

**List of Subjects in 40 CFR Part 52**

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Ozone, Volatile organic compounds.

Dated: May 17, 2006.

**Norman Niedergang,**

Acting Regional Administrator, Region 5.

■ For the reasons stated in the preamble, part 52, chapter I, of title 40 of the Code of Federal Regulations is amended as follows:

**PART 52—[AMENDED]**

■ 1. The authority citation for part 52 continues to read as follows:

Authority: 42 U.S.C. 7401 *et seq.*

**Subpart P—Indiana**

■ 2. Section 52.770 is amended by adding paragraph (c)(176) to read as follows:

**§ 52.770 Identification of plan.**

\* \* \* \* \*

(c) \* \* \*

(176) On December 21, 2005, Indiana submitted revised regulations that incorporate by reference 40 CFR 51.100(s)(1), as amended at 69 FR 69298. As a result, the compounds, 1,1,1,2,2,3,3-heptafluoro-3-methoxypropane, 3-ethoxy-1,1,1,2,3,4,4,5,5,6,6,6-dodecafluoro-2-(trifluoromethyl)hexane, 1,1,1,2,3,3,3-heptafluoropropane, and methyl formate, are added to the list of “nonphotochemically reactive hydrocarbons” or “negligibly photochemically reactive compounds” in 326 IAC 1–2–48 and these compounds are deleted from the list of VOCs in 326 IAC 1–2–90. Companies producing or using the four compounds will no longer need to follow the VOC rules for these compounds.

The requirements in 326 IAC 1–2–48 and 1–2–90 were also modified for the compound t-butyl acetate. It is not considered a VOC for emission limits and content requirements. T-butyl acetate will still be considered a VOC for the recordkeeping, emissions reporting, and inventory requirements.

Indiana is also revising 326 IAC 1–2–33.5 to remove ethylene glycol monobutyl ether from its HAP list. This chemical will no longer be considered a hazardous air pollutant.

(i) Incorporation by reference.

(A) Indiana Administrative Code Title 326: Air Pollution Control Board, Article 1: General Provisions, Rule 2: Definitions, Section 33.5: “‘Hazardous air pollutant’ or ‘HAP’ defined,” and Section 48: “‘Nonphotochemically

reactive hydrocarbons’ or ‘negligibly photochemically reactive compounds’ defined,” and Section 90: “‘Volatile organic compound’ or ‘VOC’ defined.” Filed with the Secretary of State on October 20, 2005 and effective November 19, 2005. Published in 29 *Indiana Register* 795–797 on December 1, 2005.

[FR Doc. 06–5252 Filed 6–9–06; 8:45 am]

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**ENVIRONMENTAL PROTECTION AGENCY****40 CFR Part 122**

[EPA–HQ–OW–2002–0068; FRL–8183–3]

RIN 2040–AE81

**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**

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Final rule.

**SUMMARY:** EPA is taking final action to codify in the Agency’s regulations changes to the Federal Water Pollution Control Act, also known as the “Clean Water Act” or “CWA,” resulting from the Energy Policy Act of 2005. This action modifies the National Pollutant Discharge Elimination System regulations to provide that certain storm water discharges from field activities or operations, including construction, associated with oil and gas exploration, production, processing, or treatment operations or transmission facilities are exempt from National Pollutant Discharge Elimination System permit requirements. This action also encourages voluntary application of best management practices for oil and gas field activities and operations to minimize the discharge of pollutants in storm water runoff and protect water quality.

**DATES:** This final rule is effective on June 12, 2006. For the purposes of judicial review, this final rule is promulgated as of June 12, 2006. See 40 CFR 23.2.

**ADDRESSES:** EPA has established a docket for this action under Docket ID No. EPA–HQ–OW–2002–0068. All documents in the docket are listed on the [www.regulations.gov](http://www.regulations.gov) Web site. Although listed in the index, some information is not publicly available,

e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically through <http://www.regulations.gov> or in hard copy at the Water Docket, EPA/DC, EPA West, Room B102, 1301 Constitution Ave., NW., Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the Water Docket is (202) 566–2426.

**FOR FURTHER INFORMATION CONTACT:** Jeff Smith, Water Permits Division, Office of Wastewater Management (4203M), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460; telephone number: (202) 564–0652; fax number: (202) 564–6431; e-mail address: [smith.jeff@epa.gov](mailto:smith.jeff@epa.gov).

**SUPPLEMENTARY INFORMATION:****I. General Information***A. Does This Action Apply to Me?*

Entities potentially affected by this action include operators of oil and gas exploration, production, processing, or treatment operations or transmission facilities and associated construction activities at oil and gas sites that generally are defined in the following North American Industrial Classification System (NAICS) codes and titles: 211—Oil and Gas Extraction, 213111—Drilling Oil and Gas Wells, 213112—Support Activities for Oil and Gas Operations, 48611—Pipeline Transportation of Crude Oil and 48621—Pipeline Transportation of Natural Gas.

This description with references to industrial classification codes is not intended to be exhaustive, but rather to provide a guide for readers regarding entities likely to be affected by this action. This description identifies the principal types of entities that EPA is aware could potentially be affected by this action. Other types of entities not identified could also be affected. To determine whether your facility or company is affected by this action, you should carefully examine 40 CFR 122.26(a)(2), (b)(14)(x), (b)(15), (c)(1)(iii) and (e)(8). If you have questions regarding the applicability of this action to a particular entity, consult the person listed in the preceding **FOR FURTHER INFORMATION CONTACT** section.

### B. When Does This Final Rule Take Effect?

This final rule is effective on June 12, 2006. Because this final rule provides relief from permitting requirements for certain dischargers, this final rule is not subject to the general requirement for a thirty-day waiting period after publication before a final rule takes effect. By providing such relief, this final rule "relieves a restriction" on these dischargers. 5 U.S.C. 553(d)(1). Moreover, pursuant to 5 U.S.C. 553(d)(3), EPA has good cause to make this final rule effective immediately upon publication. Without this final rule, dischargers eligible for this permit exemption would, in accordance with EPA's regulations, be required to obtain permit authorization by June 12, 2006. This action eliminates this permit obligation, which would otherwise have applied during the period between the time the rule is published and the time it would take effect (ordinarily, 30 days after publication). Making this rule effective as soon as it is published will help reduce any confusion on the part of those affected by the rule regarding the necessity for obtaining permit coverage. Therefore, a thirty-day waiting period is unnecessary and would be contrary to the public interest.

## II. Background Information

The 1987 amendments to the CWA added language at section 402(j)(2) that exempts from NPDES permitting requirements certain storm water discharges from oil and gas exploration, production, processing, or treatment operations or transmission facilities. That provision in the Act states that "[t]he 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." The 1990 NPDES Phase I Storm Water rule (55 FR 47990, November 16, 1990) established permit requirements for certain storm water discharges, including storm water discharges associated with construction

activities that disturb five acres or greater or that disturb less than five acres when part of a larger common plan of development or sale that disturbs five acres or more. One provision of the Phase I rule codified the CWA section 402(j)(2) exemption at 40 CFR 122.26(a)(2). The 1990 rule also codified, at 40 CFR 122.26(c)(1)(iii), the conditions that would be considered indicative of contamination by contact with raw material, intermediate products, finished product, byproduct, or waste products located on a site and would thus necessitate an NPDES storm water permit application by oil and gas exploration, production, processing or treatment operations or transmission facilities. Specifically, 40 CFR 122.26(c)(1)(iii) established permit requirements for contaminated discharges as follows:

(iii) The operator of an existing or new discharge composed entirely of storm water from an oil or gas exploration, production, processing, or treatment operation, or transmission facility is not required to submit a permit application in accordance with paragraph (c)(1)(i) of this section, unless the facility:

(A) Has had a discharge of storm water resulting in the discharge of a reportable quantity for which notification is or was required pursuant to 40 CFR 117.21 or 40 CFR 302.6 at any time since November 16, 1987; or

(B) Has had a discharge of storm water resulting in the discharge of a reportable quantity for which notification is or was required pursuant to 40 CFR 110.6 at any time since November 16, 1987; or

(C) Contributes to a violation of a water quality standard.

EPA based this regulation on the legislative history of CWA section 402(j)(2), which directed EPA to consider whether reportable quantities (RQs) of oil or hazardous substances under either the CWA or the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) had been exceeded in determining whether storm water from oil and gas operations had been contaminated by contact with overburden, raw material, intermediate products, finished products, byproduct, or waste products. (Pub. L. 95-217, Sec. 33(c), added subsec. (j))

Shortly after issuance of EPA's first general permit specific to storm water discharges associated with construction activity (Final NPDES General Permits for Storm Water Discharges From Construction Sites, September 9, 1992, 57 FR 41176), EPA Region 8 raised a question to EPA Headquarters about the applicability of the permit requirements to oil and gas-related construction activities. On December 10, 1992, EPA

Headquarters sent a memorandum to EPA Region 8 stating that all construction activities that disturb five or more acres must apply for a permit, including those construction activities associated with oil and gas activities.

A collection of trade associations brought a lawsuit against EPA over this memorandum, asserting that it was unlawful and requesting that the court set it aside as inconsistent with the CWA. The United States Court of Appeals for the Fourth Circuit dismissed this challenge on the grounds that the internal EPA memorandum itself did not constitute an action reviewable by the courts. *Appalachian Energy Group v. EPA*, 33 F.3d 319, 322 (4th Cir. 1994). The interpretation of CWA section 402(j)(2) contained in that memorandum, i.e., that oil and gas-related construction activities required permit coverage, formed the basis of EPA policy on the issue.

When EPA promulgated the Phase II storm water rule on December 8, 1999, EPA included a requirement that storm water discharges from small construction activities obtain NPDES permit coverage beginning on March 10, 2003. The Phase II rule defined small construction activities as those disturbing between one and five acres or those disturbing less than one acre when part of a larger common plan of development or sale that disturbs one to five acres. As part of its rulemaking, EPA analysis suggested that few, if any, oil and gas exploration sites would actually disturb more than one acre of land. Economic Analysis of the Final Phase II Storm Water Rule, October 1999 (see p. 4-2). Accordingly, EPA decided that separate analysis of this sector was unnecessary. After promulgating the Phase II rule, EPA became aware that close to 30,000 oil and gas sites annually may, in fact, be affected. EPA now believes that the majority of such sites may exceed one acre when the acreage attributed to lease roads, pipeline rights-of-way and other infrastructure facilities is apportioned to each site.

In light of this new information, on March 10, 2003, EPA published a rule (the "deferral rule") that postponed until March 10, 2005, the permit authorization deadline for NPDES storm water discharges associated with small oil and gas construction activity. This extension was intended to provide EPA time to analyze and better evaluate (1) the impact of the permit requirements on the oil and gas industry, (2) the appropriate best management practices (BMPs) for preventing contamination of storm water runoff resulting from construction associated with oil and gas

exploration, production, processing, or treatment operations or transmission facilities, and (3) the scope and effect of section 402(I)(2) and other storm water provisions of the Clean Water Act. 68 FR 11325.

Between 2003 and 2005, EPA gathered information on size, location and other characteristics of oil and gas sites to better evaluate compliance costs associated with the control of storm water runoff from oil and gas construction activities. EPA met with various stakeholders and visited a number of oil and gas sites with construction-related activities, to discuss and review existing BMPs for preventing contamination of storm water runoff resulting from construction associated with these oil and gas activities. EPA also gathered economic data for the industry and initiated an economic impact analysis of the effects of the existing Phase II regulations on the oil and gas industry. EPA's preliminary analysis indicated that there could be administrative delays in the permitting process for oil and gas construction sites which could result in substantial economic impacts, particularly in the form of lost production revenues, that were not considered in the original economic analysis for the 1999 Phase II rulemaking. As a result, on March 9, 2005, EPA further postponed the date for NPDES regulation for an additional 15 months until June 12, 2006, to provide additional time for the Agency to complete its evaluation of the economic and legal issues it had identified and to assess appropriate procedures and methods for controlling storm water discharges from these sources to mitigate impacts on water quality.

A collection of trade associations petitioned the United States Court of Appeals for the Fifth Circuit for review of the March 10, 2003 deferral rule. The petitioners asserted that the deferral rule represents the first time EPA had acknowledged in its NPDES regulations that those regulations apply to construction activities associated with oil and gas activities. Petitioners further asserted that the deferral rule was inconsistent with CWA section 402(I)(2). On June 16, 2005, the Fifth Circuit dismissed the petition on the grounds that the issue was not ripe for review. Specifically, the Court acknowledged EPA's ongoing analysis of this issue and indicated that "any interpretation [of CWA section 402(I)(2)] we would provide would necessarily prematurely cut off EPA's interpretive process." Texas Independent Producers

and Royalty Owners Ass'n, *et al. v. EPA*, 413 F.3d 479, 483 (5th Cir. 2005).

On August 8, 2005, the President signed into law the Energy Policy Act of 2005. Section 323 of the Energy Policy Act of 2005 added a new paragraph (24) to section 502 of the CWA to define the term "oil and gas exploration, production, processing, or treatment operations or transmission facilities" to mean "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." This term is used in section 402(I)(2) of the CWA to identify oil and gas activities for which EPA shall not require NPDES permit coverage for certain storm water discharges. The effect of this statutory change is to make construction activities at oil and gas sites eligible for the exemption established by CWA section 402(I)(2).

On January 6, 2006, EPA proposed 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 FR 894) to implement the new provision in the Energy Policy Act of 2005. This action finalizes that rule.

### III. Summary of This Final Rule and Statutory Basis

This action implements an amendment to the Clean Water Act contained in the Energy Policy Act of 2005. This amendment expanded the scope of oil and gas-related activities that are exempt from the requirement to obtain an NPDES permit for storm water discharges to include most storm water discharges from construction activities associated with oil and gas field operations. Under this final rule, storm water discharges from construction activity associated with oil and gas field operations are exempt from NPDES permitting requirements, except in situations when the construction-related activity results in the discharge of a hazardous substance or oil in "reportable" quantities or in situations when the discharge of a pollutant other than sediment contributes to a violation of an applicable water quality standard. See *NRDC v. EPA*, 966 F.2d 1292, 1307 (9th Cir.) (noting that 40 CFR 122.26(c)(1)(iii)(C) addresses "contamination with substances other than oil and hazardous substances").

Such storm water discharges continue to be subject to NPDES permitting requirements.

This final rule revises 40 CFR 122.26(a)(2), which EPA promulgated in 1990 to codify the statutory exemption in CWA section 402(I)(2). The features of this final rule are the same as those EPA proposed on January 6, 2006 (71 FR 894). First, EPA is creating separate subparagraphs for the purpose of distinguishing between mining operations and oil and gas operations. See 40 CFR 122.26(a)(2)(i) (mining operations) & (ii) (oil and gas operations). Second, in new subparagraph (a)(2)(ii), which applies to oil and gas operations, this final rule incorporates the new definition of "oil and gas exploration, production, processing, or treatment operations or transmission facilities" (also referred to herein as "oil and gas field operations") now found in CWA section 502(24) as a result of the Energy Policy Act of 2005. Finally, new subparagraph (a)(2)(ii) provides that sediment discharged from construction activities at oil and gas sites does not trigger the requirement for NPDES permit coverage.

As described above in section II (Background), until passage of the Energy Policy Act of 2005, EPA had taken the position that storm water discharges from oil and gas construction activities were not eligible for the NPDES permit exemption in CWA section 402(I)(2). In the Energy Policy Act of 2005, however, Congress squarely addressed the issue and specifically included construction activities among the types of oil and gas field operations eligible for the permitting exemption. The Energy Policy Act of 2005 achieved this by adding a new paragraph (24) to section 502 of the CWA to define the term "oil and gas exploration, production, processing, or treatment operations or transmission facilities"—a term which appears only in section 402(I)(2)—to mean "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.*" (emphasis added).

This final rule both codifies this new definition and specifically exempts from NPDES permitting storm water discharges of sediment from oil and gas construction activities. While the Energy Policy Act amendment does not specifically address sediment, that pollutant naturally falls within the

newly created exemption from NPDES permitting.

Indeed, singling out storm water discharges of sediment in today's rule is the best way to implement and conform the Energy Policy Act of 2005 with the preexisting text of CWA § 402(I)(2). First of all, for oil and gas exploration, production, processing, or treatment operations, or transmission facilities, only those discharges contaminated by contact with raw material, intermediate products, finished product, byproduct, or waste products located on the site are subject to permitting requirements under 402(I)(2). (Overburden is applicable only to mining.) The presence of sediment in a discharge from a construction site is not itself indicative of contact with those materials. Oil and hazardous substances for which there is an RQ under either CERCLA or the CWA, in contrast, is indicative of such contact and are not likely to be found in runoff from oil and gas exploration, production, processing, or treatment operations or transmission facilities except as a result of such contact.

Second, sediment is the pollutant most commonly associated with construction activities, whether at oil and gas sites or elsewhere. 69 FR 22475 (April 26, 2004); 67 FR 42654 (June 24, 2004). EPA's 2003 construction general permit, for example, focuses primarily on limiting discharges of sediment. In EPA's view, to codify a permitting exemption for storm water discharges from oil and gas construction activities but simultaneously to exclude from the new exemption sediment, the discharge most closely associated with construction, would not be consistent with the intent of the CWA amendments enacted by the Energy Policy Act of 2005. This view is consistent with contemporaneous interpretations of the exemption by members of Congress. Several members of Congress opposed this amendment because it would exclude oil and gas construction sites from NPDES permitting requirements.<sup>1</sup> Although these members opposed the amendment to CWA section 502 (which ultimately passed despite their opposition), today's rule is consistent with their descriptions of the impacts this amendment would have on NPDES permit requirements for oil and gas construction sites.

CWA Section 402(I)(2) provides that EPA "shall not require" an NPDES 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." (emphasis added). In 1990, EPA codified regulations at 40 CFR 122.26(c)(1)(iii) to implement this exemption. Specifically, 40 CFR 122.26(c)(1)(iii) provides that an NPDES permit is required for those storm water discharges from oil and gas field operations resulting in the discharge of reportable quantities (RQs) of hazardous substances or oil that trigger notification requirements pursuant to 40 CFR 110.6, 117.21 or 302.6, or that contribute to a violation of water quality standards. The first of these two conditions, discharge of RQs, reflects specific language in the legislative history of Section 402(I)(2) directing EPA to consider exceedances of RQs in determining whether contamination through contact with raw material, intermediate products, finished product, byproduct, or waste products had occurred. The second condition reflects EPA's judgment at the time the Phase I Storm Water rule was promulgated that violation of a water quality standard would also generally be indicative of contamination through contact with raw material, intermediate products, finished product, byproduct, or waste products. However, it is important to bear in mind that EPA has historically interpreted Section 402(I)(2) as not applying to construction activities at oil and gas sites, and therefore did not previously need to consider how sediment discharges would be treated by these regulations. These regulations were upheld in *NRDC v. EPA*, 966 F.2d 1292, 1306–08 (9th Cir. 1992). EPA did not propose to change the requirements in 40 CFR 122.26(c)(1)(iii), and is not revising that provision in this final rule, although EPA is revising the applicability of 122.26(c)(1)(iii)(C) by including in new 122.26(a)(2)(ii) a provision that (c)(1)(iii)(C) does not apply to sediment discharges. This change reflects EPA's judgment that discharges of sediment, which may become an issue now that Congress has determined that 402(I)(2) applies to construction activities at oil and gas sites, do not necessarily indicate contamination through contact with raw material, intermediate products,

finished product, byproduct, or waste products. Indeed, the only change that EPA is making to the regulations today is to modify 122.26(a)(2) to expand the NPDES permit exemption to cover storm water discharges of sediment from construction sites associated with oil and gas field operations as mandated by the CWA amendment in the Energy Policy Act of 2005, together with CWA section 402(I)(2).

Nothing in the Energy Policy Act amendment altered the structure of section 402(I)(2) itself or the conditional nature of that NPDES permitting exemption. Thus, storm water discharges contaminated by contact with raw material, intermediate products, finished product, byproduct, or waste products, as indicated by discharges of reportable quantities of hazardous substances or oil, or by violations of water quality standards for pollutants other than sediment from a construction site associated with oil and gas operations, would continue to be subject to NPDES permitting requirements. By specifically exempting sediment (which is not considered indicative of contact) but no other pollutant, this final rule thus honors both the precise focus of the 2005 amendment and the text of CWA section 402(I)(2) itself.

#### IV. Response to Comments

EPA received over 50 comments on its proposal to codify provisions of the Energy Policy Act of 2005 into the NPDES regulations. EPA's responses to all the comments received on the proposed rule are available in the Response to Comment document that is part of the docket for this final rule (Docket identification number: EPA–HQ–OW–2002–0068). EPA's responses to significant issues raised on the proposed rule are discussed below.

##### A. Applicability

Several commenters asserted that the Energy Policy Act of 2005 amendment to the CWA effectively excludes almost all oil and gas exploration, production and transmission construction activities from the NPDES permitting requirements regardless of the amount of acreage disturbed. One of these commenters also specifically supported applying the exemption to all site sizes. EPA agrees with these commenters that Congress intended to exempt discharges from the specified oil and gas activities regardless of size; under this final rule, *all* covered oil and gas-related construction activities are eligible for the NPDES permitting exemption for their uncontaminated storm water

<sup>1</sup> See 151 Cong. Rec. S9262, S9339, S9342, S9346, S9347 and E1726.

discharges without regard to the amount of acreage disturbed.

Another commenter agreed with EPA that pipelines and compressor stations should be included in the exemption. One commenter identified a number of what it believed to be exempt construction activities necessary to support construction of pipeline and compressor stations as well as long term maintenance of the system. EPA generally agrees with these commenters' assessments about the applicability of this final rule to natural gas transmission pipelines and their associated infrastructure. Storm water discharges from field activities, such as the clearing, grading, and excavation associated with pipeline and pump station construction, are within the scope of activities eligible for the NPDES permit exemption under this final rule. One commenter interpreted the language in the exemption to include material mining sites (e.g., sand and gravel pits and quarried aggregate) that exist only to support pipeline and pump station construction and maintenance activities. EPA disagrees with this comment. The Agency does not believe that Congress intended the term "oil and gas exploration, production, processing, or treatment operations or transmission facilities" to include off-site operations whose only connection to such facilities is that they produce products (e.g., sand, gravel, or aggregate) that are later used by such facilities. Under this theory, producers of any product used at oil and gas sites (e.g., drilling equipment) could similarly claim entitlement to the 402(l)(2) exemption. Nothing in the definition provided in the Energy Policy Act of 2005 or Section 402(l)(2) itself suggests that Congress intended such a broad reach for this exemption. However, the Agency does consider "cut and fill" activities (i.e. where excavated earth and rock at the site is used to level the surface of the site) within the project area of a well pad, access road, pipeline, etc., to be an integral part of the on-site construction activities and, thus, within the scope of activities for which storm water discharges are eligible for the NPDES permit exemption under this final rule.

One commenter requested that EPA provide definitions in the rule for the terms "processing operations," "treatment operations" and "transmission facilities." EPA believes the terms are generally unambiguous as understood by experienced oil and gas operations personnel and most state regulators and thus the creation of a new set of definitions specific to this

rule is unnecessary. These terms are discussed in Section V (Terminology).

One commenter suggested that EPA define the term "facility" to mean only those areas subject to oil and gas activity under control of the owner operator. EPA does not think that such a definition is warranted or appropriate because, as used in the proposed rule, the term "facilities" simply describes the types of field activities that cannot be subject to NPDES permitting under certain circumstances and is not intended to address ownership or operational issues.

One commenter noted that "the mining industry and its exemption are distinct from the oil and gas industry and its exemption, both in terms of the nature of the activities involved and the definition of 'contamination' that applies under the statute and EPA's regulations." Another commenter stated that the term "overburden" is applicable to mining activities only and commended EPA for providing a separate section in the regulatory language [40 CFR 122.26(a)(2)(i)] describing the mining activities eligible for exemption from storm water NPDES permit requirements. EPA acknowledges the commenter's detailed account of the legislative history of the CWA with respect to the definition of the term "overburden" and agrees that the language in the proposed rule appropriately differentiates between mining and oil and gas field activities and operations for purposes of implementing Section 402(l)(2) and the Energy Policy Act of 2005. EPA notes, however, that this final rule is not intended to make any change to NPDES permit requirements applicable at mining sites.

Two commenters requested general, rather than individual, permit coverage for storm water discharges that do not qualify for the permitting exemption. This would mean, for example, that coverage of releases in excess of reportable quantities (see 40 CFR 110.6, 117.21 and 302.6) in storm water from spills or other releases during pipeline construction be available under a construction general permit or an industrial permit, such as EPA's Multi-Sector General Permit (MSGP) for releases during other field activities or operations. EPA believes an individual permit application will generally be the most appropriate way to address such contaminated discharges and establish appropriate controls to minimize impacts from future discharges. EPA notes, however, that this final rule is not intended to modify any requirements or provisions regarding the availability of

general permits in lieu of individual permits.

Several commenters engaged in activities that are not related to oil and gas exploration and production suggested that their industrial sectors should also be exempt from CWA permitting requirements for discharges associated with construction activities because they believe that their construction-related activities result in no significant discharges or impairment of water quality in adjacent water bodies. One trade association, representing the geothermal energy industry, argued that its members used oilfield contractors, suppliers and equipment and constructs well pads, access roads, and pipeline rights-of-way that are virtually identical to those employed by the oil and gas exploration and production industry. This industry, however, is not engaged in oil and gas field operations or activities and, therefore, does not qualify for the exemption that is the subject of this rule.

Similarly, another commenter representing home builders argued that the application of this exemption solely to the oil and gas industry, coupled with regulatory burden on the residential construction industry imposed by the existing Phase II storm water rules, constituted overregulation. This commenter urged EPA "to defer the regulation of the residential construction industry until adequate data has been collected to provide either outright support for the current regulation or to support its modification so that the impact of the rule is both fair and justified." This commenter also provided a discussion of the regulatory burden on the residential construction industry imposed by the final Phase II storm water regulations promulgated in 1999 (64 FR 68722, December 8, 1999).

EPA acknowledges comments raised by the geothermal and home building sectors but notes that this rulemaking is in response to the Energy Policy Act of 2005, and any comments on the applicability of the Phase II regulations to activities other than oil and gas field activities or operations associated with exploration, production, processing, or treatment operations or transmission facilities are outside the scope of this rulemaking. The Energy Policy Act of 2005 merely defines the term "oil and gas exploration, production, processing, or treatment operations or transmission facilities" and does not reference any other industrial sectors. Consistent with the Act, EPA's proposal and this final rulemaking are also limited to oil and gas field activities or operations that fall within the definition of this term and do

not address any other industrial sectors. Therefore, these comments are outside the scope of this rulemaking.

Several commenters stated their concerns that all oil and gas-related operations and activities will no longer be held accountable for storm water discharges. EPA acknowledges the commenters' concerns but believes they are outside the scope of this rulemaking. The final rule merely implements clear Congressional intent to exempt certain storm water discharges from NPDES permit requirements. The Agency notes, however, that this exemption is limited to discharges that are not contaminated by contact with raw material, intermediate products, finished product, byproduct, or waste products. EPA has further included in the final regulatory text a note encouraging operators of oil and gas field activities or operations to implement and maintain Best Management Practices (BMPs) to minimize discharges of pollutants, including sediment, in storm water both during and after construction activities to help ensure protection of surface water quality during storm events. EPA further notes that the industry has developed and is promoting the use of a manual designed to assist operators in implementing such practices (see Section IV.B below).

#### *B. BMP Implementation*

EPA received a number of comments supporting the use of voluntary Best Management Practices (BMPs) to control erosion and sedimentation runoff from oil and gas construction activities. Several commenters suggested that EPA's proposed approach encouraging the use of BMPs is an appropriate means for controlling runoff. Many of these commenters liked the approach outlined by the Independent Petroleum Association of America in their "Guidance Document: Reasonable and Prudent Practices for Stabilization (RAPPS) of Oil and Gas Construction Sites" (Horizon Environmental Services, Inc., April 2004). This guidance advocates the selection and practical application of BMPs based on specific physical characteristics of the site (e.g., proximity to waterbody, slope, vegetative cover, and geographic location). The guidance is presented in a straight-forward format that is appropriate for field personnel to access and understand. Additionally, one commenter indicated that EPA's proposed approach will significantly reduce paperwork and the lead time required to implement a project while still preventing adverse impacts to the environment. Several commenters suggested that not having to obtain

permit coverage provides operators with more flexibility to schedule land disturbance activities in a way that minimizes erosion and sedimentation. One commenter suggested that EPA has met Congressional intent by encouraging the voluntary use of BMPs through the implementation of RAPPS or other similar approaches.

Several commenters indicated that similar programs already exist to control erosion and sedimentation from oil and gas activities. Specifically, one commenter described the Federal Energy Regulatory Commission (FERC) requirements for pipeline projects. Although not specifically identified by the commenter, EPA believes that the commenter is likely referring to two documents entitled "Upland Erosion Control, Revegetation, and Maintenance Plan, January 2003" and "Wetland and Water Body Construction and Mitigation Procedures, January 2003" that are designed to assist pipeline license applicants by identifying "\* \* \* baseline mitigation measures for minimizing the extent and duration of project-related disturbance of field activities." Although less detailed than some BMP guidelines developed by states and industry, the FERC plans are a valuable addition to the information base available to oil and gas operators for minimizing environmental damage. Another commenter noted that the state of West Virginia requires BMPs, consistent with the state environmental agency's erosion and sediment control field manual, through its well drilling and well re-working permit program.

Conversely, several other commenters suggested that the use of voluntary approaches is inadequate to ensure protection of water quality and also suggested that the RAPPS document is overly broad and should focus more on keeping sediment on site than keeping sediment out of nearby waterbodies. Some of these commenters suggested that NPDES permits, which would require BMP implementation, are the best approach for regulating these discharges. Several commenters believe that EPA should do more to encourage and support state efforts to control sediment from oil and gas activities. One commenter suggested that EPA should require operators to utilize BMPs and violations should be subject to enforcement.

In response to comments criticizing the adequacy of the recommended BMP provisions, the Agency again notes that this final rule merely codifies Congress' clear intent to prohibit EPA from requiring an NPDES permit for certain storm water discharges associated with oil and gas construction activities.

EPA believes that a "one size fits all" approach or the use of a single suite of BMP is generally inappropriate to control erosion and sedimentation from all types of oil and gas construction activities. The RAPPS document and other relevant guidance are intended to provide information to operators to assist them in selecting appropriate BMPs, and combinations of BMPs, to protect water quality. EPA believes that use of this guidance will result in practical, cost-effective approaches that are flexible enough to address the variety of situations and water quality concerns that might be encountered in the field. EPA also intends to continue to work cooperatively with industry representatives and other interested groups to further develop and refine RAPPS and other industry-specific BMPs to promote even wider acceptance and implementation of these tools for reducing potential environmental impacts associated with oil and gas field operations. Additionally, EPA encourages state regulatory agencies and others with an interest in protecting water quality to assist in this effort to further clarify appropriate erosion and sedimentation control measures for oil and gas field operations.

As in the proposed rule, this final rule includes a note at 40 CFR 122.26(a)(2)(ii) encouraging operators of oil and gas field activities or operations to implement and maintain BMPs to minimize discharges of pollutants, including sediment, in storm water both during and after construction activities. EPA also encourages State and local authorities to address storm water discharges of sediment from construction activities associated with oil and gas field operations through authorities other than the NPDES permit program where appropriate but, as discussed in Section IV.D, Section 402(l)(2) prohibits EPA or the States from requiring a permit for these discharges under the authority of the CWA NPDES program.

#### *C. Interpretation of Energy Policy Act Regarding Sediment*

EPA received a number of comments both agreeing with and disputing the Agency's interpretation of the Energy Policy Act of 2005, particularly as it applies to discharges of sediment from construction activities. Several commenters stated that the Energy Policy Act simply clarified Congress' original intent with respect to the 1987 amendments to the Clean Water Act exempting certain oil and gas activities from the requirement to obtain NPDES permits when the activity does not involve the discharge of any raw

material into waters of the United States. Others stated simply that they believed EPA's interpretation of the Energy Policy Act to be correct and reasonable.

A number of commenters expressed opposition to EPA's interpretation of the Energy Policy Act. Many of these commenters simply expressed opposition to exempting the oil and gas industry from permitting requirements but did not suggest how their opposition could be reconciled with the statutory revisions of the Energy Policy Act of 2005 which clearly exempts certain oil and gas related construction activities from NPDES permitting requirements. Others expressed their belief that EPA had failed to represent Congressional intent and suggested that storm water discharges of sediment that contribute to a violation of water quality standards should not be exempt from the requirement to obtain NPDES permit coverage.

EPA notes that its interpretation of the CWA amendment found in the Energy Policy Act of 2005 is consistent with contemporaneous Congressional floor statements interpreting the amendment. Even without consideration of these floor statements, however, the Agency views today's rule as adopting the best interpretation of the legislation itself. The amendment to the language in CWA section 502, together with the exemption found in CWA section 402(I)(2), clearly conveys Congressional intent to provide oil and gas construction projects with relief from the potential burdens associated with NPDES permits. Accordingly, EPA views sediment from oil and gas construction activities to be the very pollutant being exempted from permitting by the Energy Policy Act of 2005.

Under CWA section 402(I)(2), storm water discharges associated with oil & gas exploration, production, processing, or treatment operations or transmission facilities are exempt from NPDES permitting requirements under two scenarios. Under the first scenario, storm water discharges associated with oil & gas activities are exempt if they do not come in contact with, *i.e.*, if they are diverted around, any "raw materials, intermediate products, finished product, byproduct, or waste products located on the site of such operations." (The term "overburden" in CWA section 402(I)(2) is not commonly associated with oil and gas operations; therefore, it is not relevant to this discussion or today's regulation.) Under the second scenario, the storm water discharges are exempt even if they do come in contact with

water is not contaminated by such contact. Under EPA's regulations, storm water is considered contaminated by contact with these materials if the discharge contains a reportable quantity of certain substances or if the discharge contributes to a violation of a water quality standard. *See* 40 CFR 122.26(c)(iii).

The Energy Policy Act of 2005 did not alter this general regime. Rather, by defining "oil and gas exploration, production, processing, or treatment operations or transmission facilities" to include construction activities, the 2005 amendment simply provided that storm water discharges associated with construction at those oil and gas sites are eligible for the statutory exemption.

Some commenters have questioned, however, whether Congress intended to exempt construction-related storm water discharges from NPDES permitting when those discharges contain only sediment. EPA believes the answer is yes. Nothing in the 2005 amendment altered the statutory concept that storm water (of whatever type) is exempt so long as it is not contaminated by contact with "raw materials, intermediate products, finished product, byproduct, or waste products." Further, nothing in the 2005 amendment defined "raw materials, intermediate products, finished product, byproduct, or waste products"—to include naturally occurring sediment exposed or displaced as a result of construction activity, and those terms are not generally understood in the oil and gas industry to refer to such sediment.

As discussed in more detail in the proposed rule (71 FR 897–898), EPA determined, consistent with the legislative history of CWA section 402(I)(2) at the time that it originally promulgated 40 CFR 122.26(c)(1) that exceedence of an RQ for pollutants such as oil and hazardous substances would generally be indicative of contamination through contact with raw material, intermediate products, finished product, byproduct or waste products, and that violation of a water quality standard would also generally be indicative of such contact. However, now that Congress has broadened the 402(I)(2) exemption to include construction activities at oil and gas field operations, EPA believes that discharges of sediment are not necessarily indicative of such contact. Sediment is the pollutant most commonly associated with construction activity. Hence, exempting storm water discharges of sediment from oil and gas construction sites from NPDES permitting requirements reflects a reasonable (and EPA believes, the best) interpretation of

Congressional intent in limiting the 402(I)(2) exemption to discharges not contaminated by contact with raw material, intermediate products, finished product, byproduct or waste products, in the context of the new definition for oil and gas exploration, production, processing or treatment operations or transmissions facilities included in the Energy Policy Act of 2005. Therefore, pursuant to today's rule, discharges of storm water from oil and gas construction sites that do not come in contact with those materials are exempt under CWA section 402(I)(2) even if the storm water contains construction-related sediment, and even if those sediment discharges cause water quality impacts. Sediment could, however, serve as a vehicle for discharges of other pollutants, such as oil or grease or hazardous substances (*e.g.*, heavy metals) and if an RQ is exceeded or a water quality standard violated for such other pollutants, such contamination would trigger permitting requirements.

Several commenters suggested the goal of protecting water quality would be better served if discharges associated with small oil and gas construction activity required NPDES permit coverage. EPA believes that it is appropriate for operators of exempted oil and gas facilities to adopt BMPs that will, among other things, minimize the transport of sediments to surface waters, and has included in the final rule language encouraging voluntary adoption of such BMPs. However, the Agency's purpose in promulgating today's final rule is to implement the narrow statutory change relating to Section 402(I)(2) that is contained in the Energy Policy Act of 2005. The Agency believes that the best interpretation of this statutory change is that it excludes storm water discharges associated with oil and gas construction activities from regulation under the NPDES program, except where contamination by contact with raw materials, intermediate products, finished product, byproduct, or waste products (as understood within the context of Section 402(I)(2)) has occurred.

One commenter thought that EPA should interpret the statutory language more narrowly—in a way that "gives the benefit of the doubt to the environment." The commenter further suggested that the exemption is applicable only if storm water is diverted around operations to prevent contamination. EPA agrees with this commenter up to a point. One way that an operator can ensure that there is no contamination of storm water through contact with raw materials, intermediate

products, finished product, byproduct, or waste products is to ensure either that all such material is covered, or that storm water is diverted around it, and EPA strongly urges operators to do this. Operators that fail to do this will not be eligible for the Section 402(I)(2) exemption if an exceedance of an RQ or a violation of a water quality standard occurs as a result of contact with such materials. However, this does not change EPA's determination that the best interpretation of Congressional intent in enacting the revised definition in the Energy Policy Act of 2005 is that contact with naturally occurring sediment which is not itself contaminated with toxic or hazardous substances does not constitute "contact" for purposes of Section 402(I)(2). The Agency has clearly communicated this through its proposed rule and through today's regulation which does not require an NPDES permit for uncontaminated storm water discharges but encourages the voluntary use of BMPs through a note in the regulation.

#### *D. Non-NPDES Program Authority*

One commenter requested clarification on a state's authority to regulate storm water discharges associated with oil and gas construction activities. This rulemaking clarifies that uncontaminated storm water discharges associated with oil and gas field activities cannot be regulated directly or indirectly by either EPA or a state under the authority of the NPDES permit program. Another commenter noted that states are not pre-empted by the CWA amendment or by the Energy Policy Act of 2005 from acting to regulate discharges pursuant to more stringent state programs. EPA agrees with this statement and affirms the fact that States and Indian Tribes have the right to regulate or otherwise reduce pollutants (including sediment) from storm water discharges associated with oil and gas field operations under State or Tribal law, but not under NPDES program authority. While EPA agrees that States and Tribes have broad discretion to use a variety of approaches in instances where water quality standards have been violated, the ability to require an NPDES permit from sites described in CWA section 402(I)(2) that discharge storm water from oil and gas activities is limited to those discharges that contain reportable quantities of oil or a toxic and/or hazardous substance or that contribute to a violation of water quality standards for a pollutant other than sediment.

Discharges exempt from NPDES permit requirements in this final rulemaking are exempt from these

requirements regardless of whether EPA, a State, or an authorized Tribe is the permitting authority. This final rule is not intended to interfere with the ability of States, Tribes, or local governments to regulate any discharges through a non-NPDES permit program. In fact, EPA expects that operators whose storm water discharges are exempt from NPDES permit requirements will comply with any other applicable Federal, State, tribal, and local controls on oil and gas field operations. This final rule does not in any way curtail the ability of an appropriate environmental management agency (e.g., State, Tribal or local government) to impose specific discharge conditions on an oil and gas operator that is exempted from NPDES requirements under this final rule so long as these requirements are imposed pursuant to authority other than an NPDES permit program. For example, a State or Tribe could choose, under its own authorities, to require that an operator meet certain discharge conditions in sensitive watersheds. However, if a State, Tribe, or local government were to require a permit for discharges exempt from the Clean Water Act NPDES program requirements, those permit requirements would not be considered part of an NPDES program. See 40 CFR 123.1(i)(2).

#### *E. Other Comments*

Several commenters suggested that the EPA discussion in the 1990 Phase I Storm Water Application Regulation addressing issues regarding "stale" (i.e., dated) data on releases of reportable quantities of oil and/or toxic substances is appropriate to this rulemaking as well. However, these commenters were concerned that there was no specific timetable for them to file an application for a storm water permit necessitated by a discharge of a reportable quantity that took place many months or even years prior to this rulemaking going into effect. Therefore, these commenters suggested that the requirement to seek coverage under an NPDES permit as the result of such a discharge should be limited to discharge events occurring no more than three years prior to the date of the publication of this final rulemaking. EPA finds this comment to be outside the scope of this final rulemaking. EPA notes that under CFR 122.26(c)(1)(iii), an oil or gas exploration or production facility of any size that had a discharge of an RQ at any time after November 16, 1987 was already required to have obtained an NPDES storm water permit for a discharge associated with industrial activity. EPA did not propose to change

40 CFR 122.26(c)(1)(iii), and the Agency is not revisiting that provision in this final rule.

Two commenters suggested that EPA's recognition of States' authority to implement their own regulatory program outside of the "umbrella" of the NPDES program should obligate EPA to provide technical expertise and resources to help States act on this authority. To the extent practicable, given its own limited resources, EPA will develop guidance to assist States, Tribes, and local governments in exercising their authority reserved for them by the CWA. EPA has always assisted States and Tribes with responses to technical inquiries relating to interpretation of NPDES program and CWA statutory requirements, and the Agency intends to continue providing such assistance.

One Tribe notes in its comments that EPA did not consult with tribal governments during the rulemaking process, as called for in Executive Order 13175, "Consultation and Coordination with Indian Tribal Governments." As discussed below, EPA did not need to consult with the Tribes under Executive Order 13175 because the proposed rule would not—and this final rule does not—have any substantial direct effects on tribal governments, on the relationship between Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes. This final rule does not add to the existing requirements under EPA's regulations. Rather, this final action codifies a recently-enacted amendment to the CWA which exempts certain oil and gas field activities from NPDES permitting requirements.

#### **V. Terminology**

As noted earlier in this document, questions have arisen regarding some of the terms used in this final rule. This section collects EPA's interpretation of these terms.

##### *Field Activities or Operations*

This final rule adopts in 40 CFR 122.26(a)(2)(ii) language from the Energy Policy Act of 2005. EPA interprets the specific phrase "all field activities or operations" in this language to include the construction of drilling sites, drilling waste management pits, access roads, in-field treatment plants and the transportation infrastructure (e.g., crude oil and natural gas pipelines, natural gas treatment plants and both natural gas pipeline compressor and crude oil pump stations) necessary for the operation of most producing oil and

gas fields. Such construction activities may thus be eligible for the CWA section 402(l)(2) exemption from NPDES permitting requirements.

#### *Processing*

The terms “processing,” “treatment,” and “transmission” are generally well understood among industry professionals and oilfield personnel engaged in oil and gas exploration, production, processing, or treatment operations or transmission. These terms are described in turn below.

“Processing” may be used in connection with either oil or gas field activities, but it is more commonly used to describe certain natural gas field activities. Industry professionals generally regard “processing” as applying strictly to removal of either contaminants (such as hydrogen sulfide or carbon dioxide), natural gas liquids or rare gasses (such as helium) from produced natural gas.

Most produced natural gas contains over 90 percent methane by volume. “Pipeline quality” natural gas sold by intrastate and interstate transmission pipeline companies usually has been upgraded to be as much as 99 percent methane by volume. For the purposes of this final rule, EPA considers the term “processing” to refer to those field operations related to either upgrading of natural gas by removal of contaminants (e.g., carbon dioxide, hydrogen sulfide and water) or the extraction of valuable, higher molecular weight “natural gas liquids” (e.g., ethane, propane, butane, and condensate) or rare gas constituents (e.g., helium and xenon) prior to sale of the gas to an intrastate or interstate gas transmission pipeline. Regardless of the physical size or throughput capacity of a processing facility or its geographic location (either within a single producing field or at a centralized location serving several producing fields), a gas processing plant merely serves as an intermediate step in the supply-transmission-distribution chain that transports natural gas from the producing well to the ultimate end-user. Gas processing does not physically or chemically change the basic constituent (methane) in natural gas. Gas processing is not analogous to the term “chemical processing” as is commonly used by chemical engineers to describe manufacturing operations that create finished products in the petroleum and petrochemical refining industrial sectors. The North American Industrial Classification System (NAICS) codes for oil and gas extraction activities (including “natural gas processing”) are found under the designation 211 (equivalent to the older Standard

Industrial Classification [SIC] code designation 1311). EPA regards the processing described above as an inherent component of natural gas extraction field activities.

#### *Treatment*

Similarly, the term “treatment” may be used in the context of either the oil or gas industries, but is more commonly used when referring to the removal of contaminants, such as salt water, sediment, pipe scale, rust and organic material (i.e., bacterial growths) from crude oil in the producing field. These contaminants are generally removed (i.e., the crude oil is “treated”) prior to sale and transportation of the oil via tanker truck or dedicated pipeline to a petroleum or petrochemical refinery.

All crude oil contains physical and chemical contaminants that should be removed prior to sale to a refinery. The term “treatment” as used by most oil and gas field operations personnel is applied to a variety of field techniques for removing these naturally occurring contaminants from crude oil. Mature oil wells in the United States often produce large volumes of salt water along with smaller volumes of crude oil. Some oil reservoirs also yield crude oil that contains significant amounts of dissolved natural gas (predominantly methane). This mixture of crude oil, water and (sometimes) gas is treated in order to separate out the oil and gas from the contaminants. In the course of being pumped out of the well and into holding tanks, the crude oil may also pick up additional contaminants such as dirt and sediment from the producing formation, corrosive scale and rust from the steel tubing and flow lines, and bacterial growths present in the formation or the flow lines. The entrained gas, water and various contaminants are removed prior to sale of the crude oil to a refiner or intermediate buyer. The most common technique for removing these contaminants involves using a cylindrical steel tank called a separator which separates the three components of the flow—gas, oil and water. The separator can be either a vertical or a horizontal tank and configured to separate only gas from the liquid (two-phase separation) or to separate gas, oil and water (three-phase separation). This process relies primarily upon simple gravimetric separation of the gas, oil and water. Any small amounts of gas are either vented or drawn off at the top of the tank. The oil and water separates in the tank (the oil will float on top of the water column) and the heavier sediment precipitates out of the mixture and eventually settles to the bottom of the

tank as sludge. In some cases chemicals may be added to cause the suspended sediment particles to aggregate and settle out more easily from the crude oil and water. In cold weather or cases where there is bacterial contamination, chemicals may be added to the oil-water mixture to assist in killing the organisms and removing or neutralizing the contaminants. “Clean” crude oil is periodically or continually withdrawn from the top of these separators and stored in “stock” tanks to await pickup by tanker truck or metered sales to a crude oil pipeline. In some cases, where rain enters a storage tank or the temperature drops precipitously, some additional water may become entrained in the crude oil and form an oil-water emulsion. If the water content is greater than the specifications set by the crude oil purchaser, the stock tank oil may be further treated using chemicals and/or heat to reduce the amount of entrained water prior to sale.

All of the above activities are typically identified as “treatment” by oil and gas field operations personnel, and EPA will consider these, and similar field activities necessary to remove contaminants from crude oil, to fall within the scope of “treatment operations” as that term is used in CWA section 402(l)(2).

#### *Transmission*

EPA interprets the term “transmission facilities” to include all necessary infrastructure to deliver natural gas or crude oil from the producing fields to the final distribution center (in the case of natural gas) or the refinery (for crude oil).

This interpretation is consistent with the description of “transmission facilities” EPA provided in the preamble to the March 10, 2003 “deferral rule” described earlier in this notice. See 68 FR 11327. That discussion noted that transmission lines are typically major pipelines (e.g., interstate and intrastate pipelines) that transport crude oil and natural gas over long distances through large-diameter pipes operating at relatively high pressures. “Transmission facilities” generally include all pipelines, compressor stations (for natural gas) and pump stations (for crude oil). The line of demarcation between natural gas “transmission facilities” and “distribution facilities” is generally the point where a local gas utility takes delivery of the gas (often referred to as the “city gate”) and then distributes it via lower pressure service lines to small industrial, commercial or residential customers. While crude oil pipelines that convey raw material to the

refineries are generally considered "transmission facilities," pipelines that transport *refined* petroleum products from refineries and large petrochemical manufacturing plants to storage tank "farms" are not considered "transmission facilities" for the purposes of CWA section 402(J)(2) and this final rule.

The Pipeline and Hazardous Materials Safety Administration within the U.S. Department of Transportation (DOT) defines a transmission line as "\* \* \* a pipeline, other than a gathering line, that transports gas from a gathering line or storage facility to a distribution center, storage facility or large volume customer that is not down-stream from a distribution center." (49 CFR 192.3). Although EPA has not elected to codify the DOT or any other definition of "transmission line," EPA believes that its interpretation of the term "transmission facilities" as used in CWA section 402(J)(2) is generally consistent with DOT's terminology and with widely accepted understanding and usage among industry professionals.

#### VI. Best Management Practices

In accordance with CWA section 402(J)(2), this final rule does not *require* that operators select, install, and maintain Best Management Practices (BMPs) to minimize discharges of pollutants (including sediment) in storm water; however, the Agency is *encouraging* operators of oil and gas field activities or operations to institute these practices both during and after construction activities whenever practicable.

Installation of effective BMPs will not only help protect surface water during storm events but will also assist the operator in ensuring that there is no discharge of a reportable quantity or violation of a water quality standard that would trigger permitting requirements. Appropriate controls would be those suitable to the site conditions, both during and after the period of construction, and consistent with generally accepted engineering design criteria and manufacturer specifications. Selection of effective BMPs should include consideration of seasonal and climatic conditions.

Most storm water controls for construction activities can be grouped into three classes: (a) Erosion and sediment controls; (b) storm water management measures; and (c) good housekeeping practices. Erosion and sediment controls address pollutants (e.g., sediment) in storm water generated from the site during active construction-related work. Storm water management measures result in reductions of

pollutants in storm water discharged from the site after the construction has been completed. Good housekeeping measures are those practices employed to manage materials on the site and control litter. While not explicitly required by regulation, some good housekeeping practices may be necessary to ensure that runoff satisfies the conditions in 40 CFR 122.26(a)(2)(ii) and (c)(1)(iii) for eligibility for the 402(J)(2) permitting exemption.

Effective soil erosion and sedimentation control typically is accomplished through the use of a suite of BMPs. Operators should design control measures that collectively address the multiple needs of holding soil in place, diverting storm water around active areas with bare soil, slowing water down as it crosses the site, and providing settling areas for soil that has become mobilized.

The value of construction site BMPs has already been recognized by many oil and gas site operators. Under the sponsorship of the Independent Petroleum Association of America, the oil and gas industry developed guidance entitled "Guidance Document: Reasonable and Prudent Practices for Stabilization (RAPPs) of Oil and Gas Construction Sites," Horizon Environmental Services, Inc., April 2004, that describes the application of appropriate BMPs based on general geographical location and the distance, slope, and amount of vegetative cover between the construction activity and the nearest water body. This document is a common sense approach to mitigating environmental consequences arising from a variety of oil and gas construction activities. The document has been widely publicized, and a large number of independent oil and gas operating companies have informed EPA that they have adopted the practices outlined in the document in their day-to-day field construction activities.

#### VII. Post-Proposal Litigation

There is already one published court decision addressing CWA section 402(J)(2) in light of the new language in CWA section 502(24). EPA's current NPDES General Permit for Storm Water Discharges From Construction Activities (the "General Permit") was issued by EPA on July 1, 2003. 68 FR 39087. The General Permit was challenged by a variety of organizations. Three weeks after proposal of this rule, the last remaining challenges to the General Permit were dismissed. *Texas Independent Producers and Royalty Owners Ass'n, et al. v. EPA*, 435 F.3d 758, 767 (7th Cir. 2006). The Court of

Appeals took note of the proposal EPA is finalizing today, but did not address the merits of that proposal. *Id.* at 766. The court went on to note the "limited circumstances" under which this challenge was brought: "The Oil and Gas Petitioners represent members seeking to challenge 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 establish standing. Accordingly, we Dismiss this petition for lack of standing." *Id.* at 767. (emphasis added). This Court had no occasion to review facts surrounding the conditions at any particular site, and did not address the issue of what constitutes contaminated storm water discharges.

#### VIII. Statutory and Executive Reviews

##### A. Executive Order 12866: Regulatory Planning and Review

Under Executive Order 12866, (58 FR 51735 (October 4, 1993)) the Agency must determine whether the regulatory action is "significant" and therefore subject to OMB review and the requirements of the Executive Order. The Order defines "significant regulatory action" as one that is likely to result in a rule that may:

(1) Have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities;

(2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) Alter materially the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

(4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

Pursuant to the terms of Executive Order 12866, EPA has determined that this is a "significant regulatory action" within the meaning of the Executive Order. As such, EPA submitted this action to OMB for review. Changes made in response to OMB suggestions or recommendations are documented in the public record.

##### B. Paperwork Reduction Act

This action does not impose an information collection burden under the provisions of the Paperwork Reduction

Act, 44 U.S.C. 3501 *et seq.*, as this rulemaking is deregulatory and imposes no new requirements.

Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations in 40 CFR are listed in 40 CFR part 9.

#### C. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the Administrative Procedure Act or any other statute unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations, and small governmental jurisdictions. For purposes of assessing the impacts of this final rule on small entities, small entity is defined as: (1) a small business as defined by the Small Business Administration's (SBA) regulations at 13 CFR 121.201; (2) a small governmental jurisdiction that is a government of a city, county, town, school district or special district with a population of less than 50,000; and (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

After considering the economic impacts of this final rule on small entities, I certify that this action would not have a significant economic impact on a substantial number of small entities. In determining whether a rule would have a significant economic impact on a substantial number of small entities, the impact of concern is any significant adverse economic impact on small entities, since the primary

purpose of the regulatory flexibility analyses is to identify and address regulatory alternatives "which minimize any significant economic impact of the rule on small entities." 5 U.S.C. 603 and 604. Thus, an agency may certify that a rule will not have a significant economic impact on a substantial number of small entities if the rule relieves regulatory burden, or otherwise has a positive economic effect on all of the small entities subject to the rule. This final rule, by expanding the scope of oil and gas operations eligible for the NPDES permit exemption under CWA section 402(l)(2), would relieve the regulatory burden for certain discharges associated with construction activity at exploration, production, processing, or treatment operations or transmission facilities to obtain an NPDES storm water permit. I have therefore concluded that this final rule would relieve a regulatory burden for all affected small entities.

#### D. Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Pub. L. 104-4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and tribal governments and the private sector. Under section 202 of the UMRA, EPA generally must prepare a written statement, including a cost benefit analysis, for proposed and final rules with "Federal mandates" that may result in expenditures to State, local, and tribal governments, in the aggregate, or to the private sector, of \$100 million or more in any one year. Before promulgating an EPA rule for which a written statement is needed, section 205 of the UMRA generally requires EPA to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, most cost-effective or least burdensome alternative that achieves the objectives of the rule. The provisions of section 205 do not apply when they are inconsistent with applicable law. Moreover, section 205 allows EPA to adopt an alternative other than the least costly, most cost-effective or least burdensome alternative if the Administrator publishes with the final rule an explanation why that alternative was not adopted. Before EPA establishes any regulatory requirements that may significantly or uniquely affect small governments, including tribal governments, it must have developed under section 203 of the UMRA a small government agency plan. The plan must provide for notifying potentially affected small governments, enabling officials of affected small governments to have meaningful and timely input in

the development of EPA regulatory proposals with significant Federal intergovernmental mandates, and informing, educating, and advising small governments on compliance with the regulatory requirements.

This final rule contains no Federal mandates (under the regulatory provisions of Title II of the UMRA) for State, local, or tribal governments or the private sector. The final rule imposes no enforceable duty on any State, local or tribal governments or the private sector. Rather, today's final rule codifies an amendment to the CWA by expanding the scope of oil and gas operations eligible for the NPDES permit exemption under CWA section 402(l)(2), and relieves the regulatory burden for certain discharges associated with construction activity at exploration, production, processing, or treatment operations or transmission facilities of obtaining an NPDES storm water permit. Thus, this final rule is not subject to the requirements of sections 202 and 205 of the UMRA. For the same reason, EPA has determined that this rule contains no regulatory requirements that might significantly or uniquely affect small governments. Thus, today's final rule is not subject to the requirements of section 203 of UMRA.

#### E. Executive Order 13132: Federalism

Executive Order 13132, entitled "Federalism" (64 FR 43255, August 10, 1999), requires EPA to develop an accountable process to ensure "meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications." The phrase "Policies that have federalism implications" is defined in the Executive Order to include regulations that have "substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government."

This final rule does not have federalism implications. It does not have substantial, direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. Thus, Executive Order 13132 does not apply to this rule.

#### F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

Executive Order 13175, entitled, "Consultation and Coordination with Indian Tribal Governments" (65 FR

67249, November 9, 2000), requires EPA to develop an accountable process to ensure “meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications.” This final rule does not have any Tribal implications as specified in Executive Order 13175. It does not have substantial direct effects on Tribal governments, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes, as specified in Executive Order 13175. This final rule does not add to the existing requirements under EPA’s regulations. Thus, Executive Order 13175 does not apply to this rule.

*G. Executive Order 13045: Protection of Children From Environmental Health and Safety Risks*

Executive Order 13045, “Protection of Children from Environmental Health Risks and Safety Risks” (62 FR 19885, April 23, 1997), applies to any rule that: (1) Is determined to be “economically significant” as defined under Executive Order 12866, and (2) concerns an environmental health or safety risk that EPA has reason to believe may have a disproportionate effect on children. If the regulatory action meets both criteria, the Agency must evaluate the environmental health or safety effects of the planned rule on children, and explain why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives considered by the Agency. This final rule is not subject to the Executive Order because it is not economically significant as defined under Executive Order 12866, and because the Agency does not have reason to believe the environmental health or safety risks addressed by this action present a disproportionate risk to children.

*H. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use*

This final rule is not a “significant energy action” as defined in Executive Order 13211, “Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use (66 FR 28355 (May 22, 2001)), because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy.

*I. National Technology Transfer and Advancement Act*

Section 12(d) of the National Technology Transfer and Advancement

Act of 1995 (“NTTAA”), Public Law 104–113, 12(d) (15 U.S.C. 272 note) directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (*e.g.*, materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. The NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards. This action does not involve technical standards. Therefore, EPA did not consider the use of any voluntary consensus standards.

*J. Congressional Review Act*

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A Major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a “major rule” as defined by 5 U.S.C. 804(2). This rule will be effective on June 12, 2006.

**List of Subjects in 40 CFR Part 122**

Administrative practice and procedure, Confidential business information, Environmental protection, Hazardous substances, Reporting and recordkeeping requirements, Water pollution control.

Dated: June 7, 2006.

**Stephen L. Johnson,**  
*Administrator.*

■ For the reasons set forth in the preamble, chapter I of Title 40 of the Code of Federal Regulations is amended as follows:

**PART 122—EPA ADMINISTERED PERMIT PROGRAMS: THE NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM**

■ 1. The authority citation for part 122 continues to read as follows:

**Authority:** The Clean Water Act, 33 U.S.C., 1251 *et seq.*

**Subpart B—[Amended]**

■ 2. Section 122.26 is amended by revising paragraphs (a)(2) and (e)(8) to read as follows:

**§ 122.26 Storm water discharges (applicable to State NPDES programs, see § 122.35).**

(a) \* \* \*

(2) The Director may not require a permit for discharges of storm water runoff from the following:

(i) Mining operations 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 that have not come into contact with, any overburden, raw material, intermediate products, finished product, byproduct, or waste products located on the site of such operations, except in accordance with paragraph (c)(1)(iv) of this section.

(ii) All 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 paragraph (c)(1)(iii) of this section. 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 paragraph (c)(1)(iii)(C) of this section.

**Note to paragraph (a)(2)(ii):** EPA encourages operators of oil and gas field activities or operations to implement and maintain Best Management Practices (BMPs) to minimize discharges of pollutants, including sediment, in storm water both during and after construction activities to help ensure protection of surface water quality during storm events. Appropriate controls would be those suitable to the site conditions and consistent with generally accepted engineering design criteria and manufacturer specifications. Selection of BMPs could also be affected by seasonal or climate conditions.

\* \* \* \* \*

(e) \* \* \*

(8) For any storm water discharge associated with small construction activities identified in paragraph (b)(15)(i) of this section, see § 122.21(c)(1). Discharges from these sources require permit authorization by

March 10, 2003, unless designated for coverage before then.

\* \* \* \* \*

[FR Doc. E6-9079 Filed 6-9-06; 8:45 am]

BILLING CODE 6560-50-P

## ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 704, 707, 717, 720, 721, 723, 761, 790, and 799

[EPA-HQ-OPPT-2006-0405; FRL-7336-5]

### Change of Official Office of Pollution Prevention and Toxics' Mailing Address; Technical Amendments

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Final rule.

**SUMMARY:** EPA's Office of Pollution Prevention and Toxics (OPPT) has discovered an error in the mailing address that appears in certain sections of 40 CFR chapter I, subchapter R. By these technical amendments, OPPT corrects those errors.

**DATES:** This final rule is effective June 12, 2006.

**ADDRESSES:** EPA has established a docket for this action under docket identification (ID) number EPA-HQ-OPPT-2006-0405. All documents in the docket are listed on the regulations.gov Web site. Although listed in the index, some information is not publicly available, i.e., Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically at <http://www.regulations.gov> or in hard copy at the OPPT Docket, EPA Docket Center (EPA/DC), EPA West, Rm. B102, 1301 Constitution Ave., NW., Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566-1744, and the telephone number for the OPPT Docket is (202) 566-0280.

**FOR FURTHER INFORMATION CONTACT:** Colby Lintner, Regulatory Coordinator, Environmental Assistance Division (7408M), Office of Pollution Prevention and Toxics, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460-0001; telephone number: (202) 554-1404; e-mail address: [TSCA-Hotline@epa.gov](mailto:TSCA-Hotline@epa.gov).

**SUPPLEMENTARY INFORMATION:**

## I. General Information

### A. Does this Action Apply to Me?

This action is directed to the public in general, and has particular applicability to anyone who might need or want to communicate in writing with OPPT or submit information to OPPT. Since this action may apply to anyone, OPPT has not attempted to describe all the specific entities that may be affected by this action. If you have any questions regarding the applicability of this action to a particular entity, consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

### B. How Can I Access Electronic Copies of this Document?

In addition to accessing an electronic copy of this **Federal Register** document through the electronic docket at <http://www.regulations.gov>, you may access this **Federal Register** document electronically through the EPA Internet under the "**Federal Register**" listings at <http://www.epa.gov/fedrgstr>. You may also access a frequently updated electronic version of 40 CFR parts 704, 707, 717, 720, 721, 723, 761, 790, and 799 through the Government Printing Office's pilot e-CFR site at <http://www.gpoaccess.gov/ecfr>.

## II. Background

### A. What Action is the Agency Taking?

In this technical amendments document, OPPT is correcting errors found in the mailing address in certain sections in 40 CFR chapter I, subchapter R.

### B. What is the Agency's Authority for Taking this Action?

This document is issued by OPPT under its general rulemaking authority, the Toxic Substances Control Act (TSCA) (15 U.S.C. 2601 *et seq.*). In addition, section 553 of the Administrative Procedure Act (APA), 5 U.S.C. 553(b)(3)(B), provides that, when an agency for good cause finds that notice and public procedure are impracticable, unnecessary or contrary to the public interest, the agency may issue a rule without providing notice and an opportunity for public comment. OPPT has determined that there is good cause for making this a rule final without prior proposal and opportunity for comment. OPPT has determined that these amendments are technical and non-substantive. Thus, notice and public procedure are unnecessary. OPPT finds that this constitutes good cause under 5 U.S.C. 553(b)(3)(B).

## III. Do Any of the Statutory and Executive Order Reviews Apply to this Action?

No. This final rule implements technical amendments to 40 CFR chapter I, subchapter R, to correctly reflect the change in OPPT's official mailing address, and it does not otherwise impose or amend any requirements. As such, the Office of Management and Budget (OMB) has determined that a technical correction is not a "significant regulatory action" subject to review by OMB under Executive Order 12866, entitled *Regulatory Planning and Review* (58 FR 51735, October 4, 1993). Nor does this rule contain any information collection requirements that require review and approval by OMB pursuant to the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501 *et seq.*). Because this action is not economically significant as defined by section 3(f) of Executive Order 12866, this action is not subject to Executive Order 13045, entitled *Protection of Children from Environmental Health Risks and Safety Risks* (62 FR 19885, April 23, 1997). This action will not result in environmental justice related issues and does not, therefore, require special consideration under Executive Order 12898, entitled *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations* (59 FR 7629, February 16, 1994). Since the Agency has made a "good cause" finding that this action is not subject to notice-and-comment requirements under the APA or any other statute (see Unit II.B.), this action is not subject to provisions of the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*), or to sections 202 and 205 of the Unfunded Mandates Reform Act of 1995 (UMRA) (Public Law 104-4). In addition, this action does not significantly or uniquely affect small governments or impose a significant intergovernmental mandate, as described in sections 203 and 204 of UMRA. Nor does this action significantly or uniquely affect the communities of tribal governments as specified by Executive Order 13175, entitled *Consultation and Coordination with Indian Tribal Governments* (65 FR 67249, November 6, 2000). This rule will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132, entitled *Federalism* (64 FR 43255, August 10, 1999). This action does not