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

DEC 2 2 2004

OFFICE OF
ENFORCEMENT AND
COMPLIANCE ASSURANCE

Mr. Gerald M. Howard
Executive Vice President and
Chief Executive Officer
National Association of Home Builders
1201 15th Street, NW
Washington, DC 20005-2800

RE: Response to Request for Correction (RFC) regarding "U.S. v. Wal-Mart Stores, Inc., Fact Sheet, May 12, 2004" (IQG RFC # 04022)

Dear Mr. Howard:

We have received the National Association of Home Builders (NAHB) July 9, 2004, request to correct information (RFC) submitted pursuant to the *Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by the Environmental Protection Agency* (EPA Information Quality Guidelines). In the RFC you raised a number of issues with respect to the objectivity, integrity, utility, and reproducibility of information included in the "U.S. v. Wal-Mart Stores, Inc., Fact Sheet" ("Fact Sheet") which accompanied a press release announcing a Clean Water Act settlement between the United States, the States of Utah and Tennessee and Wal-Mart Stores, on May 12, 2004. In addition, your letter requests that EPA revise the Fact Sheet.

We have made several revisions to the Fact Sheet and our Web site now contains an updated Fact Sheet. It can be found at http://www.epa.gov/compliance/resources/cases/civil/cwa/ walmart2.html. Specifically, we revised the Fact Sheet to refer to updated EPA sources of information on storm water impacts to water quality (located in the 1998 and 2000 Water Quality Inventory Reports), and to clarify the specific water quality impacts associated with polluted storm water runoff from construction sites as opposed to the water quality impacts associated with the broader category of urban storm water runoff. In addition, to eliminate any potential for misunderstanding or misinterpretation, we have clarified the relationship between the overall impacts from urban storm water runoff and storm sewers and runoff from construction activities and clarified that construction storm water runoff is not a major source of pathogens. We also reviewed the Fact Sheet, considering the specific issues raised in your letter, to ensure that the statements in the Fact Sheet concerning the impacts of construction storm water runoff are consistent with prior Agency documents and

are accurate. We agree that the transparency of these statements could be enhanced by providing the specific sources of information from which the statements in the Fact Sheet were taken and have added a section to the revised Fact Sheet listing these sources. We have attached to this response a more detailed, footnoted version of the Fact Sheet with specific page numbers where you can find the information relied upon, and have posted this version on the EPA Information Quality Guidelines website (see below). We believe the revised Fact Sheet complies fully with EPA's Information Quality Guidelines.

If you are dissatisfied with this decision, you may submit a "Request for Reconsideration" (RFR). EPA recommends that this request be submitted within 90 days of the date of this letter. To do so, send a written request to the EPA Information Quality Guidelines Processing Staff via mail (Information Quality Guidelines Staff, Mail Code 2811R, U.S. EPA, 1200 Pennsylvania Ave., N.W., Washington, D.C. 20460), electronic mail (quality@epa.gov), or fax (202-565-2441). The RFR should reference RFC # 04022. Additional criteria for information that should be included in the request is listed on the EPA Information Quality Guidelines Web site (www.epa.gov/quality/informationguidelines).

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

Sincerely,

for

Walker B. Smith, Director
Office of Regulatory Enforcement

Attachment

The detailed footnotes in this version of the Fact sheet are provided to address the specific concerns on documentation raised by NAHB in their Information Quality Guidelines Request for Correction. A similar version of the Fact Sheet, without the footnotes, can be found on the OECA Web site at http://www.epa.gov/compliance/resources/cases/civil/cwa/walmart2.html.

U.S. v. Wal-Mart Stores, Inc.

FACT SHEET
May 12, 2004
(Revised: December 28, 2004)

Today's Announcement

Today, the United States lodged a settlement between the United States, the State of Tennessee, the State of Utah, and Wal-Mart Stores, Inc. In the next few months, we will undertake additional enforcement actions against other nationwide construction customers.

- Wal-Mart is one of the largest retail construction developers in the country, building well over 200 stores each year across the United States under the brand names Wal-Mart Stores, Wal-Mart Supercenters, and Sam's Clubs.

- In 2001, Wal-Mart settled claims that it had violated the storm water requirements at about 17 sites across the country. That settlement called for payment of a $1 million penalty and a compliance and training program.

- After the settlement, follow-up inspections at 24 Wal-Mart stores revealed that violations continued. Specifically, EPA and state inspectors found:

  ✓ failure to obtain permits for some sites

  ✓ discharges of excessive sediment to sensitive water ways

  ✓ failure to install and/or maintain adequate sediment and erosion control devices

  ✓ failure to develop and/or implement a storm water pollution prevention plan

  ✓ failure to inspect sediment control devices to ensure adequacy and condition and that operating properly

  ✓ failure to develop an adequate plan for controlling sediment and minimizing erosion

- Wal-Mart has agreed to a settlement with the United States, the State of Utah, and the State of Tennessee to resolve these violations. This settlement addresses violations at over 24 sites in 9 states (California, Colorado, Delaware, Michigan, New Jersey, South Dakota, Tennessee, Texas, and Utah).

- Under this settlement, Wal-Mart will:

  ✓ pay the largest civil penalty ever paid for violations of the storm water regulations – $3.1 million to be divided between the United States, Tennessee and Utah

  ✓ perform a supplemental environmental project that will result in the protection of sensitive wetlands or waterways in one of the affected states; and

  ✓ develop an extensive compliance program to provide better oversight of the contractors

- The compliance program required by this settlement requires Wal-Mart to take a comprehensive and preventive approach to compliance by focusing on:

  ✓ the use of qualified individuals – Wal-Mart will undertake an extensive training program including: an annual seminar to educate its employees and contractors on storm water controls; a certification program for construction site employees to ensure they know how to prevent excessive discharges; and provision of training materials to site employees

  ✓ careful oversight of its contractors through: regular and frequent inspections by contractor and Wal-Mart employees; documentation of the compliance efforts; and imposition of sanctions by Wal-Mart on its contractors for failure to comply with the storm water requirements

Environmental Harm and Public Health Impacts Associated with Storm Water Runoff

- Discharges of storm water runoff can have a significant impact on water quality. Several studies reveal that storm water runoff from urban areas can include a variety of pollutants, such as sediment, bacteria, organic nutrients, hydrocarbons, metals, oil and grease. These pollutants can harm the environment and public health. [1]

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[1] *Economic Analysis of the Final Phase II Storm Water Rule, Final Report* (U.S. EPA, October 1999) (page 2-1, 2-9) and *Environmental Impacts of Storm Water Discharges: A National Profile* (U.S. EPA, 1992). Also, see the *Final Rule: NPDES Regulations for Revision of the Water Pollution Control Program Addressing Storm Water Discharges* (U.S. EPA, December1999) (page 68724) which states, "Uncontrolled storm water discharges from areas of urban development and construction activity negatively impact receiving waters by changing the physical, biological and chemical composition of the

- According to EPA's *National Water Quality Inventory: 2000 Report*, prepared under Section 305(b) of the Clean Water Act, urban storm water runoff and discharges from storm sewers are a primary cause of impaired water quality in the United States. These sources contribute to 13 percent of impaired rivers and streams, 18 percent of impaired lakes, 55 percent of impaired ocean shorelines, and 32 percent of impaired estuaries.[2]

Environmental Harm Associated with Storm Water Runoff from Construction Sites

- The discharge of storm water runoff from construction activities (e.g., land development, road construction) can have a significant impact on rivers, lakes, and wetlands.[3] Construction fundamentally alters natural landscapes. During construction, earth is compacted, excavated and displaced, and vegetation is removed. These activities

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water, resulting in an unhealthy environment for aquatic organisms, wildlife, and humans." Also, see the *Report to Congress on the Phase II Storm Water Regulations* (U.S. EPA, October 1999) (pages 1-3 to 1- 4) which states, "The environmental harm currently caused by discharges from municipal separate storm sewer systems (MS4s) and construction activity is well documented...Urbanization alters the natural infiltration capability of the land and generates a host of pollutants, thus causing an increase in storm water runoff volumes and pollutant loadings....Siltation is the largest cause of impaired water quality in rivers and the third largest cause of impaired water quality in lakes..."

[2] *National Water Quality Inventory: 2000 Report* (U.S. EPA, 2002) (pages ES-3, 33, 38) also states, in regard to ocean shorelines miles, "Primary sources of pollution include urban runoff, storm sewers...."; "Across all waterbody types, states and other jurisdictions reported that: Siltation, nutrients, bacteria, metals ... are among the top causes of impairment ....(and) Pollution from urban and agricultural land that is transported by precipitation and runoff...is the leading source of impairment."; "...urban runoff and storm sewers...are the primary sources of pollutants that impair the Great Lakes shoreline waters."

[3] *Economic Analysis of the Final Phase II Storm Water Rule, Final Report,"* (U.S. EPA, October 1999((page 2-1). Also, see the *Environmental Assessment for Proposed Effluent Guidelines and Standards for Construction and Development Category* (U.S. EPA, June 2002) (pages 2-1, 2-2, 2-8, 2-11, 2-13) which states, "Erosion from construction sites can be a significant source of sediment pollution to nearby streams" and which lists sediment, metals, poly-aromatic hydrocarbons, oil, grease, and pathogens as pollutants associated with storm water runoff from construction sites and land development. Also, see the *Report to Congress on the Phase II Storm Water Regulations* (U.S. EPA, October 1999) (pages 1-3 to 1-4) which states, "The environmental harm currently caused by discharges from municipal separate storm sewer systems (MS4s) and construction activity is well documented....Discharges from construction activity impact the biological, chemical, and physical integrity of receiving waters....Siltation is the largest cause of impaired water quality in rivers and the third largest cause of impaired water quality in lakes..."

increase runoff and erosion, thus increasing sediments transported to receiving waters.[4] In addition to sediment, as storm water flows over a construction site, it can pick up other pollutants like debris, pesticides, petroleum products, chemicals, solvents, asphalts and acids which may also contribute to water quality problems.[5]

- Although erosion and sedimentation are natural processes, when land is disturbed by construction activities, surface erosion can increase up to 200 times on sites formerly under pasture, and up to 2,000 times on sites formerly forested.[6] Agriculture processes produce the largest sediment loads, however, construction results in the most concentrated form of erosion - the rate of erosion from construction sites can exceed that from agricultural land by 10 to 20 times.[7]

- Sediment-laden runoff results in increased turbidity and decreased oxygen in a stream, which in turn results in loss of in-stream habitat for fish and other aquatic species.

- Sediment-laden runoff can kill fish directly, destroy spawning beds, and suffocate fish eggs and bottom dwelling organisms.

- Sediment-laden runoff can increase difficulty in filtering drinking water, resulting in higher treatment costs, and can result in the loss of drinking water reservoir storage capacity and decrease the navigational capacity of waterways.

- Sediment-laden runoff blocks light and reduces growth of beneficial aquatic grasses.[8]

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[4] *Economic Analysis of the Final Phase II Storm Water Rule, Final Report,"* (U.S. EPA, October 1999((page 2-2).

[5] *Economic Analysis of the Final Phase II Storm Water Rule, Final Report," October 1999*, states that, in addition to sediment, "construction activities also yield pollutants such as pesticides, petroleum products, construction chemicals, solvents, asphalts, and acids that can contaminate storm water runoff (Marsh, 1993)." *Report to Congress on the Phase I Storm Water Regulations (Feb. 2000)* states that several studies "reveal that storm water runoff from construction sites can include a variety of pollutants, such as sediment, bacteria, organic nutrients, hydrocarbons, zinc, copper, cadmium, mercury, iron, nickel, and oil and grease (Barret et al., 1996)." (pg. 4-1).

[6] *Economic Analysis of the Final Phase II Storm Water Rule, Final Report,"* (U.S. EPA, October 1999) (page 2-2), and *Report to Congress on the Phase I Storm Water Regulations* (U.S. EPA, February 2000)(page 4-1).

[7] *Report to Congress on the Phase I Storm Water Regulations* (U.S. EPA, Feb. 2000) (page 4-1).

[8] Specifically, the *National Water Quality Inventory: 2000 Report* states that siltation "alters aquatic habitat, suffocates fish eggs and bottom-dwelling

- Sediment/siltation is listed in the *National Water Quality Inventory: 2000 Report* as the second leading cause of impairment in assessed rivers and streams, the third leading cause of impairment in assessed lakes, ponds and reservoirs, and the leading cause degrading wetland integrity. Construction sites are one source of sediment loading. Construction is specifically listed as the second leading *source* of pollutants degrading wetland integrity.

The Compliance Status of Construction Activities

- Ten industrial categories are specifically required to apply for and comply with NPDES permits to control their discharges involving storm water runoff. Construction activity that disturbs 1 or more acres is one of these categories.[9] The primary method to control storm water discharges is through the use of best management practices as specified in these permits.[10]

- Construction sites of 5 or more acres have been required to obtain an NPDES permit and install controls to prevent pollutants from leaving these sites for over ten years.

  EPA and the states have spent years educating the regulated community. Compliance assistance efforts have included numerous training opportunities, storm water Web sites, public service announcements, guidance documents, fact sheets, brochures and model Storm Water Pollution Prevention Plans.

- Despite extensive outreach efforts by EPA and the states, compliance within the construction industry remains poor. Results from EPA and State inspections of industrial

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organisms, and can interfere with drinking water treatment processes and recreational use of a river." (page 13). Figure 2-6 on page 15 of the *National Water Quality Inventory*: *2000 Report* states, "Siltation is one of the leading pollution problems in the nation's rivers and streams. Over the long term, unchecked siltation can alter habitat with profound adverse effects on aquatic life. In the short term, silt can kill fish directly, destroy spawning beds, and increase water turbidity resulting in depressed photosynthetic rates." Figure 2-6 also states, "Sediment suffocates fish eggs and bottom-dwelling organisms.", "Sediment blocks sunlight and reduces growth of beneficial aquatic grasses.", and "Sediment reduces available habitat where fish lay eggs and other aquatic organisms dwell." EPA's *Economic Analysis of the Final Phase II Storm Water Rule* also includes accelerated loss of storage in lakes and reservoirs, increased navigational obstruction, diminished water recreational experiences, and reduced aesthetic and preservation values. (Exhibit 2-3, pg. 2-6).

[9] EPA's website: http://cfpub1.epa.gov/npdes/home.cfm?program_id=6

[10] Ibid.

facilities indicate that a majority of facilities and sites do not have coverage under an NPDES storm water permit. Of the sites that have applied for permit coverage, non-compliance with permit requirements remains significant.

- *The Report to Congress on The Phase I Storm Water Regulations* estimated that:

  - ✓ there are more than 62,000 construction sites of 5 or more acres that should be obtaining a permit each year;

  - ✓ less than one-third (about 20,000) actually obtained permits before breaking ground;[11]

  - ✓ inspections by EPA and states indicate that many sites that did obtain permits failed to adequately implement the permits and control sediment and erosion.

- Many of the steps to control storm water runoff are simple and not costly, including:

  - ✓ planning construction projects to reduce the amount of time soil is left exposed;

  - ✓ installing relatively simple and low cost sediment and erosion control devices such as silt fences and straw bales.

- OECA first designated storm water as a priority area in the FY 1998-1999 MOA Guidance. Storm water will continue as an MOA priority in FY 2005-2007. We intend to focus our efforts on large-scale developers where there is a corporate-wide pattern of non-compliance. These developers fall into two categories of large-scale construction operations: (1) commercial development of "big-box" stores and their associated contractors, and (2) large national and residential builders.

References

- The following EPA documents were used in developing this Fact Sheet:

  - ✓ *Economic Analysis of the Final Phase II Storm Water Rule, Final Report* (U.S. EPA, October 1999)
  - ✓ *Environmental Assessment for Proposed Effluent Guidelines and Standards for the Construction and Development Category* (U.S. EPA, June 2002)
  - ✓ *Report to Congress on the Phase I Storm Water Regulations* (U.S. EPA, Feb. 2000)

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[11] *Report to Congress on The Phase I Storm Water Regulations*, (U.S. EPA, 2000) (page 4-4).

- ✓ *Report to Congress on the Phase II Storm Water Regulations* (U.S. EPA, Oct. 1999)
- ✓ *National Pollutant Discharge Elimination System - Regulations for Revision of the Water Pollution Control Program Addressing Storm Water Discharges; Final Rule* (U.S. EPA, Dec. 1999)
- ✓ *Environmental Impacts of Storm Water Discharges: A National Profile* (U.S. EPA, 1992)
- ✓ *National Water Quality Inventory: 2000 Report* (U.S. EPA, Aug. 2002)
- ✓ *National Water Quality Inventory: 1998 Report to Congress* (U.S. EPA, June 2000)
- ✓ *National Water Quality Inventory: 1996 Report to Congress* (U.S. EPA, 1998)