

US EPA ARCHIVE DOCUMENT



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Ms. Deborah Dalton
U. S. Environmental Protection Agency
Mail Stop 2136
401 M St., SW
Washington, D.C. 20460

Re: Review of Environmental Protection Agency Public Participation Policies

Dear Ms. Dalton:

On behalf of the 200,000 members of the National Association of Home Builders (NAHB), I am pleased to submit comments on the U.S. Environmental Protection Agency's (EPA) November 30, 1999, *Federal Register* notice requesting public comment on the 1981 Policy on Public Participation. NAHB's membership consists of individuals and firms who develop land and construct homes and apartments, as well as commercial and industrial projects. Because many construction activities are directly regulated under Section 402 and Section 404 of the Clean Water Act, and many development projects must ensure compliance with certain requirements of the Clean Air Act, EPA rules and actions frequently affect our members. As a result, our members rely on EPA's actions under the 1981 EPA Policy on Public Participation to keep informed of upcoming rules and to provide input to the agency during the rule-making process. Unfortunately, members of the public, including the regulated community, are often barred a meaningful opportunity to participate in the rulemaking process due to lack of notification, procedural flaws, inaccessible documentation and simply an inability to quickly understand EPA's often complex and highly technical proposals. Given these difficulties, NAHB welcomes the opportunity to review and comment on the 1981 Policy on Public Participation.

Due to the short amount of time in which to submit comments, NAHB has elected to directly address only the following one of the two issues on which comments are sought, although EPA may also find our suggestions useful in developing strategies to further engage the public in other efforts.

- 1. What changes need to be made to the 1981 Policy on Public Participation?**
(1a) What is working well, and how does the experience of the past nineteen years suggest the need for improvements in the general procedures for involving the public in EPA programs and decisions?

In General.

"Public participation" is that part of the agency's decision-making process that provides opportunity and encouragement for the public to express their views to the agency, and assures

*that the agency will give due consideration to public concerns, values and preferences when decisions are made. The purpose of EPA's Policy on Public Participation is to "strengthen EPA's commitment to public participation and to establish uniform procedures for participation by the public in EPA's decision-making process. This in turn will assist EPA in carrying out its mission, by giving a better understanding of the public's viewpoints, concerns and preferences. It should also make the agency's decisions more acceptable to those who are most concerned and affected by them."*¹

Although the policy may sound good on paper, NAHB is seriously concerned that it does not ensure that all interested parties will, indeed, have a meaningful opportunity to participate. Further, it fails to adequately guarantee that the public's comments, suggestions and preferences will be fully considered and incorporated into final rules and agency actions. Finally, although the agency expects this policy to result in decisions that are more acceptable to interested and affected parties, because of its shortcomings, as discussed below, NAHB contends that the policy, coupled with EPA's implementation of it, is actually working against the agency. Rather than garnering legitimacy, the policy has resulted and continues to result in a regulated public that frustrated, distrustful, and dissatisfied with government actions. Although EPA contends that the agency "needs the perspectives and ideas that citizens bring,"² its action speak strongly against this mantra.

D. General Procedures for All Programs

NAHB asserts that the five basic functions (*identification, outreach, dialogue, assimilation, and feedback*) identified in the policy are not being implemented to ensure effective public participation in EPA decisions or activities, as outlined below.

Identification. *The 1981 Policy states that "The responsible officials(s) shall develop a contact list for each program or projects, and add to the list whenever members of the public request it."*³ *The contact list is to be used to send announcements of public meetings and to identify members of the public who may be considered for advisory groups.*

EPA has not adequately identified individuals or groups that are interested in or affected by its actions and placed them on the contact list. Although identifying interested parties may be a difficult task, it does not eliminate the agency's responsibilities. EPA has access to numerous public records on previous actions, contacts at interest groups, trade associations, professional organizations and the like, and access to thousands of permittees through its various programs, yet it does not appear that these resources are used when developing these required contact lists. For example, NAHB has over 850 state and local Home Builder Associations with a total membership of over 200,000 member firms. How often have these associations been "identified" as a group who might be interested in or affected by a forthcoming EPA action?

¹ 64 Fed. Reg. at 66908

² 64 Fed. Reg. at 66911

³ 64 Fed. Reg. at 66908

Very rarely and in NAHB's estimation, not nearly often enough, even though the construction industry regularly participates in EPA proceedings and is affected by countless EPA actions.

The failure to identify the appropriate entities can result in severe ramification, particularly if the unidentified parties are part of the regulated community. For example, EPA recently held public meetings to provide information about the proposed changes to the Total Maximum Daily Load (TMDL) Program in Atlanta, GA, Kansas City, MO, Seattle, WA and Concord, NH. While there are Home Builders Associations (HBA) in all of these cities, none of them received notice of the meetings, even though builders and developers will be directly impacted by the proposed TMDL changes.⁴ Even more startling is the fact that EPA did not even provide a contact list to the contractor who was co-hosting two of the meetings for its use in preparing mailings to publicize these forums.⁵ Instead, the contractor used a mailing list that it had developed on its own – clearly a breach of the agency's own policy. Similarly, the contact list for the mailing that was done to promote the Concord, NH meeting was provided by "the States."⁶ How the lists were developed by the States and how any interested party may have been included on the list is unknown. In addition to these specific localities, none of the State HBAs or NAHB were informed about these meetings, either. Hence, homebuilders were effectively precluded from participating in and contributing to these forums because they were not identified as an interested party and, therefore, did not know about the meetings.

In contrast, EPA is also expected to complete its homework prior to contacting entities potentially interested in or affected by an action. Throughout its recent proposals to modify the Class V Underground Injection Well regulations, NAHB was contacted as an identified "affected party," yet upon further questioning on more than one occasion, EPA was unable to tell NAHB how its members might be impacted.

NAHB regularly interacts with EPA regarding water and other issues, particularly those associated with the NPDES program. As a result, it seems that NAHB would be just the type of affected and interested party that the agency would want to seek out to meet its goals under the public participation policy. In an effort to assist both our members and EPA, NAHB requests that the National Association of Home Builders be placed on the contact list for all of EPA's water-related activities. Second, NAHB recommends that a procedure be put in place that makes it easier for interested citizens and organizations to be informed of EPA's actions and to be placed on EPA's "contact lists." Given the broad interpretations that EPA typically uses to define its program boundaries, NAHB suggests that EPA take an equally broad approach to identifying the scope of affected and interested parties. At a minimum, when developing a proposal, the agency should be required to identify entities potentially affected by the action, articulate the

⁴ Conversations on December 15, 1999 with Mr. Ed Phillips, Executive VP of Home Builders Association of Georgia; Ms. Rachel Vance, Government Affairs, HBA of Greater Kansas City, Kansas City, MO; Mr. Thomas McCabe, Executive VP, Building Industry Association of Washington-State, Olympia, WA; and Ms. Sharon Wayman, Home Builders & Remodelers Association of New Hampshire, Concord, NH.

⁵ Conversation on December 16, 1999, with Ms. Sharon Thomas, Water Environment Federation Alexandria, VA.

⁶ Conversation on December 21, 1999, with Mr. Dennis Pyburn, New England Interstate Water Pollution Control Commission, Lowell, MA.

expected impact, and contact both the individuals (if applicable) and the governmental entities, trade associations, professional organizations, and other groups that typically represent those entities, both nationally and locally to share this information. Further, with the spreading availability of the Internet, interested parties should be just an email or fax away from being placed on the contact list (assuming that the parties somehow know that EPA is keeping a list for any given topic).

Finally, to ensure that notification is spread to an even broader audience, NAHB recommends that EPA routinely place announcements of public meetings and information about proposed regulations and final rules in local and regional newspapers. Importantly, these notices must also identify the members or segments of the public that are likely to be impacted, as well as a description of the anticipated impact. Although a publication in the *Federal Register* may be a convenient method to distribute information, the *Federal Register* rarely makes its way to the general public and therefore, its use alone fails to provide adequate notice and is unacceptable.

Outreach. *EPA is to provide "policy, program, and technical information * * * at places easily accessible to interested and affected persons and organizations, so they can make informed and constructive contributions to decision-making."*⁷

Although EPA recognizes that "the public can contribute effectively to agency programs only if it is provided with accurate, understandable, pertinent and timely information on issues and decisions,"⁸ the agency does not regularly follow this lead. For example, when EPA Region 4 published the "Notice of Proposed Addition of Waters and Pollutants of Concern to the Alabama Section 303(d) list," the 80+ pages of information, data, and analyses supporting the proposal were made available to the public at only two locations – EPA Regional Headquarters in Atlanta, GA, and the Public Library in Montgomery, AL. Placing this important information at only two locations, and only one in the state that was to be affected by it does not make it 'easily accessible'. Further, given the subject matter of this particular proposal, it would have been impossible to provide thoughtful comment without examining these vital documents.

Unfortunately, upon inspection, the supporting documents were so poorly organized that it was very difficult to make sense of the information and to provide useful feedback. Citizens who do not regularly review this type of information suffered an additional setback, as they were at a loss to make sense of the documentation at all. In this instance, limited data availability and complicated material effectively denied many members of the public a meaningful opportunity to participate in the process.

NAHB recommends that the policy be amended to increase the minimum number of sites where information can be viewed. Under the current policy, the agency is required to "provide one or more central collections of documents, reports, studies, plans, etc. relating to controversial issues or significant decisions * * *."⁹ If the information is relevant to the entire U.S., NAHB

⁷ 64 Fed. Reg. at 66909

⁸ 64 Fed. Reg. at 66908

⁹ 64 Fed. Reg. at 66909

recommends the minimum number of sites should be at least 4 per State; and if the information is relevant to a single State, the minimum number of sites should be at least 10. Given the significant implications of many of the agency's actions, any other action would be disingenuous. In addition, NAHB recommends that the policy be amended to require that all information be made available and downloadable on the Internet.

Timing. Notification must take place well enough in advance of the agency's action to permit the public to respond. Where complex issues or lengthy documents are presented for public comment, the comment period should allow enough time for interested parties to conduct their review.

The construction and development industry is regularly confronted with a myriad of issues, and at any given time, many different federal, State and local regulators are requesting input on proposals that will affect the industry. Given this unending action, and the fact that the agency recognizes that addressing these issues "requires substantial commitment of time, study, research, analysis and discussion,"¹⁰ it is imperative that the agency provide sufficient time in which to respond. As such, NAHB asserts that any public comment period should be a minimum of 120 days instead of the 60 days currently required.¹¹ It is obvious that this change is needed. For example, when EPA published proposed changes on August 23, 1999, to the Water Quality Planning and Management Regulation (TMDL program) and supporting revisions to the NPDES Program and Federal Antidegradation Program, there was a 60-day comment period with a deadline of October 22, 1999. Because of an outcry from interested parties, the comment period was extended twice. First by 60 days to December 22, 1999, followed by an additional 30 days to January 20, 2000. In this case the total comment period will be about 150 days – clearly a more reasonable comment period than the original 60, yet had the agency initially provided 150 days, the public could have spent its limited time formulating suggestions and feedback rather than desperately seeking more time to participate.

While the Administrative Procedure Act does not specify a minimum time period for comment on a proposed rule, Executive Order 12889 (1993) recognizes the need to provide adequate time for review and analysis, as it requires that a "proposed federal technical regulation ..be subject to a comment period *of not less than 75 days*" (emphasis added). NAHB submits that a minimum of 120 days is needed for the public to sufficiently review EPA proposals and to prepare meaningful input. The agency should retain the authority to extend this period where it requests feedback on lengthy documents or highly technical issues. At a minimum, the policy should be amended to require a minimum comment period of 120 days where complex issues or lengthy documents are presented for public comment (complex and lengthy broadly defined to include at least all proposals that take up 30 or more pages in the *Federal Register*. Additional criteria could also be added).

¹⁰ 64 Fed. Reg. at 66911

¹¹ 64 Fed. Reg. at 66909

Dialogue. The policy states that “There must be dialogue between officials responsible for the forthcoming action or decision and the interested and affected members of the public. This involves exchange of views and open exploration of issues, alternatives, and consequences.”¹²

NAHB questions EPA's ability to establish meaningful dialogue that actually results in the public helping to shape final regulations. First, as discussed above, in many instances those most affected by EPA's actions are not at the table. Second, although NAHB has been involved in discussing many different issues with EPA prior to the agency taking action, many of these discussions have been conducted too late in the process or are more akin to formalities than working sessions where the agency is seriously seeking comments or looking to address concerns. For example, NAHB has recently been invited to discuss the current TMDL proposal with EPA staff. Given the timing of the comment period, coupled with the government work schedule and holidays, EPA is unable to meet with us until January 4, 2000 – only 16 days before comments are due on its proposal. Conversely, while we have initiated a dialogue with EPA regarding its development of Effluent Limitation Guidelines for the Construction and Development Industry and have offered to assist the agency in any way we can, it has been like pulling teeth to keep the lines of communication open and to get the agency to ask us for the information it needs. In this case, NAHB is anxious to help the agency, yet is having difficulty keeping a dialogue afloat.

Finally, NAHB is concerned that the mechanisms EPA is using to initiate and maintain the dialogue for some programs is clearly not working as intended (i.e., is not resulting in an exchange of views and open exploration of issues, alternatives, and consequences).¹³ The most recent example of this disconnect is with regards to the Storm Water Phase II Rule. As part of the dialogue, EPA formed an Urban Wet Weather Flows Federal Advisory Committee (FACA Committee) to provide advice and recommendations on the direction of the Phase II program. The FACA Committee established two subcommittees, including Storm Water Phase II. This Subcommittee met a total of 14 times between September 1995 and June 1998. However, the format and leadership of the meetings was not conducive to constructive, reasoned discussions. As a result, the Subcommittee members' ideas, suggestions and concerns were largely stifled, overrun by agency preconceptions, or tabled for further consideration at a later time and never seriously considered. In the end, the Subcommittee never agreed on any aspect of the Phase II program, never provided a written report to the FACA Committee, and the FACA Committee never provided written advice and recommendations to EPA. This was clearly not the end result EPA intended. Further, given the strict requirements of a FACA Committee, this dialogue significantly discouraged and hindered broad public participation. Finally, since EPA relied solely on the FACA as its source for a dialogue, the final proposal (an arguably the final rule), was unfairly skewed toward the views of the majority of the FACA Subcommittee and not necessarily the public at large.

¹² 64 Fed. Reg. at 66909

¹³ 64 Fed. Reg. at 66909

If the agency intends to encourage and facilitate public participation by the broad public, particularly when contemplating rules or regulations that will have expansive applicability, EPA must initialize more than one dialogue (i.e., hearing, meeting, advisory group, etc.) and invite all interested and affected parties to participate. EPA must also take care when choosing the format of the dialog to ensure that the discussions fit the planned action(s) and the agency must be flexible to change course if it is determined that the initially-planned format does not meet the intended goals.

Assimilation. *The policy states that "The heart of public participation lies in the degree to which it informs and influences final agency decisions."¹⁴ Assimilation of public views must include documentation, content and use.*

Assimilation of public views can be provided through several mechanisms including Responsiveness Summaries, EISs and the Preamble to final rules. NAHB asserts that the current policy is woefully lacking, as it is not apparent that public comment is fully considered and it is equally uncertain that public comment plays any role in agency decision-making. For example, EPA published the final Phase II storm water regulations on December 8, 1999 and stated that it was implementing "most of the proposed revisions with minor changes based on public comments received on the proposal."¹⁵ It is difficult to imagine that in the over 500 comments it received from individuals and organizations on its proposal, EPA was only compelled to make "minor changes." EPA actions prior to the final rule further indicate that the agency scarcely intended to give serious consideration to the public comments, as months prior to issuing the final rule EPA published and made available on the Internet several lengthy fact sheets on the proposed Phase II program. Similarly, the agency developed and held several training sessions. Indeed, an effort to educate the public like this is unprecedented on a *proposed* rule and clearly demonstrates that the agency had no intention of making significant changes to the final rule because of comments received. EPA's actions here certainly do not help the agency meet the policy objective to "foster a spirit of mutual trust, confidence, and openness between public agencies and the public."¹⁶

Further, under the 1981 Policy, "The Agency must then *demonstrate*, in its decisions and actions, that it has understood and fully considered public concerns" (emphasis added).¹⁷ When EPA published the final Phase II rule in the *Federal Register*, however, although NAHB submitted 80 pages of comments in response to the proposal, EPA did not directly address commenter concerns or issues in the Preamble or in a special section as it often does. In fact NAHB can find only scant evidence that our concerns were even topically addressed.

Often, rather than disclosing the agency's logic and explaining why the agency rejected proposals made by the public, as required, EPA often uses the trite, "EPA disagrees." This

¹⁴ 64 Fed. Reg. at 66911

¹⁵ 64 Fed. Reg. at 68723

¹⁶ 64 Fed. Reg. at 66908

¹⁷ 64 Fed. Reg. at 66911

response is unacceptable and clearly contrary to the intent of the policy. NAHB submits that such a reply is also in violation of the Administrative Procedures Act (APA). EPA is urged to comply with its own policy and, therefore, should clearly document the justification and logic behind all of its actions. Absent any supporting documentation, or even a plausible stream of logic, NAHB contends that any action could be challenged as being arbitrary and capricious. NAHB believes this shortcoming to be the most egregious failing of this policy.

Feedback. *The agency must provide feedback to participants and interested parties concerning the outcome of the public's involvement.*

Rather than providing direct feedback, EPA has typically considered certain sections in its notices of final agency action as an appropriate and adequate mechanism for providing feedback to the public. NAHB asserts that EPA's use of the Preamble or a section in the Final Rule to provide "feedback" is simply not adequate, as it fails to provide any discernible clue as to the effect that the public's comments had on the action. Using the Phase II Final Rule as an example, if an entity wondered whether or not the public comment process made any difference in promulgating the final rule, he/she would have to read over 120 pages of the *Federal Register* to detect only a few minor modifications. Given that one of the goals of EPA's public participation policy is to assure that the agency will give due consideration to public concerns, values and preferences when decisions are made,¹⁸ the agency is urged to be explicit regarding its actions. NAHB recommends that the agency prepare a separate report on each action, which outlines the effect that the public's comments had on the action. At a minimum, if the agency insists on using the preamble, NAHB suggests that the agency add a separate section entitled, "Effect of Public's Comments on Today's Action."

Finally, the policy states that reprints of Preambles and final rules are to be provided to all who commented. NAHB has submitted comments on many EPA proposals and has never received a reprint, as required. EPA has clearly failed to carry out this aspect of the policy.

G. Authority and Responsibility

NAHB agrees that public participation plays a discrete, yet integral part of many of EPA's programs and that any program must include an evaluation component to determine whether or not the stated goals are being met. As such, we have two suggested modifications to this section.

1. The Administrator

- (g) *evaluate at least annually the adequacy of public participation activities conducted under this policy and the appropriateness and results of public participation expenditures.*

NAHB recommends that the policy be revised to require the Administrator to publish the results of the annual evaluation of the adequacy of public participation activities conducted under the policy, and that this report should include a listing of what criteria were used to evaluate the adequacy of the policy. Further, NAHB recommends that the policy be revised so that the

¹⁸ 64 Fed. Reg. at 66907

annual evaluation "of the adequacy of public participation activities" includes an analysis showing how and to what extent public participation has influenced final agency decisions.

2. Assistant Administrators

- (i) *seek public participation in decisions to modify or develop national policies, at their discretion*

NAHB strongly disagrees with EPA's assertion here that decisions regarding the public's role in modifying or developing national policies should be left to the discretion of the Assistant Administrators. The modification and development of all national policies should be subject to public input and follow the policies adopted within this guidance document.

NAHB would like to close with two final observations. First, the November 30, 1999 *Federal Register* notice requesting public comment fails to provide information regarding where the comments should be sent. Given that one purpose of revisiting the policy is to enhance public participation, this omission does not bode well of the agency. Second, by providing very little time in which to comment on this policy, and following on past experiences, as discussed above, the public cannot help but get the impression that despite its pleadings and the substantive nature of this notice, the agency has little intention to consider and address the public's comments. NAHB is concerned and frustrated by these shortcomings and is pleased that EPA is taking its public participation responsibilities seriously. We believe that significant progress can be made and that incorporating our ideas and suggestions into a revised policy document and implementation strategy can move EPA's public participation program closer to meeting its goals.

Thank you for your consideration of our comments. If you have any questions or would like to further discuss any issues raised in NAHB's comments, please contact Dr. Marolyn Parson, Environmental Policy Analyst, at 202-861-2157.

Best regards,

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