January 29, 2003

Water Docket
Environmental Protection Agency, Mail Code 4101T
1200 Pennsylvania Avenue NW
Washington, DC 20460

Subject: Modification of National Pollutant Discharge Elimination System (NPDES) Permit Deadline for Storm Water Discharges for Oil and Gas Construction Activity That Disturbs One to Five Acres of Land 67 Fed. Reg. 79828 (December 30, 2002) - Proposed Rule, (Docket ID No. OW-2002-0068).

Subject: Proposed National Pollutant Discharge Elimination System (NPDES) General Permit for Storm Water Discharges from Construction Activities 67 Fed. Reg. 78116 (December 20, 2002) - Notice of Availability for Comment, (Docket ID No. OW-2002-0055).

These comments are filed on behalf of the Independent Petroleum Association of America (IPAA), the Domestic Petroleum Council (DPC), the International Association of Drilling Contractors (IADC), the International Association of Geophysical Contractors (IAGC), the National Ocean Industries Association (NOIA), the National Stripper Well Association (NSWA), the Natural Gas Supply Association (NGSA), the Petroleum Equipment Suppliers Association (PESA), the US Oil & Gas Association (USOGA), and the following organizations:

California Independent Petroleum Association
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 Oil & Gas Association
National Association of Royalty Owners
Nebraska Independent Oil & Gas Association
New Mexico Oil & Gas Association
New York State Oil Producers Association

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
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 85 percent of domestic oil and natural gas wells, produce over 40 percent of domestic oil, and approximately 65 percent of domestic natural gas.

We appreciate the opportunity to comment both on the delay in applying the National Pollutant Discharge Elimination System (NPDES) permit for stormwater discharges by the oil and gas industry exploration and production (E&P) facilities between one and five acres (Phase II) and on issues associated with the General Permit for Storm Water discharges from Construction Activities.

I. Postponement of Oil and Gas Permit Deadline for Small Oil & Gas Facility Construction Activities

We support the action proposed by EPA to delay the Phase II requirements of the Stormwater Construction General Permit (CGP) for clearing, grading, and excavating activities (so-called "construction activities") at oil and gas facilities. We will focus our comments on issues associated with E&P facilities. We believe that EPA's determination to postpone the application of the permitting requirements is well justified, but it needs clarification in particular respects and it should address all E&P facility construction, including E&P sites of more than five acres.

First, we believe that the provision of the Clean Water Act adopted in 1987 - Section 402(l)(2) - excludes uncontaminated stormwater from oil and natural gas exploration and production facilities from the NPDES permitting process. And, since the municipal and industrial stormwater discharges subsection - Section 402(p) - is directed toward permitting of stormwater discharges, it does not override this exclusion. During the two year assessment period this question needs to be fully reexamined.

Second, even ignoring the issue of the exemption, we do not believe that the 1992 Natural Resources Defense Council v. Environmental Protection Agency (NRDC v EPA) case compels the current EPA treatment of oil and natural gas exploration and production facilities. While the court required EPA to reconsider its action on construction activities, it did not require that all construction activities below five acres be regulated. Rather, it required EPA to justify its actions whatever they may be. We would suggest that even if EPA determined that some construction activities needed to be permitted from one to five acres, it was not compelled to require all construction activities to be permitted. Instead, EPA should evaluate the environmental risks and regulatory burdens that are created by its actions.

In the case of oil and natural gas exploration and production facilities, we do not believe that EPA made a reasonable assessment of either the risk or the burden. Nowhere in the information that we reviewed regarding the development of the Phase I or II regulations is there an indication of significant environmental risks associated with oil and natural gas exploration and production facility construction. Nor is there any indication that EPA understood the burdens the NPDES storm water program would impose. For example, in an October 1999 report on the costs of the new Phase II requirements there is a critical footnote stating:

Based on public comments received on the propose rule, EPA considered including oil and gas exploration sites but, upon further review, determined that few, if any, such sites actually disturb more than one acre of land.

In reality, most oil and natural gas exploration and production sites fall within the one to five acre range. In 2000, a total of 31,732 exploratory and production wells were drilled - over 10,000 in Texas and Oklahoma. To meet future natural gas demand, the National Petroleum Council estimates that the number of natural gas wells alone needs to increase to approximately 48,000 wells annually. However, in the EPA cost analysis of the Phase II program, it estimated that the number of construction starts would be approximately 130,000 units. But, none of these units were oil and gas facilities. Oil and gas facilities alone would increase the number of units by 25 percent with a third of that total coming from the two states of Texas and Oklahoma where EPA Region 6 must handle the administrative burdens. The ultimate effect of this could be staggering. One recent analysis estimates that the permitting program could reduce investment in domestic exploration and production by as much as $8 billion annually.

Three things are clear. First, if the current level of drilling activity presented stormwater runoff problems during construction, it would be well known. Second, the magnitude of permitting that EPA estimated during the regulatory development process is significantly understated. Third, because the Agency believed that oil and gas facilities were not affected by Phase I or II, the Phase I and II regulations and proposed CGP are structured to address construction of building facilities - houses and commercial buildings.

This approach is overly burdensome for oil and gas facilities. For example, subdivisions are properties that are purchased by the developer, go through an extensive design process, and have a construction period that may be months or years. The timing for permitting is not a critical path item. Conversely, oil and gas production operations involve the leasing of surface rights, construction occurs within a matter of weeks, and timing is critical because it involves obtaining a drilling rig that must be carefully scheduled and is paid for based on the number of days it is in use. Disruption in this process can place entire projects and substantial capital at risk. These consequences are at issue in the Phase II regulations.

Because of these concerns, we believe that EPA should conduct a thorough reassessment of its approach to stormwater construction permitting and oil and natural gas exploration and production facilities. EPA's proposed suspension of the Phase II stormwater construction regulation as it applies to oil and gas exploration and production facilities initiates an opportunity to consider alternative approaches that would be consistent with the environmental impacts of construction of these facilities and minimizing the regulatory burden.

However, for this reassessment and consideration of alternative approaches to be meaningful, it must be thorough and encompass all of the issues, which are interrelated and must be considered for both large and small oil and gas operations. Some specific areas of concern need to be clarified.

First, a longstanding issue of concern remains clouded in the current mix of EPA actions. Specifically, the issue of the treatment of "common plan of development" as it applies to E&P facilities must be considered in the context of the postponed application of the CGP to oil and gas facilities. This issue - which will be discussed more extensively in the comments on the CGP - has always been problematic when applied in the context of oil and gas facilities. Crafted as the rest of the CGP was - for subdivision and shopping center-like facilities - its application to oil and gas facilities creates enormous uncertainty. Even the examples used in Fact Sheets accompanying the CGP proposal are confounding in their interpretation. Most significantly, however, if sites of five and greater acres or sites that are part of a common plan of development that disturbs five acres were not included in the postponement, the postponement would become a false promise. While reassessments of the application of the permit process to oil and gas facilities were being undertaken, some, if not all, EPA regions could be applying the convoluted common plan of development analysis to the same operations that were not being regulated due to the postponement and thereby regulating them. Therefore, EPA's deferral should include sites that are regulated under Phase I because they disturb five or more acres and sites that are part of common plan of development that does so, in order to allow an opportunity to consider the definition of "common plan" during the deferral.

Second, EPA intent with regard to the postponement of the CGP needs to be clearly communicated both to all the EPA regions and to the states with NPDES authority so that the regulatory process is both certain and consistent. Having a state with NPDES authority operating differently from EPA during this two year period would be completely counterproductive.

Therefore, we believe that EPA should postpone the application of the CGP to all oil and gas E&P facility permitting, regardless of size, while it reassesses its approach to the regulation of these facilities. Specifically, EPA should expand its proposed action to address E&P facilities greater than five acres (Phase I) and the attendant issues associated with the structure and concept of "common plan of development". Neither regulators nor operators should be placed in the uncertain position of facing a greater regulatory burden largely based on the calculation of the size of a facility while the entire regulatory structure is being reassessed.

Collectively, we are committed to working with EPA during the reassessment of the current regulatory structure and the evaluation of alternative approaches.

II. General Construction Permit

It is difficult to specifically address concerns with the CGP without presenting them in the context of the reasons why the EPA proposed postponement of permitting under the CGP is justified. Setting aside the question of the basis for regulating oil and gas E&P facility construction, this regulatory approach has created inherent problems. These largely result from the basis of its creation.

First, the principal target of this regulatory program has been construction operations that generate substantial soil disruption that can be affected by stormwater. As a result the regulatory process tends to track those types of projects. It assumes a clear cut plan of

development that involves a planning phase, an initial construction phase, and ultimately a termination of construction. The permit process is similar; it requires a Notice of Intent and a Notice of Termination.

Second, EPA did not anticipate that oil and gas E&P facility construction projects were large enough to trigger the permitting requirements. Consequently, EPA did not devise its structure to reflect the nature of this industry. The current regulatory structure creates fundamental and irreconcilable permitting problems. These derive from the very different objectives of a drilling operation compared to subdivision or shopping center construction. Drilling projects need to be constructed quickly and the principal objective is to stabilize the area to assure that it can handle the weight of a drilling rig.

One key element of the regulation that crystallizes these differences is the application of a "common plan of development" test to determine whether a permit is required. In principle, the idea seems to be to prevent a large project from being segmented in such a way to avoid permitting. It may be a valid concept for a subdivision that is being built over a longer period of time but is clearly designed to cover an area larger than its initial phase. However, it is a concept that does not work for oil and gas E&P facilities.

It fails for several reasons. First, while an area may be ultimately developed as an oil or natural gas "field", each drilling decision is independent. While it may be based on the prior result, timing and location decisions on developing an area are separate actions. They are not part of a common plan. Second, by all logical assessments, clearing, grading, and excavating activities ("construction" in EPA's vernacular) are in fact an inherent part of oil and gas operations. Under EPA's current definition, when drilling begins at a site, "operation" begins and "construction" is terminated. Under EPA's current interpretation of Section 402(l)(2), an "operating" E&P facility requires no stormwater discharge permit for uncontaminated stormwater, but clearing, grading, and excavating activities do. However, this ignores a physical and operational reality of E&P operations, which requires a continuous drilling program and, therefore, continuous clearing, grading, and excavating activities during the development phase of a field in order to maintain the leases and the right to operate an oil and gas field. By excluding clearing, grading, and excavating activities from the scope of the oil and gas exemption, EPA takes the exemption away from the vast majority of E&P operations.

Trying to contort this construction and operational process into the current framework of common plan of development cannot work. While EPA has tried to describe circumstances where a common plan of development would or would not exist by an example in the Fact Sheets accompanying the Federal Register notice on the CGP, the circumstances of each case are simply too different to be addressed by such an approach. For example, a recurring issue that has arisen in the context of E&P facilities relates to the construction of pipelines associated with the operating facilities. In many cases these pipelines are constructed, owned and operated by separate companies from the E&P facility. Yet, in discussions with EPA staff over the past several years, EPA's position on how it would treat these pipeline operations in the context of a common plan of development is unclear. For a producer, however, knowing that answer is critical because it could determine whether a permit was necessary.

If these insoluble conflicts are to be addressed within the current CGP structure, it is essential that the question of whether and how the concept of common plan of development is to be applied to oil and gas E&P facility construction be included in the postponement of the application of the CGP to E&P facilities.

Moreover, if application of common plan of development for E&P facilities remains in the CGP, it would have the effect of making moot the postponement of the permit on E&P facilities. Under these circumstances all of the concerns about the burden of the permit process on both industry and EPA would result. Over 30,000 wells could become subjected to the permit process - 10,000 in Texas and Oklahoma alone. These facilities would increase the number of units requiring permits by 25 percent over the EPA estimates of the number of construction starts affected by the program. A third of the increase would be in EPA Region 6 where EPA manages the program. This burden would flow into the endangered species and historic site preservation and TMDL reviews and would overwhelm the capabilities of the agencies charged with these responsibilities to conduct their reviews. The result would be unavoidable permit delays.

Such delays would be seriously damaging to the development of domestic oil and natural gas resources. Not only would producers incur substantial permit preparation costs - whenever a common plan of development threshold was triggered - delays in drilling could unravel carefully developed projects. The first cost is straightforward; endangered species and historic site assessments would have to be funded and can be expensive, in the range of $10,000 per study. The second cost arises because timing is so critical to drilling programs. Both the access to the mineral rights and the drilling rig are on schedules. A producer leases access to the mineral rights for a specified time and under specified conditions. Drilling rigs are moved from site to site on schedules and at great cost. If a permit were required as a result of a determination that a common plan of development existed, drilling rig availability would be clearly affected causing the planned drilling schedule to be reconfigured. If alternative rigs were not available when the permitting process was completed, the opportunity to drill might be lost and the entire project could fall apart. This scenario could forfeit hundreds of thousands of dollars invested in developing a project, not to mention the opportunity to develop the reserves.

Clearly, the intent of EPA's proposal to postpone the application of the CGP to oil and gas E&P facilities would not be met under these conditions. Therefore, the final CGP must make clear that its common plan of development requirements do not apply to oil and gas E&P facility construction during the postponement period.

EPA should also include Phase I oil and gas E&P facilities in the postponement. All of the issues associated with the Phase II E&P facilities are pertinent to the Phase I E&P facilities. Actual Phase I facilities represent a small fraction of the number of wells drilled annually. There is no scientific evidence that clearing, grading, and excavating activities pose such a significant environmental risk from stormwater runoff mismanagement that Congress would have intended them to be excluded from the oil and gas exemption under section 402(l)(2). Whatever regulatory judgment results from the analysis and determinations made during the two year postponement for Phase II facilities should be applicable for Phase I facilities. Consequently, Phase I facilities should be treated consistent with Phase II facilities during the postponement period.

We appreciate the opportunity to submit comments on the two regulatory proposals related to stormwater construction permitting and its effect on oil and gas E&P facilities. We look forward to working with EPA on the development of analyses and assessments of regulatory options for these facilities during the postponement period. If there are questions regarding these comments or if additional information is required, please contact Lee Fuller at IPAA, 202-857-4722.