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To: John F. Morrall III/OMB/EOP@EOP

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Subject: Comments - Draft report to Congress -Recommendation for Reform - EPA Storm Water
Permitting as Applied to *Oil* and *Gas* Drilling Industry

At the suggestion of Art Fraas of your office, attached below is a letter I sent to EPA on May 2, 2002, on behalf of Chesapeake Energy Corporation, one of the largest and most active independent onshore oil and gas exploration and production companies in the United States, and on behalf of the numerous trade associations referenced at the end of the letter, addressing our concerns over EPA's position on storm water permitting regulations as applied to the oil and gas drilling industry.

In summary, this issue surrounds the application of the EPA permitting rules to the construction of oil and gas drill sites. As explained in the letter, many in the oil and gas industry believe these activities are statutorily exempt from the permitting requirement, except under limited circumstances, i.e. when a drill site has previously suffered a spill of a reportable quantity of a restricted pollutant. Nevertheless, as also indicated by the letter, the EPA has not previously enforced these rules against drill site operators, although EPA now indicates they intent to commence active enforcement. Moreover, as we move into Phase II of the storm water permitting rules (effective March 2003), when the minimum size of regulated construction sites reduces from five acres to one acre, our industry will now be expected to comply with these burdensome permitting requirements for virtually every onshore well drilled in the United States. Complying with these permit requirements, which were designed to apply only to other industries, would create a great burden on the oil and gas drilling industry through substantial increased costs and delays. When the Phase II rules were being drafted, EPA intentionally disregarded the oil and gas industry based on the erroneous presumption that few if any oil and gas construction sites were larger than one acre. In fact, almost all drill sites are more than one acre, but most wells are drilled on privately owned, cultivated lands with minimal grade where the risk of pollution from storm water runoff is minimal. Therefore, there is little, if any, corresponding benefit to be derived from this burdensome regulatory action as applied to this activity .

For your information, EPA has met with at least two groups of industry spokesmen and representatives on these issues but no meaningful reform or relief has been adopted.

We request that the Office of Information and Regulatory Affairs of the Office of Management and Budget consider this communication as a recommendation for regulatory reform pursuant to your Notice and Request for

Comment, dated March 28,2002.

If you have any questions or comments, please contact the undersigned.

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> cc: Mr. Art Fraas (via fax (202) 395-7285)

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May 2, 2002

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Re: Phasell
NPDES Storm Water Permitting
Clean Water Act

Dear Mr. Coleman:

This letter is in follow up to the meeting you and various EPA personnel had with me and other representatives of the oil and gas industry in the offices of Senator James M. Inhofe in Washington, D.C. on April 17, 2002, to discuss storm water permitting in the context of oil and gas drilling operations, particularly in EPA Region 6. During that meeting, I promised to send you a critical analysis that we, at Chesapeake Energy Corporation, had made of the current Region 6 general permit, purporting to cover oil and gas construction activities during Phase I in several Region 6 states, including New Mexico, Texas and Oklahoma, as it would apply in actual practice to oil and gas drill sites. I have taken that analysis, expanded upon and set it out in the paragraphs that follow in this letter,

At the outset, I must reiterate the comments made to you at our meeting in Washington that many in the oil and gas industry believe the construction of a drill site is included in the scope of oil and gas exploration and production activities which are conditionally exempted from the storm water permitting requirements of the Clean Water Act (the "Act"). There *is* no definition of "exploration" and/or "production" activities or facilities in the Act or the regulations interpreting it to support EPA's position that such terms should be narrowly construed. To the contrary, **EPA** has itself gone on record recognizing that constructing the drill pad, mud pits and access road are, in fact, part of oil and gas exploration and production activities in the context of exemption provision. (See, Final National Pollution Discharge Elimination System Storm Water Multi-Sector General

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Permit for Industrial Activities ("National General Permit"), found at Federal Register, Vol. 80, No., 189, at page 50914.) Moreover, since the enactment of storm water permitting, EPA has, by your own acknowledgment, done very little to educate the oil and gas industry of the requirements of this virtually unknown body of law and has initiated no enforcement actions against non-compliant oil and gas operators. This is consistent with the intent of Congress in adopting the oil and gas exemption, as interpreted by EPA in its own rules in 1995:

From the standpoint of resource drain on both EPA as the permitting agency and potential permit applicants, the conclusion was that operators that use good management practices and make expenditures to prevent contamination must not be burdened with the requirement to obtain a permit.

(Rules and Regulations, EPA, November 16, 1990, 55 FR 47990,48029).

It is clear that when drafting the 1998 Reissuance of NPDES General Permits for Storm Water Discharges from Construction Activities in Region 6 ("Region 6 Phase I Permit"), EPA did not consider the permit's practical application to the oil and gas industry. This lack of consideration was perpetuated most recently in EPA's Storm Water Phase II Economic Analysis, Final Rule Analysis (EPA 833-R-99-002, October 1999). In that study, despite urging by commentators, the EPA refused to consider the economic and practical effects of the storm water permitting requirements on oil and gas operators that would occur during Phase II. This decision was based on the surprising conclusion at footnote 2, Section 4.1.2 that "few, if any, such [construction] sites actually disturb more than one acre of land". (Note, this conclusion directly conflicts with EPA's own recognition at page 50914 of the National General Permit that "[d]rill pads are areas used to stage the drilling operation and generally range for 2 to 5 acres"). Consequently, we are now faced with a looming deadline of March 1, 2003, in which all oil and gas operators are expected to be both well versed and compliant with storm water permitting requirements which were designed for application to other industries and with no appreciation for the way our business operates.

Notwithstanding the foregoing restatement of our position, we do see value in meeting with EPA in an effort to educate your representatives of the special concerns of oil and gas operators with regard to storm water permitting and to attempt to negotiate a specific general permit for oil and gas drill site construction (or an oil and gas section in the overall general construction permit) to minimize the cost and inconvenience of obtaining these permits while still providing adequate protection to the environment as we move into Phase II. Until the scope of the exemption is judicially reviewed and clarified, the oil and gas industry needs a general permit that fairly accommodates our operations. Towards that end, I provide the following analysis (not intended to be comprehensive) of the problems we see with the Region 6 Phase I Permit, together with some of our recommendations of how to alleviate these problems.

Analysis of Region 6 Phase I Permit and Potential Requirements for Phase II:

The NPDES permit for storm water discharges for new construction associated with industrial activity is obtained through the filing of a deceptively simple one page form, the Notice of Intent (NOI), that carries with it certain requirements that would be burdensome on the oil and gas exploration industry, especially commencing March 2003, to the extent not exempted by 33 USC Sec. 1342 (l)(2). Among the difficulties that the oil and gas industry would experience under these permitting requirements are the following:

- Prior to March, 2003 (the commencement of Phase II), no NOI is required to be filed for any construction activity unless it is anticipated to disturb five or more acres of land. From March, 2003 forward, an NOI will be required for all construction activity that disturbs one (1) acre or more. (64 FR 68722 at 68771, 40 CFR 122.26(b)(15).) This means that the NOI would need to be filed and its requirements met for virtually every well drilled in Oklahoma and other Region 6 states, barring the applicability of the oil and gas exploration exemption. A typical oil and gas drill site ranges from two to three acres in size, excluding the access road. Additionally, it is my understanding that any well previously permitted in Phase I will need a new NOI in conformity with the Phase II permit requirements by December 31, 2002.
- The Notice of Intent (NOI), the permit application document, must have been verified under oath and mailed to the EPA two full days before any road building or construction activity takes place. This means rapid response to developments, such as the discovery of expiring leasehold, the need to accommodate the last minute demands of a surface owner, or other changes in the well location would have to wait at least two days before any action on the land could be undertaken. (NOI Instructions, 63 FR 36517.) In actual practice, the delay would most likely be much longer due to the necessity of developing a *site specific* Storm Water Pollution Prevention Plan (SWPPP), conforming with the requirements discussed below, including an evaluation of threatened and endangered species and conducting an archeological evaluation.
- There is no time limit on the amount of time that EPA can respond in actually issuing the NPDES permit number for the construction activity. Approval is deemed to have occurred forty-eight hours after the NOI was mailed. However, if the operator were to proceed with construction and six months later the EPA determine that the NOI is defective or that its SWPPP is inadequate, then the operator's construction activity would constitute a violation and render the operator subject to fines of up to \$25,000 per day for that construction activity (\$50,000/day if a "knowing" violation). (Region 6 Phase I Permit, Part I.C.3, 63 FR 36499 and 33 USC Sec. 1319(c).) This puts the operator at potential significant financial risk.

- Approval by the EPA of the NOI requires certification on the NOI that a SWPPP has been prepared. The SWPPP requirements contain several onerous provisions. For example:
 - One preparer must contact the U.S. Fish and Wildlife Service (USFWS) and the Natural Marine Fisheries Service (NMFS) or State or Tribal Natural Heritage Center prior to submitting the NOI to determine if construction will encroach on or affect listed endangered species, or proposed to be listed endangered species, or their critical habitat and make provision for such endangered species, if found to be present. (Region 6 Phase I Permit, Addendum A – I.B [See "Step One"], 63 FR 36512.) Approximately 4,000 to 4,500 intents to drill (333 to 375 per month) are approved on an annual basis in Oklahoma alone. The USFWS does not have the staff to evaluate this large number of requests. If an endangered species or critical habitat is encountered, operators must consult with the USFWS. If the location cannot be moved, the USFWS can presently take up to forty-five days to conduct a biological evaluation on the impact to the threatened and endangered species and their critical habitat. This delay would likely be much longer if USWS becomes inundated with these requests.
 - In Oklahoma, for Phase II, the NOI could also require clearance from the State Historical Preservation Office (SHPO), and the Oklahoma Archeological Survey (OAS). (Not a present requirement, although EPA may modify requirements to include it. See, Region 6 Phase I Permit, 63 FR 36491 – What Does the Permit Require Regarding Historic Preservation; 63 FR, 36515, Addendum B.) The same practical limitations exist for the staff of this agency as exist for USFWS. The OAS and SHPO offices have stated that they do not intend to implement any changes to their process to handle the large increase in oil and gas requests. Requests are presently made only in connection with preparing APDs on federal or Indian lands. Both offices have thirty days from the date of receipt of a request to respond back to an oil and gas operator. Eighty percent of the time, OAS requires an archeological survey even though a very small percentage of these required evaluations uncover a historic site. These surveys can cost operators \$3,000 - \$5,000 (depending on the complexity of the site and the number of recognized tribes in the area of the proposed location).
 - The Site Description portion of the plan must identify such things as pre-construction and post-construction runoff coefficients, drainage patterns, approximate slopes, areas of soil disturbance, areas where there will not be any soil disturbance, location of structural practices (silt fences, etc.), location of stabilization practices (temporary revegetation, etc.). (Region 6 Phase I Permit, Part IV.D generally, 63 FR 36502 ff.) The typical oil and gas operator does not have personnel with the level of expertise either in the field or the office to

calculate and provide this information. Therefore, it is anticipated that most operators would have to hire environmental consultants to perform these functions and prepare the site plans. Based on conversations with at least one such consultant, and our experience in preparing APDs on federal lands, we have estimated the cost of outsourcing the plan to be prepared in this manner would range from \$3,000 – \$8,000 per well. Given that a typical drill site costs less than \$40,000 to build, this added cost is very significant. Moreover, this does not consider the added cost of building the location to meet the consultant's specifications. Furthermore, since EPA will not audit a SWPPP in advance to assure its compliance, operators and their consultants have no way of verifying the minimum environmental protection needed to conform with the Region 6 Phase I Permit. Additionally, while there are consultants in the industry working today to meet current needs, one would anticipate a shortage and resulting delays and cost increases in obtaining a SWPPP when the work load dramatically increases upon the commencement of Phase II.

- Specific requirements that must be set forth in the Storm Water Pollution Prevention Plan, the existence of which the Operator certifies in the NOI, include:
 - Identify the potential pollutant source.
 - Describe the nature of the construction activity.
 - Describe the intended sequence of major soil disturbing activities.
 - Estimate of total area of site.
 - Estimate area of site upon which there will be soil disturbing activities.
 - Estimate pre- and post-construction runoff coefficient.
 - Provide data describing the soil and the quality of any discharge from the site.
 - Provide a general location map.
 - Provide a site map showing:
 - Drainage patterns.
 - Approximate slopes after major grading activities.
 - Areas of soil disturbance.
 - Areas of no soil disturbance.
 - Location of major structural and non-structural controls.
 - Locations where stabilization practices are expected to occur.
 - Location of off-site material, waste, borrow or equipment storage areas.
 - Location of surface waters, including wetlands.
 - Locations where storm water discharges to surface waters.
 - Identify name of receiving waters.
 - Provide areal extent of wetlands that will be disturbed or receive discharges from disturbed areas of site.
 - Provide information whether storm water discharges will have an affect on property listed on the National Register of Historical Places and archeological sites.

- For each major soil disturbing activity, give description of control measures (Best Management Practices or **BMPs**) that will be implemented to control pollutants in storm water discharges, including:
 - Identify appropriate control measures and timing sequence in which they will be implemented.
 - Identify the permittee who will be responsible for implementation of the control measure.
- Erosion and sediment controls requirements:
 - Such controls must conform to the following:
 - Must be designed to keep sediment on site.
 - Must be selected, installed and maintained in accordance with manufacturer's specifications or good engineering practices.
 - Must be periodically inspected and repaired or replaced, if necessary.
 - Sediment that escapes the construction site must be removed to minimize offsite impact.
 - Sediment must be removed from sediment traps or ponds when design capacity reaches 50%
- Offsite dirt and borrow areas must also be addressed in the SWPPP.
- Stabilization practices.
 - The SWPPP must describe interim and permanent stabilization practices for the site and schedule of when they will be implemented.
- Records shall be kept and attached to the SWPPP describing:
 - The date when each major grading activity occurs.
 - The date when construction activity temporarily or permanently ceases on a portion of the site.
 - The dates when stabilization measures are commenced, which must normally begin within **14** days after construction activity has ceased on a portion of the site.
- Where common drainage location serves site with areas of ten (10) or more **acres** of disturbed soil, a temporary or permanent sediment basin must be created.
- The SWPPP must include description of measures to be installed during construction to control discharges after construction has been completed. May require a separate permit under Section 404 of the Clean Water Act (CWA).
- No solid materials shall be discharge to waters of the U.S., except as authorized by a permit under Section 404 of the CWA.
- Off-site vehicle tracking must be minimized.
- The SWPPP must meet applicable State, Tribal or local requirements for waste disposal or sanitary sewers.
- The SWPPP must include list of construction and waste materials to be stored on construction site.

- The SWPPP must include list of pollutant sources from areas other than construction and description of controls to be implemented to minimize pollutant discharges.
- The SWPPP must include description of measures to be implemented to protect threatened or endangered species or critical habitat.
- a The SWPPP must be in compliance with State, Tribal or local storm water discharge requirements.
- a The SWPPP must be updated as necessary.
- All erosion and sediment control measures must be maintained in effective operating condition.
- Non-storm water flows that are combined with storm water discharges must be identified, and SWPPP must identify appropriate controls for the non-storm water component of the discharge.
- The SWPPP, all reports required by the permit and all data used to complete the NOI must be kept for three (3) years from the date of final stabilization.
- A copy of the SWPPP must be kept at construction site or other site accessible by EPA, State, Tribal or local officials.

Noncompliance with any of these requirements would constitute a violation of the Clean Water Act and be grounds for an enforcement action.

- Once the NOI is filed, so long as the site remains “unstabilized” (i.e. not revegetated), inspections must occur on the site every fourteen days or within 24 hours following a rain occurrence of 0.5” or greater and a report prepared pursuant to the findings of the inspection. This is especially burdensome if the location is in a remote area and is not easily accessible. Additionally, the individual performing this function must be “qualified” as an inspector. Though this level of expertise is undefined, it is assumed this requires more training than the average pumper who routinely checks an operator’s wells today. The SWPPP is subject to constant review and revision as a result of these inspections. (Region 6 Phase I Permit, Part IV.D.4, 63 FR 36505.) The added cost of training and/or hiring such qualified inspectors would be prohibitive to most operators, particularly given the uncertainty of how long this obligation would extend, as discussed below.
- A Notice of Termination (NOT), terminating coverage under the permit, must be filed within thirty days of the occurrence of (a) final stabilization or (b) another operator/permittee assuming control of the site. Filing the NOT prior to one of the triggering conditions having occurred can result in an enforcement action against the permittee. Whether the EPA would institute enforcement actions for failure to file the NOT at all is not clear, but the language does say that “All permittees *must* submit a NOT within thirty (30) days . . .” . (Emphasis supplied.) Therefore, enforcement action by the EPA against the permittee appears possible for (1) failing to ever file the NOT, (2) filing the NOT more than thirty (30) days after the occurrence of the event that would require the filing of the NOT and (3) prematurely filing the NOT.

(Region 6 Phase I Permit, Part I.D.2 (63 FR 36499).) This narrow window for compliance is unreasonable given the fact stabilization or revegetation can be a gradual, indefinite process.

- "Final stabilization", one of the events triggering the requirement to file the NOT, is defined to mean "all soil disturbing activities at the site have been completed and a uniform (e.g., evenly distributed, without large bare areas) perennial vegetative cover with a density of 70% of the native background vegetative cover for the area has been established on all unpaved areas and areas not covered by permanent structures, or equivalent permanent stabilization measures (such as the use of riprap, gabions, or geotextiles) have been employed. (Region 6 Phase I Permit, Part IX.I.I (63 FR 36508-36509).) The word "pave" is not defined in the permit. However, a common dictionary definition of "pave" is "to cover (a road, walk, etc.) with stones, tiles, concrete, or the like, so as to make a firm, level surface." (Random House College Dictionary, 1982). According to that definition, graveling the access road and drillsite would constitute "paving". Graveling the road and the drill site pad might also constitute a "permanent stabilization measure" using rip rap. Thus, arguably, the only areas subject to the revegetation requirement would be any ungraveled areas, including the cut area, which would apply to only a very limited portion of the drill site. Since a typical drill site is paved with gravel almost immediately to allow for the entry of heavy machinery, and the location is built in no more than about 10 days, one wonders why an oil and gas operator should be subjected to such a burdensome and expensive regulatory burden for such a short period of time. In most cases, especially during dry months, it is unlikely a drill site would even see any rain, and thus any storm water runoff, during construction and before "stabilization".
- It is unclear when construction activities end and exploration and/or production activities begin. EPA admits that non-construction related oil and gas exploration and production activities are exempt from the storm water permitting requirements (unless the facility has experienced a release of a reportable quantity ("RQ") of oil or other hazardous substance). (See Rules and Regulations, EPA, National Pollution Discharge Elimination System Permit Application Regulations for Storm Water Discharges, November 26, 1990, at 55 FR 47990, 48030). The NOI and NOT procedures do not consider the fact an operator may find it prudent to allow all or part of a drill site to remain unrestored indefinitely for various legitimate reasons, such as to dry out the pit and soil farm or in contemplation of a re-work on the well. Further, the landowner may want to leave the site unvegetated so he can plow and plant a new crop or the operator may have agreed to leave a stock pond for future use by the landowner. Extending site maintenance obligations beyond site construction could be viewed as encroaching on otherwise clearly exempt activities. Additionally, depending on how EPA interprets the scope of a "common plan of development" in the context of oil and gas drilling, the filing of an NOT for a well site could be deferred almost indefinitely.

- Oil and gas construction activities differ from the typical residential/commercial/industrial construction activities. The terminology of “common plan of development” should not apply to oil and gas permit requirements. Industry views each well location as a separate and distinct location and should be considered as such for the filing of the NOI and NOT. This would help reduce confusion between the operator and EPA as to when a NOI needs to be filed.
- The restoration of a no longer producing well site would likely constitute a separate construction activity, requiring the preparation of a second SWPPP and the filing of a new NOI to cover the restoration construction activity. (This assumes after stabilization a Notice of Termination (NOT) would be filed on the original construction of the drill site. (Region 6 Phase I Permit, Part IV): “At least one storm water pollution prevention plan (SWPPP) shall be developed for each construction project or site covered by this permit.” 63 FR 36502.) This would create a needless duplication.
- Organizations, agencies, and contractors (such as the Oklahoma Energy Resources Board and their associated contractors) restoring abandoned/orphaned well sites should be exempt from the Phase II requirements since their efforts are to restore the site to its natural condition and restoration typically takes only a few days. Moreover, their public service purpose should not be hindered by imposing costly and time consuming burdens on their activities.

Recommended Changes to Region 6 Phase I Permit for Phase II

In addition to those changes specified in the foregoing analysis with respect to specific problem areas, we feel the obvious and most logical change in the Region 6 Phase I Permit would be for **EPA** to adopt an automatic waiver for all drill sites that meet certain criteria, thereby alleviating the need for a permit altogether for most sites. For instance, a drill site on relatively flat, cultivated private lands some minimum distance from any large body of water or stream can have virtually no impact on waters of the United States by pollution from storm water run off. The EPA has already adopted two waiver scenarios for construction activities designed to avoid the need for permitting under similar considerations. (See Section 1.21.1. Waivers for Small Construction Activities, NPDES General Permit for Storm Water Discharge from Large and Small Construction, for Regions 1, 2, 3, 7, 8, 9 and 10). This waiver would have the added benefit of relieving EPA and the various state agencies of the burden of enforcing compliance on sites with no real impact on the environment. It would also help legitimize the permitting requirement on other sites which do pose a threat to the environment.

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Finally, it should also be noted that with regard to the preparation of a **Spill** Prevention Control and Countermeasure Plan ("SPCCP"), pursuant to the "SPCC Regulation" (40 CFR Part 112), the EPA allows an oil and gas well operator to aggregate multiple wells under a general plan. (40 CFR 112.3(c)) The EPA loosely defines the term "onshore facility" so to allow all wells in a given field to be covered by the same SPCC plan. (40 CFR 112.2) This same rationale should apply to storm water permitting, thereby alleviating the need to prepare a costly and time consuming SWPPP for each well. When most drill sites require the same Best Management Practices to prevent storm water pollution, requiring a customized SWPPP for each well (which EPA admits it will never review in most cases) is unduly burdensome.

I hope the foregoing analysis has been informative. I look forward to meeting with you again on May 7, 2002 in your Dallas offices to discuss this matter further. In the meantime, if you have any questions or comments, please feel free to call me or send an e-mail.

Very truly yours,

Henry J. Hood

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