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November 29, 2010

Ted Boling
722 Jackson Place Northwest
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Re: Draft Guidance Clarifying Appropriateness of “Findings of No Significant Impact” and Specifying When There is a Need to Monitor Environmental Mitigation Commitments

Dear Ted Boling,

On behalf of the over 175,000 members of the National Association of Home Builders (NAHB), I respectfully submit these comments in response to the *Draft Guidance Clarifying Appropriateness of “Findings of No Significant Impact” and Specifying When There is a Need to Monitor Environmental Mitigation Commitments* as published in the *Federal Register* on February 18, 2010. In particular, NAHB is interested in ensuring that this draft guidance encourages flexible mitigation programs that maximize the environmental benefit. Although most of our members’ projects are not large enough to place them within reach of the National Environmental Policy Act (NEPA), because of the growing interest and reliance on NEPA at the state and local levels, coupled with the uncertainties associated with climate change science, NAHB is extremely concerned with the direct and indirect implications this policy will have on the residential construction industry.

NAHB’s membership consists of individuals and firms who not only develop land and construct single and multifamily homes, but complete light commercial projects as well. While our members are committed to environmental protection and species conservation, oftentimes well-intentioned policies and actions by regulatory agencies result in plans and programs that fail to strike the proper balance between conservation goals and needed economic growth. In these instances, our members are faced with increased costs attributed to project mitigation, delay, modification, or even termination.

Program Wide Adoption of Mitigation Strategies

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The need to consider and provide for mitigation of environmental impacts is prevalent throughout the various federal permitting programs, including NEPA, the Clean Water Act Section 404 program, and the Endangered Species Act's Section 7 and 10 programs. A consistent interpretation of how mitigation can be used to reduce impacts, however, is missing. In today's guidance CEQ "recognizes the appropriateness, value, and efficacy of providing for mitigation to reduce the significance of environmental impacts; consequently, when that mitigation is available and the commitment to perform it is made, there is an adequate basis for a mitigated FONSI." This is an important understanding, as it provides an incentive to project proponents to consider mitigation early and throughout the process. Contrast this with the Corps' interpretation of the use of mitigation in the wetlands nationwide permit program, which only allows minimal impacts, but does not allow permittees to use mitigation to reduce impacts so that they fall below the permitting thresholds. This is not only inconsistent with CEQ's read, but it relegates the consideration of mitigation to the end of the process, which limits flexibility and the broad range of opportunities that may have been available earlier. CEQ is urged to adopt a program-wide interpretation of mitigation that allows all permittees to both reduce project and/or rectify environmental impacts through the use of mitigation.

Outside Experts and NEPA Implementation

Another area of concern in today's guidance follows the suggestion that Federal agencies "use outside experts when developing the mitigation and monitoring" plans and programs. This recommendation does not address where the use of outside entities would be appropriate. CEQ must revisit this recommendation and provide detailed information as to when employing such entities would be appropriate, who would be responsible for overseeing the work performed, and identifying the responsibilities of the third party entity. Without it, the regulated community will continue to be subjected to duplicative regulations and will be unable to effectively implement programs that are innovative and adaptive to changing environmental and project conditions.

Programmatic Flexibility

Today's draft guidance on NEPA Mitigation and Monitoring sends a conflicting message to the public. CEQ initially states "*implementing Federal agency actions and mitigation involves consideration of future impacts and conditions in an environment that is evolving and not static; therefore, monitoring can help decision makers adapt to changed circumstances.*" This statement implies that CEQ will encourage Federal agencies to seek management and programmatic strategies that are

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flexible enough to adapt when faced with unforeseen environmental changes. This is contradicted on page 2 of this draft guidance document when CEQ states “...*mitigation measures that are adopted by the agency should be identified as binding commitments to the extent consistent with agency authority, and reflected in the NEPA documentation and any agency decision documents.*” While the initial statement indicates a need for a strategy that provides flexible management options that can adapt to changing conditions, the second statement appears to advocate for the adoption of rigid measures that bind projects and agencies to a predefined management strategy. With increased uncertainty surrounding environmental resilience, anthropogenic impacts and changing environmental conditions, it is necessary for CEQ and Federal agencies to adopt mitigation and monitoring strategies that can be adapted according to changing environmental and project conditions.

Thank you for consideration of our comments. NAHB strongly recommends that CEQ revisits this guidance document and clarifies its presumptions on costing, third party oversight, and the opportunity for program wide implementation in order to enable all programs to effectively implement flexible and adaptive mitigation and monitoring programs. While mitigation and monitoring are important to ensuring compliance, NAHB is concerned with the lack of detailed recommendations and guidance in this document and recommends CEQ revise this guidance and provide the necessary detailed framework for agency implementation. Please do not hesitate to contact me at (202) 266-8538 or Larissa Mark at (202) 266-8157 if you have any questions or would like to discuss any of our recommendations.

Best regards,

A handwritten signature in black ink, appearing to read "Susan Asmus". The signature is fluid and cursive, with a long horizontal stroke at the end.

Susan Asmus
Senior Vice President
Environmental, Labor, Safety & Health Policy
National Association of Home Builders