



**TESTIMONY OF**  
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**SUBMITTED TO THE**  
**HOUSE COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM**

**ON**  
**HEARING ON OIL AND GAS DEVELOPMENT: EXEMPTIONS IN**  
**HEALTH AND ENVIRONMENTAL PROTECTIONS**

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Mr. Chairman and Distinguished Members of the Committee on Oversight and Government Reform, I appreciate the opportunity to appear today to give you the views of Trout Unlimited (“TU”) on “Oil and Gas Development Exemptions in Health and Environmental Protections” under the Federal Water Pollution Control Act, better known as the Clean Water Act (“CWA”).

My name is Ken Neubecker. I am a resident of Colorado, and I have been actively involved with Trout Unlimited at both the State and local level for 14 years. In this capacity I have been very involved with a number of State issues regarding water supply and water quality. I have and currently participate in the Colorado River Headwaters Forum and am the Environmental Representative to the Colorado River Basin Roundtable, which is a part of the statewide Inter-Basin Compact process. I was also closely involved with the work to require oil and gas industry compliance with storm water discharge permitting regulations through the Colorado Water Quality Control Commission in 2005 and 2006.

The CWA regulates discharge of sediments from point-source storm water runoff events through its National Pollutant Discharge Elimination System (“NPDES”). The Energy Policy Act of 2005 exempted oil and gas-related construction activities from the NPDES program. This means that during construction of roads, well pads, pipelines, compressor stations, and associated facilities, the discharge of massive amounts of sediments into our nation’s streams, rivers, and lakes goes unregulated under federal pollution laws. TU has serious concerns with this exemption because of the considerable impacts of sediments on public health and the environment.

Sportsmen in the West, in particular, are adversely affected by this, and other exemptions, from federal pollution laws. Important populations of fish (including highly vulnerable cutthroat trout), big game, and bird species are already stressed due to the rapid pace of mineral development and resulting habitat destruction and fragmentation. Clean water is essential to the health and survival of these animals. TU, in conjunction with the National Wildlife Federation and the Theodore Roosevelt Conservation Partnership, has developed the Sportsmen’s Public Lands Energy Agenda, which identifies sportsmen’s concerns with current energy policies and offers solutions for consideration by Congress. One specific recommendation contained in the Sportsmen’s Energy Agenda, on behalf of the millions of sportsmen represented by these groups, is that Congress should overturn the CWA exemptions of the Energy Policy Act of 2005 and require energy companies to comply with the construction storm water discharge permitting provisions of in the CWA.

TU is the nation’s largest coldwater fisheries conservation group dedicated to the protection and restoration of our nation’s trout and salmon resources and the watersheds that sustain them. TU has over 150,000 members in 400 chapters in 38 states. Our members generally are trout and salmon anglers who give back to the waters they love by voluntarily contributing substantial amounts of their personal time and resources to fisheries habitat protection and restoration efforts. The average TU chapter donates 1,000

hours of volunteer time annually. Members' time is often donated to partnership projects with state and federal fisheries and water quality agencies designed to restore fish habitat in streams and rivers of vital interest to our members in their local areas.

I am here to share today TU's concerns with the current storm water discharge permit exemptions for the oil and gas industry. In doing so, I would also like to share my first-hand experience the State of Colorado's implementation of state-specific regulations necessary to fill-in the federal regulatory gap. I will briefly summarize the storm water discharge exemption, highlight known impacts to public health, the environment, and sportsmen arising from unregulated discharge of sediments from oil and gas sites, and explain the regulations put in place by the State of Colorado.

#### Brief History of the Clean Water Act Exemption:

Since 1987, storm water discharges from most oil and gas operations have been exempt from NPDES permitting requirements.<sup>1</sup> In 1990, the Environmental Protection Agency implemented regulations requiring storm water discharge permits for discharges associated with construction activities that disturb five acres or more (known as the "Phase I" regulations).<sup>2</sup> The Phase I regulations provided no exemption for oil and gas construction sites. In 1999, the EPA adopted storm water regulations for additional activities, including construction activities that affect between one and five acres (known as the "Phase II" regulations).<sup>3</sup> Like the Phase I regulations, the EPA did not include an exemption for oil and gas-related construction activities in the Phase II regulations.

In 2003, after becoming aware that close to 30,000 oil and gas sites annually could be affected by the Phase II regulations (i.e. would involve construction activities affecting between one and five acres), the EPA deferred implementation of the Phase II regulations as applicable to oil and gas construction sites until 2005.<sup>4</sup> EPA extended this deferral again until 2006.<sup>5</sup> The EPA did not, however, defer applicability of the Phase I

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<sup>1</sup> See Federal Water Pollution Control Act, 33 U.S.C. § 1342(1)(2).

<sup>2</sup> See *National Pollutant Discharge Elimination System--Regulations for Revision of the Water Pollution Control Program Addressing Storm Water Discharges* 55 Fed. Reg. 47990 (Nov. 16, 1990).

<sup>3</sup> See *National Pollutant Discharge Elimination System--Regulations for Revision of the Water Pollution Control Program Addressing Storm Water Discharges* 64 Fed. Reg. 68721 (Dec. 8, 1999).

<sup>4</sup> *Modification of National Pollutant Discharge Elimination System (NPDES) Permit Deadline for Storm Water Discharges for Oil and Gas Construction Activity That Disturbs One to Five Acres of Land*, 68 Fed. Reg. 11325 (March 10, 2003).

<sup>5</sup> *Extension of National Pollutant Discharge Elimination System (NPDES) Permit Deadline for Storm Water Discharges for Oil and Gas Activity That Disturbs One to Five Acres*, 70 Fed. Reg. 11560 (March 9, 2005).

regulations to the oil and gas industry, meaning that construction disturbances of five acres or more had always been subject to the construction storm water discharge permitting requirements. While the EPA's deferral of the Phase II regulations was still pending, the Energy Policy Act of 2005 specifically exempted all oil and gas-related construction activities from NPDES permit requirements, regardless of the amount of acreage disturbed.<sup>6</sup> Under this exemption, only sediment that comes in contact with reportable quantities of hazardous substances or oil is subject to NPDES permitting.<sup>7</sup>

The adverse impacts from discharge of sediment are well-documented, and they are significant, including impacts to public health, water quality, and aquatic life, as well as social and economic costs to communities affected by sediment discharge. TU's concerns are particularly relevant in light of the explosive pace of oil and gas exploration and development in the arid West. According to existing Bureau of Land Management planning documents, over 118,000 new wells are expected to be drilled in Colorado, Montana, New Mexico, Utah, and Wyoming in the next 15 to 20 years. Miles of new roads and pipelines will be constructed as part of this development. Yet storm water runoff from none of these activities will be regulated by the federal government.

#### The Adverse Effects of the Exemption

Impacts from sediment runoff and deposition associated with oil and gas-related activities can arise from initial road construction, site and well-pad construction, and pipeline installation. Further, although the impacts associated with construction may appear to be short-term, sediment erosion from construction sites can continue at harmful levels well after the initial ground disturbance is completed.<sup>8</sup> In the West, short but intense storm events often occur and can be very destructive and erosive forces during the time that site disturbance from construction is happening.

The EPA recognizes that "[s]tormwater runoff from construction activities can have a significant impact on water quality. As stormwater flows over a construction site, it picks up pollutants like sediment, debris, and chemicals. Polluted stormwater runoff can harm or kill fish and other wildlife. Sedimentation can destroy aquatic habitat and high

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<sup>6</sup> Energy Policy Act of 2005, Pub.L. 109-58, § 323 (Aug. 8, 2005).

<sup>7</sup> 40 C.F.R. § 122.26(c)(1)(iii).

<sup>8</sup> *See id.*

volumes of runoff can cause stream bank erosion.”<sup>9</sup> In 1998, the EPA reported that “siltation is the largest cause of impaired water quality in rivers.”<sup>10</sup>

Suspended sediment in streams causes increased turbidity, causing drinking water to have poor appearance and taste unless treated. The burden for treating sediment-polluted water falls on individual communities or water suppliers, which incur costs for settlement ponds, filtration, or chemical treatment.<sup>11</sup> Moreover the presence of sediments can cause the equipment used for treatment to become clogged or to wear out rapidly.

In addition, other industrial water users – who are not exempted from EPA’s storm water discharge permitting requirements – are negatively affected by sedimentation. For example, sediment can clog cooling water systems at power plants and other large industrial facilities.<sup>12</sup> Sediments fill irrigation ditches and clog irrigation water diversion structures.

Sediment discharge also affects the public’s ability to enjoy water recreational activities. For example, turbidity may contribute to boating, swimming, and diving accidents by obscuring submerged hazards.<sup>13</sup> Sediment pollution may also decrease the quality of fishing experience by displacing fish, reducing fish population numbers, and decreasing opportunities to catch fish.<sup>14</sup>

Sediment in a stream can be extremely damaging, both to the aquatic and riparian life and habitats and to the local communities. According to a 1999 EPA report, suspended sediments also impair the ability of young fish to emerge from their eggs, reduce light penetration, clog the gills of fish and aquatic invertebrates, and reduce spawning and juvenile fish survival.<sup>15</sup> In slower moving waters where sediment is deposited, aquatic

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<sup>9</sup> U.S. Environmental Protection Agency, *Stormwater Discharges from Construction Activity: Overview* (Dec. 1999); available at: [http://cfpub1.epa.gov/npdes/stormwater/const.cfm?program\\_id=6](http://cfpub1.epa.gov/npdes/stormwater/const.cfm?program_id=6).

<sup>10</sup> *National Pollutant Discharge Elimination System – Regulations for Revision of the Water Pollution Control Program Addressing Storm Water Discharges*, 64 Fed. Reg. 68722, 68724 (Dec. 8, 1999).

<sup>11</sup> Science Applications International Corp. *Review of Sediment Impacts from Construction Sites*, submitted to Western Resource Advocates, p.4 (Nov. 26, 2005).

<sup>12</sup> *See id.* at 5.

<sup>13</sup> *See id.* at 5.

<sup>14</sup> *See id.* at 4.

<sup>15</sup> U.S. Environmental Protection Agency, *Protocol for Developing Sediment TMDLs*, at Table 3-1, EPA-841-B-99-004 (1999) (available at [www.epa.gov/owow/tmdl/sediment/pdf/sediment.pdf](http://www.epa.gov/owow/tmdl/sediment/pdf/sediment.pdf))

insects upon which fish and other organisms feed are smothered. The gravel bars fish need for spawning are buried. The eggs and developing fry in the gravel are lost. Much of the development occurs in small tributary drainages, some of which are among the last refuge of the vulnerable populations of native cutthroat trout. Sediments also cause more rapid filling of small impoundments (which create the need for costly dredging), and reduction of aesthetic values.<sup>16</sup> Hydrocarbons have a strong affinity for sediments and will tend to adsorb to sediment particles that eventually settle to the bottom of the stream or lakes, where they may persist for long periods of time.<sup>17</sup> These impacts are occurring throughout the West, which is home to vulnerable populations of sensitive and endangered species, including several species of cutthroat trout.

Big game, bird species, and other non-game species also can be adversely affected by the presence of high levels of sediments in water. These animals are already stressed due to the rapid pace of mineral development and resulting habitat destruction and fragmentation.

As these examples demonstrate, storm water runoff of sediments into our streams, rivers and lakes causes a wide array of negative – and costly – impacts to public health, the environment, and users of water resources for recreational, industrial, or agricultural purposes. Despite the clear evidence of these impacts, though, the oil and gas industry remains exempt from compliance with the very federal pollution law aimed at protecting the public and the environment. Because of the federal government’s exemption of this industry from federal pollution prevention laws, individual western states and their resident are left with the social and economic cost of dealing with the impacts.

#### Colorado-Specific Regulation of Storm Water Discharge

In Colorado, the Colorado Water Quality Control Commission (the “Commission”) adopted regulations mirroring the EPA’s Phase I and Phase II construction storm water regulations. After the EPA initially deferred application of its Phase II regulations to the oil and gas industry in 2003, the Commission likewise deferred application of the state-based regulations. When the EPA again deferred application of the permitting rules to the oil and gas industry in March 2005, however, Colorado Trout Unlimited and other organizations appealed to the Commission to have the Colorado regulations enforced, arguing that implementation of the state-based rules was necessary to protect public health and water quality. The Commission agreed, rejecting continued deferral of the regulations. The Colorado Oil and Gas Association and Colorado Petroleum Association sued the Commission, challenging the decision to implement Phase II regulations to oil and gas construction sites of one to five acres. While this suit was pending, the Energy Policy Act of 2005 exempted oil and gas construction sites between one and five acres from the federal NPDES program.

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<sup>16</sup> Science Applications International Corp. *Review of Sediment Impacts from Construction Sites*, submitted to Western Resource Advocates, p.3 (Nov. 26, 2005).

<sup>17</sup> *See id.* at 4.

In the spirit of “good government” the Commission held a second hearing in January 2006 regarding implementation of the state-based regulations in light of the Energy Policy Act exemption. Faced with overwhelming evidence and outcry by the public, the Commission unanimously decided to continue regulation of oil and gas-related construction sites between one and five acres. The Commission had the full support of over 50 Colorado counties, cities, water conservation and conservancy districts, organizations and elected officials, including Congressman John Salazar, in whose district a large proportion of oil and gas construction and development activity is occurring, and Senator Ken Salazar.

Colorado and the Intermountain West is dry country. Most of the landscape is sparsely vegetated and the soils are composed largely of highly erodeable sedimentary material derived from the native shales, sandstones and evaporates that dominate the western surface geology. These soils are open and exposed to the frequent torrential rain storms common to the region. Native erosion and sedimentation is, and always has been, perhaps the biggest single water pollution and quality problem in the west. Flash flooding from these storm events is common and the waters bring down tremendous amounts of sediment and debris. Uncontrolled activities by man only exacerbate this situation.

Because of extensive, expensive and pervasive problems related to sediment and uncontrolled storm water discharge in the West, it came as no real surprise to me that the Commission refused to go along with the EPA’s deferral – and then Congress’s outright exemption – of the oil and gas industry from stringent and mandatory storm water discharge control regulations. The EPA itself has stated that “until passage of the Energy Policy Act of 2005, EPA had taken the position that storm water discharges from oil and gas construction activities were not eligible for the NPDES permit exemption in CWA section 402(1)(2).”<sup>18</sup> In fact, prior to the Energy Policy Act exemption, oil and gas-related construction activities affecting five acres or more were always subject to storm water discharge permitting requirements.

Nearly all land developers in Colorado and the West are required to comply with the CWA storm water discharge regulations – and for good reason. The fact that the oil and gas industry is not boggles the mind. Over the past few years this industry has become the largest single developer in the West, by far. Well pads, roads, pipelines, compression and pumping stations, man camps and all of the other related infrastructure cover enormous regions of Colorado, Utah, Montana, Wyoming and New Mexico like a vast spider web. Thousands of acres of recently disturbed lands lie open and exposed to storm events. Many are creased with eroded gullies and tons of sediment have washed into the nearby stream channels and rivers.

TU supports responsible development of our nation’s minerals, which includes protection of water resources. Uniform regulation of oil and gas construction activities throughout the West must be implemented. Federal pollution laws are in place to protect public health and the environment, and the federal government’s continued exemption of the oil

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<sup>18</sup> 71 Fed. Reg. 33628, 33630 (June 12, 2006).

and gas industry from these regulations – regulations under which all other land developers must comply -- is simply unconscionable. Congress should overturn the CWA exemptions of the Energy Policy Act of 2005 and require energy companies to comply with the construction storm water discharge permitting requirements of in the CWA.

On behalf of Trout Unlimited, thank you for the opportunity to provide this testimony.