ADVOCACY GROUP
Federal Regulatory & Housing Policy

January 9, 2006

VIA FACSIMILE AND ELECTRONIC MAIL

The Honorable John D. Graham, Administrator
Office of Information and Regulatory Affairs
Office of Management and Budget
New Executive Office Building, Rm. 10235
725 17th Street, N.W.
Washington, D.C. 20503

Re: Good Guidance Practices

Dear Dr. Graham,

The National Association of Home Builders (NAHB) would like to thank the Office of Management and Budget (OMB) for proposing a process to bring transparency and consistency to Executive Branch activities that affect the public directly, but do not qualify as rules under the Administrative Procedure Act (APA). Without any regularized procedures for publication, adoption, or even application to specific instances, such as OMB suggests, the mass of agency "guidance" has grown without order or comprehension to a point where–in the aggregate–it impairs substantially the ability of the public to understand or comply with the law. Agency guidance and policy can become tantamount to a rule; it may be unknown to the public or even the employees of the administering agency; and it may be inconsistent within and across agencies. The result is a set of unsystematic requirements that bind the public in an arbitrary manner, yet from which there is no remedy, since agency "guidance" is not generally subject to judicial review.

NAHB is a Washington-based trade association representing more than 220,000 members involved in home building, remodeling, multifamily construction, property management, subcontracting, design, housing finance, building product manufacturing and other aspects of residential and light commercial construction. Known as "the voice of the housing industry," NAHB is affiliated with more than 800 state and local home builders associations around the country. NAHB's builder members will construct about 80 percent of the more than 2 million new housing units projected for 2006, making housing one of the largest engines of economic growth in the country.

Home building is one of the most intensely regulated industries in the economy. Not only do home builder face the full slate of regulations stemming from the tax laws,

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Social Security, and equal opportunity legislation, but they also face a special chapter of regulations from the Occupational Safety and Health Administration (OSHA), and the Environmental Protection Agency (EPA) has declared home builders to be a special target for enforcement. No industry faces the restrictions that confront home builders about where they may conduct business, the minutiae of how to conduct that business in terms of the placement of structural components, or the very appearance of the business. Many of those issues are matters of state or local land use or building codes, but they resonate in federal regulations as well. Conservation requirements from the EPA or Interior Department may dictate the placement or design of housing in some areas; the ability to build may hinge on the ability to get a wetlands permit from the Corps of Engineers (Corps). Local building codes can be partly pre-empted by Department of Energy regulations. Perhaps most important for builders, building permits generally require builders to obtain "all necessary permits" before construction can begin.

Permits, agreements, licenses, and the like are issued by agencies, but the crucial point in guidance is that they are issued by individual employees of the agency. A staff member at an agency has to make a decision, and that decision may not flow unambiguously from the statute and regulations–requirements that have been codified and that were written with public scrutiny and input. While trying conscientiously to follow the statutes, regulations, and judicial interpretations that are relevant, the agency staff must consider the preferences of supervisors and the plans of the agency, even if those plans and goals have not been communicated effectively to the staff or the public. In addition, agency staff will have preferences and viewpoints of their own that may influence their decisions–consciously or unconsciously. Therefore, the agency decision–which is the staff member's decision–is subject to many influences besides the facts and the law. The purpose of guidance is to make those decisions uniform by telling the staff and the public exactly what the agency policy is.

These individualized, non-policy, or non-rule decisions are not thought to have legal consequences, because they do not determine any generally applicable principle. However, they have all the constraining power of the law. The builder cannot proceed with construction without, for example, a wetlands permit from the Corps of Engineers, if applicable. Whether the permit will be issued depends on Corps headquarters policy, Corps regional policy, and local office policy, as well as the inclinations of relevant Corps staff. These all affect the question that is crucial for builder: whether the permit will be issued. A denial has same effect on the builder whether the denial is due to clear provisions of the Clean Water Act or due to a staffer's idiosyncrasy.

Thus, guidance and office policies determine the way regulatory power is applied; NAHB would like to see mechanisms put in place to ensure this power is applied in a transparent and fair manner in accordance with the law. NAHB believes the most important principles to govern this process of guidance reform are publication, accountability, and consistency. All of these principles are addressed by the OMB proposal.

Publication is the keystone of guidance reform. This issue is illustrated by the experience of an NAHB member who sought to sell a property participating in low-income housing program. To do so, he had to assign the contract with the Department of Housing and Urban Development (HUD), which has rules and policy in place to govern such transactions. However, he was told he would also have to accept additional requirements to abide by all future HUD directives because of an "unwritten rule" HUD applied to such cases. Leaving aside the question of whether this was a rule in terms of the APA, it was at least an agency procedure that determined a condition for granting applications. He could not plan for compliance with this "rule," because it was unwritten; neither could he comment to the agency about the policy's practicality or legality.

The multiple forms of electronic media mean that many different methods might qualify as publication. OMB suggests that all guidance should be available on the internet, which would be a good thing. Electronic publication facilitates search and transmission of policies, but the most important point is that the guidance be written down in some permanent record, so the guidance itself and any changes can be traced, and there would be no more "unwritten rules." If the guidance is written, then the guidance documents can be listed and catalogued. A descriptive and organized list of existing guidance documents could be of substantial help.

Accountability means that some person in the agency is in a position to change existing guidance and issue new guidance. OMB's proposed Good Guidance Practices[1] would go a long way toward establishing accountability via Section II(1), "Approval Procedures." By the terms of that section, each guidance document would have to be signed by an official authorized to make such decisions. Agency employees are required to follow the guidance. To avoid excessive rigidity, staff can cut some of the red tape by providing justification for not following guidance. However, the staff cannot act alone; they must get supervisory approval. NAHB recommends that OMB make clear that the supervisor should be at the level appropriate for issuing relevant guidance. That clarification would ensure the chief advantage of OMB's recommended approval procedures: they eliminate *ad hoc* decision-making by agency staff, with the additional benefit of assuring that decisions are made in the appropriate office.

Consistency encompasses both the idea that the law should be same for each person and the idea that federal law should be the same in all parts of the country. As a corollary, the law should be the same at all agencies; the public shouldn't be held to violate one agency's policies when it hews to the requirements of another agency. For example, the criteria for whether a species is endangered should be the same, regardless of whether that decision is made by the Fish and Wildlife Service or the National Marine Fisheries Service.

Requiring all guidance to be written, signed by the appropriate official, and published should accomplish giant strides toward the goal of consistency. If guidance can only be issued by authorized persons, and if it is published so that people can know

[1] http://www.whitehouse.gov/omb/inforeg/good_guid/good_guidance_preamble.pdf, page 9.

what guidance is already in place, staff will naturally avoid many inconsistencies that would have arisen out of ignorance or miscommunication. OMB's suggestion to allow for public feedback is another method of calling inconsistencies to the attention of agency staff. However, these communication improvements will not affect the inconsistencies that arise when several agencies have jurisdiction over aspects of an activity, and the agencies have inconsistent ideas of the goals off the regulatory scheme. For example, OSHA, HUD, and EPA all have versions of rules pertaining to exposure to lead based paint, but the agencies have different missions and different views of the role of remodelors, many of whom are NAHB members.

Inconsistencies Between Agency Offices

EPA and the Corps: Isolated Wetlands

Well-defined guidance approval procedures–such as those suggested by OMB–would also help eliminate very real problems of inconsistency amongst the various offices of agencies, such as field offices and headquarters. An egregious example of this inconsistency problem is the Corps' regulation of isolated wetlands as waters of the United States, within the meaning of the Clean Water Act[2]. In 2001, the Supreme Court invalidated the basis the Corps had used to regulate isolated wetlands.[3] Subsequently, the Corps and EPA issued an advance notice for new rules on a different legal basis,[4] but eventually the agencies announced that they would not issue any proposed rules.[5] The agencies had published some guidance along with the advance notice,[6] which has not prevented stark policy differences from one Corps region to another.

The wetlands guidance affords considerable latitude for the judgment of the regional and local offices of the Corps, with the result that some Corps districts–such as the Philadelphia and Seattle offices–treat roadside drainage ditches as "waters of the United Sates," while other Corps districts do not. Except for infill construction in urban areas, most home building will require crossing a drainage ditch, which will require installing a culvert filling a part of the ditch to allow for road access. In the Philadelphia and Seattle Corps districts, all drainage ditches are considered "waters of the United States," and a wetlands permit is required. In the district that contains Texas, no drainage ditch requires a wetlands permit. Whether the builder needs a permit for the culvert is determined by what Corps district encompasses the land. Therefore, the federal law means different things in different parts of the country, for no reason but bureaucratic dysfunction. New authoritative guidance procedures would prevent jurisdictional questions of national policy from being set by regional officials.

Postal Service: Central Box Units

The isolated wetlands matter is a situation where a federal agency needs to issue guidance, and its failure to do so has resulted in non-uniform federal law. A similar issue

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[2] 33 USC Sec. 1344.
[3] *SWANCC vs. Corps of Engineers*, 531 US 159 (2001).
[4] 68 Federal Register 1991, January 15, 2003
[5] EPA Press release, December 16, 2003.
[6] 68 Federal Register 1995, January 15, 2003.

has arisen at the United States Postal Service (USPS). USPS seems to have a policy to favor the usage of Central Box Units (CBUs) for residential mail delivery in new city neighborhoods. Every postal official contacted by NAHB readily admitted that USPS would prefer CBUs because it is so much cheaper to deliver to them than to deliver to a separate mailbox for each detached home. However, that policy cannot be found anywhere on the USPS Web site, nor is it contained in the Code of Federal Regulations. It's not even contained in the Domestic Mail Manual or Postal Operations Manual, which merely instruct postmasters to choose the form of delivery that is cheapest for the Postal Service. Nonetheless, some NAHB members have encountered strong insistence that mail delivery in new city developments must be done using CBUs, though only in some regions. USPS staff have said the decision is in the hands of the local postmaster or district officials.

Without addressing the issue of whether USPS has the right to insist on CBUs as a condition of initiating delivery, it is clear that the decision for CBUs must rest on something less arbitrary than whose district the new homes are in. It should depend on topography, population density, mail volumes, or other facts that are relevant to the problem of delivering mail and that are authorized by statute or regulation. USPS should issue some guidance, at the very least, so the rules will be uniform across the country. The guidance process should be public, so the people can be heard on what kind of service they want, and how much they are willing to pay for it. The resulting guidance should be made public as well, because builders are very confused about what sort of mail delivery their customers can get, and what the builder must do to get the homes ready. Because USPS is conditioning the right to receive mail upon the performance of a requirement, this issue is more properly the subject of a regulation, where the standards of the APA would apply, but even guidance from the appropriate level would be helpful.

Both the isolated wetlands issue and the CBU issue are cases where more guidance is needed, but the agencies have not issued it. The OMB suggestions would be improved by including an explicit means for the public to request or suggest new or additional guidance, as well as providing the comment procedures for proposed or existing guidance. The right to ask for the issuance of guidance is guaranteed by the First Amendment right of petition, but agencies can help protect that right by telling the public how to make those requests at each agency.

Improper *de facto* Rulemakings

In contrast to the isolated wetlands issue, where guidance is needed to clarify existing rules, NAHB has encountered more numerous problems where an agency has issued policies as guidance, when in fact, they are rules. The agency is using the garb of guidance to avoid the APA, possibly in good faith that the policy is not a rule. Some examples follow.

OSHA: The Multi-Employer Citation Policy

OSHA has issued what it calls its "Multi-Employer Citation Policy,[7]" by which OSHA inspectors are instructed to issue hazard citations to employers on the job site even if their own employees are not at risk and even if they did not create the alleged hazard. NAHB has long argued that the OSH Act governs the employer-employee relationship; it does not govern locations The employers' duties have been extended greatly beyond their own employees, yet the rights of the employers get no protection of law; for not only does guidance escape notice and comment, it also escapes judicial review. The multi-employer policy alters the duties of citizens without the opportunity to participate in the process. At the very least, OSHA needs to go through a rule-making to find that the OSH Act implies a duty such on strangers to the employment relationship. The policy is a legislative rule within the meaning of *American Mining Congress v. MSHA*[8], and it should have gone through the notice and comment procedures required by the OSH Act and the APA.

Department of Energy: Residential Appliance Manufacturing Standards

The Department of Energy (DOE) has promulgated energy efficiency standards for residential heat pumps and air conditioners manufactured after January 23, 2006.[9] As part of the initiation of the new standards, DOE posted information on its website[10] that qualifies as guidance under the OMB proposal. The guidance contains the claim that builders may not meet overall energy conservation goals by combining relatively low efficiency appliances with high efficiency structural components, such as windows and doors. This is a serious claim that substantially alters the incentives to use energy-efficient technologies, and it reduces greatly the advantages that would accrue to a builder who made energy-efficient choices. This qualification is a substantive change to the energy efficiency regulations, and it belongs in regulations, not guidance. It is a statement about what can or cannot be done; it is not a statement of opinion or interpretation.

The Mandatory Nature of Guidance is Regulatory.

Though some guidance is issued to instruct or inform the public about agency procedures, much is directed to agency employees. The guidance tells agency employees what to do in various circumstances. Assuming the staff obey their instructions, the public will not be able to get permits, licenses, or whatever they seek from the agency until the staff are convinced the guidance has been satisfied. Though the guidance may seem less like policy and more like administration, consequences will flow to the public just as surely as if the instructions had come through a rule.

Fish and Wildlife Service: Quino Butterfly Survey Protocol

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[7] OSHA Directive Number CPL 2-0.124; December 10, 1999.
[8] 995 F.2d 1106, CADC September 8, 1993.
[9] 10 CFR Part 430, especially Sec. 430.33.
[10] http://www.energycodes.gov/residential_ac_hp.stm

As OMB has noted, guidance can become a back-door method of issuing regulations. For example, the Fish and Wildlife Service (FWS) had advised people living in the range of the endangered Quino Checkerspot Butterfly that they should survey their property for presence of the butterfly before applying for an Incidental Take Permit, and usage of a particular survey protocol was urged. At no time did FWS say that permits were conditioned on performing the specified survey, nor did FWS say it would not issue a permit unless the survey protocol were followed. However, there is no indication that FWS has ever accepted a survey that did not follow the protocol. Clearly, this purported guidance is not advice; it is a fiat. An applicant must follow the prescribed protocol or give up any chance of getting a permit, without which a builder or homeowner cannot undertake construction, because of a possible failure to get "all necessary permits."

Corps: Regulatory Guidance Letters

The Corps sends Regulatory Guidance Letters (RGL) to each state to advise the state about the Corps' wetlands permit program.[11] The Corps claims the letters "are used only to interpret or clarify existing Regulatory Program policy" but it admits the letters are mandatory on the Corps district offices.[12] Further amplifying the role of the guidance as regulation, the Corps stated that it "incorporates most of the guidance provided by RGL's (sic) whenever it revises its permit regulations."[13] Therefore, the "guidance" must have been mandatory all along; incorporating the terms into regulation is merely a name change.

Mitigation Banks

In 1995, the Corps, EPA, FWS and Marine Fisheries issued a joint guidance on mitigation banking, and they took public comment on it.[14] Though this procedure complies with OMB recommendations for economically significant documents, it has not cured the substantive nature of the guidance. It is treated as *de facto* regulation, and NAHB staff are unaware of any subsequent mitigation bank approvals where the applicant did not follow the steps of the guidance.

Therefore, NAHB is concerned about methods of securing agency compliance. Many of the abuses cited here have been published in the *Federal Register*, and the agencies have even accepted comment on some of them. However, they were issued as notices, not regulations. Publication and comment did not cure their abuse or prevent other ways to use guidance to compel actions on the part of the public. Though one may argue that if purported guidance is really a rule, there is a remedy in the APA; that remedy is hollow at best, and often illusory. To file litigation is an expensive and risky process under the best of circumstances; individuals are likely to find it more economically rational to comply than litigate. Worse, when the action in a lawsuit is characterized as guidance, the courts will almost automatically rule that the lawsuit is not

[11] 33 CFR 320-330
[12] 62 Fed. Reg. 31492; June 9, 1997.
[13] Ibid.
[14] 60 Fed. Reg. 58605; Nov. 28, 1995.

ripe, because guidance is not a final agency action. The court seldom reaches the merits of whether the guidance is really guidance or a disguised rule.

It would be helpful if OMB–or some other office wielding the executive authority of the President–would issue criteria under which agencies must regard interpretations, decisions, guidance, or policy as rules. Executive Branch policy can require agency decisions to be adopted pursuant to the APA, as long as the executive does not try to exempt anything required by Congress or the courts to be adopted under the APA as well. That is to say, the executive can add programs to APA purview, but it cannot subtract from judicial or Congressional requirements. This policy would merely be for the organization and operation of the Executive Branch. It would provide more discipline to the guidance and regulatory processes, and it would provide greater consistency among and across agencies.

The OMB proposal goes a long way toward increasing the transparency, consistency, and accountability of the administrative system. NAHB supports the OMB efforts and offers these comments by way of documentation of the need for reform and illustration of suggested additions to OMB's proposals.

If you have any questions, please feel free to contact the undersigned.

Sincerely,

Andrew Jackson Holliday
Regulatory Counsel
National Association of Home Builders