measures already in use by the oil and gas industry are protective of the environment. In the event EPA is required to reconsider the particular requirements of the CGP and Fact Sheet at issue with respect to oil and gas activities, it should do so in the context of the effectiveness of the protections provided by Oklahoma operators and the lack of any real water quality impact.

[15] In the Fifth Circuit case, OCC fundamentally disputes the interpretation taken by the EPA that would require a permit in the first instance for stormwater discharges from all oil and gas site preparation activity, even in the absence of contamination in the discharge.

ARGUMENT

I. The State of Oklahoma and Oklahoma Corporation Commission have a strong public rights interest in the requirements of the CGP because of the importance of the oil and gas industry to the state.

The oil and gas industry is an integral part of the Oklahoma economy. Oklahoma ranks sixth in crude oil production and third in natural gas production out of the thirty (30) oil and gas producing states. The oil and gas industry contributes both revenue and jobs for the state of Oklahoma. At the end of 2003, Oklahoma employed approximately 31,000 people in the oil and gas industry according to the Oklahoma Employment Securities Commission. The industry in 2003 contributed in excess of $2.7 billion dollars in state gross production taxes, which represents approximately 7.6% of the entire state revenue. Natural gas production from the state in 2003 was 1.566 Tcf. Oklahoma has sustained a significant increase in drilling activity since July 1, 2002. Permits to drill issued during 2003 increased to the highest number since 1988. During 2003, the OCC issued 5,119 permits as compared to 4,099 in 2002, an increase of almost 25%.

EPA's stormwater permit Deferral Rule, and the excessively broad application of the rule as contemplated by the CGP definitions, pose a serious threat to the oil and gas industry in Oklahoma. EPA has severely underestimated the economic impact of its actions. EPA's analysis of potential economic cost of $1,206 to $8,709 per site to comply with best management practices (BMPs) at a small residential and commercial construction site[16] fails to address the severe economic losses from delay and lost oil and gas production. Such factors will ensue from the mandate for a permit for uncontaminated discharges from even small oil and gas production sites which might be required to have a permit under EPA's broad definition of "common plan."

[16] 67 Fed. Reg. 79828-79829 (December 30, 2002).

The economic burden of EPA's permit requirement placed on mature production will certainly delay, and often prevent, the drilling of wells in Oklahoma.[17] The procedural burden of the SWPPP and related requirements mandating compliance with federal laws such as the Endangered Species Act (ESA) and, possibly in the future, National Historic Preservation Act (NHPA), will unquestionably delay and, perhaps, prevent the drilling of new wells. The OCC contends that the resulting impact on Oklahoma will be serious, while the resulting benefit to the environment will be non-existent or, at best, minimal. This is largely because the CGP and related requirements were designed for traditional residential and commercial construction projects and make little or no sense for an oil and gas operation.

In the instant proceeding, one Petitioner, the Natural Resources Defense Council (NRDC), filed a brief challenging the EPA's CGP on the grounds that it allegedly fails to adequately establish public participation procedures prior to the issuance of a stormwater permit.[18] The NRDC contends that the present form of the EPA's CGP fails to abide by provisions of the CWA[19], which mandate an opportunity for a hearing before an NPDES permit can be issued.[20] By implication, it must be assumed that the NRDC contends the CWA requires a pre-permit hearing on each NPDES permit application. In response, the OCC states that if this Court adopts such an interpretation of the CWA, the same negative consequences of delay or

---

[17] A 1999 study of the general economic impact of federal environmental regulations on Oklahoma oil and gas operators indicated that such requirements increased the cost of business in Osage County, Oklahoma, where the EPA directly administers environmental programs. *See* "The Osage Environmental Audit," *Conducted by StateSource L.L.C., for The Oklahoma Commission for Marginally Producing Oil and Gas Wells* www.marginalwells.com/MWC/surveys_reports.htm., (April 29, 1999). The audit found, "[t]his survey indicates that Osage County oil producers spend an average of $9 million per year to comply with environmental regulations. . . . Additionally, while less than 1% of Osage County producers paid fines for failing to comply with environmental regulations [in 1998], they spent an amazing 15-25% of their revenue on regulatory compliance." *Id.* at 4. This study focused on federal environmental requirements other than stormwater permits (secondary spill containment, underground injection control, tank and pit netting, brine and oil leak prevention).

[18] Brief of Petitioner, Natural Resources Defense Council, Inc., at 38-42 (July 28, 2004).

[19] 33 U.S.C. 1342(a)(1) (2004).

[20] Brief of Petitioner, NRDC, at 40-42.

complete prohibition of drilling activity in Oklahoma described above would occur. Moreover, as addressed in the Fifth Circuit proceedings, the OCC contends that an NPDES construction permit covering uncontaminated stormwater discharges from oil and gas exploration sites is not necessary. Certainly, the NRDC's concept of pre-issuance public hearings in all cases of CGP coverage Notices of Intent (NOIs), if applied to all oil and gas sites regardless of the status of contaminated or uncontaminated discharges, would constitute a totally unreasonable and unworkable interpretation of the CWA, which this Court should reject.

II. The State of Oklahoma through the Oklahoma Corporation Commission's regulatory authority adequately controls potential water quality impacts from oil and gas exploration and production activities by the use of controls appropriate to the nature of these activities.

The OCC is the lead state agency for the enforcement of state water quality standards affecting primary field operations at oil and gas sites. It has a well-informed perspective on both the realities of oil and gas production and on the impact of wellsite construction, operation and maintenance on surface waters in the state. The OCC has used this information in adopting substantive rules requiring containment of pollutants during all phases of oil and gas exploration and development. These rules are designed for oil and gas sites, not simply adopted from some dissimilar construction activity, as the CGP and Fact Sheet do. This approach is consistent with the need to protect all environmental media, including surface water. The OCC's regulations, which prohibit all pollution to both surface and subsurface waters, adequately protect the state's water resources. There is no need for an additional overlay of federal regulations based on an inappropriate model, as would be imposed by EPA's permit requirement for all oil and gas construction sites. EPA, however, simply presumes that all construction of wellsites causes a discharge of a pollutant to waters of the United States that impacts water quality, and further

presumes that practices that may be well-suited for other types of construction are equally well suited for oil and gas operations.

EPA currently requires all well operators disturbing five (5) or more acres, or which are part of a "common plan" that does so, to have coverage under the general permit, and all operators disturbing one-to-five acres, or which are part of a "common plan" that does so, to have permit coverage by March 2005.[21] EPA's factual basis for this conclusive presumption is a problem. Studies conducted by OCC in cooperation with other state agencies and other states show that EPA's conclusive presumption lacks a reasonable basis in Oklahoma.

By ignoring the very real differences between oil and gas construction and other types of construction activities, EPA's distinction between a wellsite under construction and a completed wellsite is not only inconsistent with its statutory authority, but is contrary to the realities of oil and gas construction. The CGP and the Fact Sheet attempt to impose unrealistic and unnecessary definitions, control, and paperwork on oil and gas operators.

Oklahoma's system of sediment control at oil and gas exploration and production sites is more than adequate to protect the waters of the state and does so in an effective manner that, unlike the CGP and Fact Sheet, adequately considers the unique nature of oil and gas activity. The OCC possesses a wide array of statutory authority available to enforce environmental quality in the oil and gas industry. The OCC has comprehensive pollution abatement rules in the Oklahoma Administrative Code.[22] These regulations contain a general ban on pollution[23] and specifically address surface discharge of fluids[24] and the discharge of deleterious substances.[25]

---

[21] 40 C.F.R. § 122.26(e)(8) (2004).

[22] OKLA. ADMIN. CODE §165:10 (2004), Oil and Gas Conservation Rules, Subchapter 7, Pollution Abatement.

[23] OKLA. ADMIN. CODE §165:10-7-5 (2004) bans pollution and requires personnel involved in the oil and gas industry to conduct their operations in such a way as to not cause pollution.

[24] OKLA. ADMIN. CODE §165:10-7-17 (2004) regulates the discharge of hydrostatic test water, stormwater, and produced water.

OCC also has authority to enact special field rules to protect fresh water.[26] Other provisions deal with the prevention of pollution through rules regulating the construction and maintenance of oil and gas facilities.[27]

The OCC is authorized to enforce the state water quality standards established by the Oklahoma Water Resources Board (OWRB).[28] The enactment of Senate Bill 549[29] during the 1999 legislative session required use of the rulemaking process by each Oklahoma environmental agency for development and/or modification of certain CWA requirements including the list of impaired waters (CWA § 303(d)), maintenance of the federally required water quality assessment (CWA § 305(b) report), nonpoint source state assessment (CWA § 319 report), and development of the continued planning document.[30] The act also established requirements for each of Oklahoma's "groundwater protection agencies" to develop and adopt by July 1, 2001, a "Water Quality Standards Implementation Plan." The OCC's Oil and Gas

---

[25] OKLA. ADMIN. CODE §165:10-7-18 (2004), prohibition of discharge of deleterious substances into surface waters without permission from the OCC or unless authorized by an NPDES permit.

[26] OKLA. ADMIN. CODE §165:10-7-6 (2004) provides that the OCC has the authority to establish special field rules by request of a municipality in order to "preserve fresh water and fresh water supplies."

[27] *See* OKLA. ADMIN. CODE §165:10-3-3 (2004), Surface and production casing, OKLA. ADMIN. CODE §165:10-3-4 (2004), Casing, cementing, wellhead equipment, and cementing reports, OKLA ADMIN. CODE §165:10-3-5 (2004) Underground storage, OKLA ADMIN. CODE §165:10-3-10 (2004) Fracturing and acidizing, OKLA. ADMIN. CODE §165:10-3-11 (2004) Swabbing and bailing, OKLA. ADMIN. CODE §165:10-3-12 (2004) Leakage prevention in producing oil and gas wells, OKLA. ADMIN. CODE §165:10-3-13 (2004) Water pollution prevention in tanks; protection of migratory birds, OKLA. ADMIN. CODE §165:10-3-15 (2004) Venting and flaring, OKLA. ADMIN. CODE §165:10-3-16 (2003) Operation in hydrogen sulfide areas, OKLA. ADMIN. CODE §165:10-3-17 (2003), Well site and surface facilities, OKLA. ADMIN. CODE §165:10-3-29 (2004) Oil Storage, OKLA. ADMIN. CODE §165:10-3-38 (2004) Testing of multiply completed wells, OKLA. ADMIN. CODE §165:10-3-39 (2004) Commingling of production, OKLA. ADMIN. CODE §165:10-3-40 (2004) Production of brine, OKLA. ADMIN. CODE §165:10-5-2 (2004) Approval of enhanced recovery injection wells or disposal wells, OKLA. ADMIN. CODE §165:10-11-3 (2004) Duty to plug and abandon.

[28] See Footnote 6, *supra.* and OKLA. ADMIN. CODE §165:10-7-4 (2004).

[29] S.B. 549 (1999) was effective November 1, 1999, and amended several parts of the Oklahoma Environmental Quality Act, OKLA. STAT. tit. 27A, §§ 1-1-201, 1-1-202, 1-1-203, 1-1-204, 1-2-101, 1-3-101 and 1-4-101 (2001), and the Oklahoma Water Quality Standards, OKLA. STAT. tit. 82, §1085.30 (2001).

[30] *See* OKLA. STAT. tit. 27A, § 1-2-101(B) (2001).

Conservation Division (OGCD) timely accomplished this regulatory requirement within the deadline.[31]

The Oklahoma water quality standards address both surface water quality standards[32] and antidegradation requirements.[33] The surface water quality standards regulate oil and grease pollution,[34] turbidity, color, taste, odor, and suspended and settleable solids in surface water.[35]

Since 1999, the OCC's OGCD Pollution Abatement Department (PAD) has worked with the Oklahoma Secretary of the Environment and other environmental agencies to test streams previously listed on the CWA § 303(d) reports to determine present actual impacts on these water bodies. This process is part of the requirement of S.B. 549 that the Oklahoma groundwater protection agencies develop implementation standards for "total maximum daily load" (TMDL) calculations affecting streams in the State, as required by the federal CWA.[36]

During the period 1999-2003, the OCC's PAD staff participated in extensive testing of surface water bodies to determine the status of impairments relating to oil and gas exploration

---

[31] *See* OKLA. STAT. tit. 27A, § 1-1-202 (B), (C) and (D) (2001). *See Oklahoma Corporation Commission Proceedings*, Cause RM No. 200100005 (Effective July 1, 2001) and OKLA. ADMIN. CODE §165:10-7-4 (2003). The OCC's *Water Quality Standards Implementation Plan* can be found at www.occ.state.ok.us/Divisions/OG/OG-Guardian/WQSIP_05c.htm.

[32] OKLA. ADMIN. CODE §785:45-5-1 (2004).

[33] OKLA. ADMIN. CODE §785:45-3-1 (2004).

[34] OKLA. ADMIN. CODE §785:45-5-10(4) (2004) states that public and private water supplies shall be free of oil and grease. OKLA. ADMIN. CODE §785:45-5-12(4) (2004) states that waters having a use of fish and wildlife propagation shall be kept free of oil and grease to the extent that it could accumulate on the bottom or be visible from the surface.

[35] OKLA. ADMIN. CODE §785:45-5-19 (2004) sets out standards to ensure the aesthetic value of surface water.

[36] See OKLA. STAT. tit. 27A, § 1-1-202(B) (3)(f) (2001), and OKLA. STAT. tit. 27A, §1-1-201(15) (2001). TMDL is defined by the statute to mean, "the sum of individual wasteload allocations (W.L.A.) for point sources, safety, reserves, and loads from nonpoint sources and natural backgrounds." OKLA. STAT. tit. 27A, § 1-1-201(8) (2001) defines "Point source" to be "any discernible, confined and discrete conveyance or outlet including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure container, rolling stock or vessel or other floating craft from which pollutants are or may be discharged into waters of the state. The term 'point source' shall not include agricultural stormwater runoff and return flows from irrigated agriculture."

and production activities. As a direct result of these tests, several bodies of water were removed from the 303(d) lists after determining that they did not exceed state water quality standards.[37]

The OCC, along with other state environmental agencies, has participated in the Coordinated Watershed Restoration and Protection Strategy for Oklahoma's Impaired Scenic Rivers.[38] This project, coordinated by the Oklahoma Secretary of the Environment, reviewed the status of certain bodies of water designated as the state's most scenic rivers under the Scenic Rivers Act.[39] A total of six streams and rivers -- Flint Creek, Illinois River, Barren Fork Creek, Upper Mountain Fork River, Lee Creek and Little Lee Creek -- were surveyed or are being monitored and tested to determine what impairments existed and the cause of the impairments. A review of the OCC's records and the results of the stream testing to date found no instances where oil and gas operators had impacted these streams.[40] Additional monitoring of these streams by the State of Oklahoma and State of Arkansas is ongoing.

With respect to sediment control, a voluntary study was undertaken by the Interstate Oil and Gas Compact Commission (IOGCC), through a grant from the federal Department of Energy, to review stormwater incidents in certain states in the Mid-Continent Region, including

---

[37] An example of this process was the removal of Black Bear Creek in Pawnee County, Oklahoma, and West Warren Creek in Noble County, Oklahoma from the 303(d) list. See OCC E-mail Correspondence Re: Question from DEQ Staff About Black Bear Creek, February 12, 2004, Patricia Billingsley, Oil and Gas Specialist, Oil and Gas Conservation Division, OCC, to Michael Decker, Deputy General Counsel, Oil and Gas Conservation Division, OCC.

[38] Coordinated Watershed Restoration and Protection Strategy for Oklahoma's Impaired Scenic Rivers, Office of the Secretary of Environment (January 31, 2003).

[39] OKLA. STAT. tit. 82, § 1451-1471 (2001).

[40] Coordinated Watershed Restoration and Protection Strategy for Oklahoma's Impaired Scenic Rivers, Office of the Secretary of Environment (January 31, 2003) at 21. PAD is also participating in three (3) grant funded (33 U.S.C. § 1329 (h), CWA § 319(h)) watershed studies (Lake Wister watershed, Ft. Cobb Lake watershed, Stillwater Creek watershed) to determine if the oil and gas activities in these watersheds contribute to the turbidity problems in the waters. To date, no such oil and gas impacts have been found; the turbidity/sediment impacts are attributed to other sources. ODEQ's Ft. Cobb TMDL now underway is planning to reduce loadings from these other sources, especially agricultural.

Oklahoma.[41] The study, conducted from 2000 through 2002, showed that with respect to clearing, grading and excavation (CGE) stormwater incidents, Oklahoma averaged only five incidents per year, with more than 6,200 wells having been drilled in the state during that time period.[42] Including recompletions, the number of permits/intents to drill averaged more than 4,300 per year over that period.[43] With regard to all four producing states covered by the study (Kansas, New Mexico, Oklahoma and Texas), during the same period, only 23 CGE stormwater incidents were reported, while 37,750 wells were drilled – corresponding to less than one incident per 1,000 sites.[44] As these studies demonstrate, the number of oilfield incidents related to stormwater in Oklahoma (as well as all four states in the survey) is minimal, especially when compared to the number of wells drilled and recompleted in the survey area.

III. The definitions of "common plan of development" and "final stabilization," as implemented by "Storm Water Pollution Prevention Plan" requirements, fail to address the realities of oil and gas exploration and production as regulated in the State of Oklahoma.

EPA's NPDES stormwater CGP and Fact Sheet[45] create a perplexing dilemma for oil and gas well operators. EPA seeks to regulate such entities using national standards for stormwater run-off permitting based on a paradigm suitable for general commercial building construction activities, but unsuitable for specialized industrial activities such as oil and gas exploration and production or minerals extraction. The following briefly summarizes the crux of the problem with the NPDES stormwater general permit definitions of "common plan of development" and

[41] See "IOGCC NPDES Stormwater Discharge Working Group Report Stormwater Guidance and EPA Identified Needs," Interstate Oil and Gas Compact Commission (August 8, 2003).
[42] *Id.* at Appendix II.
[43] *Id.* at 7-8.
[44] *Id.*
[45] *See* 68 Fed. Reg. 39087 (July 1, 2003).

"final stabilization" [46] which were applied to oil and gas sites for the first time by the Deferral Rule[47] and 2003 Fact Sheet.

First, EPA Region VI's general permit re-issuance notice of July 6, 1998, defined "common plan of development" to mean:

> The "plan" in a common plan of development or sale is broadly defined as any announcement or piece of documentation (including a sign, public notice or hearing, sales pitch, advertisement, drawing, permit application, zoning request, computer design, etc.) or physical demarcation (including boundary signs, lot stakes, surveyor markings, etc.).[48]

Second, EPA in its April 28, 2000 notice of final modifications to the CGP, defined "final stabilization" to mean:

> [T]hat all soil disturbing activities at the site have been completed, and that a uniform perennial vegetative cover with a density of 70% of the cover for unpaved areas and areas not covered by permanent structures has been established or equivalent permanent stabilization measures (such as the use of riprap, gabions, or geotextiles) have been employed.[49]

These definitions are not appropriate in the oil and gas industry, which proceeds on a per-wellsite basis and which uses prudent stabilization practices that, while effective, often do not necessarily meet the technical definition of "final stabilization." The conundrum caused by these definitions is that an oil and gas operator often cannot determine if its project exceeds the acreage threshold requiring a permit.

The problem caused by these definitions is exacerbated by EPA's requirements of the SWPPP, which must be devised for each construction site and maintained at the site for inspection purposes until "final stabilization" is achieved. The site will be subject to inspection

---

[46] *See* 40 C.F.R. § 122.26 (b)(14)(x) (2004).
[47] *Id.* § 122.26(e)(8).
[48] 63 Fed. Reg. 36490-36491, *Reissuance of NPDES General Permits for Storm Water Discharges from Construction Activities in Region 6*, United States EPA Region VI (July 6, 1998). *See also* Fact Sheet at 6.
[49] 65 Fed. Reg. 25122-25144, *Final Modification of the National Pollutant Discharge Elimination System (NPDES) General Permit for Storm Water Discharges From Construction Activities* (April 28, 2000).

by "qualified personnel" once every seven (7) days and within twenty-four (24) hours of any storm event greater than 0.25 inches (which is impossible to determine for large numbers of rural oil and gas sites far from rain gauges with no personnel on location), or once a month after the site is temporarily or finally stabilized. The permitted party must keep the SWPPP for a period of three (3) years from the date of "final stabilization."[50]

These CGP and Fact Sheet concepts of "common plan of development" and "final stabilization," as implemented in the context of SWPPP requirements, do not reflect the reality of oil and gas exploration and production activities in Oklahoma.

Regarding the concept of "common plan of development," oil and gas wells in Oklahoma are permitted, drilled and operated in most regulatory contexts on a single wellsite basis. With regard to the establishment of well drilling and spacing units under Okla. Stat., tit. 52, Section 87.1, the statute provides that once the spacing unit is established, "no more than one well shall thereafter be produced from the common source of supply on any unit so established."[51] Section 87.1 authorizes the OCC to approve the drilling of increased density wells within a spacing unit by subsequent agency order after notice and hearing.[52] In the case of field-wide unitization, the OCC has the power by unitization order to supersede exploratory drilling units and approve a field-wide unit plan. This typically identifies an injection and producing well pattern for secondary or tertiary recovery purposes, but does not provide for selection of future drilling sites.[53]

---

[50] 63 Fed. Reg. 15622, 15632-15633, *Final National Pollutant Discharge Elimination System (NPDES) General Permit for Storm Water Discharges From Construction Activities* (March 31, 1998).
[51] OKLA. STAT., tit. 52, §87.1(c) (2001).
[52] OKLA. STAT., tit. 52, § 87.1(d) (2001).
[53] OKLA. STAT., tit. 52, § 287.4 (2001).

The OCC is not permitted under the statute to force pool drilling and spacing units on the basis of a multiple well "drilling program."[54] The forced pooling of a drilling and spacing unit occurs on a unit basis.[55] However, under the terms of the standard pooling order, the election to pay a share of well costs and remain a working interest partner in the unit or receive a bonus and royalty interest, is provided for the initial well in the unit. This is within the context of the statutory prescription that only one unit well will be drilled unless subsequent increased density drilling is authorized.[56] The standard pooling order contains provisions for elections by unit working interest partners in subsequent wells as they are proposed.

Regardless of the spacing or unitization matrix established by OCC order, the permitting of any wells drilled in either type unit, however, is conducted on a single well basis.[57] Approval of disposal and containment practices for exploration and production waste is made on a single well basis.[58] The regulation of wellsite conditions is provided on a single wellsite basis.[59] The regulation of stormwater discharge from any diked areas of a production site must be approved on the basis of a single wellsite permit.[60]

Regardless of how a drilling program might be proposed to investors, the reality of the oil and gas exploration and production industry is that decisions about well locations for on-going development are not conducted as part of a "common plan of development," as this phrase might be understood in the general commercial construction industry where publicly-platted plans for area construction typically are required. In the oil and gas exploration and production industry,

---

[54] *Helmerich & Payne, Inc. v. Corporation Commission*, 1975 OK. 23, 532 P.2d 419 (Okla. 1975).
[55] *Amoco Production Co. v. Corporation Commission*, 1986 OK CIV APP. 16, 751 P.2d 203 (Okla. Ct. App. 1986) and 1987 OK. CIV. APP. 80, 752 P.2d 835 (Okla. Ct. App. 1987) and *SKZ, Inc. v. Petty*, 1989 OK 150, 782 P.2d 939 (Okla. 1989).
[56] See Note 51 *supra.*
[57] OKLA. ADMIN. CODE §165: 10-3-1(2004) [Permit to drill well] and 10-5-2 (2004) [Approval of enhanced recovery injection or disposal well].
[58] OKLA. ADMIN. CODE §165: 10-3-1(f) (2004).
[59] OKLA. ADMIN. CODE §165: 10-3-17 (2004).
[60] OKLA. ADMIN. CODE §165: 10-7-17 (2004).

selection of on-going drilling locations occurs as a result of subsurface seismic studies, evaluation of well logs, well tests, production results, and surface damage negotiations. As observed from the Oklahoma regulatory scheme, these decisions typically are made on a single wellsite basis judging particular factors applicable to individual well proposals and are permitted on a single well basis.

In addition, all payments made to production owners, investors, and royalty (land) owners are based on what each well produces and sells and the percentage of ownership/production rights each entity has in each well. Payments of expenses owed are similarly figured on a per-well percentage-owned-by-each basis. Because of Oklahoma's legal and economic per-well regulatory approach and economic basis, specific drilling, production, facilities construction, pipeline sizing, emplacement and well connections, and other construction-related considerations within a lease, unit, or entire oil and/or gas field are made individually for each well or production unit, and are not part of some master plan (or common plan of development) for large numbers of wells or for the entire field.

Regarding the concept of "final stabilization," Oklahoma's Oil and Gas Conservation rules make no distinction similar to that proposed by the CGP between regulation of stormwater run-off, sedimentation control, and pollution prevention at the time of site preparation separate from on-going well operations. The Oklahoma scheme regulates such activities at individual wellsites in a seamless manner from the start of site preparation through point of spud, through production, depletion, well plugging and abandonment, and site restoration.

The OCC has established a regulatory network by which oil and gas exploration and production is monitored throughout the state. The Manager of Pollution Abatement is charged with supervising and coordinating the administration and enforcement of the rules of the OCC

that prohibit pollution.[61] The rules of the OCC require that all operators, contractors, drillers, service companies, pit operators, transporters, pipeline companies or other persons must conduct all of their operations in a manner that will not cause pollution.[62] Rules have been promulgated to prevent runoff water from entering pits[63] as well as how to handle stormwater accumulations in diked areas built for containment of tank battery spills.[64] Additional rules have been promulgated by the OCC regarding the disposal of waste materials, including stormwater.[65]

In instances where there have been allegations of pollution, the Manager of Pollution Abatement has broad-based powers to address the problem. Under OCC rule 165:10-7-3 (b):

> Whenever a written complaint against any person is filed with the Commission alleging pollution as prohibited by 165:10-7-5, the Manager of Pollution Abatement shall immediately initiate such action as may be necessary or appropriate to abate the pollution.

In emergency situations, the Manager of Pollution Abatement has been given the authority to take action beyond the rules and take whatever steps are necessary to abate the pollution. Pursuant to Oklahoma Statute, this includes the expenditure of monies. OKLA. STAT. tit. 52, § 139 (D) 1. states:

---

[61] OKLA. ADMIN. CODE §165:10-7-2 (2004).

[62] OKLA. ADMIN. CODE §165:10-7-5(a) (2004).

[63] OKLA. ADMIN. CODE §165:10-7-16(c)(3) (2004).

[64] OKLA. ADMIN. CODE §165:10-7-17(c) (2004). The storm water accumulation may be discharged without a permit, notification of the Commission or adherence to other provisions of this Section, provided the following conditions are met:

(1) No hydrocarbons. A visual inspection of the storm water is made and there is no sheen or other visible evidence of hydrocarbons being present.
(2) Low chlorides. Chloride concentration does not exceed 1000 mg/l.
(3) Conditions recorded. The operator records the conditions required by (1) and (2) in this subsection for each discharge, maintains those records for a period of three (3) years and makes them available upon request to any representative of the Field Operations Department.

[65] OKLA. ADMIN. CODE §165:10-7-24 (45)(2004). Storm water and hydrostatic test water from E&P operations: Options 1, 7, 9 & 22, and OKLA. ADMIN. CODE §165:10-7-24(c)(2004). Disposal options and rule reference guide. The following waste disposal options are referenced in (b) of this Section:

(1) Reclaim and/or recycle.
(7) Underground injection (in accordance with 165:10-5-1 through 165:10-5-14).
(9) Discharge (in accordance with 165:10-7-17).
(22) Land application as approved by the Commission.

> For the purpose of immediately responding to emergency situations having potentially critical environmental or public safety impact and resulting from activities within its jurisdiction, the Commission may take whatever necessary action, without notice and hearing, including the expenditure of monies from the Corporation Commission Revolving Fund, to promptly respond to the emergency. Such emergency expenditure shall be made pursuant to the provisions of the Oklahoma Central Purchasing Act, upon such terms and conditions established by the Department of Central Services to accomplish the purposes of this section. Thereafter, the Commission shall seek reimbursement from the responsible person, firm or corporation for all expenditures made from the Corporation Commission Revolving Fund. Any monies received as reimbursement shall be deposited to the credit of the Corporation Commission Revolving Fund.

Statutory powers to deal with pollution are also found in the Oklahoma Wildlife Conservation Code.[66]

The EPA's definitions of "common plan of development" and final stabilization" fail to consider the unique nature of oil and gas development and Oklahoma's regulatory system described above. By failing to consider this important aspect of the problem, while proceeding to issue flawed definitions, EPA acted arbitrarily and capriciously in applying the "common plan" rubric to oil and gas sites. The EPA's arbitrary and capricious use of these definitions is made even more onerous by the control, inspection, and recordkeeping rules of the SWPPP requirements. If the EPA's stormwater permit rule is applied to uncontaminated discharges for oil and gas CGE activities that do not impact water quality, the EPA must modify these definitions and the SWPPP requirements so they have a rational relationship to the realities of the oil and gas exploration and production industry.

---

[66] OKLA. STAT. tit. 29, § 7-401(C)(2001) states in part, "....Provided, that the party responsible for the control of any salt water, crude oil or other deleterious substances causing a violation of this section and resulting from drilling, production, transmission, storage or other operation of the petroleum industry shall be reported to the Oklahoma Corporation Commission and if corrective action is not taken immediately then criminal proceedings shall be had as herein provided. The Corporation Commission is also given the express power to order whatever corrective action is necessary to abate the pollution and is given the authority to enforce the order by any action against the lease or well. Such action shall be reported by the Wildlife Department to the appropriate agency.

IV. It was arbitrary and capricious for EPA to impose flawed definitions and inappropriate requirements on oil and gas activities now while deferring analysis and response until later.

The Administrative Procedures Act requires EPA to consider significant aspects of a problem before it makes a decision, to articulate a rational connection between the facts and the choice made, and to give a reasoned response to significant comments. EPA imposed requirements now, while deferring until later analysis of a significant aspect of the problem and response to significant comments, in spite of its recognition that 30,000 oil and gas sites per year might be affected by these requirements. As EPA notice of the Deferral Rule stated:

> During the two-year postponement of this deadline, EPA plans to gather information about the area of land disturbed during construction of oil and gas exploration and production facilities. In evaluating the impact of this action, the Agency will work with States, industry, and other entities to gather and evaluate data on the development and use of appropriate best management practices for the oil and gas industry . . . The EPA will use the additional data and analyses produced during the two-year period to determine the appropriate NPDES requirements, if any, for small construction of oil and gas exploration and production facilities.[67]

The promise of future analysis cannot redeem the arbitrary and capricious nature of EPA's decision to apply a flawed definition of "common plan of development" and inappropriate permit requirements on oil and gas activities today. By imposing requirements without analysis, EPA fails to consider the unique nature of oil and gas activities, which was an important aspect of the problem before it. It also failed to respond to significant comments before it, including the comments of the OCC, submitted to EPA in a related rulemaking docket.[68] EPA thereby failed to articulate a rational connection between the reality of oil and gas operations and the

---

[67] 68 Fed. Reg. at 11327-11328 (March 10, 2003); *see also* 67 Fed. Reg. 78116, 78118 (December 20, 2002) (recognizing that 30,000 oil and gas sites may be affected.).

[68] *See Appendix E.*

definitions and requirements imposed, and its failure to do these things renders its actions arbitrary and capricious.[69]

CONCLUSION

Although the EPA maintains control of NPDES permitting authority over contaminated stormwater runoff from oil and gas exploration and production sites in Oklahoma, EPA's extra-statutory interpretation of the CWA's stormwater discharge permitting system should not be allowed to impede the efficiency of one of the state's most vital industries. If such regulation of uncontaminated discharges is permitted, it should proceed only in accordance with the realities of oil and gas operations, and in recognition of Oklahoma's water quality standards for sediment control, which are adequately implemented and enforced by the OCC. Increased federal regulation in this area is simply unnecessary.

Respectfully submitted,

Michael Decker, OBA # 2267
Attorney for the Amicus Curiae
Oklahoma Corporation Commission
State of Oklahoma
P.O. Box 52000
Oklahoma City, Oklahoma 73152-2000
Telephone: (405) 521-2255

[69] *See Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile. Insurance Co.*, 463 U.S. 29, 43 (1983).

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the above and foregoing instrument was served by the method indicated below in accordance with the Federal Rules of Appellate Procedure, on this 6th day of August 2004, on the following counsel of record:

Alan D. Greenberg
Trial Attorney
U.S. Department of Justice
999 18th Street
Denver, CO 80202
(303) 312-7324 telephone
(303) 312-7331 facsimile
(Via Facsimile)

Janet L. McQuaid
Marcy Greer
Fulbright & Jaworski, L.L.P.
600 Congress Avenue, Suite 2400
Austin, TX 78701
(512) 474-5201 telephone
(512) 536-4598 facsimile
(Via Facsimile)

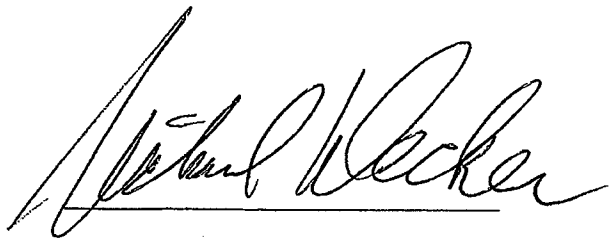
R. Timothy McCrum
Ellen B. Steen
Crowell & Moring
1001 Pennsylvania Avenue. NW
Washington, D.C. 20004

Richard H. Streeter
Frederic P. Andes
Barnes & Thornburg
750 17th Street, NW, Suite 900
Washington, D.C. 20006

Barry Sullivan
Jeffrey T. Shaw
Jenner & Block, L.L.C.
One IBM Plaza
Chicago, Illinois 60611

Philip Bein
Assistant Attorney General
The Capitol
Albany, New York 12224

David W. Cooney, Jr.
Lindil Fowler
Office of General Counsel
1701 N. Congress
P.O. Box 12967
Austin, TX 78711-2967v



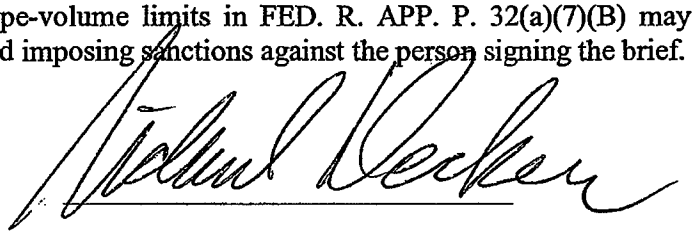
CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of FED. R. APP. P. 32(a)(7)(B) because:

1. This brief contains 5,541 words, excluding the parts of the brief exempted by FED. R. APP. P. 32(a)(7)(B);

2. The Brief has been prepared in proportionally spaded typeface using Microsoft Word for Windows in Times New Roman, Font Size 12;

3. The undersigned understands a material misrepresentation in completing this certificate, or circumvention of the type-volume limits in FED. R. APP. P. 32(a)(7)(B) may result in the court's striking the brief and imposing sanctions against the person signing the brief.



INDEX TO APPENDIX

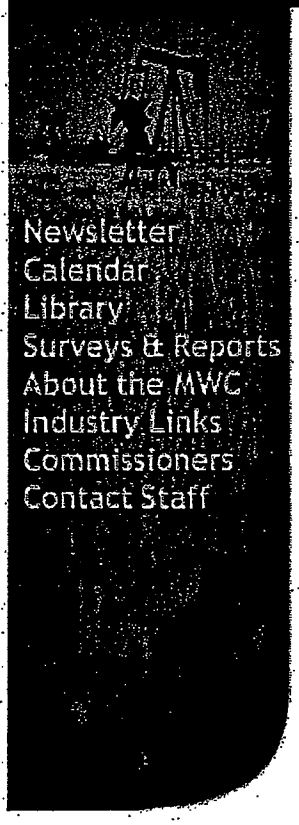
A. "The Osage Environmental Audit," *Conducted by StatSource L.L.C., for The Oklahoma Commission for Marginally Producing Oil and Gas Wells (April 29, 1999).*

B. Coordinated Watershed Restoration and Protection Strategy for Oklahoma's Impaired Scenic Waters (31 January 2003).

C. OCC email correspondence RE: Question from DEQ Staff about Black Bear Creek, February 12, 2004, Patricia Billingsly, Oil and Gas Specialist, Oil and Gas Conservation Division, OCC, to Michael Decker, Deputy General Counsel Oil and Gas Conservation Division, OCC.

D. "IOGCC NPDES Stormwater Discharge Work Group Report on Stormwater Guidance and EPA Identified Needs" Interstate Oil and Gas Compact Commission (August 8, 2003) (Appendix II).

E. Letter from Chairman Denise A. Bode, Oklahoma Corporation Commission, to EPA Water Docket No. OW-2002-0068 (February 14, 2003)



Oklahoma Commission on Marginally Producing Oil and Gas Wells

The Osage Environmental Audit

April 29, 1999

This report was compiled by

StateSource, LLC
for
The Oklahoma Commission on Marginally Producing Oil & Gas Wells

---

"Unfortunately for the United States, the declines in oil production costs apply more to oil lying outside the United States than to domestic reserves. This change in the relative cost of producing oil in the United States signals a sharp loss in competitiveness and market share for domestic oil production since the United States will become one of the most expensive production environments."

By Russell L . Lamb and Chad R. Wilkerson
Federal Reserve Bank of Kansas City

April 15, 1999

Foreword

Former Secretary of the Interior Don Hodel once said, "The cleanest, safest barrel of crude oil in the world is produced in the United States." The significant revenue impact oil and gas production has had on the Oklahoma economy is documented in the state's history, and is amplified by the increasing dilemma inherent in the maturing oil and gas production fields, the aging workforce and the industry's older infrastructure taking the product to market. Understanding the relationship between the rising production expenses due to environmental production costs and the prohibitive relative disadvantages placed on domestic oil and gas production by these costs offers an overview of the obstacles. These obstacles, both prudent and irrational, influence the revenue stream, and thereby create an unnecessary burden on domestic production competing against global markets relatively unencumbered by the corresponding compliance requirements.

Continuing the process of 'putting a face on the energy industry' and illuminating the cost against production, the 1999 Osage Environmental Audit again polls the relevant personnel in determining the real cost of regulatory compliance on a per barrel basis, and attempts to capture the facts of the 'field' where low prices and high cost endanger the efforts to prolong marginal production.

The results of this body of work are intended to broaden the view of the process that taxes, regulates and dominates the viability of sustained domestic production, and more specifically the remarkably fragile nature of hundreds of thousands of marginal oil and gas wells nationally and tens of thousand of marginal wells in Oklahoma. Enhanced recovery projects, potential reentry, the search for new technology and the opportunity to see the future through old wellbores are all stymied by overburdensome regulations that should be intended to be proportional to preserve our own natural resources. We hope that this unique information will be used by both public and private leaders in ascertaining ways to preserve our nation's vital domestic energy supply.

Richard H. Chapman, Executive Director
Commission on Marginally Producing Oil and Gas Wells
1999

Executive Summary

The Osage Environmental Audit Survey sponsored by the Oklahoma Commission on Marginally Producing Oil & Gas Wells has found more evidence that our domestic oil industry is at risk of extinction. This survey indicates that Osage County oil producers spend an average of $9 million per year to comply with environmental regulations. By combining the estimated operating cost of oil production with the cost of regulatory compliance, we can estimate that oil producers have sustained an overwhelming net loss of over $ 4.45 per barrel in the past six months. Additionally, while less than 1% of Osage County producers paid fines for failing to comply with environmental regulations in the past year, they spent an amazing 15-25% of their revenue on regulatory compliance.

The primary question raised by this study relates to the feasibility of imposing expensive regulatory compliance costs on both large and small oil producers where the risk to the environment is negligible. Although it is true that some precautions are necessary for the protection of the environment, this study indicates the urgent need to review the cost and the benefit of each regulation relevant to the risk of environmental harm. For example, some regulations may only be necessary for large producers, while others may be necessary only for those in a particular geographical location, such as coastal regions.

At a minimum, the results of this study absolutely demand that no additional environmental regulations, forms or compliance rules be implemented for domestic oil producers. Furthermore, it indicates that current regulations be reviewed with careful scrutiny to determine where

they provide protection relevant to the cost of compliance and risk to the environment. It is imperative that each cost imposed on domestic oil producers be based on sound research. Unnecessary costs must be removed to help ensure the survival of our most vital domestic industry.

This report was compiled by
StateSource, LLC

Purpose

The purpose of this study is to determine the per-barrel cost of compliance with environmental regulations for Osage County oil producers in order to gain a better understanding of the costs associated with today's oil production.

Group

For operational purposes the group was defined to be oil operators in Osage County, Oklahoma. With almost 500 operators, Osage County is home to more marginally producing oil and gas wells per capita than any other county in the United States, and, in turn, is losing producers at a faster rate than many other counties. Additionally, the county is directly supervised by the Environmental Protection Agency.

Questionnaire

A survey questionnaire was mailed out to 512 operators and 104 were returned. The response rate of 23% was considered excellent, and was found to be indicative of the concern by operators regarding the impact of environmental regulatory compliance relevant to the overall cost of production. The response rate could feasibly be underestimated, as many producers who received the initial survey are no longer operating.

Those responses, as well as supplemental data collected from secondary sources are outlined in this report.

General Conclusions

The average cost of compliance with environmental regulations is $1.97 per barrel for Osage County oil producers.

Based on an average oil production of 4.6 million barrels1 per year from 1996 to 1998, an average of $9 million per year is spent by oil producers in Osage County alone in order to maintain compliance with environmental regulations.

The average operating cost for oil production is estimated at

$13.38 per barrel2. When added to the cost of environmental compliance, $1.97 per barrel, the cost of producing a barrel of oil is now estimated at $15.35 per barrel.

The average price for Osage County crude oil from September 1998 to March 1999 was $10.903 per barrel. With the cost of production and regulatory compliance estimated at $15.35 per barrel, the resulting net loss for oil producers is $4.45 per barrel of oil.

The average operator in Osage County produces 28,333 barrels of oil each year.

The average well operator in Osage County operates approximately 29 wells.

The average production per well is 2.8 barrels per day.

Only 1% of survey respondents were required to pay fines related to environmental regulations in the past year.

This report does not include an assessment of man hours required for environmental compliance and the completion of burdensome paperwork, which many small business owners site as the number one threat to small business4.

footnotes
1 Received from the State of Oklahoma Corporation Commission, April 1999. **2 From the "Survey of Oklahoma Oil & Gas Leases-Well Cost Analysis" authorized by the Oklahoma Commission on Marginally Producing Oil & Gas Wells in 1996.** **3 Received from the Bureau of Indian Affairs, April 1999.** **4 Received from the National Federation of Independent Business.**

Specific Conclusions

Spill Containment

The Environmental Protection Agency's SPCC Regulations require containn of drainage from the operating areas of a facility to prevent oil spills and contaminated runoff from reaching storm drains, streams, ditches, rivers, ba and other navigable waters. Additionally, any leaks which have saturated th must be stopped and the accumulation of oil removed.

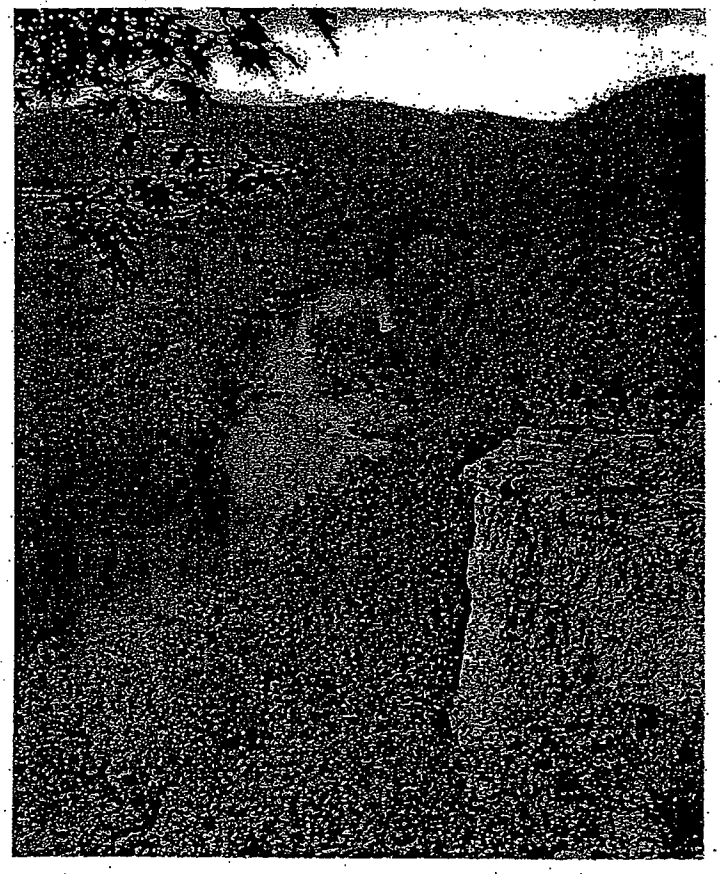
In Osage County, this survey indicates that an average of $460,000 per yea $.10 per barrel of oil produced is spent on spill containment each year.

Requirements for Drips & Leaks

(Such as sumps and catchment drums at unloading areas)

Coordinated Watershed Restoration and Protection Strategy for Oklahoma's Impaired Scenic Rivers

(per Senate Bill 972, 2nd Session of the 48th Legislature, 2002)



Coordinated and Prepared By:

Office of the Secretary of Environment
C. Miles Tolbert, Secretary of Environment
3800 North Classen Boulevard
Oklahoma City, Oklahoma 73118

31 January 2003

that 1,640 tons of poultry litter are generated each year, which yields 19 tons of total phosphorus (43 tons of P_2O_5). Based upon soil samples collected by ODAFF field inspectors, coupled with records submitted to ODAFF by poultry litter applicators, preliminary estimates are that 20% of the poultry litter application fields in the Scenic River watersheds have reached the 250 soil test phosphorus ("STP") threshold. This translates into 328 tons of surplus litter generated in the Lee and Little Lee Creek watersheds that cannot be safely applied to existing land application fields. Obviously, these estimations will be refined as additional information is collected and a new phosphorus index is developed based upon the 0.037 phosphorus criterion.

While no regulated dischargers exist in the Oklahoma portion of this watershed, the Oklahoma Corporation Commission reports 44 *gas wells* under its jurisdiction within the Lee/Little Lee Creek watershed. Currently, none of these wells have any outstanding enforcement actions pending before the Oklahoma Corporation Commission and, thus, are not known to be causing pollution problems.

CONCLUSION

The State of Oklahoma fully expects the next twelve months to bring even greater accomplishments in terms of tangible actions to address the threats to Oklahoma's Scenic Rivers. Once the OWQS and, in particular, the phosphorus criterion contained therein, are approved by EPA, an unprecedented level of effort and action will be unleashed. Should the Oklahoma Legislature continue to provide support for monitoring programs, the State and its partners will continue to collect valuable data on water quality threats and impairments. Additionally, the TMDL process will ensue in the months ahead, resulting in more specific pollution reduction goals for agencies, as well as the activities that they regulate. Most importantly, continued discussions with Arkansas should result in cooperative efforts to develop and implement TMDLs that stretch across state boundaries.

Ultimately, all of these activities will result in drastically needed pollution reductions aimed at restoring water quality in the state's invaluable Scenic Rivers. Just as it has taken decades for pollution to impair the beneficial uses of these waters, so to will it take many years for noticeable improvements to be made. However, Oklahoma's state environmental agencies are united like never before in their desire to initiate actions today so that discernible improvements can be measured tomorrow. Because the Scenic Rivers of Oklahoma were afforded special protection by the Oklahoma Legislature decades ago, and because these waters are so esteemed and appreciated by the citizens of Oklahoma, the continued degradation of these important natural resources is simply unacceptable.

From: Patricia Billingsley
To: Mike Decker
Date: 2/12/2004 3:30:08 PM
Subject: Re: Question from DEQ staff about Black Bear Creek

Yes, studies of Black Bear Creek and other streams/lakes in Pawnee Co. have been done. 17 to date.

Black Bear Creek Watershed
Since Black Bear Creek and a major tributary (West Warren) had alleged oilfield impacts (e.g. Black bear was placed by someone, not us, on the 303d list in the 1990s), I asked the OWRB to sample them for us as part of their BUMP (Beneficial Use Monitoring) program. Black Bear was sampled at two different sites, 1 each in Pawnee and Noble counties - 11 samples taken monthly over 1 year for all salinity minerals plus Barium (an occasional oilfield pollutant from drilling mud). While two of the samples in Noble Co. were elevated in TDS and chlorides, they did not exceed standards; Pawnee Co. was fine. We removed Black Bear from the 303d list. West Warren Creek in Noble Co. was also fine, no high readings, removed also.

Three small tributaries (Lucien and Gansel creeks in Noble Co. and Garber Creek in Garfield County) which Corp Comm has sampled have had significant spills or historic production along them to have been pushed over state salinity standards, but not high enough to affect the larger downstream creeks (e.g. Black Bear or West Warren).

PST had a site where gasoline was affecting Cow Creek in Perry - I do not know its current status.

Other streams in the Black Bear watershed that have been evaluated by OWRB and/or Conservation Commission are listed below. Some have only limited testing. Data is from the 2002 303d list and 305b Integrated Report (new 2004 report will be done in ~2 months):

Black Bear Creek, Pawnee Co. Impaired for Lead, enterocci (bacteria), turbidity, and some unknown toxicity; OK for other parameters tested
Camp Creek - Impaired for fecal coliform, OK for other parameters tested
Lone Chimney Lake - No problems found to date
Pawnee Lake - No problems found to date
Black Bear Creek near Perry - No problems found to date
Cow Creek - No problems found to date (except the gasoline from the PST site, above)
Perry Lake - No problems found to date

Other streams/lakes in or adjacent to Pawnee Co.

Tiny intermittent Keywest creek in Pawnee County by Kaw lake had a brine spill in 1998 that impaired it; sampling done in 2001 shows that it has cleaned up, is no longer affected.
The Arkansas river in Pawnee Co. also had alleged salinity and oil impacts, was sampled by Corp Comm & OWRB the requisite 10+ times, and is not impaired by either salinity or oil.
Keystone Lake at the east end of Pawnee Co. was been checked by OWRB; the lake has some turbidity problems, otherwise OK for the parameters tested.
The Arkansas River was checked by us and the OWRB near Ralston for salinity and many other parameters, and was impaired only for turbidity.
Lagoon Creek (where Payne-Logan-Lincoln Counties come together) is impaired for fecal coliform and turbidity.
Salt Creek, on the Payne-Logan Co. border has had a few samples taken, not enough to evaluate it yet.

Anything else you need to know?

Tricia

>>> Mike Decker 2/12/2004 8:57:54 AM >>>
Yesterday DEQ attorney Barbara Rauch had a question for Pollution Abatement stemming from some references in the materials received from the EPA about the Pawnee TAS/WQS application. There are statements in the documents that certain studies of Black Bear Creek were going to be conducted after 1998 to determine impacts on the creek. Barbara Rauch wanted to know if we have any information about whether these studies were conducted by the tribe or others involved in the situation such as the Okla. Conservation Commission, OWRB, etc. Any information we have on this would be helpful to her. E-mail to Barbara.Rauch@deq.state.ok.us. Thanks.

CC: Tim Baker

IOGCC NPDES Stormwater Discharge Work Group Report

On

Stormwater Guidance And EPA Identified Needs

Prepared By
Interstate Oil and Gas Compact Commission

For The

U.S. Department Of Energy
Contract No. DE-AP5-03SW54441

August 8, 2003

APPENDIX II

THREE YEAR SUMMARY OF STORM WATER INCIDENTS For WORKGROUP MEMBER STATES

State	No. of CGE Storm Water Incidents (2000 thru 2002)	No. of Wells Drilled (2000 thru 2002)
Kansas	3	4553
New Mexico	0	3734
Oklahoma	15	6218
Texas	5	23245
Three Year Total =	23	37750
Three Year Annual Average per State	1.6	9438

Note: CGE = Construction, Grading, and Excavation

CORPORATION COMMISSION OF OKLAHOMA

Jim Thorpe Building
Oklahoma City, Oklahoma 73105

DENISE A. BODE
CHAIRMAN

Phone: 405-521-2267
FAX: 405-521-4109

February 14, 2003

Water Docket
EPA
Mail Code 4101T
1200 Pennsylvania Ave., N.W.
Washington, DC 20460

Attention: Docket ID No. OW-2002-0068

Re: EPA's proposed delay in the Stormwater Phase II National Pollutant Discharge Elimination System Permit Deadline for Storm Water Discharges for Oil and Gas Construction Activity that Disturbs One to Five Acres of Land.

The Oil and Gas Conservation Division of the Oklahoma Corporation Commission supports the proposed 2 year delay in the enforcement of National Pollutant Discharge Elimination System (NPDES) Stormwater Phase II for storm water discharges from oil and gas construction activity that disturbs one to five acres of land. The Oil and Gas Conservation Division believes that the EPA should reconsider the implementation of these rules as they pertain to oil and gas exploration and production activities altogether. There are yet still some important legal issues and technical rules justifications to address regarding the implementation of these rules for oil and gas exploration and production and infield pipeline construction sites. This proposed EPA Phase II rule should not be applied to these sites until the following issues have been properly addressed:

1. The EPA's failure to properly assess the impacts of the Phase II rule on small businesses, specifically the many small independent operators who manage thousands of Oil and Gas sites in the lower 48 states;
2. The claim by some in the O&G industry that oilfield construction is covered by the exploration and production industry's general exemption from the NPDES permitting requirements of the Clean Water Act; and thus, the NPDES rules covering construction activity should not be interpreted as applying to oil & gas exploration & production sites, and
3. The President's mandate to gauge the effects of rules on energy production.

A delay of two years for both implementation and enforcement for these rules until these issues can be resolved is appropriate.

Mailing Address: P.O. Box 52000, Oklahoma City, OK 73152-2000
d.bode@occmail.occ.state.ok.us

Small independent companies and individuals manage today's onshore oil and gas exploration and production industry. They do not have the capacity to do the extensive watershed sampling, historical and archaeological surveys, or endangered species reviews, to demonstrate construction site impact or lack thereof, that some environmental organizations would like. That capability mainly rests with the large oil & gas companies who have largely abandoned the mature provinces of the continental United States (including Oklahoma) for offshore and overseas exploration areas.

If the NPDES Stormwater construction Phase II rules are not delayed, it will in effect subject the industry to a possibly illegal or unjustified rule as well as impose serious financial hardships and delays on thousands of independent oil and gas operators. This could also result in a loss of oil and gas production that the nation cannot afford at a time when our oversees sources in the Middle East and Venezuela are becoming less certain due to war, terrorism, and/or civil strife. For these reasons, the Oil and Gas Conservation Division of the Oklahoma Corporation Commission supports a delay for both implementation and enforcement in the NPDES Phase II rules for oil and gas exploration and production activities.

Thank you for the opportunity to comment on this very important issue. Implementation and enforcement of these rules to the oil and gas exploration and production and pipeline transportation industries could have very devastating effects on this nation's energy supplies and economy. It should not be taken lightly and without regard to its ramifications.

Sincerely,

Denise A. Bode

Denise Bode, Chairman
Oklahoma Corporation Commission

cc: Commissioner Bode
Commissioner Anthony
Commissioner Cloud
Tom Daxon, General Administrator
Michael Decker, Office of General Counsel
Angier Burkhalter, OIPA
Mike Bernard, MOGA
Brent Larson, EPA Region 6 Storm Water Coordinator, NPDES Permits Branch, 1445 Ross Avenue, Suite 1200, Dallas, Texas 75202