

United States Senate

WASHINGTON, DC 20510

March 6, 2003

The Honorable Christine Todd Whitman
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Ave. NW
Washington, DC 20460

Dear Administrator Whitman:

We are writing regarding your proposed rule entitled, A Modification of National Pollutant Discharge Elimination System (NPDES) Permit Deadline for Storm Water Discharges for Oil and Gas Construction Activity That Disturbs One to Five Acres of Land, printed in the Federal Register on December 30, 2002, and hereafter referred to as the "proposed regulation." This letter is a follow-up to our correspondence on February 20, 2003. We have requested a meeting with your staff to review that letter, and we hope we are able to do so soon.

We have serious questions about the quality of the information contained in the proposed regulation and the way in which EPA presents it. To help resolve these concerns, we asked the General Accounting Office (GAO) to conduct an evaluation of this information. The GAO provided a verbal briefing on February 24, 2003 that identified a number of critical flaws. In issuing this proposed rule, we believe that you have violated both the letter and the spirit of the Data Quality Act (P.L. 106-554, section 515(a)).

We are writing to you today to request a correction of information under that Act. In accordance with EPA Guidelines For Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by the Environmental Protection Agency (December 2002), hereafter referred to as the "Guidelines", we expect that you will complete consideration of this request prior to issuance of a final rule. Based on your findings, we expect that you will suspend activity on your proposed rulemaking due to the failings of the data used to justify it.

The information described above and cited in proposed rule entitled, A Modification of National Pollutant Discharge Elimination System (NPDES) Permit Deadline for Storm Water Discharges for Oil and Gas Construction Activity That

Disturbs One to Five Acres of Land, printed in the Federal Register on December 30, 2002 does not comply with EPA or OMB guidelines for Data Quality.¹

Standards of Performance for Information

The Guidelines apply to information EPA disseminates to the public.² It is clear that the Guidelines apply to the proposed regulation and that the standard of performance for influential information³ should be used in this case.

The Guidelines state that EPA initiates a distribution of information if:

EPA distributes information prepared or submitted by an outside party in a manner that reasonably suggests that EPA indorses or agrees with it; if EPA indicates in its distribution that the information supports or represents EPA's viewpoint; or if EPA in its distribution proposes to use or uses the information to formulate or support a regulation, guidance, policy, or other Agency decision or position.⁴

In its proposed regulation, EPA is using information prepared by the Department of Energy's Energy Information Administration (EIA) as the basis for its hypothesis that there may be an impact of this regulation on the oil and gas industry that it did not consider previously. The Agency then uses this hypothesis as the basis for the proposed regulation and the reason for postponing the permit deadline for the storm water phase II regulation for the oil and gas industry.⁵ In its proposed regulation, EPA endorses the EIA data, indicates that the existence of the EIA data is the basis for changing EPA's belief regarding the impact of the storm water phase II regulation on the oil and gas industry, and uses the EIA data to formulate and to support its proposed regulation. Clearly, the Guidelines apply in this case.

¹ Office of Management and Budget (OMB) Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies, Fed. Reg. Vol. 67, No. 36, February 22, 2002, pp. 8452 - 8459; Environmental Protection Agency (EPA) Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by the EPA, December 2002.

² EPA Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by the EPA, December 2002, p. 15; OMB Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies, Fed. Reg. Vol. 67, No. 36, February 22, 2002, p. 8453-8454.

³ Ibid., p. 19; Ibid., p. 8452, 8455, 8459-8460.

⁴ EPA Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by the EPA, December 2002, p. 15-16.

⁵ EPA proposed rule entitled, "Modification of National Pollutant Discharge Elimination System (NPDES) Permit Deadline for Storm Water Discharges for Oil and Gas Construction Activity That Disturbs One to Five Acres of Land," Fed. Reg. Vol. 67 No. 250, December 30, 2002.

The Guidelines also identify a higher standard of performance for "influential information."⁶ The Guidelines state that influential information means "that the Agency can reasonably determine that dissemination of the information will have or does have a clear and substantial impact (i.e., potential change or effect) on important public policies or private sector decision."⁷ In this case, the information in question is clearly influential. EPA uses the information to justify extending a permit deadline for two years during which time EPA will consider, among other things, exempting an entire industry from permit requirements.⁸ EPA and OMB indicate in their Guidelines that influential information should be held to a higher standard of quality. Specifically, EPA states, "A higher degree of transparency about data and methods will facilitate the reproducibility of such information by qualified third parties, to an acceptable degree of imprecision."⁹ The following discussion will demonstrate that EPA's proposed regulation fails to meet the performance standards for data quality established by its Guidelines.

Information Fails to Comply with Guidelines

The purpose of the OMB and EPA guidelines is to comply with the Data Quality Act which seeks to "ensure and maximize the quality, including objectivity, utility and integrity of disseminate information."¹⁰ Objectivity focuses on whether the disseminated information is being presented in an accurate, clear, complete and unbiased manner, and as a matter of substance, is accurate, reliable, and unbiased. Integrity refers to security, such as the protection of information from unauthorized access or revision, to ensure that the information is not compromised through corruption or falsification. Utility refers to the usefulness of the information to the intended users.¹¹ The proposed regulation fails to meet each of these standards.

In your proposed regulation, you propose to postpone the permit deadline from March 10, 2003 to March 10, 2005 to "allow time for EPA to analyze and better evaluate

⁶ EPA Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by the EPA, December 2002, p. 19; OMB Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies, Fed. Reg. Vol. 67, No. 36, February 22, 2002, p. 8452, 8455, 8459-8460.

⁷ EPA Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by the EPA, December 2002, p. 19; OMB Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies, Fed. Reg. Vol. 67, No. 36, February 22, 2002, p. 8455, 8460.

⁸ EPA proposed rule entitled, "Modification of National Pollutant Discharge Elimination System (NPDES) Permit Deadline for Storm Water Discharges for Oil and Gas Construction Activity That Disturbs One to Five Acres of Land," Fed. Reg. Vol. 67 No. 250, December 30, 2002

⁹ EPA Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by the EPA, December 2002, page 19; OMB Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies, Fed. Reg. Vol. 67, No. 36, February 22, 2002, pp. 8452, 8459-8460.

¹⁰ P.L. 106-554.

¹¹ EPA Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by the EPA, December 2002, page 15; OMB Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies, Fed. Reg. Vol. 67, No. 36, February 22, 2002, pp. 8459-60.

the impact of the permit requirements on the oil and gas industry....”¹² There are four main pieces of information in this proposal that fail to meet the standards in the EPA Guidelines.

You base the need for this additional evaluation on “recent information from the U.S. Department of Energy”¹³ that EPA uses to estimate oil and gas starts per year. Section II of the proposed rule states, “Based on recent information from the U.S. Department of Energy, EPA now estimates that on average there are 30,000 oil and gas starts per year, including exploration and development activities.”¹⁴

This section goes on to say, “Initially, EPA assumed that very few of these starts would incur compliance costs associated with the Phase II rule because most of them would be less than one acre. However, based on new information, EPA now believes that a significant number of such sites may exceed one acre.”¹⁵

Section III of the proposed rule states, “Since January 2002, information has become available indicating that close to 30,000 oil and gas sites may be affected by the Phase II storm water regulations.”¹⁶

The number “30,000”,¹⁷ used by EPA to justify its proposed regulation, is supported in the EPA docket only by Table 5.2, entitled, “Crude Oil and Natural Gas Wells Dilled,”¹⁸ produced by the EIA and published in its Monthly Energy Review. There is no additional supporting information.

The most egregious failure comes in the area of objectivity. Both EPA and OMB Guidelines require that the disseminated information be presented in an accurate, clear, complete and unbiased manner, and as a matter of substance, is accurate, reliable, and unbiased.¹⁹ The data presented in this proposed regulation does not meet this standard.

First, the number 30,000 is presented in the proposed regulations as “recent”²⁰ data. Table 5.2 shows that this data has been presented by EIA since 1978,²¹ making it impossible to accurately call this data “recent.”

¹² EPA proposed rule entitled, “Modification of National Pollutant Discharge Elimination System (NPDES) Permit Deadline for Storm Water Discharges for Oil and Gas Construction Activity That Disturbs One to Five Acres of Land,” Fed. Reg. Vol. 67 No. 250, December 30, 2002, Summary.

¹³ EPA proposed rule entitled, “Modification of National Pollutant Discharge Elimination System (NPDES) Permit Deadline for Storm Water Discharges for Oil and Gas Construction Activity That Disturbs One to Five Acres of Land,” Fed. Reg. Vol. 67 No. 250, December 30, 2002, Section II.

¹⁴ Ibid.

¹⁵ Ibid.

¹⁶ Ibid., Section III.

¹⁷ Ibid.

¹⁸ EPA Docket ID: OW-2002-0068-0005.

¹⁹ EPA Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by the EPA, December 2002, p. 15; OMB Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies, Fed. Reg. Vol. 67, No. 36, February 22, 2002, p. 8459.

Second, the proposed regulation indicates that "on average" there are 30,000 oil and gas starts per year.²² However, there is no explanation for how this number was derived, making it impossible for the average user of this data to understand its development. Staff discussions with EPA indicate that this number was developed using 2000 through 2002 data and finding the average. However, the average number of reported wells drilled for 2000 to 2002 was 28,839. The number of reported oil, gas, and dry wells drilled in 2002 was 24,540. The average number of reported wells for the last ten years was 24,588. Over the last five years, the average was 25,629. In addition, in 2001, the monthly average of drilling rigs in operation for natural gas was the highest ever recorded by EIA since it began reporting this statistic in 1988,²³ which, if 2001 is used in calculating an average number of oil and gas starts per year, would skew the results upward.

Third, according to the GAO, the reported number of wells drilled per Table 5.2 includes both onshore and offshore wells. Yet, EPA fails to identify this fact in its proposed regulation. In addition, EPA fails to include an explanation as to why the number of offshore wells drilled per year should be used as part of justification for a two-year delay in the permit deadline for a storm water regulation that has no effect on offshore wells.

Fourth, section II of the December 30, 2002 rule states, "Based on recent information from the U.S. Department of Energy, EPA now estimates that on average there are 30,000 oil and gas starts per year, including exploration and development activities. Initially, EPA assumed that very few of these starts would incur compliance costs associated with the Phase II rule because most of them would be less than one acre. However, based on new [emphasis added] information, EPA now believes that a significant number of such sites may exceed one acre."²⁴ The third sentence in this quote indicates that some "new" information has led them to believe that a significant number of such sites may exceed one acre. The only data included in the docket accompanying this regulation is Table 5.2, which includes no information at all regarding the size of an average oil and gas start.²⁵ The Agency has failed to provide any information to support its belief that a significant number of sites may exceed one acre.

²⁰ EPA proposed rule entitled, "Modification of National Pollutant Discharge Elimination System (NPDES) Permit Deadline for Storm Water Discharges for Oil and Gas Construction Activity That Disturbs One to Five Acres of Land," Fed. Reg. Vol. 67 No. 250, December 30, 2002, Section II.

²¹ EPA Docket ID: OW-2002-0068-0005.

²² EPA proposed rule entitled, "Modification of National Pollutant Discharge Elimination System (NPDES) Permit Deadline for Storm Water Discharges for Oil and Gas Construction Activity That Disturbs One to Five Acres of Land," Fed. Reg. Vol. 67 No. 250, December 30, 2002, Section II.

²³ Energy Information Administration, Monthly Energy Review, January 2003, Table 5.1.

²⁴ EPA proposed rule entitled, "Modification of National Pollutant Discharge Elimination System (NPDES) Permit Deadline for Storm Water Discharges for Oil and Gas Construction Activity That Disturbs One to Five Acres of Land," Fed. Reg. Vol. 67 No. 250, December 30, 2002, Section II.

²⁵ EPA Docket ID: OW-2002-0068-0005.

EPA based its entire proposal to extend the permit deadline for the storm water phase II regulation on "recent"²⁶ information that identified "30,000"²⁷ oil and gas starts per year, that "new" information now leads EPA to believe that they are larger than one acre and subject to the storm water phase II regulations.²⁸ The description of each of these data elements above demonstrates that EPA has failed to meet even the most basic standard of objectivity.

EPA's proposal has additional problems with accuracy, further demonstrating the Agency's failure to meet the objectivity standards²⁹ of the Guidelines as well as the integrity standards.³⁰

Table 5.2, which EPA accepts without validation and uses as the basis for its proposed regulation, has several serious flaws. First, the EIA does not collect drilling data itself. The EIA estimates are based on partial data available from the American Petroleum Institute. The estimates are subject to continuous revision. This information is clearly articulated in EIAs Monthly Energy Review.³¹ Second, EIA has reported problems with drilling activity data in the past. A 1998 EIA report notes that "drilling activity which were published or otherwise distributed by EIA prior to February 1998 are substantially in error."³² Third, in a 1999 report on oil and gas drilling activity data, EIA notes that all work with the raw data and all initial processing are conducted outside EIA. EIA states that: "Such an 'arms-length relationship with the basic data does not facilitate familiarity with the data, and it hampers efforts to investigate concerns about the data."³³ EIA concludes that, "EIA does not collect the raw data itself, so some data errors may remain extremely difficult to discover, identify, and remedy in a timely manner."³⁴

Thus, EPA's reliance on one data point that is so flawed violates the objectivity standard of the Guidelines. In addition, EPA does not meet the integrity standard of the Guidelines by failing to ensure that the data, which is not controlled or collected by EPA, EIA, or any government entity, is protected.³⁵

²⁶ EPA proposed rule entitled, "Modification of National Pollutant Discharge Elimination System (NPDES) Permit Deadline for Storm Water Discharges for Oil and Gas Construction Activity That Disturbs One to Five Acres of Land," Fed. Reg. Vol. 67 No. 250, December 30, 2002, Section II.

²⁷ Ibid., Section II.

²⁸ Ibid., Section II.

²⁹ EPA Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by the EPA, December 2002, page 15; OMB Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies, Fed. Reg. Vol. 67, No. 36, February 22, 2002, pp. 8459-60.

³⁰ Ibid.

³¹ EIA Monthly Energy Review, January 2003, p. 86.

³² EIA Natural Gas Monthly, March 1998, p. vii.

³³ Trapmann, William and Shambaugh, Phil. EIA: EIA Completes Corrections to Drilling Activity Estimates Series, 1999, p. 10.

³⁴ Trapmann, William and Shambaugh, Phil. EIA: EIA Completes Corrections to Drilling Activity Estimates Series, 1999, p. 10.

³⁵ EPA Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by the EPA, December 2002, page 15; OMB Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies, Fed. Reg. Vol. 67, No. 36, February 22, 2002, pp. 8459-60.

Finally, the information used by EPA to justify its proposed regulation fails to meet the utility standard in the Guidelines.³⁶ The proposed regulation fails to identify even the most readily identifiable problems with Table 5.2. EPA's acceptance of the EIA data without validation or verification and its presentation to the public as an accepted fact without identifying any of the data problems we raise in this letter prevents an average person from reviewing EPA's proposed regulation and developing an informed response.

In reviewing the Guidelines while preparing this document, several questions arose. First, the Information Quality Guidelines, EPA states that "There are many tools that the Agency uses such as the Quality System, review by senior management, peer review process, communications product review process, the web guide, and the error correction process."³⁷ EPA also indicates that it seeks input from experts and the general public, and that it consults with groups such as the Science Advisory Board and the Science Advisory Panel.³⁸ Which of these tools were used in preparing the proposed regulation—include full citation here...rule on storm water phase II published in the Federal Register on December xx, 2002?

The EPA Information Quality Guidelines contain a section entitled, "Does EPA Ensure and Maximize the Quality of Information from External Sources?"³⁹ It indicates that since 1998, the use of environmental data collected by others or for other purposes has been within the scope of the Agency's Quality System.⁴⁰ Please explain how the data used by EPA to justify the December xx 2002 proposed regulation regarding storm water phase II met the standards of this system before being published in the Federal Register.

Based on the preceding analysis, we are requesting a correction of the information used to justify EPA's proposed regulation.⁴¹ We recommend that EPA suspend activity on the regulation until it can apply basic data quality control actions to this information, review the accuracy of the data the Agency is using to justify its actions, and re-evaluate the need for the regulation.⁴² In conducting this review, we ask EPA to specifically evaluate each of the points we raise in this letter, in addition to any others that you may identify. We urge the Agency to recall the requirements in its Guidelines for "influential

³⁶ Ibid.

³⁷ EPA Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by the EPA, December 2002, page 19.

³⁸ Ibid., p. 19.

³⁹ Ibid., p. 28.

⁴⁰ Ibid., p. 28.

⁴¹ Ibid., p. 30.

⁴² EPA Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by the EPA, December 2002, p. 30.

information” and ensure that the data used in this proposed regulation meets that standard.⁴³ In addition, in accordance with the Guidelines, we expect that you will complete consideration of this request prior to issuance of a final rule.⁴⁴

The errors that EPA has made in accepting and presenting this data to the public are unacceptable. The presentation of faulty data as fact makes it impossible for the public to respond to EPA’s proposal with full information. EPA’s reliance on this faulty data has set into place a process that could delay water quality benefits and potentially eliminate them completely. In the preamble to the storm water phase II regulation, EPA states, “EPA believes that implementation of Best Management Practices (BMP) controls at small construction sites will also result in a significant reduction in pollutant discharges and an improvement in surface water quality....Expected benefits [of the rule as a whole] include reduced scouring and erosion of streambeds, improved aesthetic quality of waters, reduced eutrophication of aquatic systems, benefit to wildlife and endangered and threatened species, tourism benefits, biodiversity benefits and reduced costs for siting reservoirs.”⁴⁵ Postponement of the storm water phase II requirements for construction sites in the oil and gas industry will only reduce the water quality benefits of the regulation.

In EPA’s proposed regulation, you indicate that you will be analyzing and evaluating the scope and effect of 33 U.S.C. 1342(1)(2) which is an exemption for certain types of discharges from certain types of systems. The exemption of the storm water discharges covered by the phase II regulation will not only delay the water quality benefits described above, but also eliminate them completely.

At a time when EPA reports that 45% of our nation’s waters remain impaired⁴⁶ and non-point source runoff is the leading source of impairment,⁴⁷ any action to roll back existing protections is imprudent. It is worth noting that one of the commenters on the Agency’s proposal, the Warren County Conservation District in Pennsylvania, indicates that they have been regulating oil and gas industry construction projects under the storm water phase I regulations for ten year. They note that 70% of the oil and gas projects inspected between 1997 and 2002 were in violation of permit requirements.⁴⁸

⁴³ EPA Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by the EPA, December 2002, p. 19; OMB Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies, Fed. Reg. Vol. 67, No. 36, February 22, 2002, p. 8452, 8455, 8459-8460.

⁴⁴ EPA Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by the EPA, December 2002, p. 32.

⁴⁵ EPA Final rule entitled, “National Pollutant Discharge Elimination System--Regulations for Revision of the Water Pollution Control Program Addressing Storm Water Discharges; Final Rule,” Fed. Reg. Vol. 64, No. 235, December 8, 1999.

⁴⁶ Statement of G. Tracy Mehan, III, Assistant Administrator for Water U.S. Environmental Protection Agency Before the Committee on Environment and Public Works, October 8, 2002.

⁴⁷ EPA National Water Quality Inventory, 2000 Report, p. ES-3.

⁴⁸ EPA docket ID No. OW-2002-0068-0023, -0024.

We believe that the correction of the information in the proposed regulation will demonstrate that there is no justification for EPA's proposal to extend the permit deadline for the storm water phase II regulation for the oil and gas industry. Your correction of the Agency's mistakes during this rulemaking process will protect water quality for future generations and protect the integrity of the rulemaking process. We can be contacted at the Committee address and phone number above. We look forward to hearing from you soon to discuss this matter.

Sincerely,





