

March 14, 2007

Thomas C. Jackson
TEL +1 202.639-7710
FAX +1 202.585-1009
thomas.jackson@bakerbotts.com

VIA EMAIL AND REGULAR MAIL

Information Quality Guidelines Staff
Mail Code 28221T
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

RE: Request for Reconsideration of EPA's Response to NAHB's Request for Correction: EPA's "Storm Water Enforcement and Compliance: Construction" Presentation (RFC # 06004)

Dear Sir or Madam:

On behalf of the National Association of Home Builders ("NAHB"), I hereby submit this Request for Reconsideration ("RFR") pursuant to the Office of Management and Budget ("OMB") *Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies* ("OMB Guidelines")¹ and the U.S. Environmental Protection Agency ("EPA" or the "Agency") *Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by the Environmental Protection Agency* ("EPA Guidelines").² NAHB submits this RFR to appeal and seek modification of EPA's December 15, 2006 response to NAHB's Request for Correction ("RFC"), dated February 3, 2006. A copy of the RFC is attached as Tab A and a copy of EPA's response is attached at Tab B. The RFC sought correction of legally and factually incorrect information regarding the need for operators of construction sites to obtain permits for "potential discharges" of storm water under Section 402(p) of the Clean Water Act ("CWA"), 33 U.S.C. § 1342(p). NAHB requests in this RFR that EPA reconsider its response to NAHB's RFC, take corrective actions that are necessary to mitigate the adverse effects of the incorrect information recently removed from EPA's Web site, and prevent ongoing dissemination of the incorrect information from other sources.

NAHB is a Washington, DC-based trade association representing more than 235,000 members involved in home building, remodeling, multi-family construction, property management, subcontracting, design, housing finance, building product manufacturing and other aspects of residential and light commercial construction. Known as "the voice of the housing industry," NAHB is affiliated with more than 800 state and local home builder associations around the country. NAHB's builder members will construct about 80 percent of the more than

¹ 67 Fed Reg. 8542, 8460 (February 22, 2002) ("OMB Guidelines").

² 67 Fed. Reg. 63657 (October 15, 2002) ("EPA Guidelines").

1.56 million new housing units projected for 2007, making housing one of the largest engines of economic growth in the country.

Summary of NAHB's RFC, EPA's Response, and this RFR

In its RFC, NAHB identified legally and factually incorrect information contained in Slide 37 of EPA's presentation entitled *Storm Water Enforcement and Compliance: Construction* ("Storm Water Presentation"). Specifically, Slide 37 of the Storm Water Presentation characterized as a "fact" the statement that builders are required under Section 402(p) to obtain permits for "potential discharges" of storm water from their construction sites. NAHB explained that this information was incorrect and misleading, and failed to conform to the standards of quality, objectivity, utility, and integrity applicable to the dissemination of information by EPA found in the Information Quality Act³ ("IQA") and the OMB and EPA Guidelines implementing the IQA. NAHB demonstrated that this false and misleading information had been disseminated within the meaning of the EPA and OMB Guidelines because the Storm Water Presentation was disseminated to the public, including NAHB members, during public seminars and workshops, and on EPA's "Wet Weather Discharges Reference Materials" Web site. NAHB further demonstrated that the Association and its members were "affected persons." NAHB indicated that the Storm Water Presentation adversely affected the Association and its members because the false and misleading information in the Storm Water Presentation would foreseeably lead builders to expend resources seeking and obtaining storm water permits where they were not legally obligated to do so. Thus, NAHB was entitled to submit the RFC on behalf of its members. NAHB requested that the Agency take a number of corrective actions to halt the dissemination of the false and misleading information and to address the effects of such dissemination.

In its December 15, 2006 response to the RFC, the Agency failed to acknowledge that storm water permit coverage is not required for potential discharges of storm water from construction sites but decided to remove the Storm Water Presentation from its Web site because Slide 37 "characterizes a legal interpretation as 'fact.'" EPA also indicated that it does not plan to post a revised Storm Water Presentation on its Web site, but reserved the right to do so.

At the same time, the Agency declined to undertake any of the corrective actions requested by NAHB in its RFC that would address the adverse impacts of EPA's dissemination of false and misleading information. Among other things, EPA failed to respond to NAHB's request that the Agency provide clarification of the storm water permitting requirements and review and identify other sources disseminating the same incorrect information regarding purported CWA permit requirements for "potential discharges" of storm water from construction sites. NAHB has confirmed that the Agency continues to disseminate the same legally and factually incorrect information by virtue of the continued posting on EPA's Web site of certain documents identified in the RFC that contain erroneous and misleading statements similar to those in the Storm Water Presentation.⁴ EPA provided no reason or justification in its response

³ Public Law 106-554, § 1(a)(3) [Title V § 515], 114 Stat. 2763 (2000), *reprinted* at 44 U.S.C. § 3516, note (hereinafter "IQA, § 515").

⁴ *See, e.g., Does Your Construction Site Need a Stormwater Permit? A Construction Site Operator's Guide to EPA's Stormwater Permit Program* ("Operator's Guide"), available at

for its apparent decision not to undertake corrective actions that would mitigate the adverse impact of EPA's dissemination of the incorrect storm water permitting information.

In short, EPA's mere removal of the Storm Water Presentation from its Web site - without acknowledgement or clarification of the incorrect information and without taking any affirmative corrective measures to mitigate the effects of its dissemination of incorrect information or ensure that it was not continuing to disseminate the same information in other forms - falls short of the standard in the IQA to ensure and maximize the quality, objectivity, utility and integrity of information.⁵ Thus, as described below, EPA must take corrective actions that are necessary to mitigate the adverse effects of the legally and factually incorrect information disseminated in the Storm Water Presentation and halt the ongoing dissemination of the same incorrect information in other sources.

The Request for Reconsideration Is Authorized by Federal Guidelines

Under the EPA Guidelines, NAHB is authorized to seek reconsideration of EPA's response to the RFC concerning the dissemination of incorrect information purporting to require NAHB members and other builders to obtain storm water permits for "potential discharges" of storm water from construction sites.⁶ NAHB properly submitted a RFC as described in the EPA Guidelines,⁷ setting forth in detail the nature and scope of the incorrect information, the manner in which the information failed to comply with the IQA and the OMB and EPA Guidelines, and corrective actions that would benefit NAHB and its members. As set forth below, NAHB believes that EPA's response to the RFC is inadequate and does not comply with the OMB Guidelines or the EPA Guidelines and that a reconsideration of the Agency's response is warranted.

EPA Has Failed to Acknowledge That the Information Being Disseminated Was and Is Incorrect and Misleading

In its RFC, NAHB discussed at some length the critical inaccuracies in the Storm Water Presentation's statement that operators of construction sites must obtain NPDES storm water permit coverage for potential discharges of storm water from construction sites, a statement that was characterized in the Presentation as "fact." As set forth in the RFC, this statement is inconsistent with the plain language of the Clean Water Act and its implementing regulations, which require NPDES permits for discharges of pollutants, not "potential discharges." The RFC indicated that this conclusion was confirmed by the U.S. Court of Appeals for the Second Circuit in *Waterkeeper Alliance, Inc. v. EPA*.⁸ In holding that EPA's regulatory jurisdiction extends only to the actual discharge of a pollutant and that any attempt by

http://www.epa.gov/npdes/pubs/sw_cgp_brochure.pdf; see also EPA's *NPDES General Permit for Storm Water Discharges from Construction Activities – Fact Sheet* at 4 (modified January 21, 2005) ("*Storm Water Permit Fact Sheet*"), available at http://www.epa.gov/npdes/pubs/cgp2003_fs.pdf.

⁵ IQA, § 515(b)(2).

⁶ EPA Guidelines, § 8.6, p. 34.

⁷ EPA Guidelines, § 8, p.30.

⁸ 399 F.3d 486 (2d Cir. 2005).

EPA to regulate point sources absent an actual discharge exceeds EPA's statutory authority, the Second Circuit stated that:

unless there is a "discharge of any pollutant," there is no violation of the Act, and point sources are, accordingly, neither statutorily obligated to comply with EPA regulations for point source discharges, nor are they statutorily obligated to seek or obtain an NPDES permit. Congress left little room for doubt about the meaning of the term "discharge of any pollutant." The Act expressly defines the term to mean "(A) any addition of any pollutant to navigable waters from any point source, [or] (B) any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft." 33 U.S.C. § 1362(12). *Thus, in the absence of an actual addition of any pollutant to navigable waters from any point [source], there is no point source discharge, no statutory violation, no statutory obligation of point sources to comply with EPA regulations for point source discharges, and no statutory obligation of point sources to seek or obtain an NPDES permit in the first instance.*⁹

In its response to the RFC, EPA failed to acknowledge that the statement in the Storm Water Presentation regarding the alleged need to obtain permits for potential discharges of storm water is inaccurate. The Agency's response indicated that EPA elected to remove the Storm Water Presentation from its Web site because the statement regarding the need to obtain permit coverage for potential discharges of storm water was characterized as fact rather than EPA's legal interpretation. However, EPA failed to acknowledge that its legal position is not supported by the courts and that the Clean Water Act simply does not require permits for potential discharges. This conclusion has recently been further affirmed by the U.S. District Court for the Northern District of California in *Environmental Protection Information Center v. Pacific Lumber Co.*¹⁰ In that case, the court refused to impose a blanket duty on a timber products company to apply for storm water permit coverage in connection with its silvicultural activities. Noting the "strong language" of the Second Circuit in *Waterkeeper Alliance*, the court found that a site operator is required to obtain storm water permit coverage only where there is an actual addition of a pollutant to waters of the United States.¹¹

The effects of EPA's refusal to acknowledge the inaccuracy of the statement in the Storm Water Presentation are reflected in the fact that EPA continues to convey essentially the same erroneous message to construction site operators through other means. The most egregious example is found in EPA's *Storm Water Permit Fact Sheet*, which states that "[a]ny construction activity that will . . . disturb one or more acres and has the *potential* to have a discharge of stormwater to a water of the United States must either have a permit OR have

⁹ 399 F.3d at 504-05 (emphasis added).

¹⁰ 2007 WL 43654 (N.D. Cal. Jan. 8, 2007).

¹¹ *Id.* at *16.

qualified for a waiver.”¹² Thus, EPA continues to disseminate the same inaccurate information, and characterize its position as a fact, even though it has removed the Storm Water Presentation from its Web site. In short, the Agency’s failure to acknowledge the erroneous nature of the information in the Storm Water Presentation has resulted in EPA’s continued failure to comply with the standards of quality, objectivity, utility and integrity under the OMB Guidelines and the EPA Guidelines.

**Maximizing Quality of Information Includes
Mitigating the Adverse Effects of Past Dissemination and
Ensuring No Ongoing Dissemination of Incorrect Information**

EPA’s response to the RFC does not comply with the OMB Guidelines and the EPA Guidelines for a second major reason, *i.e.*, the only step taken in response to the RFC by the Agency – removal of the Storm Water Presentation from EPA’s Web site – is wholly inadequate to address the information quality deficiencies identified in the RFC. As discussed further below, the Agency is required to take corrective measures that will maximize the quality of the information it has disseminated and bring EPA into compliance with the standards set forth in the IQA and in the OMB and EPA Guidelines.

As discussed in the RFC, the IQA requires that each federal agency issue guidelines “ensuring and maximizing the quality, objectivity, utility and integrity of information disseminated by the agency.”¹³ The EPA Guidelines state that the Agency “is dedicated to the collection, generation, and dissemination of high quality information” and that “ensuring the quality of information is a key objective . . .”¹⁴ Accordingly, and consistent with the IQA and OMB Guidelines, EPA Guidelines were issued to “ensure and maximize the quality, including objectivity, utility and integrity, of disseminated information.”¹⁵ “Quality” is a term that collectively refers to the *objectivity*, utility, and integrity of disseminated information. In order to meet the standards for “objectivity,” information that is being disseminated must be presented in “an accurate, clear, complete, and unbiased manner.”¹⁶ “Objectivity” also requires information to be presented “within a proper context.”¹⁷ In addition, information that is disseminated must, as a matter of substance, be accurate, reliable, and unbiased.¹⁸ The term “utility” refers to the usefulness of the information to its intended users, including the public, and more important, requires an agency to consider the uses of information from the perspective of the public.¹⁹ “Utility” also encompasses the transparency of information. When the transparency of information is relevant for assessing its usefulness, transparency must be addressed in determining the utility of information.

¹² At 4 (emphasis added).

¹³ IQA, § 515(b)(2).

¹⁴ EPA Guidelines, § 8.6, p. 34.

¹⁵ *Id.* at § 5.1, p. 15.

¹⁶ OMB Guidelines, 67 Fed. Reg. at 8459.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.* at § V.2, 67 Fed. Reg. at 8459.

The Agency's mere removal of the Storm Water Presentation conforms neither to the letter nor the spirit of the IQA and the EPA guidelines. In fact, the IQA and implementing guidelines adopted by both OMB and EPA require not only that "quality" standards be met, but that all federal agencies ensure that quality, objectivity, utility, and integrity be "maximized." "Maximize" means to make as great as possible.²⁰ As the courts have long made clear, the words of a statute must be given their ordinary or natural meaning.²¹ Thus, EPA is statutorily obligated to make the information it disseminates to the public as objective – *i.e.*, as accurate, reliable, clear and unbiased – and as useful as possible. This duty to maximize the quality of information is particularly important when EPA knows and in fact intends that the information in question will be relied on by members of the regulated community in making decisions regarding compliance with federal regulatory requirements. In this case, EPA presumably put the Storm Water Presentation together and posted it on the Agency's Web site for the express purpose of having builders seek storm water permit coverage for all construction sites disturbing more than one acre. Under these circumstances, EPA's duty to maximize the quality of information takes on added significance.

The Agency's response falls short of fulfilling this duty in at least two fundamental respects. First, simply removing the Storm Water Presentation from EPA's Web site does nothing to correct the misimpressions conveyed to builders and other members of the public who saw the Storm Water Presentation either on the Agency's Web site or in other forums before its removal and who may continue to act in reliance on the false and misleading information contained in the Presentation. The Storm Water Presentation was given directly to many builders through workshops and seminars focusing on storm water permitting requirements for construction sites, and was made readily available to the public at large through the Agency's Web site. Without some affirmative statement to those who are known to have viewed the Storm Water Presentation through seminars and to the members of the public who may have viewed the Presentation on the Web site acknowledging the erroneous and misleading nature of the information presented, operators of construction sites may continue to seek and obtain storm water permit coverage where such coverage is not legally required. Such operators will devote resources to meeting perceived legal requirements that do not in fact exist. Allowing such impacts to continue unabated can hardly be said to be consistent with the goal of maximizing the quality of information, particularly when the Agency could easily take steps to correct the misimpressions left by the Storm Water Presentation. Indeed, if "maximizing" the quality of information means anything it must mean letting affected members of the public know that information disseminated by the Agency was not objective so that members of the public will not continue to rely on it. Otherwise, EPA will continue to allow information that lacks objectivity, utility and integrity to be used by the public.

EPA's response to the RFC is also inadequate because, as noted above, the same erroneous information contained in the Storm Water Presentation continues to be disseminated by EPA by other means. While the RFC focused on Slide 37 of the Storm Water Presentation, the RFC identified other materials on EPA's Web site that conveyed the same or similar

²⁰ American Heritage Dictionary, Office Ed. at 514 (3d ed. 1994).

²¹ *Leocal v. Ashcroft*, 125 S. Ct. 377, 382 (2004); *Engine Mfrs. Ass'n v. South Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 252 (2004) (courts begin with the assumption that the ordinary meaning of statutory language accurately expresses legislative purpose).

misleading information. NAHB specifically requested that EPA review its Web site for such material and remove it. As discussed above, EPA has failed to take any action in this regard and such material continues to be disseminated. As with Slide 37, this information lacks quality, particularly objectivity and utility, and does not conform to the IQA and the OMB and EPA Guidelines. Like Slide 37, the incorrect information that continues to be disseminated is not substantively objective in its presentation because it fails to acknowledge contrary case law and displays a strong bias toward an incorrect EPA legal interpretation. Furthermore, such information is not substantively objective in that it is untrue, displays a strong bias toward an incorrect EPA legal interpretation, is inaccurate and unclear, and fails to consider the usefulness of that information regarding legal obligations for permit coverage as required by the CWA. Combined with the failure by the Agency to provide any acknowledgement or clarification of the Storm Water Presentation's removal, the continued dissemination of erroneous information may foreseeably lead NAHB and its members to unnecessary legal analysis and/or permitting of "potential discharges" at considerable expense. Such information is not useful to its intended audience and therefore lacks "utility." Thus, the Agency has not met the standard of *ensuring* and maximizing the quality of information and has ignored its own policy statement that "ensuring the quality of information is a key objective . . ." ²² Instead, allowing this information to be disseminated shows a minimum of effort on the Agency's part in response to the RFC.

In short, EPA has created a false impression and simply removing the Storm Water Presentation from the Web site represents, at best, a minimal effort on EPA's part, which did nothing to mitigate the adverse effects to persons that relied, and may continue to rely, on the erroneous information contained in that Presentation. Similarly, allowing the same legally and factually incorrect information to continue being disseminated from other sources represents a minimal effort at ensuring information quality. As a result, the Agency has not "maximized" the quality of information it disseminated. In this case, due to the nature of the erroneous information disseminated and its significance, ²³ "maximizing" the quality of the information must include the corrective actions set forth in the RFC and discussed further below.

Past and Ongoing Dissemination of Erroneous and Misleading Information Necessitates Corrective Action

In its RFC, NAHB set forth several corrective measures that it believes are necessary and consistent with the IQA. These corrective actions will ensure and maximize the quality of information disseminated by the Agency and mitigate the adverse effects caused by the dissemination of erroneous and misleading information purporting to require a CWA permit for "potential discharges" of storm water. As discussed above, merely removing the Storm Water Presentation from the Agency's web site is insufficient to maximize the quality of disseminated information and mitigate the adverse effects of erroneous information. Accordingly, NAHB respectfully requests that EPA take the following corrective actions to mitigate past and prevent future adverse effects and to ensure that all dissemination of the false and misleading information is stopped.

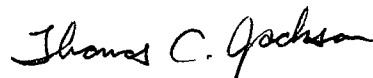
²² EPA Guidelines, § 4, p. 10.

²³ EPA Guidelines, § 8.7, p.35.

- EPA must post an acknowledgement and correction of the error in Slide 37 on the Wet Weather Discharges Reference Materials Web site in order to meet the standard for “objectivity,” *i.e.*, that information disseminated be accurate, clear, complete, and unbiased. NAHB suggests that the following statement be issued: “No permit is necessary for a potential discharge of storm water, and no person can be cited for failure to have a permit unless there is an actual discharge of pollutants to waters of the United States.”
- EPA must issue an acknowledgement and correction by mail or e-mail to all persons who attended seminars, workshops, or other public forums where the Storm Water Presentation was given. In particular, insofar as EPA, including any of its Regional Offices, has given the Storm Water Presentation directly to any NAHB local chapters, NAHB requests that EPA notify all such members to whom the Storm Water Presentation has been given, disclose the error, and provide an accurate replacement statement.
- EPA must refrain from making any further dissemination of information to the effect that the CWA requires an NPDES storm water permit for “potential discharges,” and must take steps to ensure that all future dissemination of information concerning NPDES storm water permit requirements for construction sites is free from bias, factually accurate, and not misleading.
- EPA must perform a full review of other guidance and policy documents disseminated to the public, including but not limited to those sources cited herein, discussing NPDES permits for storm water discharges associated with construction activities in order to determine whether similar false and misleading statements regarding the permitting of “potential discharges” are being disseminated by the Agency. Any such statements in disseminated information that do not satisfy the standard of quality found in the IQA and the OMB and EPA Guidelines should be removed or revised accordingly, consistent with Section 6 of the EPA Guidelines, EPA’s December 15, 2006 response to NAHB’s RFC, applicable law, and the holding in *Waterkeeper Alliance* and other applicable judicial decisions.

We believe that these necessary corrective actions will benefit NAHB, its members, and the public in general. NAHB looks forward to EPA’s response to this RFR.

Sincerely,



Thomas C. Jackson

TCJ/jmd

Enclosures

cc: Susan Asmus
Duane Desiderio
Tom Ward

TAB A



NAHB
NATIONAL ASSOCIATION
OF HOME BUILDERS



ADVOCACY GROUP

Regulatory and Housing Policy
Susan Asmus, SVP

February 3, 2006

Information Quality Guidelines Staff
Mail Code 2811R
U.S. Environmental Protection Agency
1200 Pennsylvania Ave., N.W.
Washington, D.C., 20460

Re: Request for Correction of Information in EPA's "Storm Water Enforcement and Compliance: Construction" Presentation

Dear Sir or Madam:

On behalf of the National Association of Home Builders ("NAHB"), I hereby submit this Request for Correction of Information ("Request") pursuant to the Office of Management and Budget ("OMB") *Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies* ("OMB Guidelines"),¹ and the U.S. Environmental Protection Agency ("EPA") *Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by the Environmental Protection Agency* ("EPA Guidelines").² As provided in the OMB and EPA Guidelines, NAHB respectfully requests that EPA correct certain information in the Agency's slide presentation, entitled *Storm Water Enforcement and Compliance: Construction* ("Storm Water Presentation"),³ where it falsely alleges as fact that a permit is required for a potential discharge of storm water from a construction site. This information is being disseminated to the public on the EPA's "Wet Weather Discharges Reference Materials" website, which was last updated June 16, 2005.⁴ The Storm Water Presentation is currently the first available link on EPA's Wet Weather Discharges Reference Materials website.

NAHB is a Washington, DC-based trade association representing more than 225,000 members involved in home building, remodeling, multi-family construction, property management, subcontracting, design, housing finance, building product manufacturing and other aspects of residential and light commercial construction. Known as "the voice of the housing industry," NAHB is affiliated with more than 800 state and local home builder associations around the country. NAHB's builder members will construct about 80 percent of the more than

¹ 67 Fed. Reg. 8542, 8460 (2002).

² 67 Fed. Reg. 63657 (2002).

³ <http://www.epa.gov/compliance/resources/publications/civil/programs/modelstormwaterpresentation-0605.pdf> slide 37. A copy of the Storm Water Presentation is attached hereto as Exhibit 1.

⁴ <http://www.epa.gov/compliance/resources/publications/civil/programs/wwrefmaterials.html>.

2 million new housing units projected for 2006, making housing one of the largest engines of economic growth in the country.

Summary of Request for Correction of Information

NAHB submits that EPA is disseminating incorrect and misleading information regarding the need for builders to obtain storm water permits under Section 402(p) of the Clean Water Act (“CWA”), 33 U.S.C. § 1342(p). As discussed further below, the Storm Water Presentation includes “information” disseminated by EPA on its website and through individual presentations to the regulated community (including NAHB members). Specifically, Slide 37 of the Presentation characterizes as a “fact” that builders must obtain storm water permits under Section 402(p) for “potential discharges” from their construction sites. This information is incorrect, misleading and fails to conform to the standards of quality, objectivity, utility, and integrity applicable to the dissemination of information by EPA as required by the Information Quality Act⁵ (“IQA”) and the OMB and EPA Guidelines implementing the IQA.⁶

As a result of the dissemination of Slide 37, erroneous information regarding the necessity to obtain a storm water permit for “potential discharges” of storm water has been and is being presented to NAHB’s members. The members have contacted and will contact NAHB staff for compliance advice as a result of the incorrect and misleading information in the Storm Water Presentation; will foreseeably rely on the Storm Water Presentation to obtain a CWA permit when they are not legally obliged to do so; and/or will invest further resources in ascertaining their actual obligations for CWA permit coverage under Section 402(p). In addition, NAHB’s mission in providing accurate and reliable compliance assistance to its members regarding their responsibilities to obtain CWA permits is affected because the Storm Water Presentation presents information that is directly contrary to the CWA as interpreted by the courts. As affected persons, NAHB and its members are entitled to seek correction of the information in the Storm Water Presentation through the procedures for administrative review authorized in the OMB Guidelines and prescribed in the EPA Guidelines. Correcting the erroneous information in the Storm Water Presentation, along with an acknowledgment by EPA that its previous dissemination was false and misleading, will benefit NAHB and its members by clarifying the circumstances under which builders are legally required to obtain CWA permits for construction activity. That clarity will enable builders and other members of public to know what the CWA demands of them so they may better conform to the law and plan their construction of housing with greater certainty.

We ask that EPA respond to this Request within 90 days, as EPA’s own Guidelines require.⁷

⁵ Public Law 106-554, § 1(a)(3) [Title V § 515], 114 Stat. 2763 (2000), *reprinted* at 44 U.S.C. § 3516, note (hereinafter “IQA, § 515”).

⁶ The IQA required the OMB to prepare guidelines implementing the IQA’s requirements, namely, to ensure and maximize the quality, objectivity, utility, and integrity of information disseminated by federal agencies. *Id.* at § 515(a). The OMB Guidelines require each federal agency to issue its own guidelines implementing the IQA and conforming to the OMB Guidelines. OMB Guidelines, § II.1, 67 Fed. Reg. at 8458.

⁷ EPA Guidelines, § 8.4, p. 31.

The Request for Correction is Authorized by Federal Guidelines

Under the IQA and the implementing guidelines, NAHB is authorized to seek correction of the statement in the Agency's Storm Water Presentation regarding the purported need for builders to obtain storm water permits for "potential discharges" of storm water. As discussed further below, this statement constitutes information that has been disseminated by EPA within the meaning of the IQA, and must be corrected through the administrative process established by the Agency pursuant to the IQA and the OMB Guidelines.⁸ Moreover, NAHB and its members have been and will be adversely affected by the dissemination of this information and therefore are entitled to seek correction of the information.

The statement in the Storm Water Presentation regarding the need for storm water permits certainly qualifies as "information." The EPA Guidelines define "information" as generally including any communication or representation of knowledge such as facts or data, in any medium or form.⁹ The Storm Water Presentation easily fits within this definition of "information." Indeed, as discussed below, the Storm Water Presentation itself sets forth as "fact" the statement that storm water permits are needed for potential discharges. Moreover, the EPA Guidelines state that "[i]nformation generally includes material that EPA disseminates from a website,"¹⁰ which would include the Storm Water Presentation.

Moreover, the statement at issue does not fit within the categories of items that are excluded from the EPA Guidelines' definition of "information." The EPA Guidelines state that an item is not considered information if it is an opinion—provided that EPA's presentation makes it clear that what is being offered is someone's opinion rather than fact or EPA's views.¹¹ However, no such qualification appears in the Presentation with respect to the potential discharge statement at issue. In addition, the EPA Guidelines claim an exemption from data quality requirements for "information of an ephemeral nature, such as press releases, fact sheets, press conferences, and similar communications"¹² The Storm Water Presentation is not "ephemeral" in nature as it remains posted and is thereby disseminated on EPA's Wet Weather Discharges Reference Materials website as part of a body of reference material made continuously available to the public and regulated community for purposes of assisting with compliance with federal storm water regulations. Information that has been offered to the public as a reference material for a period of at least six months can hardly be deemed ephemeral.

It is also clear that the statement at issue has been "disseminated" by the Agency. The OMB Guidelines define the term "dissemination" to mean "agency initiated or sponsored distribution of information to the public"¹³ Under the EPA Guidelines, EPA disseminates information if it "initiates or sponsors the distribution of information to the public."¹⁴ EPA initiates a distribution of information when it prepares the information and distributes it to support or represent EPA's viewpoint, or to formulate or support a regulation, guidance, or other

⁸ EPA Guidelines, § 8.1 *et seq.*

⁹ *Id.* at § 5.3, p. 15.

¹⁰ *Id.* at § 5.3, p. 15.

¹¹ *Id.* at § 5.4, p. 16.

¹² *Id.*

¹³ OMB Guidelines, § V.8, 67 Fed. Reg. at 8460.

¹⁴ EPA Guidelines, § 5.3, p. 15.

Agency decision or position.¹⁵ EPA itself prepared the Storm Water Presentation and initiated the distribution of that presentation on its Wet Weather Discharges Reference Materials website. Further, the Storm Water Presentation supports and represents EPA's viewpoint on storm water permitting obligations under the National Pollutant Discharge Elimination System ("NPDES") program.¹⁶ By appearing on EPA's Wet Weather Discharges Reference Materials website, the Storm Water Presentation was disseminated within the meaning of the OMB and EPA Guidelines because EPA initiated and sponsored the distribution of the Storm Water Presentation to the public.

Finally, NAHB is entitled to seek correction of the information in the Storm Water Presentation. The EPA Guidelines create administrative mechanisms pursuant to which "affected persons" may seek correction of information disseminated by the Agency.¹⁷ The erroneous information in the Storm Water Presentation adversely affects NAHB and its members because the information will foreseeably lead builders to obtain storm water permits (or coverage under a general permit) when they would not be legally obligated to do so, thereby costing builders time and money. Thus, NAHB and its members are adversely affected by EPA's misinformation in the Storm Water Presentation and would benefit by the correction of the erroneous information. As a result, NAHB is entitled to submit this Request for Correction of Information on behalf of its members.

Based on the foregoing, the Storm Water Presentation is information disseminated by EPA that is subject to the administrative appeal process available to affected persons in order to correct information that does not comply with the IQA, the OMB Guidelines, and the EPA Guidelines. As discussed more fully below, the information presented in the Storm Water Presentation is erroneous on a critical point: EPA incorrectly asserts that a permit is required if there is a "potential discharge" of storm water associated with construction activity.

The Storm Water Presentation Incorrectly States that a Permit is Required for a "Potential Discharge" of Storm Water

The Storm Water Presentation contains a critical statement that misrepresents the obligation of builders to obtain permits to control storm water run-off from construction sites. Under "Top 10 Myths: Storm Water Construction," Slide 37 states:

Myth # 2

- **Myth:** "I don't need a storm water permit because there won't be a discharge."
- **Fact:** You need a permit if there is a *potential discharge*.¹⁸

EPA's statement that a storm water permit is needed if there is a "potential discharge" is legally and factually incorrect and misleading to NAHB's members and the public. The statement is

¹⁵ *Id.*

¹⁶ See 40 C.F.R. §§ 122.21, 122.26 and 123.25.

¹⁷ EPA Guidelines, § 8.1, p. 30.

¹⁸ Storm Water Presentation at p. 37 (emphasis in original).

inconsistent with the plain language of the CWA and its implementing regulations. Section 402(p) of the Act specifies that a storm water permit is required “for discharges associated with industrial activity”¹⁹ The term “discharge” includes a “discharge of a pollutant, and a discharge of pollutants.”²⁰ The terms “discharge of a pollutant” and “discharge of pollutants” in turn mean “any addition of any pollutant to navigable waters from any point source”²¹ A “point source” is defined as “any discernable, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, [or] discrete fissure ... from which pollutants are or may be discharged”²² EPA’s regulations implementing the CWA likewise impose the duty to apply for an NPDES permit on any person who “discharges or proposes to discharge pollutants,” which the Agency’s regulations define as the addition of a pollutant or combination of pollutants to waters of the U.S. from a point source.²³ Thus, under the plain text of both the CWA and EPA regulations, the term “discharge of a pollutant” requires the *actual* “addition” of a pollutant, and the mere potential for a pollutant to be discharged at some point in time does *not* trigger a duty to apply for an NPDES permit.

This conclusion is confirmed by a recent decision of the U.S. Court of Appeals for the Second Circuit, which held that the “Clean Water Act gives the EPA jurisdiction to regulate and control only *actual* discharges—not potential discharges, and certainly not point sources themselves.”²⁴ The court in *Waterkeeper Alliance* confronted the issue of whether EPA could require operators of concentrated animal feeding operations (“CAFOs”) to either obtain an NPDES permit or affirmatively prove that they have no potential to discharge pollutants.²⁵ In holding that EPA’s regulatory jurisdiction extends only to the actual discharge of a pollutant and that any attempt by EPA to regulate point sources absent an actual discharge exceeds EPA’s statutory authority, the Second Circuit stated:

... unless there is a “discharge of any pollutant,” there is no violation of the Act, and point sources are, accordingly, neither statutorily obligated to comply with EPA regulations for point source discharges, nor are they statutorily obligated to seek or obtain an NPDES permit. Congress left little room for doubt about the meaning of the term “discharge of any pollutant.” The Act expressly defines the term to mean “(A) any addition of any pollutant to navigable waters from any point source, [or] (B) any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft.” 33 U.S.C. § 1362(12). *Thus, in the absence of an actual addition of any pollutant to navigable waters from any point, there is no point source discharge, no statutory violation, no statutory obligation of point sources to comply with EPA regulations for point source discharges, and no statutory obligation of point sources to seek or obtain an NPDES permit in the first instance.*²⁶

¹⁹ 33 U.S.C. § 1342(p)(3)(A).

²⁰ *Id.* at § 1362(16).

²¹ *Id.* at § 1362(12).

²² *Id.* at § 1362(14).

²³ 40 C.F.R. §§ 122.2, 122.21(a).

²⁴ *Waterkeeper Alliance, Inc. v. EPA*, 399 F.3d 486, 505 (2nd Cir. 2005) (“*Waterkeeper Alliance*”) (emphasis in original) citing *Natural Resources Defense Council v. EPA*, 859 F.2d 156, 170 (D.C. Cir. 1988) (“*NRDC*”).

²⁵ *Waterkeeper Alliance*, 399 F.3d at 505.

²⁶ 399 F.3d at 504 (emphasis added).

EPA's position with respect to the need for storm water permits for construction activities, as disseminated in Slide 37, suffers from the same legal defect. Construction activities cannot be regulated unless they cause an actual discharge of pollutants from a point source.²⁷ While EPA may believe that builders should err on the side of obtaining storm water permits if there is any potential for a discharge of pollutants, that is a matter of EPA policy and not a CWA requirement. The Storm Water Presentation fails to distinguish between the legal requirement to obtain an NPDES permit for an actual discharge resulting from construction activities, and a prudential decision to obtain a storm water permit if there may be a "potential" to discharge. Thus, the statement in the Storm Water Presentation regarding the need for a storm water permit for potential discharges is false and misleading because authorization for *potential* storm water discharges from construction activities is not a legal obligation under the Clean Water Act.²⁸

EPA's Misleading Statement Fails to Satisfy OMB's Standard for Pre-dissemination Review and Information "Quality"

The inclusion of "Myth #2" and its erroneous statement in the Storm Water Presentation is contrary to the standards established by OMB and EPA concerning the quality of information disseminated by an agency. The OMB Guidelines require agencies to "take appropriate steps to incorporate information quality criteria into agency information dissemination practices."²⁹ "Quality" is defined as a term encompassing "utility," "objectivity," and "integrity."³⁰ The Storm Water Presentation, in particular "Myth #2," lacks both objectivity and utility and therefore violates the information quality standards adopted by OMB and EPA.

First, misleading builders with the incorrect statement that they need a storm water permit for a "potential discharge" violates OMB and EPA Guidelines concerning the "objectivity" Standard. In order to meet the standards for "objectivity," information that is being disseminated must be presented in "an accurate, clear, complete, and unbiased manner."³¹ "Objectivity" also requires information to be presented "within a proper context."³² In addition, information that is disseminated must, as a matter of substance, be accurate, reliable, and unbiased.³³

²⁷ EPA has recognized that there are some circumstances in which the potential for discharges of pollutants to waters of the U.S. as a result of construction activities is minimal. For example, EPA has stated that construction activities may achieve no actual discharge of storm water where the topography is such that there is no possibility that storm water could leave the site and where storm water is captured onsite and allowed to evaporate, soak into the ground, or is used for irrigation. See EPA's *NPDES General Permit for Storm Water Discharges from Construction Activities – Fact Sheet* at 4 (modified January 21, 2005) (hereinafter "*Fact Sheet*").

²⁸ EPA may not rely on the "may be discharged" language in the definition of "point source" to support a requirement that a storm water permit be obtained for a potential discharge of storm water. This approach was rejected by the court in *Waterkeeper Alliance*, where the court stated that there is no portion of the Clean Water Act that gives "operational effect" to the "may be discharged" language and held that "while point sources are statutorily defined to include potential dischargers, effluent limitations can, pursuant to 33 U.S.C. § 1311(e), be applied only to 'point sources of discharge of pollutants,' i.e., those point sources that are *actually* discharging." 399 F.3d at 505 (emphasis in original).

²⁹ OMB Guidelines, § II.1, 67 Fed. Reg. at 8458.

³⁰ *Id.* at § V.1, 67 Fed. Reg. at 8459.

³¹ *Id.*

³² *Id.*

³³ *Id.*

The statement in EPA's Storm Water Presentation regarding "Myth #2" fails to satisfy the OMB Guidelines' objectivity requirements in several respects. The information is not substantively objective because it is untrue, as demonstrated above. In addition, "Myth #2" lacks substantive objectivity because it displays a strong bias to the extent it conveys as "fact" a position that actually represents the Agency's view that all builders should obtain coverage under a storm water permit even where they may not be legally obligated to do so.

Similarly, the Storm Water Presentation lacks objectivity because "Myth #2" is not presented in an accurate, clear, complete and unbiased manner. As the Second Circuit held in *Waterkeeper Alliance*, it is simply *not* a fact that builders need a storm water permit if there is a potential discharge of storm water from a construction site, yet EPA presents this information literally labeled as "fact." This alone renders the information unobjective. Even if EPA were to disagree with the holding in *Waterkeeper Alliance* (and other holdings from the D.C. Circuit), "Myth #2" still lacks objectivity. The "Myth #2" slide contains no acknowledgment that *Waterkeeper Alliance* rejects EPA's position that CWA permit coverage is required for "potential" discharges of storm water. Thus, EPA's failure to inform the public that case law from the federal appellate courts directly contradicts the "fact" set forth in the Myth #2 slide violates the IQA's objectivity standard. Finally, if the statement in "Myth #2" is intended to convey EPA's position that builders should obtain coverage under a storm water permit as a good, preventive business measure if there is any potential for a discharge associated with construction activities (a reading that plain text of Slide 37 does not support), the statement would again lack objectivity because the information would not be presented in an accurate, clear, complete and unbiased manner. Thus, under any set of circumstances, "Myth #2" lacks objectivity and thus fails the information quality requirements adopted by OMB and EPA.

"Myth #2" also lacks utility. The term "utility" refers to the usefulness of the information to its intended users, including the public, and more important, requires an agency to consider the uses of information from the perspective of the public.³⁴ EPA's dissemination of Slide 37 solely reflects the agency's policy position concerning potential discharges, and fails to consider the usefulness of that information regarding legal obligations for permit coverage as required by the CWA. As a result, EPA's dissemination leads NAHB's members to believe that they must obtain CWA permits when in fact, they have no legal obligation to do so and impedes the function of NAHB staff in providing accurate and reliable compliance advice to its members. Information with such consequences could hardly be deemed to have utility for its intended users. Correction of the erroneous information in "Myth # 2" in the Storm Water Presentation would bring the necessary "utility" to the information, and allow builders to evaluate properly whether an actual discharge will occur in order to determine if they must obtain a storm water permit for their construction activities.

In addition, the OMB Guidelines require that information disseminated by federal agencies after October 1, 2002 must undergo internal, pre-dissemination quality review before presentation to the public.³⁵ Pre-dissemination review ensures that agencies treat information quality "as integral to every step of an agency's development of information ..."³⁶ There is no

³⁴ *Id.* at § V.2, 67 Fed. Reg. at 8459.

³⁵ OMB Guidelines, § III.2, 67 Fed. Reg. at 8459.

³⁶ *Id.*

indication that EPA subjected the Storm Water Presentation to a pre-dissemination review. If EPA had conducted the required pre-dissemination review, it would have been aware of the Second Circuit decision in *Waterkeeper Alliance*, which expressly rejected a reading of the CWA allowing EPA to regulate point sources absent any actual discharge. Such awareness would presumably have led the Agency to modify the Presentation in an appropriate manner.

Finally, through the dissemination of “Myth #2,” EPA has not served its mission to “enhance citizen understanding and involvement and provide[] people with tools to protect their families and their communities.”³⁷ The EPA Guidelines provide that the Agency has a responsibility to ensure that the public has an accurate understanding of “regulatory expectations” under the statutory program to protect the environment, and that “[i]nformation quality is a key component of every statute that governs our mission.”³⁸ EPA has misinformed the public insofar as Myth #2 creates “regulatory expectations,” beyond the scope of Congress’s intent, that landowners have a legal obligation to obtain CWA permits for “potential” discharges of storm water. Moreover, EPA has not informed the public of the economic impacts of its regulatory position. Requiring home builders and developers to obtain permits where they have no such obligation will result in added delays and expenses. Increased costs associated with obtaining unnecessary permits will drive-up the price of housing, have a negative impact on the wallet of the ultimate consumer, and obstruct NAHB’s mission in providing affordable housing to our Nation’s citizens.

Corrective Action is Justified by the False and Misleading Nature of the Information

The Storm Water Presentation disseminates false and misleading information to the public. As a result, the Storm Water Presentation, specifically “Myth #2,” fails to comply with EPA’s own IQA-based guidelines, which set forth the manner in which EPA ensures and maximizes the quality of disseminated information.³⁹ Moreover, EPA’s dissemination of information in the Storm Water Presentation is contrary to the basic standards of quality for the dissemination of information by federal agencies as set forth in the OMB Guidelines.

Where, as here, an agency disseminates information that does not comply with the applicable guidelines, affected persons may seek and obtain timely correction of the information.⁴⁰ Clearly NAHB’s members and staff are being misinformed by the information in the Storm Water Presentation because it represents EPA’s biased policy and not a factual statement or settled legal requirement under the Clean Water Act or EPA’s implementing regulations. Accordingly, NAHB is entitled to seek immediate correction of this erroneous and misleading information.

³⁷ EPA Guidelines, § 2.1, p. 2.

³⁸ *Id.*

³⁹ EPA Guidelines, § 6.1, p. 19.

⁴⁰ *Id.* at § 8.2, p. 30.

NAHB's Request for Correction

NAHB respectfully requests that EPA take the following corrective actions:

- “Myth #2” in the Storm Water Presentation, as it presently exists, must be removed from EPA’s website.
- EPA must bring “Myth #2” in the Storm Water Presentation in line with the OMB Guidelines standard for “objectivity,” *i.e.*, that the information be accurate, clear, complete, and unbiased. Therefore, EPA must issue a correct statement on the subject of Slide 37 and potential discharges, to wit: No permit is necessary for a potential discharge, and no one can be cited for failure to have a permit unless there is an actual discharge.
- EPA must post an acknowledgement and correction of the error in Slide 37, either in a revised Storm Water Presentation or on the Wet Weather Discharges Reference Materials website in place of the presentation itself. If EPA prefers to continue the dissemination of the Storm Water Presentation, it must contain an acknowledgement that refers to the removal of “Myth #2” and briefly discusses the reason for its removal and that includes a complete correction.
- EPA must issue an acknowledgement and correction by mail or e-mail to all persons who attended seminars, workshops, or other public presentations where the Storm Water Presentation was given. In particular, insofar as EPA, including any of its Regional Offices, has given the presentation directly to any NAHB local chapters, NAHB requests that EPA notify all such members to whom the Storm Water Presentation has been given, disclose the error, and provide an accurate replacement statement.
- EPA must refrain from making any further dissemination of information that the CWA requires an NPDES permit for “potential” discharges, and take steps to ensure that all future disseminations are free from bias, factually accurate, and not misleading in presentation.
- EPA must perform a full review of other storm water construction guidance to determine the existence of similar false and misleading statements regarding permit obligations for a “potential discharge,” that do not satisfy the standard of quality found in the IQA and the OMB Guidelines.⁴¹ Should similarly erroneous information be discovered, NAHB requests that EPA remove or revise such information accordingly, consistent with Section 6 of the EPA Guidelines.

⁴¹ See, e.g., *Does Your Construction Site Need a Stormwater Permit? A Construction Site Operator's Guide to EPA's Stormwater Permit Program*, available at www.epa.gov/NPDES/pubs/sw_cgp_brochure.pdf; *Fact Sheet* at 4.

We believe that these corrections will benefit NAHB, its members, and the public in general. NAHB looks forward to discussions with EPA regarding the corrective action requested herein. If you have any questions or would like to discuss this Request, please contact me at (202) 266-8538, or Duane Desiderio, Staff Vice President for Legal Affairs, at (202) 266-8146.

Sincerely,



Susan Asmus

Attachments

cc: Benjamin Gumbles, Esq. EPA Assistant Administrator, Office of Water
Ann Klee, Esq., EPA General Counsel
Granta Nakayama, Esq., EPA Assistant Administrator, Office of Enforcement and
Compliance Assurance
Thomas Jackson, Baker Botts LLP

TAB B



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

DEC 15 2006

OFFICE OF
ENFORCEMENT AND
COMPLIANCE ASSURANCE

Ms. Susan Asmus
Senior Vice President
National Association of Home Builders
1201 15th Street, NW
Washington, DC 20005-2800

RE: Information Quality Act Request for Correction: EPA's "*Storm Water Enforcement and Compliance: Construction*" Presentation (RFC # 06004)

Dear Ms. Asmus:

This letter responds to your February 3, 2006, letter submitted under the United States Environmental Protection Agency's *Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by the Environmental Protection Agency* (EPA IQG). In the letter, the National Association of Home Builders (NAHB) requests correction of information in EPA's "*Storm Water Enforcement and Compliance: Construction*" Presentation (Presentation). Specifically, the letter addresses the statement on Slide 37 of the Presentation that builders must obtain permits under the storm water construction program "if there is a potential discharge." Your letter requests that EPA remove the slide and take several other "corrective actions."

After reviewing Slide 37, EPA decided to remove the Presentation from its Web site. Because this slide characterizes a legal interpretation as "fact," the presentation was removed in September 2006. At this time, EPA does not plan to post a revised Presentation on its Web site. However, if the Agency decides at a later date to revise this Presentation and post it, we will notify you.


If you are dissatisfied with this response, you may submit a "Request for Reconsideration" (RFR). EPA requests that any such RFR be submitted within 90 days of the date of this letter. If you chose to submit a RFR, please send a written request to the EPA Information Quality Guidelines Processing Staff via mail (Information Quality Guidelines Staff, Mail Code 2811R, U.S. EPA, 1200 Pennsylvania Ave., N.W., Washington, D.C. 20460), electronic mail (quality@epa.gov), or fax (202-565-2441). If you submit a RFR, please reference RFC #06004. Additional information about how to submit a RFR is listed on the EPA Information Quality Guidelines Web site (www.epa.gov/quality/informationguidelines).

Internet Address (URL) • <http://www.epa.gov>

Recycled/Recyclable • Printed with Vegetable Oil Based Inks on Recycled Paper (Minimum 50% Postconsumer content)

We look forward to continuing our numerous efforts to improve communication, coordination and collaboration between our two organizations to strengthen compliance with our storm water regulations and to ensure environmental protection.

Sincerely,


Walker B. Smith, Director
Office of Civil Enforcement