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Private and confidential

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The Council on Environmental Quality
Attn: Ted Boling
722 Jackson Place, NW
Washington DC 20503

Via internet: Mitigation.guidance@ceq.eop.gov
<http://www.whitehouse.gov/ceq/initiatives/nepa>

Dear Mr. Boling:

Rio Tinto is writing today to comment on the draft guidance (the "Guidance") released for review and comment on February 18, 2010, from the Council on Environmental Quality on "NEPA Mitigation and Monitoring" in accordance with the National Environmental Policy Act (NEPA), 42 U.S.C 4344 and Executive Order No. 11514, as amended by Exec. Order No. 11991. In response to that request for comments, these comments are submitted by Rio Tinto Services Inc., on behalf of itself and its US affiliated and related group companies (collectively "**Rio Tinto**"). I am the General Counsel, United States and South America for Rio Tinto and am submitting these comments on their behalf.

Rio Tinto is a leading international mining group with substantial operations and activities in the United States. Our business is exploring, locating, developing, mining, and processing mineral resources. Major products are aluminum, copper, diamonds, energy (coal and uranium), gold, industrial minerals (borax, titanium dioxide, salt, talc) and iron ore. In the United States, our hard rock mining and processing operations include Kennecott Utah Copper, which is a producer of copper, gold, silver, and molybdenum from an open pit mine with its associated concentrator, smelter, and refinery facilities, all located near Salt Lake City, Utah; Rio Tinto Minerals, which owns and operates an open pit mine and refining facilities in Boron, California that supplies nearly half the world's demand for refined borates and is also the owner and operator of talc mines in Montana and Vermont; Rio Tinto Alcan, which is the owner and operator of the Sebree aluminum smelter located in Robards, Kentucky; Kennecott Eagle Minerals, which is the owner of a new underground nickel-copper project near Ishpeming, Michigan; and Resolution Copper Company, which is a joint venture project for a world class underground copper mine in Superior, Arizona. In addition, Rio Tinto has a number of active US exploration projects. Rio Tinto has successfully operated, remediated and closed copper and gold mines in various locations in the United States, including in Wisconsin, Utah, Nevada, and South Carolina. Our Colowyo coal mining operations located in Western Colorado produces sub-bituminous coal, with sales to coal fired power plants. At Utah Copper alone, Rio Tinto's operation directly employs approximately 1880 people. Thousands more people support our mines as contractors and suppliers. Many of Rio Tinto's activities occur on, or affect public lands managed by the U.S. Bureau of Land Management or U.S. Forest Service. Decisions by these agencies to approve exploration and mining activities are subject to NEPA. As thus a producer and

consumer of fuels the combustion of which produces GHG emissions, we are thus extremely interested in these proposed guidelines.

Rio Tinto's operations and mining activities have been the subject of dozens of environmental assessment and environmental impact statements and as a result, Rio Tinto has first hand and direct knowledge of the implementation of NEPA. Rio Tinto prides itself as being proactive in working closely with the various federal agencies to meet all necessary required permitting and regulatory objectives. Clearly, and particularly in obtaining timely completion of EA and EIS requirements, Rio Tinto has witnessed the large demands placed on agency personnel and resources.

Along with our commitment to sustainable development goals, Rio Tinto's corporate climate change position acknowledges that human emissions are contributing to dangerous climate change and recognizes that reductions of these emissions are an important international goal. We have actively advocated for the adoption by the US Congress of comprehensive, market-based climate policy. As a proponent of thoughtful government action, we do, however, believe that certain aspects of the proposed Guidance require attention.

First, a fundamental aspect of the National Environmental Policy Act is that it is a procedural, rather than a substantive law, and the authority to implement substantive measures must arise from other substantive laws. The procedural aspects are critical for giving clear and consistent guidance to the regulated community in assisting in the preparation and engagement with the regulatory agencies in meeting the various EIS requirements and ensuring that the public involvement is met. However, the tenor of this Guidance implies a much more substantive approach – namely the requirement of developing and implementing mandatory mitigation plans and projects – as well as the long term maintenance of these. In point of fact, this burden generally will be met not by the regulatory agencies, but by the project proponents themselves. Inherent in this approach is a 'no net loss' concept, where the mitigation projects must at least equal or exceed the effect on the environment caused by the project itself – regardless of the merits of the project. While we believe that mitigation often forms a critical part of projects, not every project is capable of a "no net loss" mitigation concept, or at least, the potential mitigation concepts may be rather difficult to plan and ascertain, as well as to quantify compared to the project activity itself, particularly in the mining industry. Where mitigation may work extremely well for small scale projects, it becomes far less capable of quantification for large scale projects. For instance, in the case of a large open pit mine with a long useful life, and notwithstanding the required reclamation to be conducted at the end of mine life, how the effects can reasonably be 'mitigated' are very unclear. Questions such as whether it is the acreage affected that must be equalized, whether the volume of material must be taken into account, what is the impact on various air, water and other emission controls and long term monitoring that will be required for the mine, as well as numerous other factors, may all factor into the mitigation analysis. It would seem that the Guidance should specifically address how mitigation and monitoring would be handled in the case of large natural resources projects.

Second, we believe that the 'public involvement' in monitoring and mitigation should be more carefully worded. While we certainly would support the goal of having appropriate monitoring information made available to the public, which should be made available by various web resources, it should be clear that the general public would not have access to the actual monitoring sites, certain critical lands (where access should be precluded as part

of the actual mitigation goals), or to confidential information necessary to properly manage the mitigation project.

Third, we are quite concerned about the lengthy example posed by the Department of the Army. Compared to the public sector, where resources are not as constrained as they are in the private sector, in the case of private project proponents flexibility needs to be included to fashion plans, including by the engagement of third party contractors – to actually operate the mitigation projects. Once suitable funding and engagement of a reliable operator is achieved, as well as the project goals, objectives and plans are approved by the regulatory agency, the project proponent should be deemed to have met its requirements. The project proponent as to which the mitigation requirement is attached, should not act as a long term guarantor of the success of that project, particularly where it is due to factors outside its control. Yet, the Guidance suggests that a failure of the mitigation project, regardless of fault, may well impose greater restrictions and additional obligations on the part of the underlying project. In point of fact, that implies a long term mandatory obligation on the part of the project proponent

Finally, we do believe it important to emphasize that if the mitigation plan is sufficiently detailed, funded, and of sufficient scope to fully mitigate the large project effects – however defined – even those large projects should warrant a FONSI. However, we rather doubt that, even with those good intentions, such determination would pass muster in the courts absent a clarifying change in NEPA. We would encourage that effort to provide the dual goals of reducing the burdens on the project proponents and encouraging the extremely worthwhile goal of mitigating effects.

We appreciate the opportunity to provide comments to the draft Guidance.

Thank you again.

Sincerely,

A handwritten signature in blue ink, appearing to read "R. Craig Johnson", with a long horizontal flourish extending to the right.

R. Craig Johnson
General Counsel – US and South America
Rio Tinto