Housing Finance and Regulatory Affairs
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Associate Administrator Dravis:

On behalf of the National Association of Home Builders (NAHB), I am pleased to submit the following recommendations regarding which EPA regulations, policies, guidance documents, and programs that impact the U.S. residential home building industry warrant consideration as the Agency formulates its response to E.O. 13777, "Enforcing the Regulatory Reform Agenda."

NAHB is a federation of more than 700 state and local associations representing more than 140,000 member firms nationwide. NAHB's members are involved in home building, remodeling, multifamily construction, land development, property management, and light commercial construction. Collectively, NAHB's members employ more than 1.26 million people and construct about 80 percent of all new housing units constructed within the U.S. each year. Due to the wide range of activities they conduct on a regular basis to house the nation's residents, NAHB members are often required to comply with various EPA mandates and/or opt to participate in voluntary programs and initiatives to meet their business goals. The number and breadth of these rules and initiatives, however, impose significant costs, delays, and other challenges that not only impact the ability of their businesses to thrive and grow, many also negatively affect housing affordability and stifle economic development. As such, NAHB is pleased to provide the following suggestions and is hopeful that the Administration's focus on regulatory reform and reducing burdens will provide meaningful relief for the industry.

Introduction

Reducing unnecessary regulatory burdens, promoting economic growth and job creation, and minimizing the impacts of government actions on small businesses are central tenets of President Trump's agenda. To effectuate these goals, President Trump released the Presidential Executive Order on Reducing Regulation and Controlling Regulatory Costs (Executive Order 13771) on January 30, 2017.[1] This Order, among other things, directs the agencies, for each new regulation issued, to identify at least two prior regulations to be modified or eliminated so that the net cost of the regulation is zero. Recognizing the challenges associated with this Order's implementation, on February 24, 2017, he signed Executive Order (E.O.) 13777, "Enforcing the Regulatory Reform Agenda," which provided additional guidance as to how the agencies are to "alleviate unnecessary regulatory burdens" on the American people.[2]

[1] 82 FR 9339 (February 3, 2017).
[2] 82 FR 12285 (March 1, 2017).

Section 3(a) of E.O. 13777 requires each federal agency to establish a "Regulatory Reform Task Force" that is charged with evaluating existing regulations and "making recommendations to the agency head regarding their repeal, replacement, or modification." The term "regulation" is defined under Section 4 of E.O. 13771 to include any rules, regulations, or policies that "establish an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or to describe the procedures or practice requirements of an agency."[3] As a result, "regulation" can be broadly interpreted to include regulations, policies, guidance documents, and even federal programs that prescribe procedures or practices that either EPA or regulated entities must follow to comply with agency requirements. Importantly, when evaluating existing regulations and making recommendations for repeal, replacement or modification, each federal agency is also directed to ensure their respective Regulatory Reform Task Forces, "seek input and other assistance, as permitted by law, from entities significantly affected by Federal regulations including State, local and tribal governments, small businesses, consumers, non-governmental organizations and trade associations."

Directing federal agencies to periodically review existing regulations for potential repeal or modification and asking for public input is not a new concept. The idea of presidentially-directed regulatory review was introduced by President Clinton in 1993 through Executive Order 12866 and most succeeding presidents have tweaked these provisions or added new ones to ensure systematic and periodic review of most regulations. In addition, Congress, under Section 610 of the Regulatory Review Act (RRA), requires all federal agencies to periodically review existing regulations. NAHB does not view these two retrospective review processes as redundant or duplicative. Rather, they underscore the importance both Congress and the Administration place on ensuring federal regulations, policies, and programs remain relevant, efficient, and accomplish their stated objectives, while imposing the least possible burdens upon the regulated community. Unfortunately, while compelling in concept, these efforts, to date, have resulted in arguably minimal impacts on the small businesses that feel the brunt of the regulatory bite.

President Trump's most recent initiatives recognize this problem and are intended, in part, to help get struggling industries back on their feet. In an effort to provide necessary relief to the residential construction industry, NAHB strongly urges the Administration to use this opportunity to make housing a priority. By focusing its retrospective review and oversight responsibilities for new rules on those policies that impact builders and developers, this Administration has an opportunity to create jobs and restore a broken segment of the economy. By examining the cumulative impacts and burdens placed by the myriad of EPA regulations – many of which are duplicative, overlapping, or contrary to one another – along with assessing their performance, NAHB is certain that the agency will find sufficient room for efficiencies and streamlining.

Regulatory Burdens on Residential Construction are Untenable

The stresses confronting the U.S. housing market, specifically those affecting the small businesses that comprise the vast majority of residential construction companies, are real and widespread, including an increasing tight labor market, lack of available financing for new construction projects, impacts of trade sanctions on lumber costs, declining housing production levels, and declined home values and their collective impact on remodeling activity. Furthermore, residential construction is one of the most heavily regulated industries in the country. In these economic times, the decrease in production, loss of jobs within the industry, and other factors point to the need to reduce the regulatory burden on this vital industry.

[3] E.O. 13771, "Reducing Regulations and Controlling Regulatory Costs" Section 4.

The majority of NAHB's members run small businesses that construct 10 or fewer homes each year and/or have fewer than 12 employees. Small businesses are the engine of growth for the U.S. economy. At the same time, they are disproportionately impacted by federal regulations, underscoring the need for, and importance of, conducting meaningful reform to reduce these onerous requirements. For example, residential construction is one of the few industries in which a government-issued permit is typically required for each unit of production. The rules do not stop there, as a constricting web of regulatory requirements affects every aspect of the land development and home building process, adding substantially to the cost of construction and preventing many families from becoming homeowners.

NAHB estimates that, on average, regulations imposed by government at all levels account for nearly 25 percent of the final price of a new single-family home built for sale.[4] The significant cost of regulations reflected in the final price of a new home has a very practical effect on housing affordability. According to NAHB research, approximately 14 million American households are priced out of the market for a new home by government regulations.[5] Given the outsized impact of regulations on the final price of a newly built single-family home, it is critically important that each existing regulation, whether found at the federal, state, or local level, actually addresses the problem it was created for, avoids duplication with identical or similar regulation, and is designed in a manner to impose the least possible burden on the regulated entities. Further, because the cumulative burdens associated with layers of regulations can be overwhelming, EPA is strongly urged to also be cognizant of the challenges that will continue to remain if the cumulative impacts from complying with regulations at all levels of government are not considered.

NAHB Recommended EPA Regulations for Repeal, Replacement or Modification

E.O. 13777 requires the agencies to gather input from a variety of sources and sets the baseline criteria that each Regulatory Reform Task Force is to consider when reviewing and making recommendations for repeal, replacement, or modification. Specifically, agencies are to attempt to identify existing federal regulations that:

i. Eliminate jobs or inhibit job creation;
ii. Are outdated, unnecessary, or ineffective;
iii. Impose costs that exceed benefits;
iv. Create a serious inconsistency or otherwise interfere with regulatory reform initiatives and policies;
v. Are inconsistent with requirements under the Data Quality Act of 2001, or rely on data, information, or methods that are not publicly available or that are insufficiently transparent to meet the standard of reproducibility; or
vi. Derive from or implement Executive Orders or other Presidential directives that have since been subsequently rescinded or substantially modified.

While E.O. 13777 provides criteria EPA's Regulatory Reform Task Force should use to evaluate existing regulations for possible repeal or reform, the E.O. is essentially silent on what factors EPA should consider when identifying specific existing regulations to be repealed or revised. A primary

[4] http://www.nahbclassic.org/generic.aspx?sectionID=734&genericContentID=250611&channelID=311&_ga=1.255452874.358516237.1489032231
[5] http://eyeonhousing.org/2016/05/14-million-households-priced-out-by-government-regulation/

concern for NAHB and other small businesses is how EPA will ensure all sectors of the economy and different sized firms i.e., large and small firms both benefit from E.O. 13777's call for regulatory relief.

While EPA could fulfill its obligations under E.O. 13777 by simply identifying a subset of federal regulations that cost the most and thereby focus EPA's deregulatory actions on those specific regulations, following such an approach would only benefit a few sectors of the economy (i.e., electric utilities or energy production). Furthermore, it is unclear under such an approach how other sectors of the economy, in particular the residential construction sector that is dominated by small businesses, would benefit. NAHB believes it is imperative for EPA to provide the public and the regulatory community with some indication of the criteria the Agency will use to identify federal regulations that will be addressed under the E.O. At a minimum, NAHB suggests the Agency should consider the following criteria when assessing existing regulations (including guidance documents, interpretive memoranda and other related actions) for potential deregulatory action:

- Impacts. What sector(s) of the economy are impacted; what types of businesses are impacted; how many entities are impacted (direct and indirect); and what is the nature of the impact(s)?
- Economics. What are the costs, benefits and cost/benefit ratio; who incurs the costs and reaps the benefits; how do costs impact small vs large entities?
- Need. Is the regulation required by statute; does the regulation confer authorization (such as a permit) that is needed for the lawful operation of certain businesses?
- Data & Technology. Is there new, publicly available information that would impact the underlying rule or the underlying assumptions; does new data impact the rule's achievability, efficacy, cost or value; does a change in technology impact costs or achievability?
- Redundancy. Are there similar regulations within any agency or at any level of government that address the same or similar issue(s); are those rules duplicative or inconsistent with one another?
- Other Rules. Do more current regulations surpass the need for an existing rule; can rules be combined to meet the same outcome?

Importantly, in contemplating any reforms NAHB strongly encourages EPA's Regulatory Reform Taskforce to group existing regulations by which industry sector or entity size must comply with the regulations. Such an approach not only helps to better promote regulatory relief across all sectors of the economy, but it also compels EPA's program offices to better understand, evaluate, and address cumulative impacts, as oftentimes it is not the costs and burdens of individual regulations that are problematic, but the additive nature of the rules, particularly as they apply to heavily regulated industries like residential construction. Similarly, because some regulatory actions are necessary to provide authorizations (i.e., federal permitting programs) to conduct daily business operations in compliance with the law, care must be taken to fully consider and avoid the unintended consequences that can result from rushed deregulatory action(s).

Consistent with the directives under E.O. 13777, NAHB submits the following thirteen (13) EPA regulations, policies, and programs for consideration by EPA's Regulatory Reform Task Force. NAHB's recommendations are divided into the following three categories: regulations; policies and guidance documents; and federal programs. Under each category, the comments provide a brief overview, followed by an explanation of the impact or benefit a particular "regulation" has on the home

building industry, along with references to prior public comment letters NAHB has submitted to EPA on the specific topic. Each entry concludes with a recommendation for repeal, replacement, modification, or preservation of an existing program.

Category A: EPA Regulations

1. Lead Renovation, Repair and Painting Rule (40 C.F.R. § 745)

Background

EPA's Lead Renovation, Repair and Painting (RRP) rule was designed to reduce exposure to lead-based paint (LBP) by ensuring contractors working in older homes do not inadvertently create a "lead hazard" by disturbing LBP during routine renovation, painting, or maintenance activities. The original rule, when first adopted in 2008, applied to all for-hire contractors working in pre-1978 housing stock unless appropriate testing determined that no LBP is present at levels regulated by the federal government in the work areas that are to be disturbed.[6] Importantly, the rule also included an "opt-out" provision that allowed homeowners to affirmatively opt-out of having the contractor follow the RRP rule if there were no pregnant women or children under six living in the house.

If LBP is present or presumed to be present, the RRP rule requires the contractors working in that home to have their firms certified by EPA or an EPA-authorized state and obtain and maintain proof of training in "lead safe work practices," and post-work cleaning and verification from an EPA-approved training provider. In addition, EPA's RRP rule requires contractors to document and maintain records demonstrating that they have distributed EPA's pre-work notification pamphlet, posted warning signs in all work areas, performed "lead safe work practices" and completed the post-work cleaning verification process.

Statement of the Problem

There are three key problems with the RRP rule that merit consideration by EPA in response to E.O. 13777. First, the universe of regulated buildings is too broad and compels renovators to follow the rule even if LBP is not present. Second, despite EPA's over-reliance in their analysis on a commercially available, reliable, affordable lead-test kit becoming available in year two of the program to determine whether or not LBP is present in a specific work area, such a test-kit still does not exist, rendering the rule's cost-benefit analyses moot. Third, EPA's most recent amendments to the RRP rule have created an unnecessarily complicated process for certified renovators to renew their certification and obtain the required training, which creates additional obstacles for small businesses.

Problem #1: Too Many Regulated Building Don't Contain LBP

Despite the specific and intentional limitations and flexibility regarding which structures were regulated by the 2008 rule, EPA has repeatedly expanded the scope of the rule to a point where its reach is hardly

[6] The Federal regulated level of lead-based paint is defined by HUD as "paint or other surface coatings that contain lead equal to or exceeding 1.0 milligram per square centimeter or 0.5 percent by weight or 5,000 parts per million (ppm) by weight." (24 CFR 35.110).

limited or flexible. Further, the lack of a reliable test kit has, by default, effectively subjected even more homes to the rule's provisions because it cannot be determined with sufficient certainty that they do not contain LBP at the regulated levels.

According to the U.S. Department of Housing and Urban Development (HUD), only 24 percent of homes built between 1960 and 1977 contain lead-based paint.[7] The fact that the use or sale of lead-based paint was banned in 1978 led EPA to use that timeframe as the cutoff date for target housing. Although EPA's 2008 rule was estimated to apply to 37.7 million structures, the actual number could have been reduced through the use of the opt-out provision, which allowed homeowners to affirmatively opt-out of the requirements of the RRP program if no children under six or pregnant women were living in the house that was under renovation. In 2010, EPA revised the rules to remove the opt-out. According to EPA's economic analysis for the 2010 amendment, eliminating the opt-out provision increased the number of pre-1978 structures regulated under the rule by approximately 40.2 million, effectively doubling the scope of the program.[8]

Furthermore, since no commercially available, reliable, or affordable lead-test kit capable of providing certified renovators with on-site results has come to market, the number of pre-1978 homes where EPA certified renovators are over-applying the RRP requirements (e.g., following the safe work practices and other protocols of the rule) has increased dramatically. Without a reliable test kit or workable field alternative, renovators working on pre-1978 homes or child-occupied facilities must either (i) assume LBP is present or (ii) use an available test kit that is prone to unreliable results. Both options can cause a renovator to apply lead safe work practices in buildings that do not present any actual LBP hazard. Using HUD's statistic, this means that when renovators assume that lead is present in these pre-1978 homes, it is likely that *76 percent of the time, renovators are applying the rule in a home never intended to be covered by the program*. This over-application imposes significant costs on renovators and homeowners and further erodes the rule's supposed benefits in stark contrast to the assumptions EPA made in its economic analysis for the 2010 rule. In that report, EPA assumed total program costs would be significantly reduced in the program's second year, from $507 million annually to $295 million annually due to the introduction of a reliable, affordable test kit. Absent said test kit, the numbers do not factor out, yet renovators and homeowners must still pay the costs.

Problem #2: An Accurate, EPA-Approved LBP Test Kit Does Not Exist

At the time EPA finalized the 2008 rule, even though no test kit met the requirements of the regulation, the agency felt confident that improved test kits would be commercially available by September 2010. As a result, EPA's economic analysis likewise assumed a qualifying test kit would become available in

[7] U.S. Department of Housing and Urban Development, *American Healthy Homes Survey: Lead and Arsenic Findings* (April 2011) at 14 (Table ES-1), available at http://portal.hud.gov/hudportal/documents/huddoc?id=AHHS_Report.pdf.
[8] *See* EPA, Economic and Policy Analysis Branch Economics, Exposure and Technology Division OPPPT, *Economic Analysis for the TSCA Lead Renovation, Repair, and Painting Program Opt-out and Recordkeeping Final Rule for Target Housing and Child Occupied Facilities* (April 2010) (2010 Amendment Economic Analysis) at ES 1-2 ("There are 78 million target housing units and [child occupied facilities] . . . The 2008 [RRP] rule applied to 37.7 million target housing units and 0.1 million public and commercial buildings. About 40.2 million target housing units would be added to the regulated universe due to the elimination of the opt-out provision.")

mid-2011.[9] It did not. In fact, to date, there is still no LBP test kit available that meets EPA's parameters. Absent a recognized test kit, renovators must assume LBP is present and, hence, apply lead-safe work practices. Conducting these practices and otherwise complying with the RRP rule requires time and resources – neither of which is accurately reflected in the economic analysis.

Although two testing methods (i.e., XRF testing and the collection of paint chip samples to be subsequently chemically analyzed by EPA accredited laboratories) were subsequently approved after the final RRP rule was promulgated, neither serves as an acceptable substitute for the reliable, affordable test kit the rule was predicated on. Furthermore, EPA evaluated both of these testing technologies during the development of the original RRP rule and dismissed them as infeasible and too expensive. In the case of the XRF, the cost of obtaining ($14,000 - $21,000 per XRF) and maintaining ($2,000 - $4,000 per year) the device rendered it impractical. While both are approved for use in lieu of the promised test kit, their costs and impracticality keep them from wide application.

Problem #3: The New Recertification and Training Requirements are Problematic

Although EPA's proposed revisions to the certified renovator requirements and new online training options would have streamlined, improved and facilitated more contractors becoming LBP certified, the agency put forth a final rule that is overly complex and confusing. The final rule contains two significant changes. First, EPA shortened the recertification period for certified renovators who take a course that does not have a hands-on component from five years to three years. Following this three-year period, the certified renovator who elects this option must take a recertification course with a hands-on component. Second, EPA established a separate path for renovators who elect to take a course with a hands-on component by providing them a recertification period of five years (instead of the three years for those taking a course that has no hands-on component). Thus, EPA altered the recertification program by setting up two separate recertification schedules – three years/five years or every five years – based solely on the format of one element of the refresher course.

The decision to unexpectedly add provisions and further complicate the final regulation by bifurcating the training process decreases the utility of the online training option and creates a disincentive for renovators to use it. In fact, according to EPA, the number of certified renovators nationally has dropped from approximately 550,000 in March of 2016 to approximately 248,000 in December 2016 after these changes took effect. This further illustrates how EPA's changes to the RRP rule are contributing to its inefficiencies. In EPA's economic analysis for the original RRP rule in 2008, for example, the agency noted that at least 373,968 certified renovators were needed to perform the estimated annual number of renovation activities in pre-1978 housing units.[10] If correct, the current situation leaves the nation nearly 125,000 certified renovators short of what is needed.

The amendment failed on multiple fronts. It did not achieve the sought after improvements in "the day-to-day function of these programs by reducing burdens to industry and the EPA and by clarifying

[9] *See* EPA, Office of Pollution Prevention and Toxics (OPPT), *Economic Analysis for the TSCA Lead Renovation, Repair, and Painting Program Final Rule for Target Housing and Child-Occupied Facilities* (March 2008) (hereinafter, 2008 Rule Economic Analysis) at 4 ("EPA expects that improved test kits . . . will be commercially available by September 2010, but this analysis does not assume that the improved test kits will be in use until *the second year that all of the rule's requirements are in effect.*") (emphasis added).
[10] *Id* at chp. 4 pg 95.

language for training providers, while retaining the benefits of the original rules;" it added an additional layer of burden and complexity to the recertification program for renovators; and it failed to meet the notice and comment requirements of the Administrative Procedure Act. Although NAHB raised these issues with EPA in a July 5, 2016 Petition for Reconsideration, which the agency denied on December 8, 2016, the challenges and real impacts remain.

Proposed Solution

NAHB urges EPA to conduct a new cost-benefit analysis that acknowledges the reality that an accurate, EPA-approved lead paint testing kit has not come to market. NAHB similarly urges EPA to reinstate the "opt-out" provision, allowing homeowners of pre-1978 housing units without children or pregnant women present to voluntarily waive the requirements of the RRP rule. EPA also could limit the scope of the RRP rule through an alternative administrative path, such as limiting the affected housing stock to homes built before 1960, which research shows have the greatest likelihood of containing LBP. In addition, the agency should re-open and revise the RRP's renovator refresher training requirements to facilitate new opportunities for online training and streamline the certification renewal processes.

Finally, recognizing that EPA is currently overseeing a Regulatory Review Act Section 610 review of the RRP rule, it is important that the agency coordinate its E.O. 13777 review in a manner that is in alignment with the extensive docket established for the ongoing Section 610 review. In other words, any action(s) taken pursuant to modifying the RRP rule should be included in the final Section 610 report and be used by EPA in meeting its requirements under E.O. 13777. NAHB submitted extensive comments on this action, which can be found here.

2. Definition of "Waters of the U.S." under the Clean Water Act (33 C.F.R. § 328; 40 C.F.R. §§ 110, 112, 116, et al.)

Background

The Clean Water Act (CWA) makes it unlawful for a person to discharge dredged or fill materials or add pollutants to a "water of the United States" from a point source without a permit. Since 1972, determining which water bodies are and are not "waters of the United States" (WOTUS) has been difficult and the subject of numerous court cases both at the U.S. Supreme Court and at the lower federal courts.

On June 29, 2015, EPA and the Corps jointly finalized a regulation titled "Clean Water Rule: Definition of 'Waters of the United States'" (WOTUS Rule), that established a new definition of the term "waters of the United States."[11] Unfortunately, the new definition extends far beyond the limits allowed under the Constitution and expressed by the U.S. Supreme Court.

Once finalized, NAHB, several industry groups, and 32 states filed lawsuits challenging the WOTUS Rule, claiming the new definition illegally expanded federal CWA jurisdiction by regulating man-made ditches, channels that only flow when it rains, and isolated ponds. Further, many claimed that, in finalizing the rule, the agencies failed to follow the procedures required by the National Environmental Policy Act, the Administrative Procedure Act, and the Regulatory Flexibility Act.

[11] 80 Fed. Reg. at 37,054 (RIN 2040–AF30).

In August 2015, the District Court in North Dakota issued an injunction of the WOTUS Rule, which applies in 13 states (ND, AK, AZ, AR, CO, ID, MO, MT, NE, NV, SD, WY, NM). Several weeks after the North Dakota District Court decision, the 6th Circuit U.S. Court of Appeals issued a nationwide stay of the rule until it could determine whether the Circuit or the District Court has jurisdiction. The stay remains in place.

On February 28, 2017, President Trump signed Executive Order 13778, "Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the 'Waters of the United States' Rule."[12] E.O. 13778 directs EPA and the Corps to "review the final rule entitled ''Clean Water Rule: Definition of 'Waters of the United States,''' … for consistency with the policy set forth in section 1 of [the] order and publish for notice and comment a proposed rule rescinding or revising the rule, as appropriate and consistent with law."[13] This is an important first step toward fixing the flawed regulation and working toward a more sensible and defensible WOTUS rule.

Statement of the Problem

EPA and the Corps have been struggling with the scope of the CWA for almost two decades. During that time, attempts have been made to clarify and/or redefine both the extent of the agencies' authority, as well as the methodology for determining whether any given feature meets the jurisdictional test. The most recent effort began with a April 21, 2014 proposal.[14] During the proposed rule stage, NAHB submitted extensive comments highlighting the proposal's numerous constitutional, statutory, judicial, scientific, economic, practical, and procedural shortcomings. NAHB's comments are available here: https://www.regulations.gov/contentStreamer?documentId=EPA-HQ-OW-2011-0880-19540&attachmentNumber=1&contentType=pdf

The sheer scope of the new WOTUS definition, the continuing uncertainty over which areas are or are not jurisdictional, and the vast acreage it would bring under federal scrutiny raise significant concerns for the home building industry. By their very nature, land development and home building involve substantial earth-moving activities. Because CWA Section 404 requires a permit for the discharge of dredged or fill material into WOTUS, builders and developers must often obtain CWA permits to complete their projects. As the definition of WOTUS expands, more activities will trigger CWA Section 404 and federal permits. Obtaining these permits is no small task, as the process causes delays, additional scrutiny, possible project redesign, and increased costs. A 2002 study, for example, found that it takes an average of 788 days and $271,596 to obtain an individual CWA Section 404 permit and 313 days and $28,915 for a "streamlined" nationwide permit.[15] Importantly, these values do not take into account the cost of mitigation, which can add up quickly.

Perhaps even more costly, however, can be discharging into a WOTUS without a CWA permit—a violation that can cost up to $51,570 per day. Given the ambiguous nature of some of the language and the difficulty in ascertaining whether or not a certain area of land is subject to the CWA, many are left to ponder whether the Act's permit requirements apply and place themselves at risk of violation. Indeed, even if it is thought that the requirements do not apply, a landowner is not in the clear until the Corps

[12] 82 Fed. Reg. at 12,497 (March 3, 2017).
[13] E.O. 13778 at Section 2(b).
[14] 79 FR 22188 (April 21, 4014).
[15] David Sunding & David Zilberman, The Economics of Environmental Regulation by Licensing: An Assessment of Recent Changes to the Wetland Permitting Process, 42(1) Nat. Resources J. 60 (2002).

has issued an "approved jurisdictional determination" stating that there are no regulated areas within the project site. If a private consultant makes that same claim, there is no assurance that the Corps or EPA will agree. Completing a jurisdictional determination also takes money, energy and time – all factors that create burdens, increase liabilities, and raise the cost of housing.

Proposed Solution

NAHB recommends that EPA withdraw and replace the WOTUS Rule and supports EPA's efforts to begin this process with the transmission of the proposed rule entitled "Definition of 'Waters of the United States' Recodification of Preexisting Rules" to the Office of Management and Budget on May 2, 2017 (RIN 2040-AF74). In alignment with the directives of E.O. 13777, the withdraw and replacement of the WOTUS Rule will prevent federal overreach under the CWA and, in turn, stave off countless landowners from having to obtain needless, expensive and time consuming federal permits that inhibit economic growth and job creation among the home building and countless other industries.

Following the withdraw of the WOTUS Rule, NAHB looks forward to working with the Trump Administration, EPA and the Corps to develop a clear, commonsense rule to protect our nation's waterways while taking into account the interests of local businesses and communities nationwide.

3. Regional Supplements to the 1987 Wetlands Delineation Manual

Background

EPA and the Corps jointly administer Section 404 of the CWA, which regulates the discharge of dredged or fill material into waters of the United States (WOTUS), including wetlands. In short, Section 404 requires project proponents to obtain a permit before dredged or fill material may be discharged into a jurisdictional water or wetland.

While EPA has oversight over the program as a whole, it is the Corps' responsibility to conduct delineations and verify which waters and/or wetlands are jurisdictional under the CWA. The Corps defines wetlands as "those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions."[16] To identify and delineate wetlands in particular, the Corps published the "1987 Corps of Engineers Wetlands Delineation Manual" (the 1987 Manual).[17] The 1987 Manual, intended to be used nationwide, describes the technical guidelines and methods to be used to determine whether an area is a jurisdictional wetland for purposes of Section 404. Specifically, the 1987 Manual requires positive evidence of three parameters to identify a wetland:

1) Hydrophytic vegetation;,
2) Hydric soils; and
3) Wetland hydrology;

[16] 33 C.F.R. § 328.3(b)
[17] U.S. Army Corps of Engineers. Corps of Engineers Wetlands Delineation Manual. Technical Report Y-87-1. January 1987.

Over time, there have been several attempts to revise and update the 1987 manual, but none have been successful. Recognizing the challenges and in an attempt to put an end to the uncertainty surrounding how delineations would be conducted, in 1993, the Energy and Water Development Appropriations Act was passed. It specified "the Corps of Engineers will continue to use the Corps of Engineers 1987 Manual . . . until a final wetlands delineation manual is adopted."[18] Rather than adopting a new manual through the proper rulemaking process, however, the Corps has made a practice of "supplementing" the national 1987 Manual with regional variations.

Statement of the Problem

The "regional supplements" relax the three parameter threshold needed to determine that an area is a jurisdictional wetland and unlawfully expand the Corps' regulatory authority. For instance, the supplement that applies to Alaska uses a standard for determining the growing season that is much more relaxed than the one found in the national manual. In doing so, the Corps has inappropriately expanded its authority over all permafrost across the state.

Similarly, in Chapter 5 of the Regional Supplement for the Coastal Plain of the MidAtlantic and Southeastern United States, the Corps can consider areas to be regulable wetlands even if they exhibit only two of the three required criteria. In other words, if hydric soils and hydrophytic vegetation are observed, the Corps is free to presume the presence of wetland hydrology. In doing so, the Corps has made a mockery of the national standard and expanded its authority over areas not previously considered wetlands under the 1987 Manual. If the supplements are not eliminated, the Corps will continue to unlawfully exert federal jurisdiction over non-wetland features. The permits needed to operate in waters deemed jurisdictional, as noted above, can be prohibitively expensive and time consuming, preventing projects from moving forward and costing jobs.

Proposed Solution

In response to E.O. 13777 and as the agency with primary authority over the CWA's Section 404 permit program, NAHB strongly urges EPA to work with the Corps to eliminate the regional supplements. We further recommend that EPA and the Corps conduct a formal rulemaking to finalize the criteria used to define jurisdictional wetlands, as required by the 1993 statute.

4. Construction Stormwater Program (40 C.F.R. § 122.26(b) - RIN 2040-ZA27)

Background

Under EPA's National Pollutant Discharge Elimination System (NPDES) program, builders and developers must seek permit coverage for the stormwater discharges associated with their construction activities if they disturb one or more acres of land area, or under one acre if the property is within a larger common plan of development.[19] EPA's 2017 Construction General Permit (CGP) became effective on February 16, 2017, and will remain in effect for five years.[20] Although the CGP applies in only a handful of states and territories, it serves as a national model for the 46 states that administer their

[18] Energy and Water Development Appropriations Act, 1993, Pub. L. No. 102-377, 106 Stat. 1315 (1992).
[19] 40 CFR §122.26(b)(15)(i)
[20] 82 Fed. Reg. 6534 (January 19, 2017)

own CWA Section 402 programs.[21] Construction operators make up a large portion of the total universe of NPDES permittees, with approximately 200,000 sites seeking coverage under state or EPA permits each year. [22]

Statement of the Problem

EPA issued a revised CGP in early 2017. During the proposed permit stage, NAHB submitted extensive comments highlighting the introduction of unnecessary and costly provisions that directly affect builders and developers, and in particular, small businesses. NAHB's comments are available here: https://www.regulations.gov/document?D=EPA-HQ-OW-2015-0828-0059. While NAHB continues to support EPA's commitment to a non-numeric, Best Management Practice (BMP) based approach to compliance under this general permit, there remain significant opportunities to reduce redundancy and streamline compliance for small entities.

Problem #1: The CGP Treats Small Residential Sites the Same as Large Developments

The current CGP contains the same permit requirements for all sites, regardless of applicability, site size or risk. As a result, many builders are forced to fill out significant paperwork, agree to unreasonable requirements, and incur unnecessary costs for low-risk sites. NAHB strongly believes that the costs far outweigh the benefits for holding small, low-risk sites accountable to the same 300 plus page permit as major housing or commercial developments. Our members regularly report that the level of detail and work needed to develop and implement Storm Water Pollution Prevention Plans (SWPPPs) under this permit is overwhelming, complicated, and confusing, particularly as it relates to a single home site.

In an effort to ease these burdens, NAHB developed and submitted a Single Lot Permit to EPA nearly ten years ago in 2007. The goal of this permit is to authorize storm water discharges from residential construction activities that occur on small single lots that need to obtain CWA coverage (i.e., a single lot within a larger subdivision). NAHB drafted this permit to clarify, simplify, and eliminate duplicative permit requirements by better distinguishing a builder's responsibilities from those of a developer. EPA's CGP contains many requirements that are not applicable to those who are building one home on a single lot. Anecdotal assessments estimate costs of between $500 and $1,200 to hire a third party to produce SWPPP documentation for a single family home site.

This cost could be significantly reduced with the introduction of a streamlined, check-list based permit. Because a Single Lot Permit will be short, better specify permit requirements, and more understandable, it will foster higher rates of compliance among small residential construction sites. As a result, it will be even more protective of the environment, while improving the enforcement process by clarifying the responsibilities for individual permit holders during subsequent enforcement inspections

[21] EPA's 2017 Construction General Permit (CGP) applies in New Mexico, Idaho, Massachusetts and New Hampshire, Puerto Rico and the District of Columbia, as well as other tribal lands and territories. For more details: https://www.epa.gov/npdes/authorization-status-epas-construction-and-industrial-stormwater-programs#undefined

[22] *Source: U.S. EPA. "NPDES Electronic Reporting Rule". Presentation, WEFTEC, September 29th, 2015.* Note: This graph covers all discharge sources except for significant industrial users not under an Approved Pretreatment Program and dischargers operating under general permits for discharges from vessels and discharges from pesticide applicators.

NAHB worked with the EPA Office of Wastewater Management (OWM) staff over the past three years to develop a streamlined voluntary compliance plan template for small residential sites. It is hoped that this template can serve as a model for the development of a streamlined permit option.

Problem #2: Expanded Liability for Small Businesses in the CGP is Unlawful

Despite protests from NAHB and other industry groups, EPA finalized controversial language in the 2017 CGP that considers all builders on shared sites "jointly and severally liable" for compliance with all permit terms, including failures of off-site controls they have no legal or physical access to.[23] Before petitioning for review of this permit in February 2017, NAHB filed comments arguing this new liability framework was both in conflict with the CWA and unworkable in the field. Operators often work on a site at different times, do not have legal access to property they do not own, and cannot control the activities of others. This provision will have devastating effects for single-family home builders, in particular, because it will place even the smallest of businesses at risk for the CWA violations of neighboring sites – violations that can incur fines of over $50,000 per day, even if they are in full compliance within their own property limits.

Cost and job loss implications for small businesses under EPA's new liability criteria are staggering. NAHB's single-family members who build in subdivisions are concentrated at the lower end of the revenue scale. It follows that even a one-day CWA violation could greatly affect these businesses. Over 40 percent of NAHB single-family members build *five or fewer* homes per year, and have median annual receipts of $980,000. Moreover, NAHB's 2016 *Cost of Doing Business Study* shows that "production" builders who start at least 25 homes per year earn a somewhat higher 6.8 percent rate of profit—compared to 5.0 percent for builders with fewer new home construction starts.[24] As a result, the annual profit for the median small single-family builder who builds homes in subdivisions is only $49,000. A single, one-day maximum civil penalty under the CWA of $51,570 would be enough to wipe out this builder's annual profit through no fault of his or her own.

Problem #3: Overly Restrictive Stabilization Criteria in the CGP

EPA's final 2017 CGP halved the timeline for some operators to achieve temporary stabilization on active sites.[25] Where EPA's previous permit allowed a 14-day time period for operators to complete temporary stabilization, the 2017 CGP penalizes sites disturbing over 5 acres at once by making them adhere to a 7-day stabilization schedule. Most developers need more than seven days to complete "horizontal" development activities like land clearing, grubbing, utility and road placement. Truncating the time to complete stabilization to such a small window risks raising both project costs and environmental harm caused by stopping and starting land disturbance over a longer period of time.

Problem #4: Incomplete Cost Benefit Analysis for the Construction Stormwater Program

NAHB has consistently urged EPA to conduct more thorough cost analyses when it considers changes to the construction stormwater program. When an agency issues a rulemaking proposal, the Regulatory Flexibility Act (RFA) requires it to prepare and make available for public comment an initial regulatory flexibility analysis (IRFA) or certify the proposal will not have a significant impact on a substantial

[23] 82 Fed. Reg. 6534 (January 19, 2017)
[24] NAHB Cost of Doing Business Study, 2016 Edition. NAHB Business Management & Information Technology. Available: https://builderbooks.com/the-cost-of-doing-business-study-2016-edition.html
[25] 82 Fed. Reg. 6537 (January 19, 2017)

number of small entities. EPA's 2017 permit did not follow the required steps for certification under the RFA. [26] For example, the economic analysis provided within the public notice docket for the draft CGP made no attempt to quantify the number of small entities subject to the draft CGP, as required under the RFA.[27,28] In future permits, EPA must quantify the number of small entities within those states where EPA is the permitting authority and evaluate all proposed requirements.

Problem #5: The NPDES Information Collection Approach is Too Broad

In order to reform programs effectively, any new requests for information collection should be conducted on a program by program basis so that they accurately reflect any new burdens placed on industry. EPA currently issues a consolidated NPDES information collection request (ICR) for the NPDES permitting program as a whole. NAHB believes it is inappropriate to lump 46 state-issued CGPs, and the EPA-issued CGP into one "generic" ICR approval along with all of the other NPDES permitting programs (e.g., Multi-Sector General Permit, Vessels General Permit, EPA's CGP). Compliance forms and paperwork requirements for many of these permits vary drastically. The Office of Management and Budget (OMB), as well as the public, needs more refined information to specifically analyze any new impacts that may stem from the data collected under each NPDES permit.

Proposed Solutions

In alignment with the directives of E.O. 13777, NAHB recommends that EPA review and modify the 2017 Construction General Permit to remove/revise the new expanded liability and restrictive stabilization provisions that create significant implementation challenges, yet add limited environmental benefit. EPA is also urged to reduce compliance burdens by creating a separate, streamlined permit for small, low-risk residential sites. NAHB also recommends that EPA commit to conducting improved cost benefit analyses and submitting program-by-program information collection approval requests as it assesses future cost impacts of the various components of the NPDES program.

5. Regulations for Controlling Stormwater Discharges from Construction Activities (40 C.F.R. §§ 122.26(b), 122.34(b)(4))

Background

In an effort to control the discharge of pollutants associated with stormwater, EPA's NPDES regulations require construction site operators that disturb one or more acres of land area, or under one acre if the site is within a larger common plan of development or sale, to obtain a permit from the state or EPA prior to discharging.[29] Similarly, pursuant to the same section of the CWA, EPA's Small Municipal Separate Storm Sewers (MS4s) program requires regulated municipalities to develop a program for regulating construction stormwater runoff from sites that disturb one acre or more, or under one acre if the site is within a common plan of development. This requirement, referred to as "*Minimum Measure #4*" resides in a set of six minimum control measures within EPA's Small MS4 Program that aim to

[26] 69 Fed. Reg. at 21334 (Monday, April 11, 2016)
[27] "Cost Impact Analysis for the 2017 Proposed Construction General Permit (CGP)." EPA. 2016.
[28] 5 U.S.C. §603(b)(3)
[29] 40 CFR §122.26(b)

reduce the discharge of pollutants from municipal storm sewers.[30]

Statement of the Problem

In addition to the MS4s' responsibilities under *Minimum Measure #4*, EPA's Construction Stormwater regulations require states to administer general permits for the *same sites* under their delegated 402 programs. As a result, most builders and developers are required to obtain permits and comply with both state and a local stormwater mandates that are aimed at achieving the same result. Having duplicative requirements for both states and municipalities is burdensome, ineffective, and creates inconsistency for all parties. It also provides no added environmental benefit. For example, a State Construction General Permit (CGP) may require a given activity or best management practice, and a local MS4 plan may require a conflicting or additional practice. Under this duplicative system, municipalities often find themselves collecting and reporting data for their local construction stormwater programs twice, via Stormwater Management Plan (SWMP) and State Erosion and Sediment Control program reporting. In turn, builders often have to report to or undergo plan review from multiple layers of authorities connected to this federal program.

Proposed Solution

In alignment with the directives of E.O. 13777, EPA should modify its Small MS4 Rules and remove the duplicative Minimum Requirement #4 (Construction Stormwater) at 40 C.F.R. § 122.34(b)(4). Alternatively, it could allow states to deem compliance with an MS4 program as compliance with the state requirements (or compliance with the state requirements as compliance with the MS4 program). Reducing the list of obligations that must be completed and reported on by municipalities covered under this program will reduce confusion and save states and municipalities time and money spent managing and coordinating these nearly identical programs. Equally important, it will reduce duplicative and unnecessary obligations currently placed on builders and developers.

Category B: EPA Guidance Documents

6. EPA's Water Quality Trading Policy (2003)

Background

In 2003, EPA issued the Water Quality Trading Policy ("policy") to provide guidance to states, interstate agencies, and tribes to assist them in developing trading programs.[31] Water quality trading (WQT) under the CWA provides an option for complying with water quality based effluent limitations in a NPDES permit. Trading recognizes that the costs to control the same pollutant coming from different sources within a watershed can vary greatly and creates a commodity that can be shared among NPDES permitted dischargers. Under trading programs, permittees facing higher pollution control costs (e.g., home builders) may be able to meet their regulatory obligations by purchasing environmentally

[30] 40 CFR § 122.34(b)(4)
[31] U.S. EPA. Water Quality Trading Policy. 2003. Available: https://www3.epa.gov/npdes/pubs/wqtradingtoolkit_app_b_trading_policy.pdf

equivalent pollution reductions from another source (e.g., farmers) at lower cost.

Statement of the Problem

EPA's 2003 policy is outdated and did not deliver the significant cost reductions envisioned. At present, this policy is too limited, as it does not encourage trades across watershed boundaries, which could provide states, municipalities, and individual NPDES permit holders like developers and builders with more cost effective options to achieve mandated federal pollution reductions. Whereas methods and data are available for point source participants in water quality trades (e.g., waste water treatment plants), methods to consistently measure trading potential from non-point, urban, suburban, and agricultural sources are not readily available. This disparity is a major barrier that is hindering more permittees entering the market.

Proposed Solution

EPA should update and modify its 2003 Water Quality Trading Policy to encourage more robust adoption of trading among states and multiple jurisdictions, as well as across watersheds at appropriate scales. To do so, EPA should develop better methods to support trades between point and non-point sources, as well as trades that allow developers to go beyond their required stormwater requirements and thus generate credits to sell.

7. Guidance Documents and Policies Regarding CWA Section 402 NPDES Stormwater Program

Background

EPA deferred taking action on a national rulemaking to reduce permanent, or "post-construction" stormwater discharges from new and redevelopment in 2014.[32] Despite dropping this rulemaking effort, EPA has issued guidance that places an emphasis on inserting numeric, flow-based limits in *state* Multiple Separate Storm Sewer (MS4) permits as a way to address stormwater runoff from existing development.

Statement of the Problem

In many cases, federal guidance has either directly or indirectly placed obligations on the construction industry well beyond the minimum federal requirements established by the CWA Section 402 stormwater program. Although this "backdoor" approach to regulating post-construction flows is inappropriate and fails to follow proper rulemaking, there is a concern that EPA guidance will continue to push states to adopt stricter programs even though there is no consensus on the need for, or vehicle for doing so.

[32] U.S. EPA. Proposed National Rulemaking to Strengthen the Stormwater Program. Accessed May 2017. Available: https://www.epa.gov/npdes/proposed-national-rulemaking-strengthen-stormwater-program#info

MS4 Permits: Compendium of Clear, Specific & Measurable Permitting Examples -- Part 1 & Part 2 (Guidance issued: 11/1/16)

The practical implication of this guidance is to push states into higher cost, more complex programs where no such federal mandate exists.[33] The *Compendium of Clear Specific and Measurable Permitting Examples* accompanied release of EPA's Small MS4 Remand Rule in 2016. This guidance functions as a list of "approved" permit terms and conditions for local MS4 post-construction programs.[34] Approved language consists almost entirely of numeric limits. EPA's regulations do not mandated the use of baseline flow or quality criteria for stormwater leaving finished construction sites. In reality, states maintain a number of options for adopting post-construction stormwater limits that rely on narrative criteria and are free to base program decisions on those pollution reduction activities that will achieve the best results. Highly complex flow based or treatment standards can be difficult to implement across variation in local soil types, climate, and existing development patterns, making such approaches inappropriate and ineffective. . Furthermore, the Agency does not have statutory authority to regulate "flow." The CWA limits EPA's authority to the regulation of the addition of "pollutants" to the waters of the United States. Flow is not a pollutant.[35] Adopting any standard that is the subject of guidance without carefully considering needs and consequences across the spectrum is both costly and dangerous.

Revisions to the November 22, 2002 Memorandum "Establishing Total Maximum Daily Load (TMDL) Waste Allocations (WLAs) for Storm Water Sources and NPDES Permits Based on Those WLAs" (Guidance issued: 11/12/14)

In this guidance EPA placed greater emphasis on clear, specific, and measurable permit requirements and, where feasible, numeric NPDES permit provisions.[36] NAHB is concerned that this memorandum lays out broad policy implications for state programming which deserve more specific discussion. Concepts related to TMDL waste load allocations (WLA's) for stormwater flows, in particular, have been implemented in a patchwork fashion across the U.S., and further stakeholder engagement is needed on this subject to ensure ballooning costs are not being delegated to municipalities without proper consideration. NAHB echoes other national groups' (such as the Federal Water Quality Coalition) concerns with a number of current TMDL practices including: (1) applying "interpretations" of narrative criteria to impose numeric limitations, without requiring (or even allowing) the State to follow the rulemaking process to adopt new numeric standards; (2) issuing permits that are inconsistent with approved TMDLs, based on a belief that the TMDLs are "flawed" and should be disregarded; and (3) refusing to let States remove TMDLs (and their allocations) if a waterbody meets standards. Each of these practices could be changed by issuance of new Agency policy.

Integrated Municipal Stormwater and Wastewater Planning (Guidance issued: 6/1/2012)

This guidance is intended to help communities struggling with multiple CWA obligations to prioritize and plan for successful implementation of multiple community, economic, and water quality goals. EPA

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[33] By requiring localities to enact and enforce a federal program, the Agency is pushing the outer bounds of the 10th Amendment. See Printz v. United States, 521 U.S. 898, 935 (1997)(Holding that "Congress cannot compel the States to enact or enforce a federal regulatory program.")

[34] This guidance is available at: https://www.epa.gov/npdes/stormwater-rules-and-notices

[35] *Virginia Dep't of Transp. v. U.S. E.P.A.*, No. 1:12-CV-775, 2013 WL 53741, at *5 (E.D. Va. Jan. 3, 2013).

[36] This guidance is available at: https://www.epa.gov/tmdl/establishing-total-maximum-daily-load-tmdl-wasteload-allocations-wlas-storm-water-sources-and

has not allowed for adequate flexibility in implementing this policy. Integrated plans, where they've been applied, lack teeth and thus cannot provide relief from multiple permit obligations or allow for phased implementation of infrastructure and capital investments to support faster advancement toward water quality goals. Outside legislative changes to this program, there is still much flexibility that could be provided by EPA and state permitting offices to allow for extended compliance schedules, special permit conditions, and mechanisms for tracking and accounting units of pollution to better understand which permit programs are producing tangible progress on the ground.

Proposed Solution

In alignment with the directives of E.O. 13777, EPA should modify the stormwater guidance documents noted above to focus on practical steps that can be taken to better achieve water quality goals. EPA should review and modify each guidance to ensure it no longer limits options for state and local governments under the CWA 402 program.

8. NPDES Permit Quality Review (PQR) Assessment Packet (2013)

Background

On a rotating basis, the Office of Wastewater Management at EPA Headquarters reviews state NPDES programs. During these reviews, topics related to NPDES program implementation are addressed, including permit backlog, Priority Permits, Action Items, and Withdrawal Petitions. A large component of each review is the issuance of a *Permit Quality Review* (PQR) report, which assesses whether a state adequately implements the requirements of the NPDES Program.

Statement of the Problem

The PQR process can be a helpful tool for states to use to examine their programming from a different perspective, but it was never intended to be used as a substitute for state discretion. Similarly, it is not believed that EPA's Permit Quality Review Standard Operating Procedures document[37] or the "action items" identified within the review process are supposed to translate into legal binding direction from EPA. Yet, in several instances, NAHB members have experienced state permitting staff referring to PQR report results as the basis for shifting their post-construction stormwater programs in a new direction, or stating that each recommendation within a PQR assessment "must" be implemented to comply with federal law, even when recommendations reference action beyond minimum federal standards.

Proposed Solution

In alignment with the directives of E.O. 13777, EPA should review and modify the PQR standard operating procedures guidance, or issue a separate memorandum to clarify that PQR report recommendations are advisory and not legally enforceable. There can be no appearance that EPA may

[37] This document is available here: https://www.epa.gov/npdes/npdes-permit-quality-review-standard-operating-procedures

inappropriately pressure states to adopt measures beyond minimum federal requirements in this program.

9. Next Generation Compliance Policy & Cooperative Enforcement/Compliance Assistance

Background

EPA's 2014 Next Generation Compliance Policy ("Next Gen") directs EPA Regions to streamline the permitting process by drafting regulations and permits that are easier to implement, with the goal of improved compliance and environmental outcomes.[38] The policy also encourages greater focus on electronic collection and posting of compliance data, and public accountability through increased transparency of these data.

Statement of the Problem

Despite this new policy, NAHB members have continued to report a high focus on low-level paperwork violations in the field – a practice for which administrative costs clearly outweigh environmental benefit. NAHB is concerned that continuing efforts to collect, report and publicly share large amounts of data on low-level paperwork infractions is actually counter to the Next Gen approach. Without redesigning better compliance assurance programs that help operators avoid such violations, costs of compliance will continue to rise, and environmental benefit derived from the Next Gen program will be small. Paperwork violations related to record keeping for Stormwater Pollution Prevention Plan or SWPPP implementation, for example, often do not result in real water quality improvements, and only serve to increase administrative costs for cities, states, and EPA.

Problem #1: Lack of a "Right to Cure" Policy

Without a viable "right to cure" provision in either rules or guidance, costs associated with small infractions will continue to dominate EPA's water permitting programs, especially in the construction sector. Rather than assessing monetary penalties for every infraction, the agency could adopt policy that provides permittees with an opportunity to fix certain alleged problems before they are marked for enforcement. Such "right to cure" protection removes the fear factor associated with those trying to comply in good faith. Many states already allow this. EPA could codify right to cure at the federal, state and local levels for infractions that do not result in environmental harm, and need not be escalated through multiple bureaucratic processes.

Problem #2: Lack of Compliance Data and Information on the Scope of the Regulated Community

To enforce its regulations and achieve maximum compliance and thus environmental benefit, a regulatory agency must know its entire regulated universe. Unfortunately, EPA has no idea of how many construction activities are regulated under the NPDES program. Without knowing what the baseline is for the number of sites subject to regulation, it is neither possible to determine the percentage of those sites that have permits that need them, nor is it possible for EPA's Office of Enforcement and Compliance Assurance (OECA) to gauge whether or not it is meeting one of its key goals: improving

[38] Policy is available here: https://www.epa.gov/compliance/next-generation-compliance

compliance. Similarly, absent reliable data, the regulated community is at a disadvantage, as EPA mischaracterizes and implicates them for impacts for which they may not be responsible.[39] Unfortunately, most states lack these data as well. The National Academy of Sciences study titled, *Urban Stormwater Management in the United States* references a survey conducted to evaluate the knowledge of States on the number of non-filers within their jurisdiction. This survey indicated that the states have little to no data collected on non-filers.[40]

Problem #3: Need to Reorganize OECA back into Office of Water Program Office; Provide Adequate Funding for Regional Compliance Training Associations

Lack of consistency in enforcement is one of the leading drivers of high costs of compliance in EPA's construction stormwater program. Enforcement by EPA officials often varies widely from region to region, making it difficult for NAHB to advise members on how to reduce their liability or risk of violation in the field, even with the best intentions. Moving EPA's CWA enforcement and compliance assurance program back into the Office of Water would help reduce inconsistency between programs that produce new policy and regulations, and those that enforce them. In addition, NAHB strongly believes that states should take the lead on enforcement actions within the NPDES program. It follows that state officials should be provided the resources and training they need to successfully implement increasingly complex stormwater programs. NAHB is concerned with reports that many Regional Compliance Training Associations have either closed due to lack of funding, or are at high risk of closure.[41]

Proposed Solutions

In alignment with the directives of E.O. 13777, EPA should review and modify the 2014 Next Generation Compliance policy to sanction use of "right to cure" options in construction stormwater enforcement. In addition, NAHB recommends that EPA modify this policy to direct EPA staff to collect basic information on rate of non-compliance needed to judge the scope of the regulated universe for programs such as construction stormwater. Lastly, NAHB recommends fully funding regional enforcement training and compliance assistance programming, and in particular, Regional Compliance Training Associations. NAHB looks forward to working with EPA to achieve improved water quality in the nation.

10. Technical Report: Protecting Aquatic Life from Effects of Hydrologic Alteration (EPA–HQ–OW–2015–0335; FRL–9956–93–OW)

Background

In March 2016, EPA and the U.S. Geological Survey (USGS) released a draft technical report entitled "Protecting Aquatic Life from Effects of Hydrologic Alteration."[42] The Agencies jointly developed the

[39] "Limited Knowledge of the Universe of Regulated Entities Impedes EPA 's Ability to Demonstrate Changes in Regulatory Compliance" EPA's Office of the Inspector General, September, 2005, "EPA Performance Measures Do Not Effectively Track Compliance Outcomes," EPA's Office of the Inspector General, December, 2005 and "Evaluation of the Phase I Construction Storm Water Compliance and Enforcement Program," Industrial Economics, Incorporated, Kerr, Greiner &Associates, Inc., May 2005.
[40] "Urban Stormwater Management in the United States." 2008. Appendix C. The National Academies Press.
[41] ECOS. Letter on Environmental Enforcement Training for States. December 21, 2015. Available: https://www.ecos.org/documents/ecos-letter-on-environmental-enforcement-training-for-states/
[42] 81 Fed. Reg. at 10,620 (March 1, 2016).

report to address the potential impairment of water bodies designated to support aquatic life due to hydrologic alteration. The document describes potential effects of flow alteration on surface waters, identifies CWA programs EPA believes are available to address changes in flow, and calls upon states to incorporate narrative and ultimately quantitative flow water quality criteria into their water quality standards (WQS). The report focuses particularly on the relationship between natural land cover alteration and changes to hydrologic processes.

Statement of the Problem

In June, 2016, NAHB submitted comments in response to the report, noting that any future regulations or permit conditions governing water quantity – a clear goal of the document – have the potential to significantly impact builders' and developers' projects, particularly with respect to stormwater management. NAHB's comments can be found here: https://www.regulations.gov/contentStreamer?documentId=EPA-HQ-OW-2015-0335-0093&attachmentNumber=1&contentType=pdf

The report considers flow alteration as it pertains to issuing NPDES (CWA section 402) permits and "dredge and fill" (CWA section 404) permits. In doing so, EPA overlooks the limits of CWA sections 402 and 404 with respect to "flow." The Courts have ruled that flow is not a pollutant. As such, it cannot be treated as one under sections 402 and 404. Section 404 permits allow for the discharge of "dredge and fill" material, and section 402 permits allow for the lawful discharge of all other pollutants. EPA must clarify that these sections do not require, nor can they authorize permits for "flow."

Ultimately, we urged EPA and USGS not to finalize the document. Rather, if they wish to issue regulatory guidance on the legal and policy issues related to flow alteration, NAHB comments stressed that the Agencies should begin the process of guidance development in an open, transparent way, with full involvement of relevant stakeholders.

In December 2016, EPA and USGS finalized the report.[43] Importantly, they removed all the case law language "supporting" the report in response to our comments. In its response to comments, EPA and USGS state that they "decided to remove the case law appendix, water quality standards appendix, and policy discussions from the document to ensure that the focus of the document is on the technical information presented about potential impacts of hydrologic alteration and approaches that could be considered in developing quantitative flow targets." The final report is much more of a technically-focused document than it was in draft form, which is what NAHB had requested in our comments,

Nevertheless, the finalized report still includes an appendix describing CWA programs EPA believes are available to address changes in flow and effectively encourages states to incorporate narrative and ultimately quantitative flow water quality criteria into their WQSs. The authority to set WQSs generally rests with states, and any efforts to thwart such primacy represent federal overreach and violation of the statute. If a state chooses to use flow as one consideration in its WQSs, it may do so, but EPA has no authority to coerce states into using this practice. Moreover, EPA cannot use a so-called "nonprescriptive" and "scientific" report as a means to undermine states' primacy over land use, water

[43] 81 Fed. Reg. at 93,681 (December 21, 2016).

allocation, groundwater and all other activities that are inherently state responsibilities.

Furthermore, by encouraging states to regulate "flow" under the CWA is inconsistent with Congressional intent. Congress defined "pollutant" as "dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water." All of the pollutants listed (except heat) are substances or materials. In contrast, flow and elements of the natural flow regime (e.g., magnitude, frequency, duration, timing, and rate of change) are measurements. Because "measurements" are not substances, flow is not a pollutant.

Regulating flow, either by narrative or numeric standards, will impose significant monitoring and cost burdens upon states, local governments, and industries regulated under the CWA – including land developers and home builders.

Proposed Solution

NAHB recommends repeal of the "Final EPA-USGS Technical Report: Protecting Aquatic Life from Effects of Hydrologic Alteration." In alignment with the directives of E.O. 13777, a repeal of the report will prevent federal overreach under the CWA, in turn, staving off unnecessary expensive and time consuming monitoring by states and compliance with the Act not envisioned by Congress as it did not intend to regulate flow as a pollutant. Such monitoring and compliance costs would inhibit economic growth and job creation among home builders, land developers, manufacturers, and countless other industries.

Category C: EPA Programs

11. Energy Star Program

Background:

ENERGY STAR is a national voluntary program offered through the EPA, in partnership with the U.S. Department of Energy (DOE), which certifies products, homes and other buildings that meet specified standards of energy efficiency. The Office of Energy Efficiency & Renewable Energy and Office of Air & Radiation provides oversight and management of this program. Since 1992, ENERGY STAR has saved more than $362 billion dollars on utility bills for homeowners, renters, and building tenants and owners[44].

Statement of Problem

In March, the Administration released its suggested budget "blueprint" for federal programs in FY'18, which recommends cutting funding for EPA's ENERGY STAR program.[45] NAHB is concerned that removing this voluntary program from the federal policy landscape could seriously disrupt the progress

[44] *ENERGY STAR Accomplishments:* https://www.energystar.gov/about
[45] https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/budget/fy2018/2018_blueprint.pdf.

that has been made, to date, to encourage and facilitate energy efficiency within the residential landscape. The real estate industry supports ENERGY STAR funding in EPA's 2018 budget as stated in a letter dated March 30, 2017, which NAHB signed onto in support, along with 13 other organizations representing aspects of residential and commercial real estate.

NAHB understands that energy efficiency is in the best interest of the nation's economy, environment, security and energy independence in the long-term, and that the nation must look beyond short-term fluctuations in the cost and availability of energy in establishing energy policies and programs. EPA's ENERGY STAR program facilitates job growth and economic investment by promoting products and new homes based upon their energy efficiency. In fact, a recent survey conducted by NAHB shows that between 87% and 90% of all homebuyers ranked having Energy Star-rated windows and appliances as vital, and an ENERGY STAR rating for the whole house as either highly desirable or essential elements for their next home[46]. This information demonstrates that the voluntary program has penetrated the market place and created a demand.

The ENERGY STAR program is also critical element of the ICC/ASHRAE 700-2015 National Green Building Standard (NGBS), offering compliance options to home builders who seek to obtain green certification for the new and remodeled single-family and multifamily homes they construct. The NGBS is a green building standard serving as a uniform national platform for the recognition and advancement of green residential construction and development. It is a point-based system, wherein single-family or multifamily building(s) can attain certification by accumulating points for the sustainable and green practices included in design and construction, and planned for its operation and maintenance. Projects can qualify for four certification levels (Bronze, Silver, Gold or Emerald) by earning the required number of points for each level. NGBS Conformance is verified through construction documents, plans, specifications, in-field inspection reports and other data that demonstrate compliance with the points being pursued. To date, there are over 100,000 homes units certified under the NGBS combined.

Proposed Solution

Since the program's inception, and based on the utility bill savings alone, ENERGY STAR has garnered significant benefits. NAHB strongly recommends that funding for ENERGY STAR continue in FY'18 at current fiscal year levels. In addition, NAHB supports EPA as the bipartisan administrator of this program and urges the agency not to include the ENERGY STAR program in any proposal to modify or withdraw rules or programs under E.O. 13777.

12. WaterSense Program

Background

WaterSense is a voluntary program administered by EPA that encourages water efficiency through labeling of consumer products and homes. The Office of Wastewater Management provides oversight

[46] Emrath, Paul. "The Average Builder Uses 10 Different Green Products and Practices," *Eye on Housing* (blog). March 13, 2017 http://eyeonhousing.org/2017/03/the-average-builder-uses-10-different-green-products-and-practices/?_ga=2.172538915.1055520192.1494427816-135545152.1476289408

and management of this program. The average family spends more than $1,000 per year in water costs, but can save more than $380 annually from retrofitting with WaterSense labeled fixtures and Energy Star certified appliances.[47] The type of savings that can be attained through voluntary federal programs demonstrate the need for bipartisan programs like WaterSense to remain in place to educate consumers, guide the market transformation, and realize needed saving in water usage. WaterSense saved homeowners, renters, and building tenants and owners over $33 billion in water and energy bills since the program began in 2006.[48] WaterSense has also helped communities save an estimated 1.5 trillion gallons of water.

Statement of Problem

While WaterSense was not specifically named in the Administration's 2018 budget "blueprint," due to its similarities with ENERGY STAR, there is a high likelihood that its funding will, likewise, be cut. NAHB is concerned that defunding this voluntary program could have serious ramifications as the nation struggles to ensure sufficient water for a growing population. The federal government's role in WaterSense is a key component, as it adds important credibility and direction. Many manufacturers, trade associations, and other industry professionals supported the WaterSense program publicly in this coalition letter, which highlights its benefits. NAHB supports approaches and initiatives like WaterSense that encourage water conservation and efficiency in new and existing structures as long as those programs are voluntary, affordable and recognize consumer preferences.

Importantly, the WaterSense program is a key practice included in the water efficiency, and lot and site development chapters of the ICC/ASHRAE 700-2015 National Green Building Standard (NGBS). The NGBS is a green building standard serving as a uniform national platform for the recognition and advancement of green residential construction and development. It is a point-based system, wherein single-family or multifamily building(s) can attain certification by accumulating points for the sustainable and green practices included in design and construction, and planned for its operation and maintenance. Projects can qualify for four certification levels (Bronze, Silver, Gold or Emerald) by earning the required number of points for each level. NGBS Conformance is verified through construction documents, plans, specifications, in-field inspection reports and other data that demonstrate compliance with the points being pursued. To date, there are over 100,000 homes units certified under the NGBS combined. Given the widespread use and acceptance of the WaterSense program, it is clearly providing benefits.

Proposed Solution

Since the program's inception, WaterSense has led to significant savings in water and energy bills, while simultaneously reducing demand for the nation's limited water resources. It has proven itself to be an effective collaboration between industry and the government that has rendered benefits for consumers, industry, and state/local governments. NAHB strongly urges the EPA to continue the WaterSense Program and to refrain from making any changes to this important program as it considers its options for

[47] https://www.epa.gov/watersense/statistics-and-facts
[48] Environmental Protection Agency, WaterSense Accomplishments 2015

responding to E.O. 13777.

13. Sustainable Communities Program

Background

All home building starts with the land. Land use policy and regulations affect everything associated with what, where, and how construction occurs. While "all land use is local" still holds true because that is where development approvals continue to be made, there are more regulatory agencies involved in this process, at all levels of government, than ever before. The federal government has played an increasing role via an ever-expanding array of environmental statutes and more recently through the unprecedented partnership called the Sustainable Communities Initiative, which involves the U.S. Departments of Housing and Urban Development (HUD), U.S. Department of Transportation (DOT) and the U.S. Environmental Protection Agency (EPA).

The HUD/DOT/EPA initiative focuses on better integrating transportation, land use, and housing and is being implemented through a variety of grant programs that focus on assisting local governments with planning, zoning, and development issues. A major focus is on steering development towards existing communities and infrastructure and boosting density to support more transit-oriented development, with a view to achieving a range of presumed benefits, from affordability to public health to climate change.

Statement of Problem

The nation's communities reflect a diverse range of people, needs, and ideals. Their design and shape are dictated by powerful market forces and realities that reflect the choices consumers make about where they live, work, and play. As a result, sustainable land use and design are not nearly as simple as promoting higher density or adopting policies intended to reduce vehicle miles traveled. Despite the need to balance competing needs, the array of planning and zoning concepts being wrapped in to this federal initiative are very specific and complex, yet they are being applied in a simplistic, one-size-fits-all manner that is largely based on assumptions. While NAHB has long supported green building, Smarter Growth, and good planning, it is clear that regardless of whether a specific community receives federal funding, the new federal programs under the Sustainable Communities Initiative have inappropriately created a new national dialogue and precedent for reform of state and local requirements on where, how, and when, development--and thus homebuilding--can proceed.

Proposed Solution

If funding remains available for the Sustainable Communities program, NAHB urges EPA to broaden the parameters under which funding is provided. At a minimum, EPA must refrain from directing a grantee to undertake specific changes to existing planning or zoning regulations or to use specific tools (ex: EPA's Smart Location Database) as a condition of accepting federal grant funds.

Conclusion

NAHB appreciate the opportunity to provide EPA's Regulatory Reform Task Force with specific examples of existing regulations, regulatory policies, and programs for consideration as the Agency

formulates its response to E.O., 13777. Please contact my colleague, Mr. Michael Mittelholzer at (202) 266-8660 or mmittelholzer@nahb.org if you have any questions regarding any of the regulations, regulatory policies, or programs discussed within this letter. NAHB looks forward to future opportunities to engage with EPA as it works toward reducing regulatory burdens and improving the overall environment for the nation.

Sincerely,

Susan Asmus, Senior Staff Vice President