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**To: Tricia Beaver, COGCC  
From: Ken Wonstolen, COGA  
Date: 9/20/05**

**Re: Rulemaking Proposal**

Statement of Basis and Purpose

In light of recent federal enactment into law of a provision<sup>1</sup> clarifying that the oil and gas exemption from stormwater discharge permitting extends to “construction activities” related to oil and gas operations, it is the purpose of the proposed amendment to expand and clarify the Commission’s current regulatory provisions requiring operators to employ measures designed to “minimize erosion.” Stormwater-related erosion and uncontrolled discharges of sediment into water bodies represent potentially significant adverse environmental impacts.

The statutory basis for this rule is found at CRS 34-60-106(2)(d), wherein the Commission is authorized to regulate “oil and gas operations so as to prevent and mitigate significant adverse environmental impacts on any air, *water, soil, or biological resource ...*” (emphasis added).

Regulatory Proposal

Amend Rule 1002.e by adding additional material, to read:

1002.e. **Surface disturbance minimization; stormwater management.** In order to reasonably minimize land disturbances and facilitate future reclamation, well sites, production facilities, *gathering pipelines* and access roads shall be located, constructed and maintained so as to reasonably control dust, minimize erosion, alteration of natural features and removal of surface materials. *Best management practices to minimize erosion and offsite sedimentation by controlling stormwater runoff shall be implemented. These practices will vary with site specific conditions, such as slope, vegetative cover and proximity to water bodies, and may include silt fencing, straw bales, plant buffers, rock filter dikes, slope roughening, mulch and other measures designed to reduce erosion and minimize the transport of soil from disturbed areas.*

*[new material in italics]*

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<sup>1</sup> Energy Policy Act of 2005, Section 323.

## EXHIBIT 2

### COLORADO OIL & GAS ASSOCIATION (“COGA”) AND COLORADO PETROLEUM ASSOCIATION (“CPA”) PROPOSAL

Revise subsections 61.3(2) and 61.4(3) as follows:

#### **61.3(2) APPLICABILITY – STORMWATER**

- (c) The Division may not require a permit for discharges of stormwater 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 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. 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.

#### **61.4(3) APPLICATION REQUIREMENTS FOR STORMWATER DISCHARGES**

- (a) Time to Apply.

~~(xv) — The permit application deadlines set forth in this section 61.4(3)(a) notwithstanding, permit applications for stormwater discharges associated with small construction activity at oil and gas exploration, production, processing, and treatment operations or transmission facilities need not be submitted until June 30, 2005.~~

## PROPOSED

### **61. STATEMENT OF BASIS, SPECIFIC STATUTORY AUTHORITY, AND PURPOSE – JANUARY 2006 RULEMAKING HEARING**

The provisions of sections 25-8-202(1)(d) and (i) and 25-8-501 to -504, C.R.S., provide the specific statutory authority for adoption of these revisions to Regulation 61. The Commission also adopted, in compliance with sections 25-4-103(4) and 25-8-202(8)(a), C.R.S., the following statement of basis and purpose.

#### **BASIS AND PURPOSE**

##### **Purpose of the proposed amendments**

The proposed amendments will bring Colorado’s stormwater permit program into conformance with the Federal Water Pollution Control Act (33 U.S.C. §§ 1251 *et seq.*) (the “Federal Act”), from which the State’s permit program is completely derived. The amendments expressly exclude the construction phase of activities at oil and gas sites from the requirement to obtain a stormwater discharge permit, whether such sites would otherwise be subject to the “Phase 1” (five acres or larger) or “Phase 2” (one-to-five acres) construction activity permitting requirements. Accordingly, all existing stormwater discharge

permits for oil and gas sites would be rescinded. COGA and CPA do not request a refund of previously-paid permit fees.

### **Basis of the proposed revision**

Section 402(l)(2) of the Federal Act conditionally exempts from the NPDES stormwater permit requirements of the Federal Act all “oil and gas exploration, production, processing, or treatment operations or transmission facilities.” The newly-enacted federal Energy Policy Act of 2005 (the “Energy Law”) contains a provision (“Amendment”) defining “oil and gas exploration, production, processing, or treatment operations or transmission facilities” as follows:

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.*

Energy Policy Act of 2005, Section 323. OIL AND GAS EXPLORATION AND PRODUCTION DEFINED (emphasis added). Because this definition comprises oil and gas *construction* activities, such activities are now expressly exempt under Section 402(l)(2) from the stormwater discharge permit requirements of the Federal Act.

Because the Federal Act exempts oil and gas construction activities from the stormwater permit requirements of Section 402, all of the provisions of Colorado’s stormwater permit program that require, or have been interpreted to require, stormwater permits for oil and gas construction activities are in direct conflict with the Federal Act and, as a consequence, are in direct violation of State law and the Commission’s own regulations.

For example, section 61.1(1)(a) of the Colorado Discharge Permit System Regulations provides: “These regulations are promulgated in implementation of the Colorado Water Quality Control Act as amended, and in particular sections 25-8-501 through 505, C.R.S., as amended and are designed to be *in conformity with* that act and the Federal Clean Water Act ....” (emphasis added). Because the Federal Act excludes oil and gas construction activities from stormwater permit requirements, the provisions of the State’s program that include oil and gas construction activities in the stormwater permit program are not in “conformity” with the Federal Act.

Moreover, under section 61.3(2)(c), the Water Quality Control Division (“Division”) “may not require a permit for discharges of stormwater runoff from. . . oil and gas exploration, production, processing, or treatment operations or transmission facilities. . .” Since construction activities are included within the rubric of exempt oil and gas activities, the Division cannot require a permit for such activities without violating section 61.3(2)(c).

Finally, the Colorado Water Quality Control Act provides: “The commission shall maintain a program which *does not conflict* with the provisions of the federal act ....” C.R.S. § 25-8-202(6) (emphasis added). Again, because the Federal Act expressly includes oil and gas construction activities in the stormwater permit exemption for oil and gas operations, all of the provisions of Colorado’s program that require, or have been interpreted to require, stormwater permits for oil and gas construction activities are in direct conflict with the Federal Act and are, therefore, prohibited under section 25-8-202(6).

Colorado law recognizes that there is a conflict between federal law and state law when the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. *See Middleton v. Hartman*, 45 P.3d 721 (Colo. 2002), citing *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm’n*, 461 U.S. 190, 204 (U.S., 1983): “Even where Congress has not entirely displaced state regulation in a specific area, state law is pre-empted to the extent that *it actually conflicts with federal law*. Such a conflict arises when ‘compliance with both federal and state

regulations is a physical impossibility,' . . . or where state law 'stands as an *obstacle to the accomplishment and execution of the full purposes and objectives of Congress*. . . ." (emphasis added).

Congress' manifest purpose in adopting Section 402(l)(2) of the Federal Act, and in amending it with the Energy Bill, was to remove entirely from regulation under the NPDES permit program uncontaminated stormwater discharges from oil and gas field activities. This is consistent with Congress' recognition that oil and gas sites and operations possess unique aspects, notably including the existence of state agencies entirely devoted to regulation of the entire range of such operations.\* Colorado's current requirement of stormwater permits for oil and gas construction activities stands in the way of this Congressional purpose and objective.

The Commission will bring the Colorado stormwater permit program into conformance with the referenced federal and state statutory provisions by adopting the revisions to Regulation No. 61 proposed by COGA and CPA.

### **Additional information**

Other parties to this rulemaking might recommend that the Commission maintain the applicability of the stormwater permit program to oil and gas construction activities under the authority of CRS 25-8-202(8)(a):

The commission may adopt rules more stringent than corresponding enforceable federal requirements only if it is demonstrated at a public hearing, and the commission finds, based on sound scientific or technical evidence in the record, that state rules more stringent than the *corresponding federal requirements* are necessary to protect the public health, beneficial use of water, or the environment of the state.

(Emphasis added). Any such recommendation must be rejected. This provision does not authorize the Commission to ignore its mandate to "maintain a program that does not conflict" with federal law. The provision is only applicable if there are "corresponding federal requirements" for the activity in question. No such corresponding federal requirements exist with respect to oil and gas construction activities. To the contrary, they are expressly prohibited. Accordingly, this statute provides no authority whatsoever for the Commission to maintain a stormwater permit requirement for oil and gas construction activities.

The Colorado Water Quality Control Act provides that, as a general rule, the Commission may not require permits, or otherwise regulate activities subject to the jurisdiction of the Colorado Oil & Gas Conservation Commission (COGCC). CRS 25-8-202(7)(b)(II). To the extent that the Commission believes that the COGCC rules relating to oil and gas site location, construction, maintenance and prevention of erosion (*see* COGCC Rules 1002c, 1002d, 1002e, 1002f & 1003b) are inadequate with respect to managing stormwater runoff and preventing stream sedimentation, it should engage in a joint process with the COGCC to develop and promulgate "best management practices" related to compliance with these rules. COGA and CPA indicate their willingness to participate in that process if the Commission adopts this suggestion.

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\*Note that Congress has incorporated similar exclusions into other regulatory programs such as the exploration and production waste exemption under RCRA, the petroleum exclusion under CERCLA, and the "non-aggregation" provision of the Clean Air Act.