significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4). This proposed rule also does not have a substantial direct effect on one or more Indian tribes, 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 by Executive Order 13175 (65 FR 67249, November 9, 2000), nor will it 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 (64 FR 43255, August 10, 1999), because it merely proposes to approve a state rule implementing a Federal requirement, and does not alter the relationship or the distribution of power and responsibilities established in the Clean Air Act. This proposed rule also is not subject to Executive Order 13045 (62 FR 19885, April 23, 1997), because it is not economically significant.

In reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the Clean Air Act. In this context, in the absence of a prior existing requirement for the State to use voluntary consensus standards (VCS), EPA has no authority to disapprove a SIP submission for failure to use VCS. It would thus be inconsistent with applicable law for EPA, when it reviews a SIP submission, to use VCS in place of a SIP submission that otherwise satisfies the provisions of the Clean Air Act. Thus, the requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) do not apply. As required by section 3 of Executive Order 12988 (61 FR 4729, February 7, 1996), in issuing this proposed rule, EPA has taken the necessary steps to eliminate drafting errors and ambiguity, minimize potential litigation, and provide a clear legal standard for affected conduct. EPA has complied with Executive Order 12630 (53 FR 8859, March 15, 1988) by examining the takings implications of the rule in accordance with the ''Attorney General's Supplemental Guidelines for the Evaluation of Risk and Avoidance of Unanticipated Takings'' issued under the executive order.

This proposed rule pertaining to the amendments of Virginia's ambient air quality standards, does not impose an information collection burden under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Carbon monoxide, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, Volatile organic compounds.

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

Dated: December 28, 2005.

Donald S. Welsh,

Regional Administrator, Region III.

[FR Doc. E6–30 Filed 1–5–06; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 122

[OW–2002–0068; FRL–8019–6]

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: Notice of proposed rulemaking.

SUMMARY: Today EPA proposes action to codify in the Agency's regulations changes to the Federal Water Pollution Control Act resulting from the Energy Policy Act of 2005. This proposed action would modify National Pollutant Discharge Elimination System regulations to provide that certain storm water discharges from field activities, including construction, associated with oil and gas exploration, production, processing, or treatment operations, or transmission facilities would be 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: Comments must be received on or before February 21, 2006.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–HQ–OW–2002–0068 by one of the following methods:

- *www.regulations.gov:* Follow the on-line instructions for submitting comments.
- E-mail: *ow-docket@epa.gov*
- Mail: Water Docket, Environmental Protection Agency, Mailcode: 4101T, 1200 Pennsylvania Ave., NW., Washington, DC 20460. Please include a total of three copies.
- Hand Delivery: EPA Docket Center, EPA West, Room B102, 1301 Constitution Ave., NW., Washington, DC 20004. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID No. EPA–HQ–OW–2002–0068. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *www.regulations.gov*, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *www.regulations.gov* or e-mail. The *www.regulations.gov* Web site is an ''anonymous access'' system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through *www.regulations.gov,* your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional information about EPA's public docket, visit the EPA Docket Center homepage at *www.epa.gov/epahome/dockets.htm.* For additional instructions on submitting comments, go to Unit I.C of the **SUPPLEMENTARY INFORMATION** section of the document.

Docket: All documents in the docket are listed in the *www.regulations.gov* index. 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, will be publicly

available only in hard copy. Publicly available docket materials are available either electronically in *www.regulations.gov* or in hard copy at the Water Docket, EPA/DC, EPA West, Room B102, 1301 Constitution Ave., NW., Washington, DC 20004. This Docket Facility is open from 8:00 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The Docket telephone number is (202) 566–2426. 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.

FOR FURTHER INFORMATION CONTACT: Jeff Smith, Office of Wastewater Management, Office of Water, 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.*

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 and treatment, and 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 is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be affected by this action. This description identifies the 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 the applicability criteria in 40 CFR 122.26(a)(2), (b)(14)(x), (b)(15) 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. What Should I Consider as I Prepare My Comments for EPA?

1. *Submitting CBI.* Do not submit this information to EPA through *www.regulations.gov* or e-mail. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD ROM that you mail to EPA, mark the outside of the disk or CD ROM as CBI and then identify electronically within the disk or CD ROM the specific information that is claimed as CBI). In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. *Tips for Preparing Your Comments.* When submitting comments, remember to:

- Identify the rulemaking by docket number and other identifying information (subject heading, Federal Register date and page number).
- Follow directions—The agency may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.
- Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.
- Describe any assumptions and provide any technical information and/or data that you used.
- If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.
- Provide specific examples to illustrate your concerns, and suggest alternatives.
- Explain your views as clearly as possible.
- Make sure to submit your comments by the comment period deadline identified.

II. Background Information

A. NPDES Program

In 1972, Congress amended the Federal Water Pollution Control Act (more commonly referred to as the Clean Water Act or CWA) to prohibit the discharge of any pollutant to waters of the United States from a point source except in compliance with specified provisions of the CWA, including section 402. The principal means by which one may lawfully discharge pollutants into waters of the United States is by obtaining authorization in a NPDES permit issued under CWA section 402. Initial efforts to improve water quality under the NPDES program focused primarily on reducing pollutants in industrial process wastewater and municipal sewage.

As pollution control measures for industrial process wastewater and municipal sewage were implemented and refined, it became increasingly evident that more diffuse sources of water pollution were also significant causes of water quality impairment. Specifically, storm water runoff draining large surface areas, such as agricultural and urban land, was found to be a major cause of water quality impairment, including the non-attainment of designated beneficial uses. As a result, in 1987, Congress added Section 402(p) of the CWA, which directs EPA to develop a two-phased approach to regulate storm water discharges under the NPDES program.

The first phase of the national program for controlling storm water, commonly referred to as ''Phase I,'' was promulgated on November 16, 1990 (55 FR 47990). Phase I requires NPDES permits for storm water discharges from a large number of priority sources, including municipal separate storm sewer systems (MS4s) generally serving populations of 100,000 or more and industrial activity. EPA defined the term ''storm water discharge associated with industrial activity'' in a manner that covered a wide variety of facilities, including construction activities that disturb at least five acres of land (40 CFR 122.26(b)(14)(x)).

The second phase of the storm water program, ''Phase II,'' was promulgated on December 8, 1999 (64 FR 68722). Phase II expanded the existing program to include discharges of storm water from smaller municipalities in urbanized areas and from construction sites that disturb between one and five acres of land. (40 CFR 122.26(b)(15)(i)). Discharges from these sources have generally needed permit authorization since March 10, 2003 (40 CFR 122.26(e)(8)). Phase II allows certain sources to be excluded from the national program based on a demonstrable lack of impact on water quality. The Phase II rule also allows for other sources not automatically regulated on a national basis to be designated for inclusion based on increased likelihood for localized adverse impact on water quality.

B. NPDES Program Provisions Specific to Oil and Gas Activities

The 1987 amendments to the CWA also added language at section 402(*l*)(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 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.''

On January 4, 1989, EPA promulgated a rule [National Pollutant Discharge Elimination System Permit Regulations] that, among other actions, codified the CWA section 402(*l*)(2) exemption at what was then 40 CFR 122.26(a)(3). (See 54 FR 246). The preamble to that rule explained that the legislative history of CWA section 402(*l*)(2) suggests that, with respect to oil or grease or hazardous substances, the determination of whether storm water is contaminated by contact with such materials, as established by the Administrator, shall take into consideration whether these materials are present in such storm water runoff in excess of reportable quantities under section 311 of the CWA or section 102 of CERCLA.

The 1990 NPDES Phase I storm water regulations also codified the CWA section 402(*l*)(2) exemption, this time moving the regulatory exemption to 40 CFR 122.26(a)(2) for uncontaminated storm water discharges from oil and gas activities while also imposing permit requirements for storm water discharges associated with industrial activities, including construction sites disturbing at least five acres (40 CFR 122.26(b)(14)(x)). The Phase I rule re-codification of the CWA section 402(*l*)(2) provision also revised the regulatory language to specify that the ''Director may not require a permit'' rather than the section 402(*l*)(2) language that specifies that the ''Administrator shall not require a permit under this section, nor shall the Administrator directly or indirectly require any State to require a permit'' for these discharges. This change helped clarify that States may not require permits for these discharges under the NPDES program.

The rule also codified at § 122.26(c)(1)(iii) the conditions which would be considered indicative of contamination by contact with overburden, raw material, intermediate products, finished product, byproduct, or waste products located on the site and would thus necessitate an NPDES storm water permit application by oil and gas exploration, production, processing or treatment operations or transmission facilities. Section 122.26(c)(1)(iii) provides 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 anytime 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 interpretation of contamination on the legislative history of section 402(l)(2), which directed EPA to consider whether reportable quantities (RQs) of oil or grease or hazardous substances under either the CWA or 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.

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 for 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.

This memorandum was legally challenged by a collection of trade associations who asserted that the memorandum was unlawful and requested 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).

As noted previously, EPA promulgated the final Phase II storm water rule on December 8, 1999 with a requirement that storm water discharges from small construction activities (those disturbing between one and five acres) obtain NPDES permit coverage beginning on March 10, 2003. Based on public comments on the January 9, 1998, proposed Phase II rule, EPA had considered including oil and gas exploration sites in its economic analysis for the rulemaking, but further analysis suggested that few, if any, of these 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 final 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 right-of-ways 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 permits for oil and gas construction activity that disturbs one to five acres of land. This extension allowed EPA 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(*l*)(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 site characteristics 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. Additionally, EPA gathered economic data for the industry and

initiated an economic impact analysis of the existing Phase II regulations specific to the oil and gas industry. EPA's preliminary analysis indicated that there could be significant and potentially costly administrative delays in the permitting process for oil and gas construction sites 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 that were raised 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 Agency's first acknowledgment that the NPDES regulations apply to construction activities associated with oil and gas activities, but that such regulations are inconsistent with CWA section 402(*l*)(2). On June 16, 2005, the Fifth Circuit dismissed the petition on the grounds that the issue is not ripe for review. Specifically, the Court acknowledged EPA's ongoing analysis of this issue and indicated that ''any interpretation [of CWA section 402(*l*)(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).

III. Description of Proposed NPDES Program Modifications

A. Objectives EPA Seeks To Achieve in Today's Proposal

The primary purpose of today's proposed rule is to propose modifications to the NPDES regulations in 40 CFR part 122 based on changes to the Clean Water Act (CWA) resulting from the Energy Policy Act of 2005 language (See Pub. L. 109–58, 119 Stat. 694 (codified as amended at 33 U.S.C. 1362 (2005))). A second purpose is to encourage voluntary application of best management practices (BMPs) for oil and gas field activities and operations, including construction, to provide additional protection of water quality from potential storm water discharges.

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, 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 CWA section 402(*l*)(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(*l*)(2). EPA interprets this extension of the statutory exemption to include construction of drilling sites, drilling waste management pits, and access roads as well as construction of the transportation and treatment infrastructure such as pipelines, natural gas treatment plants, natural gas pipeline compressor stations and crude oil pumping stations.

The action is being published in the **Federal Register** as a proposed rule to provide the public and interested stakeholders with the opportunity to comment on this rulemaking.

B. Today's Regulatory Approach

1. Requirements for Regulated Entities Under Today's Proposal

Today's action proposes to codify changes to section 502, subpart (24) (''Oil and Gas Exploration and Production Defined'') of the Clean Water Act (CWA) into EPA regulations in 40 CFR part 122 (''EPA-Administered Permit Programs: The National Pollutant Discharge Elimination System [NPDES]''). Specifically, the language in the Energy Policy Act of 2005, signed by the President on August 8, 2005, states that section 502 of the CWA is amended by adding the following subparagraph at the end of the current section: ''(24) OIL AND GAS EXPLORATION AND PRODUCTION.—The term 'oil and gas exploration, production, processing, or treatment operations or transmission facilities' means all field activities or operations associated with exploration, production, processing, or treatment operations, or transmission facilities, including activities necessary to prepare a site for drilling and for the movement and placement of drilling equipment, whether or not such field activities or operations may be considered to be construction activities.''

In extending this statutory exemption at CWA section 402(*l*)(2) to oil and gas construction activities, Congress did not differentiate among operations on the basis of the size of the disturbed acreage. Accordingly, there is no distinction in today's proposal as to whether the amount of disturbed acreage is less than 1 acre, between 1 and 5 acres, or greater than 5 acres. Hence, discharges from ''large'' construction activity (disturbing at least 5 acres) at oil and gas facilities would be eligible for the exemption from NPDES permitting requirements under today's proposal to the same extent as discharges from small construction activity at such facilities.

In addition to the construction of drilling sites, drilling waste management pits, and access roads, EPA also interprets the specific phrase in the statutory language ''*all field activities or operations*'' [emphasis added] as being applicable to construction of 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 would thus be eligible for the CWA section 402(*l*)(2) exemption from NPDES permitting requirements.

This proposed regulation would implement Congress' intention, in the Energy Policy Act of 2005, to exclude virtually all oil and gas construction activities from regulation under the NPDES storm water program. However, consistent with the language of CWA section 402(*l*)(2), the proposed regulatory changes would not exclude oil and gas construction activities from regulation under the NPDES storm water program when such field activities or operations discharge storm water that has been contaminated by contact with ''* * * any overburden, raw material, intermediate products, finished product, byproduct or waste products located on the site of such operations.'' [CWA section 402(*l*)(2)].

The legislative history of CWA section 402(l)(2) provided guidance to EPA in interpreting the phrase ''contaminated by contact with.'' It provides as follows:

> The substitute [final version of the bill] provides that permits are not required where stormwater runoff is diverted around mining operations or oil and gas operations and does not come in contact with overburden, raw material, product, or process waste. In addition, where stormwater runoff is not contaminated by contact with such materials,

as determined by the Administrator, permits are also not required. With respect to oil or grease or hazardous substances, the determination of whether stormwater is 'contaminated by contact with' such materials, as established by the Administrator, shall take into consideration runoff in excess of reportable quantities under section 311 of the Clean Water Act or section 102 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, or in the case of mining operations, above natural background levels.

Based on this language, EPA codified its interpretation of ''contaminated by contact with'' at § 122.26(c)(1)(iii). It provides that oil and gas operations are exempt except where their discharges contribute reportable quantities of oil or grease or hazardous substances to waters of the United States or contribute to a violation of a water quality standard.

However, a plain reading of CWA section 402(*l*)(2) suggests that oil and gas sites where runoff is not contaminated by contact with raw material, intermediate products, finished product, byproduct or waste products located at the site are not required to obtain NPDES permits, even in situations where the runoff might be contributing to a violation of water quality standards (the term overburden is applicable only to mining). At the time that EPA promulgated § 122.26(c)(1)(iii), EPA believed it reasonable to presume that causing or contributing to a violation of water quality standards was an indication of contamination as envisioned in the statute. However, now that Congress has explicitly extended the exemption to construction activities associated with oil and gas operations, EPA believes this presumption may no longer be valid in some instances. For example, sediment in runoff related to the clearing of ground or construction of an access road could cause or contribute to a water quality standard violation even where the runoff does not come into contact with raw material, intermediate products, finished product, byproduct or waste products located at the site.

For this reason, EPA is proposing to clarify in § 122.26(a)(2)(ii) that a water quality standard violation for sediment alone does not trigger a permitting requirement. Because most substances for which an RQ has been established are the types of materials (e.g., oil, grease, toxic or hazardous chemicals) that would likely not be present in storm water discharge from an oil or gas site other than through contact with exposed raw material, intermediate products, finished product, byproduct or waste products, EPA would generally consider an exceedance of an RQ as indicative of contamination. This would be true whether such contact occurred during or after construction. Sediment, in contrast, could easily be present in the discharge even without such contact, and thus in and of itself would not lead to a determination of contamination through contact. Sediment could serve as a vehicle for discharges of oil or grease or hazardous substances (*e.g.*, heavy metals) and if an RQ is exceeded or a water quality standard violated for such a pollutant, such contamination could trigger permitting requirements. EPA believes that this interpretation is fully consistent with Congress' intent in enacting the 2005 Energy Policy Act, which specifically included within the scope of the section 404(*l*)(2) exemption construction activities associated with oil and gas sites.

Finally, EPA proposes to reorganize regulatory language in § 122.26(a)(2) to create two new paragraphs: (i) and (ii). EPA believes this change is consistent with the existing regulatory framework provided in § 122.26(c)(1)(iii) and (iv) which separates mining and oil and gas requirements. Proposed paragraph (i) merely recodifies existing requirements at § 122.26(c)(1)(iv) for storm water discharges from mining operations that come into contact with, any overburden, raw material, intermediate products, finished products, byproduct, or waste products located on the site of such operations.'' Proposed paragraph (ii) clarifies permit requirements for storm water discharges from oil and gas sites consistent with the discussion provided above. In addition, EPA is proposing to add a note to the regulations *encouraging* operators of oil and gas field activities or operations to implement and maintain Best Management Practices (BMPs) to minimize the discharges of pollutants, including sediment, in storm water both during and after construction activities to help protect surface water quality during storm events. Additional discussion of the importance of these activities is provided in section III.B.3.

Today's proposed rulemaking would apply to all States, Federal lands and Indian Country regardless of whether EPA is the NPDES permitting authority. Discharges that would be exempted from NPDES permit requirements in today's proposal would be exempted from such NPDES requirements regardless of whether EPA or a State is the permitting authority. EPA wishes to clarify, however, that today's proposal is not intended to interfere with the States' ability to regulate any discharges through a State's non-NPDES program. However, if a State were to require a permit for discharges exempt from the Clean Water Act NPDES program requirements, the State's permit requirement would not be considered part of the State's EPA-approved NPDES program. See 40 CFR 123.1(i)(2).

EPA requests comment on all aspects of this proposed rule.

2. Timeframe for Final Rule

EPA intends to issue a final rulemaking in advance of the June 12, 2006 deadline by which oil and gas construction sites that disturb one to five acres of land are currently scheduled to obtain NPDES permits for their discharges. If finalized as proposed, EPA's final rulemaking would effectively exempt all field activities or operations associated with oil and gas exploration, production, processing or treatment and transmission construction activities from regulation under the NPDES storm water permitting program, except in accordance with § 122.26(a)(2)(ii) and (c)(1)(iii).

3. Best Management Practices (BMPs)

In accordance with CWA section 402(*l*)(2), today's proposed 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 adding a note within the regulatory text *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 would provide additional measures to help protect surface water during storm events. 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 BMPs could also be affected by seasonal or climate 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 § 122.26(a)(2)(ii) and (c)(1)(iii) for eligibility for the 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 EPA's recommended oil and gas 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 relatively simple, 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.

4. Other Federal, State, Tribal, and/or Local Controls

EPA expects that operators will comply with applicable Federal, State, Tribal, and/or local controls on oil and gas construction activities. For example, today's action does not affect existing requirements established under section 404 of the CWA for discharges of dredge and fill materials to waters of the United States, including requirements as they apply to wetlands. Similarly, the proposed rule does not affect decisions made at the local level on the need for enhanced protection of local water resources. As such, this proposed rulemaking would not curtail the ability of an appropriate environmental management agency (*e.g.*, State, Tribal or local government) from imposing specific discharge conditions on an oil and gas operator that would otherwise be exempted under today's proposed rule so long as these requirements are imposed pursuant to authority other than an EPA-approved NPDES program. For example, a State or tribe could choose, under its own authorities, to set limits or require that an operator meet certain discharge conditions in sensitive watersheds.

IV. Statutory and Executive Order 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. EPA has submitted this action to OMB for review. Changes made in response to OMB suggestions or recommendations will be documented in the public record.

B. Paperwork Reduction Act

This proposed rule would 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 are listed in 40 CFR part 9.

C. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA), 5 U.S.C. 601 *et seq.*, 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 today's final rule on small entities, small entity is defined as: (1) A small business based on Small Business Administration size standards; (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 today's proposed 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.

Today's proposed rule, by expanding the universe of oil and gas operations eligible for the NPDES permit exemption created by 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. We have therefore concluded that today's proposed 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), Public Law 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.

Today's proposed 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 proposed rule imposed no enforceable duty on any State, local or tribal governments or the private sector. Thus, today's proposed rule is not subject to the requirements of sections 202 and 205 of the 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 proposed rule does not have federalism implications. It would 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 proposed rule does not have any Tribal implications as specified in Executive Order 13175. It would 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. Thus, Executive Order 13175 does not apply to this rule. EPA specifically solicits additional comment on this proposed rule from tribal officials.

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 proposed 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 proposed 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, section 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 standard 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 proposed rulemaking does not involve technical standards. Therefore, EPA is not considering the use of any voluntary consensus standards.

List of Subjects in 40 CFR Part 122

Environmental protection, Administrative practice and procedure, Confidential business information, Hazardous substances, Reporting and

recordkeeping requirements, Water pollution control.

Dated: December 30, 2005.

Stephen L. Johnson,

Administrator.

For the reasons set forth in the preamble, Chapter I of Title 40 of the Code of Federal Regulations is proposed to be 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 § 122.26(c)(1)(iv).

(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 § 122.26(c)(1)(iii). Discharges of sediment from construction activities associated with oil and gas exploration, production, processing, or treatment operations, or transmission facilities are not subject to the provisions of § 122.26(c)(1)(iii)(C).

Note to § 122.26(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. E6–36 Filed 1–5–06; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[EPA–HQ–OPP–2005–0252; FRL–7755–6]

Iodomethane; Pesticide Chemical Not Requiring a Tolerance or an Exemption from Tolerance

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing to designate the use of the active ingredient, iodomethane as a non-food use pesticide when applied as a pre-plant soil fumigant for peppers, strawberries and tomatoes by adding an entry to 40 CFR 180.2020 noting the non-food use determination. This determination is based on the Agency's evaluation of data which indicates that residues of iodomethane (CH_3I) are quickly degraded or metabolized into non-toxic degradates and subsequently incorporated into natural plant constituents. The effect of this proposed designation is that EPA does not require that a tolerance or exemption from tolerance under section 408 of the Federal Food, Drug, and Cosmetic Act (FFDCA), 21 U.S.C. 346a, be established as a condition of registration of the pesticide under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. 136 *et. seq.*

DATES: Comments must be received on or before February 6, 2006.

ADDRESSES: Submit your comments, identified by docket identification (ID) number EPA–HQ–OPP–2005–0252, by one of the following methods:

- *Federal eRulemaking Portal*: *http://www.regulations.gov/*. Follow the on-line instructions for submitting comments.
- *Agency Website*: EDOCKET, EPA's electronic public docket and comment system was replaced on November 25, 2005 by an enhanced federal-wide electronic docket management and comment system located at *http://www.regulations.gov/*. Follow the on-line instructions.
- *E-mail*: Comments may be sent by e-mail to *opp-docket@epa.gov*, Attention: Docket ID Number EPA–HQ–OPP–2005–0252.
- *Mail*: Public Information and Records Integrity Branch (PIRIB) (7502C), Office of Pesticide Programs (OPP), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001, Attention: Docket ID Number EPA–HQ–OPP–2005–0252.
- *Hand Delivery*: Public Information and Records Integrity Branch (PIRIB), Office of Pesticide Programs (OPP), Environmental Protection Agency, Rm. 119, Crystal Mall #2, 1801 S. Bell St., Arlington, VA, Attention: Docket ID Number EPA–HQ–OPP–2005–0252. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to docket ID number EPA–HQ–OPP–2005–0252. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *http://www.epa.gov/edocket/*, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through EDOCKET, regulations.gov, or e-mail. The EPA EDOCKET and the regulations.gov websites are ''anonymous access'' systems, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through EDOCKET or regulations.gov, your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD ROM you submit. If EPA cannot read your comment due to