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June 9, 2010

Filed Electronically

EPA Docket Center
Environmental Protection Agency
Water Docket
Mailcode 28221T
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

Re: Agency Information Collection Activities; Proposed Collection; Comment Request; Stormwater Management Including Discharges From Developed Sites Questionnaires; Docket ID No. EPA-HQ-OW-2009-0817

EPA Water Docket:

On behalf of the Building Owners and Managers Association International, International Council of Shopping Centers, NAIOP – the Commercial Real Estate Development Association, National Association of Real Estate Investment Trusts, National Multi Housing Council, National Apartment Association, and The Real Estate Roundtable (collectively hereafter, the "Real Estate Stormwater Coalition" or "Coalition"), we submit the following comments regarding EPA's May 10, 2010 *Federal Register* Notice: Agency Information Collection Activities; Proposed Collection; Comment Request; Stormwater Management Including Discharges From Developed Sites Questionnaires; Docket ID No. EPA-HQ-OW-2009-0817 (75 Fed. Reg. 25,852)(proposed Owner/Developer questionnaire[1]). The Coalition represents the interests of owners, managers, and developers of office, multifamily, retail, hospitality, and other properties. We believe that EPA has exceeded the authority granted to it pursuant to the Clean Water Act (CWA) Section 308(a), 33 U.S.C. § 1318(a), and has violated the Paperwork Reduction Act ("PRA"), 44 U.S.C. § 3401 *et. seq.*. For these reasons, the Office of Management and Budget (OMB) cannot approve this information collection request (ICR).

EPA states that the ICR's purpose is to aid in developing "standards for long term stormwater discharges from developed sites." Supporting Statement at 2. As a threshold matter, EPA has not demonstrated that it has the legal authority to undertake such a regulation. Nevertheless, EPA has asked OMB to approve the ICR and to compel unregulated entities to respond to a burdensome request for information that the Coalition believes is unlawful. The Coalition asserts the following: (1) developed land, as a category, is not a point source; (2) EPA has no authority to regulate impervious surfaces; (3) releases into municipal separate storm

[1] We recognize that EPA has proposed "long" and "short" versions of the proposed Owner/Developer questionnaire. These comments focus on the long version but the comments are equally applicable to both versions, as appropriate.

sewer systems (MS4s) are not discharges into waters of the U.S.; and (4) for properties where runoff is channelized and discharged into a water of the U.S., EPA has not met the statutory prerequisites necessary to exercise any regulatory authority over such discharges. Because EPA has not articulated its legal authority, it also then cannot narrowly define which entities should be subject to this ICR. In October 2009, EPA identified "Contractors" for an "Industry" questionnaire. Now, EPA has shifted its focus to property owners and developers . The resulting proposed Owner/Developer questionnaire is a confusing and incoherent mess.

The Real Estate Stormwater Coalition strongly urges EPA to comply with the statutory prerequisites for expanding the existing stormwater program. EPA is rushing to regulate, using the specious excuse that it has compelled itself to issue a final stormwater regulation by November 2012 in a letter from the Assistant Administrator of the Office of Water to the Natural Resources Defense Council (NRDC) and the Waterkeeper Alliance, as well as in a settlement of a lawsuit brought by the Chesapeake Bay Foundation (CBF).

The November 17, 2009, letter from EPA Office of Water Assistant Administrator Peter Silva to Jon Devine of NRDC and Scott Edwards of the Waterkeeper Alliance states EPA's intent to use section 402(p) of the CWA to regulate impervious surfaces and water flows:

> As the urban, suburban and exurban human environment expands, there is an increase in impervious landcover and stormwater discharges. This increase in impervious landcover on developed sites reduces or eliminates the natural infiltration of precipitation. The resulting stormwater flows across roads, rooftops, and other impervious surfaces, picking up pollutants that are then discharged to our nation's waters. In addition, the increased volume of stormwater discharges results in the scouring of rivers and streams; degrading the physical integrity of aquatic habitats, stream function and overall water quality. EPA is committed to strengthening the stormwater program under the Clean Water Act (CWA) to ensure that our nation's waters are protected.

The Settlement with CBF expands on that intention:

> By September 30, 2011, EPA will propose a regulation under section 402(p) of the Clean Water Act to expand the universe of regulated stormwater discharges and to control, at a minimum, stormwater discharges from newly developed and redeveloped sites. As part of that rulemaking, EPA will also propose revisions to its stormwater regulations under the Clean Water Act to more effectively achieve the objectives of the Chesapeake Bay TMDL. In developing the proposed rule, EPA will consider the following elements related to stormwater discharges both nationally and in the Bay watershed: (1) additional requirements to address stormwater from newly developed and redeveloped sites; (2) requiring development and implementation of retrofit plans by MS4s to reduce loads from existing stormwater discharges; and (3) expanding the definition of regulated MS4s. EPA will take final action on the regulation by November 19, 2012.

Notwithstanding these so-called commitments, EPA can only exercise the authority granted to it by Congress. Accordingly, neither the letter to NRDC and Waterkeeper Alliance, nor the settlement with CBF allows EPA to exceed its authority under CWA Sections 402 or 308 or violate the PRA. In fact, if EPA misses the November 2012 deadline, the only relief provided to CBF in its settlement agreement is the right to reinstate its lawsuit.[2] To the extent that CBF is asking EPA to take action outside of the Agency's authority, CBF will not prevail.

For all of the reasons discussed below, EPA must withdraw the proposed Owner/Developer questionnaire, or OMB must deny approving it pursuant to the CWA and the PRA.

I. LACK OF CWA SECTION 308 AUTHORITY

The proposed Owner/Developer questionnaire states that:

> EPA has the authority to administer this questionnaire under section 308 of the Clean Water Act. (Federal Water Pollution Control Act, 33 U.S.C. § 1318). Participation in this questionnaire is mandatory, and you are required to respond. You must retain a copy of the completed questionnaire for your files. EPA may contact you with follow-up questions to clarify your answers. Late filing of the questionnaire, or failure to follow any related EPA instruction, may result in civil penalties, criminal fines, or other sanctions provided by law including the possibility of fines and imprisonment as explained in Section 308 of the Clean Water Act (33 U.S.C. Section 1318).

EPA's information gathering authority pursuant to CWA Section 308(a), 33 U.S.C. § 1318(a), is limited to "the owner and operator of any point source." EPA plans to send the proposed Owner/Developer questionnaire to a random selection of entities based on their status as owners or developers of construction, land development, or redevelopment projects. *See* Part B of the Supporting Statement, section 2.3 (describing the target population and statistical approach). Nowhere in the ICR or the Supporting Statement is there any indication that EPA will first determine that a recipient of the proposed Owner/Developer questionnaire is an owner or operator of any point source. Distributing the ICR without a threshold determination that the recipient owns or operates a point source would exceed EPA's authority under the CWA and, as an unauthorized expenditure, would likely result in a violation of the Anti-Deficiency Act. 31 U.S.C. § 1341(a)(1). OMB should prevent these violations of law by returning the proposed Owner/Developer questionnaire to EPA and instructing EPA to develop a new ICR that respects the statutory limits of EPA's authority.

[2] *See* Settlement Agreement, Case No. 1:09-CV -00005-CKK (Fowler v. United States), section V, paragraph D, at p 23.

A. Developed Land is Not a Point Source; Therefore, EPA has No Authority Under Section 308 to Issue This ICR.

Under the CWA, the term "point source" is defined as "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged." 33 U.S.C. § 1362(14). EPA asserts that nearly every piece of developed property in the U.S. is a point source. Supporting Statement at 17. This position is not supported by the plain language of the statute or by case law.[3]

To be considered a point source under the CWA, a feature must channelize water flows, carry pollutants, and discharge into a water of the U.S. Developed land, which can include impervious surfaces such as roofs, parking lots, and roads, are not point sources. Impervious surfaces do not channelize water. Instead, sheet flow that travels across impervious surfaces is considered non-point runoff, which is not regulated by the CWA. EPA previously concluded that at least certain roads are non-point sources. *See* 40 CFR § 122.27(b) (excluding forest roads from the definition of silviculture point sources).

EPA's apparent interpretation of "point source," including impervious surfaces, renders the term meaningless, which clearly contradicts Congressional intent to define the term and differentiate "point sources" from "non-point sources." As noted by the Second Circuit Court of Appeals, "the phrase 'discernible, confined, and discrete conveyance' cannot be interpreted so broadly as to read the point source requirement out of the statute." *Cordiano v. Metacon Gun Club, Inc.,* 575 F.3d 199, 219 (2d Cir. 2009). Such a broad interpretation would be contrary to the structure of the CWA. The Act defines the term "point source," and all other flows of water are nonpoint sources, the regulation of which is left to the states. *Id.* at 219-220.

> The EPA's NPDES regulations define the extent to which surface runoff can in certain circumstances constitute point source pollution. The definition of "Discharge of a pollutant" includes "additions of pollutants into waters of the United States from: surface runoff *which is collected or channeled by man.*" 40 CFR § 122.2 (emphasis added). By implication, surface water runoff which is neither collected nor channeled constitutes nonpoint source pollution and consequentially is not subject to the CWA permit requirement. *See Hardy v. N.Y. City Health & Hosps. Corp.,* 164 F.3d 789, 794 (2d Cir.1999) (relying on "the familiar principle of *expressio unius est exclusio alterius,* the mention of one thing implies the exclusion of the other").

Metacon Gun Club at 221.

[3] As discussed in Part D, below, there may be some developed properties that channelize stormwater and discharge it directly into a water of the U.S., but EPA has made no effort to identify such sources and exclude all non-point sources from the scope of the ICR.

B. A Municipal Separate Storm Sewer System (MS4) is Not a "Water of the U.S." Hence Stormwater Entering a MS4 is Not a Discharge Into a "Water of the U.S."

Some developed land will collect and then release stormwater at the edge of the property into a MS4. However, a MS4 is a point source, which must obtain an NPDES permit; a permitted NPDES point source is not a water of the U.S. Thus, a discharge ***from*** a MS4 into waters of the U.S. is regulated, not the flow of stormwater ***into*** a MS4. This distinction between point sources and waters of the U.S. was recognized by the Supreme Court in *Rapanos v. U.S.*, 547 U.S. 715, 735 (2006).

> Most significant of all, the CWA itself categorizes the channels and conduits that typically carry intermittent flows of water separately from navigable waters by including them in the definition of point source. The Act defines point source as any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. 33 U. S. C. § 1362(14). It also defines discharge of a pollutant as any addition of any pollutant *to* navigable waters *from* any point source. § 1362(12)(A) (emphases added). The definitions thus conceive of point sources and navigable waters as separate and distinct categories. The definition of discharge would make little sense if the two categories were significantly overlapping.

This distinction also is found in CWA Section 402(p) whereby Congress granted EPA the authority to regulate stormwater discharges into waters of the U.S. from certain MS4s. *See* Section 402(p)(2)(C) and (D). However, this section specifically limits EPA's authority to the discharges *from* the MS4 system into the waters of the U.S. This limitation is consistent with the structure of the Act, which generally grants EPA authority only over point source discharges. Because a MS4 is a point source, and not a water of the U.S., Congress left locally-governed MS4s with the responsibility to limit or control the discharges *into* their systems in order to meet any restrictions EPA ultimately places on the discharges *from* those systems.

When Congress wishes to regulate indirect discharges under the Act, it does so expressly. *See, e.g.,* CWA section 307 (establishing the pretreatment program for indirect discharges into publicly owned treatment works, which then discharge to waters of the U.S.); CWA section 402(p)(B) (authorizing EPA to regulate stormwater discharges "associated with industrial activity" into MS4s as well as waters of the U.S.); and CWA section 402(p)(3)(ii) (prohibiting non-stormwater discharges into MS4s). Absent such express authority, EPA cannot regulate indirect dischargers.

C. EPA Cannot Use CWA Section 308 To Seek Information Unrelated to a Point Source Discharge.

Because stormwater from developed property that is received by a MS4 is not a point source discharge, EPA has no authority to gather information about the management of that stormwater. EPA's proposed ICR makes no effort to distinguish or ensure that recipients are

owners or operators of point sources from which pollutants are or may be discharged into waters of the U.S. EPA's failure to address or account for the statutory distinctions separating "point sources" from non-point sources is a fatal flaw in its proposed ICR approach. The recent Eighth Circuit Court of Appeals case, *Service Oil v. EPA*, limited EPA's CWA Section 308 authority in finding that it is "is clearly aimed at ensuring proper and effective recording, monitoring, and sampling of [point source] *discharges* of pollution." 590 F.3d. 545, 550 (8th Cir. 2009) (emphasis in original). The proposed ICR fails to provide OMB with any assurance that EPA will not be using its section 308 authority to seek information from entities that do not have "point source discharges to waters of the U.S." Indeed, many of EPA's questions in the Owner/Developer questionnaire are unrelated to any regulation of a point source discharge.

D. Congress Provided EPA With Authority to "Designate" Stormwater Discharges For Permitting, But EPA Has Not Yet Met Congressional Standards For Any New Designations.

Point source stormwater discharges from previously developed land could, in theory, become subject to a NPDES permitting program, but EPA first must meet the standards for "designating" such discharges for permitting as set forth by Congress in the CWA. Until that time, EPA's attempt to collect information to justify such a regulatory program is premature and unjustified.

Congress set forth EPA's authority to create a regulatory permit program for specific categories of stormwater discharges. *See* CWA Section 402(p)(1)-(4). Congress also set forth a process authorizing EPA to "study" classes of stormwater discharges not designated by Congress or otherwise subject to the stormwater permitting program, AND THEN report back to Congress regarding the results of any such studies. *See* CWA Section 402(p)(5). In addition, Congress set forth a specific process for EPA to develop stormwater regulations for newly designated and currently unregulated stormwater discharges. *See* CWA Section 402(p)(6). The statutory scheme is clear on its face; Congress set as a condition precedent to any new categorical designation and subsequent regulatory program that EPA first conduct a study pursuant to CWA Section 402(p)(5) and then submit it to Congress before proceeding with a specific process for such new regulations under CWA Section 402(p)(6).

EPA has not complied with its Congressional mandates here and cannot justify regulating any discharges from developed land without first meeting the conditions precedent set forth by Congress.[4] The ICR is not the study contemplated by section 402(p)(5).[5] Until EPA has fulfilled

[4] Of course, EPA has no authority to regulate developed land itself as the source of that discharge. As the D.C. Circuit stated in *NRDC v. EPA*, 859 F.2d 156, 169-70 (D.C. Cir. 1988): "EPA can properly take only those actions authorized by the CWA – allowing, prohibiting, or conditioning the pollutant discharge. And, contrary to EPA's assumption, ***the CWA does not empower the agency to regulate point sources themselves; rather, EPA's jurisdiction under the operative statute is limited to regulating the discharge of pollutants.***") (emphasis added); *see also American Iron and Steel Inst. v. EPA,* 155 F.3d 979, 996 (D.C. Cir. 1997) ("The statute is clear: The EPA may regulate the pollutant levels in a waste stream that is discharged directly into the navigable waters of the U.S. through a "point source"; it is not authorized to regulate the pollutant levels in a facility's internal waste stream.").

[5] In addition, as discussed in Part II, below, the ICR contains such serious flaws that it cannot provide information to support any potential regulatory expansion.

these statutory requirements, EPA has no basis for gathering information from owners and developers of developed land pursuant to CWA section 308.

Recognizing that there might be significant non-industrial or non-MS4 sources of stormwater pollution, Congress provided EPA and authorized states with the authority to designate "a discharge" for permitting other than industrial or MS4 discharges already included in the permitting program. *See* CWA Section 402(p)(2)(E). But that authority is limited to individual discharges ("a discharge") that the permitting authority specifically determines "contributes to a violation of a water quality standard or is a significant contributor of pollutants" to U.S. waters. This provision demands a case-by-case assessment and determination, which EPA has not yet made. Hence, EPA can designate categories or classes of discharges through the Section 402(p)(5)-(6) process that includes reporting to Congress, or it can designate individual sites pursuant to section 402(p)(2)(E). However, EPA cannot unilaterally bring all developed land under CWA jurisdiction, as it appears to be doing through the current ICR process.[6]

In sum, CWA section 308 provides EPA authority to collect information from point source discharges to waters of the U.S., or other stormwater discharges identified through a process set forth by Congress. Non-channelized runoff over developed land does not meet the definition of point source discharge to waters of the U.S. Moreover, no runoff from developed properties has been designated for any regulatory program by EPA through the process set forth by Congress. Absent legal authority over most developed properties and related stormwater discharges, EPA cannot use section 308 information collection procedures to indiscriminately send questionnaires to unregulated entities, even if its ultimate purpose is to try to craft a permitting program for such entities. EPA's current ICR effort is overly-broad, unlimited in scope, and exceeds its statutory authority.

II. PAPERWORK REDUCTION ACT VIOLATIONS

The Paperwork Reduction Act (PRA) sets forth certain standards that EPA must satisfy in order to obtain ICR approval from OMB. *See* 44 U.S.C. § 3506(c)(3)(A) (Agency certification) and 44 U.S.C. § 3508 (OMB determination). Among other things, EPA must demonstrate that any proposed ICR:

- is "necessary" for EPA to perform its function, including that such information has "practical utility;"
- is not unnecessarily duplicative of information otherwise reasonably accessible to the agency;

[6] EPA's actions in Region 1 to designate certain properties and municipalities for permitting, if at all relevant, demonstrates that when EPA is motivated to "designate" individual sites alone or within a narrow geographic area for permitting, it studies the hydrology of the area extensively. After completion of the hydrologic studies, it engages in a lengthy notice and comment rulemaking process prior to such designation. For the Charles River, the rulemaking process began in 2008 and is ongoing today (comments on a revised designation are due June 30, 2010). We know of no ICR process associated with that designation and the use of Section 308 ICR authority to precede any such designation, we argue, is unlawful.

- reduces to the extent practicable and appropriate the burden on the persons providing the information;
- is written in plain, coherent, and unambiguous terminology and is understandable to those who are to respond; and
- sets forth an effective and efficient statistical survey methodology appropriate to the purpose for which the information is to be collected.

As discussed below, the Real Estate Stormwater Coalition does not believe that the Owner/Developer questionnaire meets these statutory requirements. The PRA also sets forth a mandatory 60-day comment period for each new proposed ICR, followed by a 30-day comment period on the revised version of the ICR that is submitted to OMB. We believe that, by providing only a 30-day comment period on the Owner/Developer questionnaire, EPA is in violation of the notice requirements of the PRA.

A. EPA Has Not Demonstrated That the Questions Are "Necessary" or Have "Practical Utility."

In the Supporting Statement, EPA links the necessity for the ICR to the "November 2012" rulemaking that will, among other things, establish national standards for stormwater discharges from "new and redeveloped sites." *See* Supporting Statement, at 3-4. As set forth above (Part I), EPA has not yet established that it has legal authority to establish national standards for stormwater discharges from new and developed sites. Setting forth its legal justification is central to the question of whether or not the Owner/Developer questionnaire is necessary. Hence, the "need" and "utility" of all questions in the proposed ICR cannot be demonstrated until EPA firmly establishes the legal authority to proceed to a rulemaking and OMB should deny EPA's ICR request with regard to the Owner/Developer questionnaire.

In the event that OMB defers to EPA's discretion over its statutory authority and approves some version of the proposed Owner/Developer questionnaire, a number of its questions are clearly irrelevant to any perceived "need" or "utility" to develop final standards for the properties in question. These questions include, for example, Questions 9-11, 26-29, 48-50. Questions 9-11 are irrelevant to project-specific post construction stormwater issues in any way. Questions 26-29 are a rather obvious attempt to collect information regarding active construction stormwater permit compliance, which again is irrelevant to post construction stormwater management. Finally, Questions 48-50 will not provide EPA with information that will serve any useful purpose. EPA's ICR will not create a comprehensive understanding of "typical" roles from "different" establishments for "different" projects, but rather will merely confuse any attempt at crafting "model" establishments and projects.

Further, EPA's plan to develop "model firms" is flawed and the resulting model will be of little or no practical utility, to the extent such models are premised on information gathered through this ICR.[7] The proposed Owner/Developer questionnaire contains confusing, sometimes

[7] According to the Supporting Statement, "OW will use survey results, supplemented with other data sources to establish the baseline number and an economic/financial profile of potentially affected entities in sectors impacted

contradictory definitions and incorrect business practice assumptions. The extensive non-project level economic data illustrates EPA's confusion or ill-advised assumption that there is a direct correlation between stormwater management decisions and a firm's broader economic performance. EPA also appears to assume that all income within a larger firm or establishment is somehow fungible or potentially available for stormwater control purposes. That assumption is also contrary to ordinary business practices.

EPA simply asserts that the financial data will help it develop a "model" but it provides no evidence of a causal linkage between the information to be generated by its comprehensive data demands and the stormwater-related behavior of firms in the real world. For these reasons, EPA cannot certify that the financial data requested in Owner/Developer questionnaire is necessary or of practical utility and the Coalition requests that EPA remove all questions seeking financial data or OMB to mandate such action prior to any ICR approval.

Finally, EPA's ICR also is fatally flawed by its 5-year time frame for project data collection, which corresponds to the peak of a real estate building and profitability bubble, which subsequently became the worst real estate economy since the Great Depression. These facts only serve to further undermine any confidence in EPA's proposed economic model's ability to predict future behavior.[8] Thus, the financial data gathered from the Owner/Developer questionnaire will not be representative of future industry finances or prosperity, and will have little practical utility.

In sum, EPA has not provided the necessary legal justification for the Owner/Developer questionnaire. To the extent OMB disagrees, many of the questions contained in the Owner/Developer questionnaire are irrelevant to EPA's stated purpose and should be removed. Any remaining questions should be analyzed pursuant to the other criteria set forth below.

B. The Information Sought Through the ICR is not Duplicative Of Information Otherwise Reasonably Accessible to EPA.

Under PRA Section 3506(c)(3)(B), EPA must certify to OMB that the information sought under an ICR is not unnecessarily duplicative of information otherwise reasonably accessible to the Agency. EPA's proposed ICR does not satisfy that PRA obligation.

EPA asserts that the ICR will provide information on current stormwater discharge practices and controls. However, there are many sources for information regarding stormwater (including post-construction) best management practices (BMPs), and their costs. *See e.g.,* the Center for Watershed Protection website[9] for a compendium of reports and guidance concerning those issues. Neither the BMPs nor the costs of building, operating, or maintaining them is a

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by the rule. A set of model firms that perform development projects will be based on the profile of developers/owners." Supporting Statement, at 11.

[8] The Coalition has attached a graph titled "*MIT CRE Transactions*" that illustrates this fundamental flaw in EPA's approach. *See also* http://web.mit.edu/cre/research/credl/tbi.html#whatis.

[9] www.cwp.org

mystery. EPA has not justified the need for additional site-specific data associated with these practices. While those considerations must be assessed for any future rulemaking, EPA cannot defend its proposed approach to collect site-specific data through the ICR at this time, or how its approach will achieve any intended outcome.

EPA admits that much of the project specific data already are available through information mandated through the federal and state NPDES construction stormwater permitting programs, but asserts that such data are not readily available for all states. Instead of addressing the root problem in the Notice of Intent (NOI) databases to assess information already collected through CWA section 308, EPA now is proposing to collect it (again) from those entities that have been subject to the construction stormwater permit program. On its face, this would appear to define the type of situation Congress wanted agencies to avoid by not allowing "duplicative" information collections. EPA should address issues associated with the NOI databases in lieu of burdening the regulated community with a request for duplicative information.[10] Otherwise, OMB should not approve the ICR.

C. EPA has Not Reduced the Burden of Reporting to the Extent Reasonable And Appropriate, nor has it Tailored the Questionnaire to the Existing Reporting and Recordkeeping Practices of those Who Are Expected To Respond.

Under PRA Section 3506(c)(3)(C), EPA must certify to OMB that the information sought under an ICR reduces to the extent practicable and appropriate the burden on the persons providing the information. EPA's proposed ICR does not meet this standard.

First, EPA must modify the Owner/Developer questionnaire to clearly delineate which entities are required to respond and what information those entities are required to provide. The current version of the questionnaire appears to assume that every piece of developed property is regulated under the CWA. That assumption is not supported by law or facts. If EPA continues with its plan to send the questionnaire to a random sample of property owners and developers, it is inevitable that persons who are not subject to CWA regulation will receive the Owner/Developer questionnaire, with its threat of civil and criminal penalties for failing to respond. The questionnaire must include a section in the front that asks whether or not the recipient is the owner or operator of a point source that discharges into waters of the U.S. If the answer to that question is "no," the questionnaire must clearly state that the recipient has no legal obligation to complete it.

Even if a recipient of the proposed Owner/Developer questionnaire owns or operates a point source that discharges into waters of the U.S., much of the information asked in the questionnaire is not legally required to be kept and is not maintained by owners or developers of property in their ordinary course of business. Under the PRA, EPA must certify that its information collection will be implemented in ways that are consistent and compatible, to the maximum extent practicable, with the existing reporting and recordkeeping practices of those who are to respond. *See* 44 U.S.C. § 3506(c)(3)(E). EPA cannot certify that it has met this requirement with respect to the proposed Owner/Developer questionnaire.

[10] EPA also can obtain this information from MS4s, most of which are regulated under the CWA.

In fact, it is apparent from the questionnaire that EPA does not adequately understand the reporting and recordkeeping practices of the owners and developers of developed property. This may not be surprising, as this group of recipients was not an apparent target of the October 30, 2009 version of EPA's ICR. To meet this legal requirement, EPA must learn more about the real estate industry. After doing so, EPA can then redesign its questionnaire to align it with the industry's reporting and recordkeeping practices. If EPA chooses not to do this, then the final questionnaire must clearly state that, in responding to the questionnaire, recipients are under no obligation to collect information from third parties (such as engineering consultants or stormwater contractors), to create new information, or to provide estimates when actual information was not otherwise available.

In the "Detailed Instructions for Completing the Questionnaire," the proposed Owner/Developer questionnaire erroneously asserts that the recipient "may need to contact other business establishments with which you were involved on individual projects, such as engineering or design firms, in order to answer some questions." Owner/Developer questionnaire at 5. Recipients are under no obligation to obtain information from third parties; this statement must be removed from the questionnaire and EPA should include a "not known" option in each of the questions in the ICR. If EPA can demonstrate that it has authority under CWA Section 308 to require recipients to gather information from third parties, the burden estimate must be significantly revised to appropriately reflect the true costs associated with paying engineering and design firms to gather such information that will not be readily available.

For example, the owner or developer of developed property will not necessarily have the detailed project level information requested in Part 2 of the Owner/Developer questionnaire. In the ordinary course of business, a developer contracts with design and construction firms to develop a piece of land. If a stormwater permit was required for the construction phase of the project, it would have been obtained by the contractor, so questions 26 and 27 likely cannot be answered by the owner or developer. The owner/developer would not necessarily keep any records of the pre-construction land cover so no information may be available to answer question 32. Projects are not currently characterized based on the area of pervious and impervious surfaces, so most recipients will not have data available to answer question 33 and are under no obligation to obtain that data.

Owners and developers are not likely to know about pre-development conditions, including the vegetative buffer zones asked about in question 35. Owners and developers are unlikely to have information about a soils survey, so questions 36, 37, and 38 will yield little information and, even if a soil survey was conducted by a contractor, EPA cannot require an owner or developer to respond to these questions if the soil survey is not in the possession of the questionnaire recipient. Similarly, an owner or developer may have no information about the stormwater performance standards or criteria that a piece of developed property was designed to meet, or other stormwater specific information requested in questions 39 through 47.

The certification statement appears to add additional burdens on recipients of the questionnaire by suggesting that, in the absence of data, a recipient must provide a "best engineering and/or financial estimate." As discussed above, a recipient of a questionnaire is not obligated, under threat of civil and criminal penalties, to turn to third parties, such as engineering

firms, design firms, or accounting firms, and pay for a "best engineering and/or financial estimate." A recipient is only obligated to provide available information, so this sentence must be removed from the Certification Statement. If EPA would like recipients to voluntarily provide an estimate when information is not available, the questionnaire can provide that option, as in question 33, which states: "please provide your best estimate or 'NK' for Not Known," But EPA cannot imply or overtly mandate such action. If EPA believes that it can require respondents to obtain "best engineering and/or financial estimates," it should cite the specific statutory authority and, as suggested above, significantly increase the estimate of the burden of responding to the questionnaire to account for the cost of obtaining those estimates from third parties.

The proposed Owner/Developer questionnaire also seeks information about very small projects, which increases burden, particularly on small businesses, for no apparent regulatory purpose. For example, question 4c, which is one of the questions that determines scope, seeks information regarding whether an establishment has completed a project that resulted in one or more acres of land disturbance and/or resulting in the installation of 5,000 feet of impervious surfaces. Five thousand square feet is a very small area. The roofs (which are considered impervious surfaces) of some individual homes will exceed this threshold. In contrast, one acre is 43,560 square feet. EPA has provided no basis or authority to use 5,000 square feet of impervious surface as a threshold for the ICR.

Finally, the financial data requested by the questionnaire are unnecessary, intrusive, and excessively burdensome – particularly to small businesses. In addition, the information requested would be proprietary, and its potential disclosure could cause irreparable competitive harm to the companies that respond to the questionnaire. Accordingly, the Coalition requests that all of the financial data questions be dropped from the Owner/Developer questionnaire. Alternatively, EPA should only seek information that is required to be reported by the real estate industry in the regular course of business, consistent with 44 U.S.C. § 3506(c)(3)(E). Under this option, all requests for confidential business information should be deleted. Finally, if EPA is able to justify to OMB that it has a need for financial information, including confidential business information, requests for that information should be segregated from other questions as a separate section following the stormwater-related questions.

Creating a separate section for financial information (if any is even needed or appropriate) will reduce the burden on the recipient and help protect confidential business information. First, if the recipient is out of scope based on the stormwater-related questions, it should not need to answer the financial questions. Second, a separate financial section will help to ensure the questions are answered by the appropriate personnel within a company. Finally, segregating this information also will allow a company to appropriately identify confidential business information, and will help EPA to prevent the inadvertent release of that information.

D. EPA Has Not Ensured That the Questions Are Written Using Plain, Understandable Terminology.

Under PRA Section 3506(c)(3)(D), EPA must certify to OMB that the ICR is written in plain, coherent, and unambiguous terminology that is understandable to those who are to respond. EPA's proposed ICR does not meet this standard.

EPA's draft questionnaire includes many terms that are ambiguous or are not commonly accepted or understood by the real estate industry. This may not be surprising, because EPA changed the universe of its possible questionnaire recipients between making draft questionnaires available for public comment in October 2009, and releasing new questionnaires specifically targeted at owners and developers in May 2010. However, because the commercial real estate industry has not had an opportunity to educate EPA about the real estate business, EPA is unlikely to receive consistent responses from the proposed Owner/Developer questionnaire, severely reducing the utility of the proposed ICR.

At the outset, it is not clear what business unit the questionnaire addresses. Most of the information in the Owner/Developer questionnaire is directed to the "establishment." "Establishment" is defined as location where business is conducted and for which revenue, employment, and other records are kept. If EPA randomly selects a developer who maintains more than one office, is the recipient intended to respond only with respect to the projects from that one office location? The questionnaire is unclear and EPA will receive inconsistent responses that will reduce the utility of the ICR itself.

This confusion is compounded by the use of personal pronouns through the questionnaire. Each time the word "you" or "your" is used, is the recipient intended to respond with respect to the office location that received the questionnaire?[11] The questionnaire is unclear and EPA will receive inconsistent responses.

Among the most befuddling questions is question 4, which is intended to determine whether a recipient falls within the scope of the ICR. Question 4a asks if an establishment has completed the construction, land development or redevelopment phase of a project between 2005 and 2009. First, the Coalition notes that the word "complete" by definition removes most projects from EPA's regulatory authority under the CWA, because once land disturbance activities are completed, NPDES construction stormwater permit obligations cease. Second, the word "complete" will mean different things depending on the entity that receives the questionnaire. To the real estate industry, only the general partner "completes" a project, although others may be participants in some fashion. The questionnaire is unclear and EPA will receive inconsistent responses.

The "construction phase" is defined as the project phase following land acquisition and land development. "Land development" is defined as the second phase of a project that follows land acquisition and precedes construction. "Redevelopment" is defined as the development of

[11] For example, question 10 asks: "Are you a publicly traded company." Does the pronoun "you" refer to the "establishment" or the "firm?'

sites with existing structures or impervious surfaces. The term development is not defined. It is not clear if that term is intended to include construction or not. However, the term "project" is defined as new development or redevelopment and as generally consisting of land acquisition, land development, and construction. From these questions, it appears that an owner of developed property that was not involved at any stage prior to the completion of construction has no obligation to further answer the questionnaire. Property owners, who had nothing to do with the development or construction of the property they currently own, should not have to provide financial information, contact third parties or provide estimates to respond to the burdensome questions that follow. The questionnaire is unclear and EPA will receive inconsistent responses.

Question 4b asks whether the establishment was the owner or developer for a project. It appears to be intended to screen-out construction contractors and owners of developed property after construction is complete. "Owner" is defined as the firm, individual, or institutions for which the project "is being" built. Thus, it appears that an entity can be an owner only with respect to a project that has not yet completed construction.[12] This is consistent with the definition of "project," which is defined to mean land acquisition, land development, and construction. "Developer" is defined as a person, business, or partnership that controls project design and/or land development (phase of the project that precedes construction) activities. Thus, it appears that persons involved only in the construction phase of a project are not developers. Both the definition of "owner" and the definition of "developer" use the present tense, which suggests that an entity can only be an owner or a developer of projects that are currently underway. However, that reading makes the definitions inconsistent with question 4a, which asks about completed projects. As these definitions are central to the scope of the questionnaire, they must be made clear. OMB should not approve the ICR until this confusion is fixed.

It is unclear, but "phase/portion" of a project referred to in question 4b could be intended to correspond to the construction, land development or redevelopment phases discussed in question 4a. Alternatively, it could mean the land acquisition, land development, and construction activities that are specifically described as phases in the Glossary of Terms. These phases also correspond to the phases discussed in the definition of "project." Question 4b also appears to expand the definition of "owner" and "developer" to include the undefined category, "participant." The Coalition assumes that persons who invest in a project or are a limited partner in a project would answer "no" to question 4b because they do not meet the definition of an owner or developer? These terms are used throughout the questionnaire. EPA must provide clarifications.

In fact, EPA should provide examples of what entities and projects fall within or outside of the scope of the questionnaire. For example, a Real Estate Investment Trust (REIT) may have projects that fall both in and out of scope. A REIT may develop and manage its own property. That property may be within the scope of the questionnaire. It may build for investors, for a fee. Is such a project in or out of scope? It may develop a property through a limited partnership that ceases to exist when the project is completed. That project should be out of scope because the

[12]It also appears that persons with no ownership interest could be considered owners for the purposes of the questionnaire.

legal entity that meets the definition of owner or developer no longer exists, but it is unclear. Finally, a REIT may buy a building. That building should be out of scope. However, the questionnaire is unclear and EPA will receive inconsistent responses.

Question 4c asks if the establishment completed a project that resulted in one or more acres of land disturbance and/or resulting in the installation of 5,000 feet of impervious surfaces. Is the recipient supposed to assume that the question pertains only to projects where the recipient is an owner or developer (as defined in the Glossary)? Also, as noted above, the term "complete" is ambiguous in the real estate industry context.[13]

Question 5 asks about the participation of "your establishment" in projects. Again, the word "participated" is ambiguous. The Coalition assumes that investors that are not actively involved in a project are not participants. Please clarify. Also, is this question intended to be limited to projects where the establishment (a single office) was the owner or developer? The questionnaire is unclear and EPA will receive inconsistent responses that affect the reliability of any subsequent analyses.

Questions 6, 7, and 8 introduce the concept of "firm." A firm is defined as a business organization or entity with one or more domestic establishments (single offices) under common ownership or control. We assume that EPA understands and respects the corporate form, so we assume that a firm would not include the parent company of a subsidiary? These questions continue the use of personal pronouns "you" and "your," when it is unclear whether the "you" in a question is addressed to an establishment or a firm. The questionnaire is unclear and EPA will receive inconsistent responses.

Questions 12, 13, 14, 15 request establishment level financial information. Understanding "establishment" to mean a single office, the information requested may not be available at the office level at a larger company. Further, the use of the term "revenue" demonstrates a lack of understanding of the real estate industry and questions about "revenue" may be unanswerable. An owner of a piece of property may derive a net operating income from the property. A developer of a piece of property may derive a return on investment. But, neither would be characterized as revenue from land acquisition, land development, or construction (the definition of "project"). In fact, based on the definition, a project ends when construction ends. At that point, there is no revenue or income and there may not be any return on investment.

EPA should be aware that commercial real estate projects are typically undertaken by single-purpose entities (for example, an independent LLC) that may exist solely to execute one or more phases of the project. During the design and construction phase, these LLCs typically generate no revenues. They attract investments from other individuals and entities that seek to earn a profit from future activities (whether that is leasing/management income or sale of the property outright, or both). They do not generate revenues, nor do they share in the revenue stream of other businesses owned or operated by the investing individuals or entities (often limited partners not actively engaged in management decisions). Many recipients of this

[13] As noted above, it also is unclear why EPA would target such small projects.

questionnaire will have no idea what is being asked in these questions and EPA will receive inconsistent responses.

Further, the Coalition cannot determine why questions 12 and 14 ask about revenue (however defined) from alterations and expansions. EPA previously excluded remodeling or alterations to the interior of a structure from the definition of redevelopment. Are these the activities that EPA is seeking information about? If so, why would EPA seek that information when interior alterations do not affect runoff? If alternations and expansions are not intended to encompass interior work, then how is this category any different from redevelopment? Also, does the phrase "all other revenue" in question 12 only relate to development and redevelopment projects or to all properties?

The questions under "Project Information: Part 1" are addressed to the undefined personal pronouns "you" and "your" and all pertain to the undefined "participation" in "projects," which is defined to end when construction is completed. Given these definitions, a person who meets the definition of developer may be able to respond, but the owner of developed land that purchased the property after the construction phase will not be within the scope of the questionnaire. .

Question 20 introduces a new term: "value," but the section continues the use of the term "revenue." As discussed above, that term will not be applicable to many phases of real estate development.

The questions under "Project Information: Part 2" use the same ambiguous terms discussed above, including the use of personal pronouns, the use of the term "participation," and the ill-defined terms "owner," "developer," and "project." In addition, this Part introduces another undefined term "site." The Owner/Developer questionnaire states that this Part is intended to provide a profile of projects (at 19). The term "project" is defined as ending at the end of the construction phase. However, questions 33, 36-39, and 41-45 use the term "site" instead of "project," creating ambiguity about the scope of the questions.

In addition, question 39 misuses the term "discharge." Under the CWA, "discharge" means the addition of a pollutant to a water of the U.S. Not all of the activities discussed in question 39 meet that definition. Answering this question could be considered an admission by EPA that a recipient of the questionnaire is subject to CWA jurisdiction, when the recipient lacks any understanding of the statutory definition and legal meaning of the term "discharge."

Questions 43, 44, and 45 all request information about implementing of stormwater controls at the "site." The Coalition does not understand how a person who meets the definition of an owner (an entity for which a project is being built) or developer (the entity that controls project design or land development activities) of a project (which is defined to end at the end of the construction phase) could be expected to have information about implementing of stormwater controls.

Question 47 uses the term "value," without defining that term. Is it intended to mean the same thing as in question 20? This question should include a box to mark the answer as "CBI."

This question also seeks the cost of stormwater post construction controls. Is the question asking for capital costs or implementation costs? If EPA is asking for implementation costs, that information will not be available from entities meeting the definition of owner and developer, unless those definitions are amended to include persons that continue to own a project after the construction phase. In addition, any request to estimate value or costs should be stated as an option, not a requirement, as in question 33.

Given all the ambiguities in the questions, all of the financial data questions are likely to produce inaccurate or misleading results when used as the basis of a computer model, particularly given the flaws in EPA's statistical sampling, discussed below. In addition, as discussed earlier, the financial information requested would be proprietary, and its potential disclosure could cause irreparable competitive harm to the companies that respond to the questionnaire. Therefore, the Real Estate Stormwater Coalition requests that these questions be dropped from the proposed Owner/Developer questionnaire.

In fact, given the magnitude of the ambiguities in EPA's questionnaire and the confusion that it will cause, the Coalition contends that pre-testing of the questionnaire is necessary to validate EPA's multiple assumptions and clarify the numerous points of confusion for recipients. EPA has refused to consider this option and asserts that, "For more than 30 years, EPA's Engineering and Analysis Division has conducted surveys of numerous sectors to collect information to support regulation development activities in the effluent guidelines program. ***In past years, EPA has relied predominantly on active participation by trade groups in reviewing the questionnaires. In EPA's experience, such collaboration generally tends to better reflect the sectors at large than pre-tests. For this reason, EPA considers additional review through the pre-test process to be unnecessary for this survey.***" Supporting Statement Part B, at B-19 (emphasis added). It is inappropriate in this case for EPA to deny a request for pre-testing, particularly when this confusing questionnaire will be sent to a poorly sampled population that EPA does not regulate, does not understand, has not worked with sufficiently to develop the questionnaire (EPA targeted owners/developers only ***after*** it released its draft questionnaires in October 2009). In addition, EPA's prior experience is through the ELG program, working with industries with sophisticated understandings of the CWA permitting programs because they already were subject to those laws that element is missing in this ICR.

E. EPA Cannot Certify That its Statistical Method is Effective And Efficient

Under PRA Section 3506(c)(3)(I), EPA must certify to OMB that the ICR uses an effective and efficient statistical survey methodology appropriate to the purpose for which the information is to be collected. The survey must be well-designed so that it produces a meaningful cross-section of facilities.

EPA seeks to develop a statistically valid sample of the Owner/Developer population from Dun & Bradstreet's MarketPlace Pro. EPA asserts that MarketPlace Pro has "relatively complete" coverage of the target population. Supporting Statement Part B, at B-11. Yet the degree of accuracy provided by MarketPlace Pro in this ICR process has been assumed by EPA, not demonstrated. Simply because MarketPlace Pro has ten million names in its database does not mean that it includes the single-purpose entities that are common in real estate development.

In reality, MarketPlace Pro is intended as a marketing tool to generate leads and prospects for vendors of various goods and services. EPA's reliance upon it is misplaced.

Confronted with an obviously excessive list of ten million names, EPA utilized a range of NAICS primary and secondary codes to generate a shortened list of approximately 740,000 names. Supporting Statement Part B, at B-12. However, EPA has not presented sufficient information to justify its assertion that it will achieve a statistical precision of at least 90 percent for the Owner/Developer survey. Supporting Statement Part B, at B-13. Although EPA plans to collect some data on the type of commercial project being surveyed (*e.g.,* retail, multi-family, etc.), it does not present evidence of how many of each of these sub-types of commercial real estate exist in the real world (the "target population"), or within the MarketPlace Pro list (the "judgment sample" – note that this list does not meet the definition of a "statistical sample"), or in the ultimate sample pool to be surveyed. Based on the descriptions provided, the Coalition believes it is entirely possible that none of the entities that receive the questionnaire will be within EPA's intended scope.[14]

Even if recipients fortuitously fall within the scope of the questionnaire, it is impossible to determine whether EPA's approach to surveying the Owner/Developer population will return statistically valid results. *See* Supporting Statement B, at page B-2. For example, with respect to question 20, it is not clear that EPA's sample will include establishments in each of the project categories listed, much less a statistically relevant sample.

Finally, use of these categories will not provide meaningful data. Shopping centers and high rises will both be considered part of the commercial/institutional category but will have dramatically different stormwater flows. Even within categories, entities will provide dramatically different answers based on the location of the property. A high rise in Manhattan will provide very different financial information than a high rise in Omaha. The developer of a shopping center often receives a share of the retail sales of the stores in the shopping center. Those retail sales will vary widely based on national and regional economic conditions and, even in good economic times, a shopping center in a low income neighborhood will have vastly different sales numbers than a shopping center in a high income neighborhood.

Given all of these variables, EPA cannot derive meaningful economic data to develop national models. If EPA's sample fails to capture the variability in the commercial real estate industry, then EPA may assume stormwater controls are affordable, when in fact the cost may rob a low income neighborhood of a new neighborhood grocery store. For these reasons, the Coalition repeats its request that EPA drop all financial data questions from the Owner/Developer questionnaire.

Similarly, EPA cannot demonstrate how any random sample of entities that receive the questionnaire will provide meaningful information about stormwater practices. Even after

[14] In addition, two of the D&B primary codes cover "Highway, Street and Bridge Construction" and "Heavy and Civil Engineering Construction." Although EPA indicates that it seeks data on impervious surfaces, including streets, it is unclear why these two code categories should be used to generate an "owner/developer" target population. Support Statement Part B, at B-12.

reviewing the Supporting Statement, as well as asking questions of EPA staff, we have not been able to determine precisely how EPA will generate a target population sample or how it will successfully filter out non-target population entities and individuals. Even at this late date in the process, EPA's supporting documents remain contingent and subject to change. Given the lack of any clear-cut and fixed process, the best that commenters can do is to provide generic suggestions that would be applicable to any statistical sampling process. The PRA requires that the public be allowed to comment on the specifics of this ICR, including the specific sampling methodology chosen by EPA, and not (for example) generic comments on the validity of one-frame versus two-frame approaches to sampling populations.

Given the contingent nature of EPA's proposed process, it is difficult, if not impossible, to determine whether EPA can successfully reflect the owner/developer population with its sampling and distribution methods. The supporting documents indicate that EPA has not settled major issues in the sampling and questionnaire distribution processes (or else EPA has failed to include them in its supporting documents). Therefore, the Coalition and its members have been denied the opportunity to provide material comment on these points as required by the PRA.

In sum, EPA must withdraw the Owner/Developer questionnaire and resubmit it for Public Comment after EPA has finalized its statistical sampling methodology.

In addition, the questionnaires (both the methods and the results of EPA's analysis) are ultimately governed by the requirements of the Data Quality Act. As stated by EPA's own policy: "We agree with commenters who noted that even if a particular distribution of information is not covered by the [Data Quality Act] Guidelines, the Guidelines would still apply to information disseminated in other ways. As stated in section 1.4, if information is not initially covered by the Guidelines, a subsequent distribution of that information will be subject to the Guidelines if EPA adopts, endorses, or uses it." *See* EPA Guidelines for Data Quality Act, Appendix, at 40.

EPA is required to provide sufficient information to allow for informed public comment in advance of releasing the ICR. Doing so would ultimately conserve Agency resources and expedite the eventual analytical process by providing better data collection, generating a stronger population sample, and avoiding a challenge under the Data Quality Act.

F. The May 2010 Notice is not a Logical Outgrowth of the October 2009 Notice.

The May 10, 2010 *Federal* Register Notice (with a 30-day public comment period) appears to be premised on the assumption that previous public notice periods were sufficient to satisfy PRA requirements. On October 30, 2009, EPA requested comment on an ICR related to post-construction stormwater discharges. 74 Fed. Reg. 56,191 (October 30, 2009) (the "October 2009 Notice"). However, the ICRs from the May 2010 Notice vary in material respects from those that were contemplated in the October 2009 Notice. EPA is wrong to assert that the May 2010 Notice is a logical outgrowth of the October 2009 Notice. Two of the questionnaires covered by May 2010 Notice are pointedly titled, "Owner/Developer" questionnaires. The initial October 2009 questionnaire was generally titled "Industry" questionnaire. "Industrial stormwater" is a term of art reflecting the types of discharges covered by EPA's Phase I

stormwater permit program, including active construction sites five acres and larger. *See* 40 CFR § 122.26(b)(14). In fact, contractors engaged in active construction were EPA's stated and intended targets for the October 2009 ICR. Owners and developers reasonably concluded that they were outside the scope of such a stormwater questionnaire. Now, however, EPA has adopted a new approach and owners/developers are plainly the targets of the May 2010 ICR. This confusion is EPA's responsibility and additional time should be granted to owners and developers to enable them to analyze this ICR and submit more comprehensive comments than this very limited 30-day period.[15]

The very purposes of the May 2010 and October 2009 questionnaires vary significantly. The May 2010 questionnaire describes its purpose as providing EPA with information to "[c]haracterize current building and real estate improvement ***projects*** including type, location, and size ...." Owner/Developer questionnaire, at 2 (emphasis added). However, the October 2009 questionnaire emphasized ***stormwater management practices,*** to provide EPA with information to "[d]etermine current usage, availability, design and cost of post construction stormwater controls, BMPs, and retention practices ...." Industry questionnaire at 2.

EPA states that the May 2010 questionnaire is intended to "[c]haracterize the ***operations and financial conditions of owners and developers*** that could be subject to revised regulations." Owner/Developer questionnaire at 2. But the October 2009 ICR sought information more generally to "characterize the ***economic status of the construction industry*** that could be subject to revised regulations ...." Industry questionnaire at 2. The shift in focus on the financial status of specific building owner and management firms, as opposed to the industry at large, is sufficient reason alone to warrant new OMB control numbers for the May 2010 ICR, create a new EPA docket, and ensure a new 60-day comment period.

Furthermore, a comparison of the "Burden Statements" from the May 2010 and October 2009 Notices is telling. It reveals that EPA has significantly altered the scope, costs, and inconvenience of its information collection efforts in the past six months:

Burden	October 2009 Notice	May 2010 Notice	Percent Change
Estimated total number of potential respondents	2,060	5,516	62.7% increase
Estimated total average number of hours for each respondent	53 hours	30 hours	43.3% decrease
Estimated total annual burden hours	108,675	167,669	35% increase
Estimated total annual costs	$4.07 million labor; $17,150 operations and maintenance	$6.97 million labor; $37,487 operations and maintenance	25% increase labor; 54% increase operations and maintenance

[15] The Coalition requested additional time, but EPA rejected that request.

Finally, EPA admits that the May 2010 Owner/Developer questionnaire targets a new population. Based on comments that certain categories were inappropriate recipients of the Industry questionnaire because they would not have the requested information, "**EPA reviewed and revised its universe of possible questionnaire recipients....**" Supporting Statement, Part A, at 18 (emphasis added). Having done so, EPA cannot now deny these new questionnaire recipients with an adequate opportunity to comment on the proposed ICR.

In short, EPA cannot rely on prior comment periods to discharge its current PRA obligations for questionnaires that were not subject to that prior 60-day notice. The May 2010 Owner/Developer ICR must be treated as an entirely new information collection effort and given new OMB Control Numbers, EPA docket numbers, a new Federal Register notice for the "Owner/Developer" questionnaires, and start a new 60-day comment period pursuant to 44 U.S.C. § 3506(c)(2)(A).

G. EPA's Certification Statement Must Be Modified.

Assuming *arguendo*, that EPA's Owner/Developer questionnaire can be revised and obtain OMB approval under the PRA, the "certification statement" must also be revised. EPA cites to its own regulations for the basis of its certification statement. However, 40 CFR § 122.22 sets forth a significantly different certification statement than the proposed Owner/Developer questionnaire. EPA has inappropriately broadened that statement to imply that recipients should supplement their lack of information with their best guess as to what an appropriate answer might be ("In those cases where we did not possess the requested information, we have provided best engineering and/or financial estimates or judgment."). EPA's ICR is an "information" collection, not an opinion poll, and recipients are obligated to provide only the fact-based information that they have available, if any. EPA's suggestions that they "guess" at answers or that they contact other businesses to collect information to answer questions, under the penalty of law, is inappropriate and inconsistent with standard CWA Section 308 ICR protocol.

III. CONCLUSION

In October 2009, EPA initially targeted the construction and contracting industries – which are regulated under the CWA and must obtain CWA Section 402 NPDES permits during the active construction phase of a project – for receiving ICR questionnaires. EPA has now added new targets, owners and developers of developed property, which have no current CWA permit obligations. Yet, EPA proposes to ask these owners and developers for information that may be held only by their construction company or other third-party consultants. Furthermore, EPA has not adequately explained its legal authority over developed property nor demonstrated a sufficient understanding of the commercial real estate business. As a result, the proposed Owner/Developer questionnaire exceeds EPA's statutory authority and will prove to be indecipherable and incoherent to its recipients.

If EPA wishes to promulgate national regulations that would control stormwater runoff from developed property, EPA must first compile a record that supports its assertion that all developed property is a point source discharge of pollutants to the waters of the U.S. If EPA can compile a record that supports that assertion for all or some subset of developed property, EPA

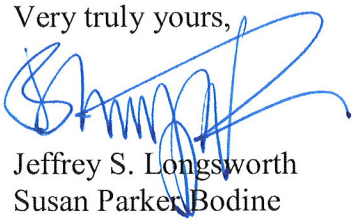
should identify appropriate targets for a future information collection. EPA should then meet with those entities to discuss how best to obtain the necessary information, as well as the most efficient method for obtaining that information.

OMB has an obligation to ensure that agencies reduce collection burdens imposed on the public and increase the efficiency of information collection. *See* 44 U.S.C. 3505(a)(1). OMB cannot approve this ICR until EPA has addressed and corrected the issues addressed in these comments.

The Real Estate Stormwater Coalition appreciates this opportunity to comment on EPA's proposed ICR and looks forward to working further with EPA and OMB to address these issues.

Please call if you have any questions.

Very truly yours,



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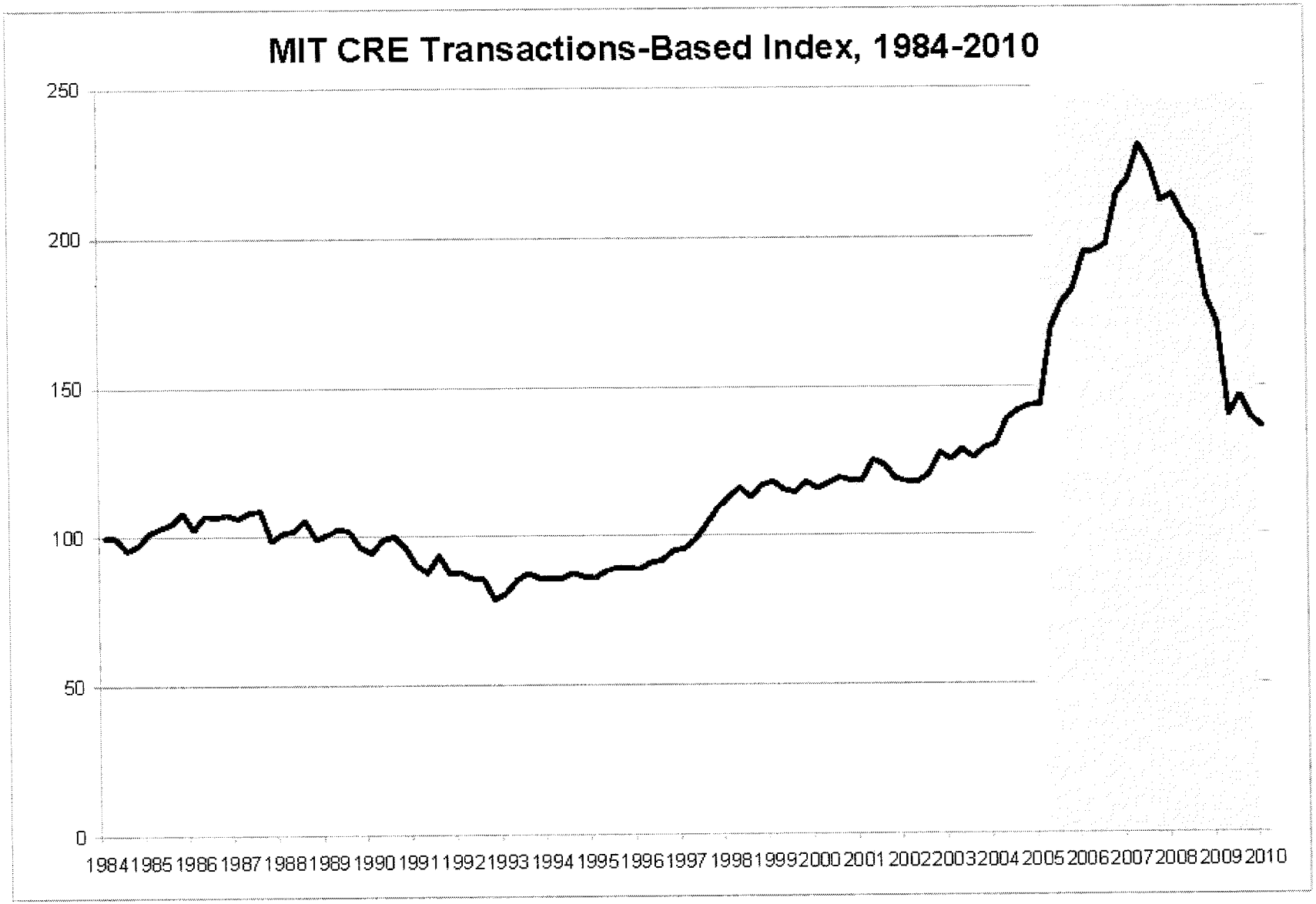
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