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

JUN - 6 2008

OFFICE OF
ENVIRONMENTAL INFORMATION

Mr. Thomas C. Jackson
Baker Botts, LLP
The Warner
1299 Pennsylvania Avenue, NW
Washington, DC 20004-2400

RE: Information Quality Act Request for Request for Reconsideration (RFR #06004A) of EPA's response to the National Association of Home Builders (NAHB) Request for Correction: EPA's "*Storm Water Enforcement and Compliance: Construction*" Presentation (RFC #06004)

Dear Mr. Jackson:

This letter is in response to the National Association of Home Builders (NAHB) Request for Reconsideration (RFR), which was received by the United States Environmental Protection Agency (EPA) on March 14, 2007. The NAHB RFR requests that EPA reconsider its response to Request for Correction (RFC) #06004, take corrective actions to address the removal of the *Storm Water Enforcement and Compliance: Construction* Presentation ("Storm Water Presentation") from its Web site, prevent the dissemination of similar information from other EPA sources, and conduct a full review of other guidance and policy documents. In response to the NAHB RFC, EPA removed the Storm Water Presentation from its Wet Weather Discharges Reference Materials Web site, because Slide 37 characterized a legal interpretation as "fact." In its RFR, NAHB states the removal of the Storm Water Presentation without an acknowledgement or clarification of the information is not consistent with the Information Quality Act (IQA), the Office of Management and Budget (OMB) *Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies,*[1] and EPA's *Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by the Environmental Protection Agency*[2] (EPA's IQG).

EPA convened an executive panel to determine the Agency's response to the RFR. The members of the executive panel consisted of the Science Advisor, the Assistant Administrator for the Office of Solid Waste and Emergency Response, and me, the EPA Chief Information Officer. Having reviewed the RFC, Agency's RFC response and RFR, the panel concludes the Agency's removal of the Storm Water Presentation was an appropriate response and consistent with the

[1] 67 Fed. Reg. 8452 (February 22, 2002). http://www.whitehouse.gov/omb/fedreg/reproducible2.pdf
[2] 67 Fed. Reg. 63657 (October 15, 2002).
http://www.epa.gov/quailty/informationguidelines/documents/EPA_InfoQualityGuidelines.pdf

EPA IQG. The legal issue raised by NAHB is under the Agency's consideration, and will be addressed in the context of other administrative processes.

Given that the Presentation has been available online, it is difficult for EPA to determine who has viewed it. Consequently, it is not feasible for the Agency to inform all persons who may have viewed the Storm Water Presentation, of its removal from the EPA Wet Weather Discharges Reference Materials Web site. If your constituents are interested in the rationale for the Agency's decision to remove the Presentation from the Web site, they may view the EPA NAHB RFC response on the EPA IQG Web Site - http://epa.gov/quality/informationguidelines/documents/06004-response.pdf .

The panel discussed NAHB's concern about the impact of the Court of Appeals decision in *Waterkeeper Alliance v. EPA* [3] on the Agency's legal interpretation that a National Pollutant Discharge Elimination System (NPDES) permit is needed when there is a "potential discharge" of storm water. In March 2007, pursuant to the Administrative Procedure Act (APA), the American Farm Bureau Federation and NAHB submitted a petition for rulemaking[4], which asks the Agency to clarify whether owners and operators need to apply for a NPDES permit when there is a "potential discharge." EPA will consider the implications of *Waterkeeper* on this issue in the course of reviewing NAHB's petition for rulemaking, and will respond to NAHB's challenge to the Agency's legal interpretation when it responds to that petition. Given EPA's ongoing commitments to other Agency actions, we will respond to the petition as soon as practicable.

In light of EPA's ongoing review of the issue, the Agency has revised the storm water brochure identified in the RFR.[5] As revised, the brochure no longer addresses the issue of whether the potential for discharge triggers the obligation to obtain an NPDES permit. First, we changed the title of the brochure to "How Do I Get Storm Water Permit Coverage for My Construction Site?". Second, we removed language in the brochure that discusses when permit coverage is or is not required. A revised brochure is posted on the Web site - http://www.epa.gov/npdes/pubs/sw_cgp_brochure.pdf. You may wish to inform NAHB's local chapters of this change.

As part of the process to issue the construction general permit in 2010, EPA plans to address the issue of whether the language in the current permit and fact sheet needs to be modified to address the issue of potential discharges, and will include any revised language in the new permit and fact sheet. The reissued permit language and fact sheet will be available for public comment through the Federal Register process, consistent with EPA's procedures for publicly noticing all NPDES permits and accompanying fact sheets. This process will include a thorough consideration of public comments. A copy of the revised permit and fact sheet will be available on our NPDES website.

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[3] *Waterkeeper Alliance, Inc. v. EPA,* 399 F.3d 486, 505 (2nd Cir. 2005)

[4] American Farm Bureau Federation and National Association of Home Builders Petition for Rulemaking before the United States Environmental Protection Agency, March 12, 2007.

[5] See *Does Your Construction Site Need a Stormwater Permit? A Construction Site Operator's Guide to EPA's Stormwater Permit Program*, available at http://www.epa.gov/npdes/pubs/sw_cgp_brochure.pdf;

EPA values input from the public on the quality of information it produces and embraces opportunities for improvement. EPA is committed to promoting transparency in our process and providing the public with information that is objective and useful. If you have any questions about our decision on this RFR, please do not hesitate to contact Reggie Cheatham, Director, Quality Staff, at (202) 564-6830.

Sincerely,

Molly A. O'Neill
Assistant Administrator
and Chief Information Officer

cc: George Gray, Assistant Administrator
Susan Bodine, Assistant Administrator
Michael H. Shapiro, Deputy Assistant Administrator
Tony Guadagno, Acting Associate General Counsel, CCILO
Walker Smith, Director, Office of Civil Enforcement