

extensive economic analysis that is described in the Phase II rule. EPA did not specifically address oil and gas because the information we considered at that time suggested that most oil and gas sites would disturb less than one acre. EPA's decision to postpone the construction permit requirements for small oil and gas sites is partially based on the information that we became aware of since publication of the Phase II rule. EPA needs the additional time to thoroughly consider the impact of the construction requirements on the oil and gas industry.

Commenters also stated that EPA did not do the proper evaluation of energy-related production activities in accordance with Executive Order 13211. Executive Order 13211 was issued on May 22, 2001 which was well after promulgation of the Phase II rule. However, in the spirit of this Executive Order, during the two year postponement, EPA will analyze the question of whether the imposition of storm water permitting requirements on construction of oil and gas facilities of one to five acres would result in a significant energy impact.

#### *Common Plan*

Commenters asked that EPA clarify how the "common plan of development" applies at oil and gas sites, so they would know the extent of applicability of the two-year permit postponement. Where construction activity is part of a larger common plan of development or sale that will disturb five acres or more, the two year postponement provided for in this final rule does not apply. The primary concern raised by commenters was that when a field is first developed, the producer does not know when, where, and how many wells will be drilled.

EPA acknowledged this broader issue of what constitutes a "common plan" in the "Frequently Asked Questions" section of the proposed fact sheet for the proposed CGP. EPA stated that "If you have a long range master plan of development where some portions of the master plan are a conceptual rather than a specific plan of future development and the future construction activities would, if they occur at all, happen over an extended time period, you may consider the 'conceptual' phases of development to be separate 'common plans' provided the 'conceptual phase' has not been funded and periods of construction for the physically interconnected phases will not overlap." *Fact Sheet for the Issuance of a NPDES Permit*. (This proposed fact sheet is available in the official public docket referenced in the

Notice of Availability for Comment for the proposed CGP at 67 FR 78116 (Dec. 20, 2002).) The proposed fact sheet goes on to describe a possible example in the context of the oil and gas industry. EPA plans to further clarify this issue when it takes final action on the proposed CGP.

#### *Exemption*

Many commenters reiterated their belief that Congress intended CWA 402(l)(2) to exempt all types of activities, including construction, associated with oil and gas exploration, production, processing, treatment, or transmission. EPA recognizes that this issue is, and has been, of concern to many in the oil and gas industry. *See, Appalachian Energy Group, et al. v. EPA*, 33 F.3d 319 (4th Cir. 1994). Today's action is limited to postponing permit requirements for certain oil and gas construction activities and, in this limited context, should not conflict with these commenters' position. Again, as reflected in the proposal, EPA plans to use the two-year extension to assess the scope of 33 U.S.C. 1342(l)(2) with regard to storm water discharges caused by this industry.

Differences between construction disturbing five or more acres ("large" construction. *See* 40 CFR 122.26(b)(14)(x).) and construction disturbing one to five acres ("small" construction. *See* 40 CFR 122.26(b)(15).)

Several commenters believe that the two-year postponement should apply to large construction as well as smaller sites. Large construction has been regulated as an industrial activity under CWA section 402(p)(2) since the promulgation of the Phase I storm water rule. EPA did not propose to take any action with respect to large construction activity and did not seek comment on this issue. The Agency declines to respond to these comments, as they are outside the scope of the action proposed.

#### *Transmission facilities*

EPA received many questions about our definition of "transmission facilities." EPA has looked at the information submitted by the oil and gas industry to help understand what types of pipelines should be considered "transmission facilities." For the purposes of today's action, the term "oil and gas exploration, production, processing, and treatment operations or transmission facilities" includes gathering lines, flowlines, feeder lines, and transmission lines. The construction of water lines, electrical utilities lines, etc. as part of the oil and gas exploration, production, processing,

treatment, and transmission of oil and gas are also included. Transmission lines are typically major pipelines (e.g., interstate and intrastate pipelines) that transport crude oil and natural gas over long distances and are large-diameter pipes operating at relatively high pressure. Many of these pipelines traverse long distances and disturb over five acres (and as such, are covered by EPA's permitting requirements for large construction activity). Pipelines that transport refined petroleum product and chemicals from refineries and chemical plants are not included in the terms described in today's rule as potentially eligible for the two year postponement.

One commenter requested that EPA clarify in its final rule that its definition of transmission be consistent with terms used by the U.S. Department of Transportation (DOT) at 49 CFR part 192 (Transportation of Natural and Other Gas by Pipeline: Minimum Federal Safety Standards). Commenters also asked about other types of pipelines (i.e., distribution lines). Distribution lines are those pipelines that deliver natural gas to homes, businesses, etc. and operate at relatively low pressures. EPA does not consider distribution lines to be transmission lines, and as such, these lines are not included in the terms described in today's rule as potentially eligible for the two year postponement. While EPA is not codifying DOT definitions, the Agency does consider the DOT's definitions to be consistent with EPA's interpretation of "transmission" in this rulemaking.

#### **IV. Today's Action**

In today's action, EPA is postponing until March 10, 2005, the permit authorization deadline for National Pollutant Discharge Elimination System (NPDES) storm water permits for oil and gas construction activity that disturbs one to five acres of land and sites disturbing less than one acre that are part of a larger common plan of development or sale that disturbs one to five acres. Since January 2002, EPA has become aware that close to 30,000 oil and gas sites may be affected by the Phase II storm water regulations. In the spirit of Executive Order 13211, which directs EPA to consider the impact of its actions on energy-related production activities, the Agency believes it is important to review this new information in light of the Phase II rule to determine the impact on the oil and gas industry. During the two-year postponement of this deadline, EPA plans to gather information about the area of land disturbed during construction of oil and gas exploration and production facilities.