Testimony of

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On behalf of the more than 140,000 members of the National Association of Home Builders (NAHB), I appreciate the opportunity to submit this testimony. My name is Richard Kligman and I am a builder from Plymouth, Michigan, and serve as President of Superb Custom Homes. A third generation builder, I received my builder's license in 1993. We generate work for hundreds of suppliers and subcontractors and are engaged in custom home building and renovations. I also serve as a Director for the National Association of Home Builders, am on the Board of Directors and a Regional Vice President of the Michigan Home Building Association, and the Past President of the Home Builders Association of Southeastern Michigan.

NAHB represents members involved in a wide variety of activities, including the development and construction of single-family for-sale housing; the development, construction, ownership, and management of affordable and market-rate multifamily rental housing; and the development and construction of light commercial properties. Since the association's inception in 1942, NAHB's primary goal has been to ensure that housing is a national priority and that all Americans have access to safe, decent and affordable housing, whether they choose to buy or rent a home.

The growth potential in the home building industry is particularly important because few industries have struggled more during the Great Recession than construction. The decline in home construction was historic and unprecedented. Single-family housing production peaked in early 2006 at an annual rate of 1.8 million homes, but construction fell to 353,000 homes per year in early 2009, an 80% decline in activity. A normal year driven by underlying demographics should see 1.4 million single-family homes produced. If home building were operating at a normal level today, there would be millions of more jobs in home building and related trades, and smart regulation can help unleash that growth.

Our impact on the economy is more than just jobs. Buyers of new homes and investors in rental property add to the local tax base through business, income and real estate taxes, and new residents buy goods and services in the community. NAHB estimates the first-year economic impacts of building 100 typical single family homes includes $28.0 million in wage and net business income, $11.1 million in federal, state and local taxes, and 297 jobs. In the multifamily sector, the impacts building 100 typical rental apartments includes $10.8 million in wages and business profits, $4.2 million in federal, state, and local taxes, and 113 jobs. As an industry, we have finally turned the corner and are contributing to, rather than subtracting from, Gross Domestic Product growth and an improving labor market. Any effort to advance our nation's housing recovery is smart economic policy.

Home building is a complex and highly regulated industry. Costs for certain regulatory actions are borne by these small businesses in the form of land, planning, and carrying costs, which ultimately arrive in the market as a combination of higher prices and lower output for the industry. Housing serves as a great example of an industry that would benefit from smarter and more sensible regulation. According to a study completed by NAHB, government regulations account for 25% of the price of a single-family home. Higher costs mean fewer sales, and as output declines, jobs are lost and other sectors that buy from or sell to the construction industry also contract.

Home buyers, especially first-time buyers, are particularly price sensitive. As builders, we are acutely aware of how even minimal price increases can lock thousands of buyers out of the new home market. To illustrate the effect, I want to refer to an analysis recently conducted for Michigan by NAHB's economists. In this case, we were looking at the number of households that would no longer qualify for a mortgage due to compliance with the latest building codes. The analysis determined that the new code requirements would increase the incremental construction costs for typical residences by $2,532. The base price of a typical new one-story home in Michigan is $121,040. $2,532 may not seem like a lot in the big picture, but the study indicates that 31,106 Michigan households would be priced out and denied the opportunity of homeownership. While we are not here to discuss building codes, I believe this example illustrates just how impactful overregulation can be, and we believe that many of the regulations being discussed will be significantly more costly to implement than $2,500. The bottom line is unnecessary regulatory costs hurt real people, right here in Michigan.

I would like to highlight a few of those regulations that are of concern.

"Waters of the United States" Proposed Rule:

On April 21, 2014, the Environmental Protection Agency and U.S. Army Corps of Engineers ("the agencies") proposed a rule redefining the scope of waters protected under the Clean Water Act (CWA). For years, landowners and regulators alike have been frustrated with the continued uncertainty over the scope of federal jurisdiction over "Waters of the United States." By improving the CWA's implementation, removing redundancy, and further clarifying jurisdictional authority, it can do an even better job at facilitating compliance and protecting the aquatic environment.

Unfortunately, the proposed rule falls well short of providing the clarity and certainty the construction industry seeks. This rule will increase federal regulatory power over private property and will lead to increased litigation, permit requirements, and lengthy delays for any business trying to comply. These changes will not improve water quality, as much of the rule improperly encompasses water features that are already regulated at the state level.

The agencies assert that the scope of CWA jurisdiction is narrower under the proposed rule than under current practices and that it does not assert jurisdiction over any new types of waters. This is simply not accurate. In reality, the proposed rule establishes broader definitions of existing regulatory categories, such as tributaries, and regulates new areas that are not jurisdictional under current regulations, such as adjacent non-wetlands, riparian areas, floodplains, and other waters.

The proposed changes provide no additional protections for these newly jurisdictional areas as many already comfortably rest under state and/or local authority. The agencies intentionally created overly broad terms so they have the authority to interpret them as they see fit. For any small business trying to comply with the law, the last thing it needs is a set of new, vague and convoluted definitions that only provide another layer of uncertainty.

The CWA was designed to strike a careful balance between federal and state authority. This has proven to be a difficult task, and to some extent, the efforts of the courts to provide clarity have only added to the uncertainty. However, the courts have been clear on one issue: there is a limit

to federal jurisdiction of waters. In fact, the Supreme Court has twice affirmed that both the U.S. Constitution and CWA place limits on federal authority over intrastate waters. While many were optimistic that this rule would finally translate the Court's directives to a workable framework, the proposed rule instead is a marked departure from past Supreme Court decisions and raises significant constitutional questions.

While many aspects of the CWA are vague, it is clear that Congress intended to create a partnership between the federal agencies and state governments, to protect our nation's water resources. Congress states in section 101 of the CWA that "[f]ederal agencies shall co-operate with state and local agencies to develop comprehensive solutions to prevent, reduce and eliminate pollution in concert with programs for managing water resource." Under this notion, there is a point where federal authority ends and state authority begins. The rule proposed by the agencies blatantly ignores this history of partnership and fails to recognize that there are limits on federal authority.

States have successfully regulated their own waters and wetlands for years. States takes their responsibilities to protect their natural resources seriously and do not need the federal government to assert jurisdiction. In fact, every state has the authority to exceed federal law, so long as there is a compelling reason. If you looked around the country you would find that many states are protecting their natural resources more aggressively than when the CWA was enacted.

Construction projects rely on efficient, timely, and consistent permitting procedures and review processes under CWA programs. Developers are generally ill-equipped to make their own jurisdictional determinations and must hire outside consultants to secure necessary permits and approvals under CWA programs. Delays often lead to greater risks and higher costs. If the rule is finalized in its current form, the ability to sell, build, expand, or retrofit real estate projects will suffer notable setbacks, including added cost and delays for development and investment.

Specifically for the "other waters" category, builders will be at the mercy of the agencies. Builders will have to request a jurisdictional determination from the agencies to ensure they are not disturbing land near an aggregated water. Consequently, an increase in the number of jurisdictional determinations requests, across all industries, will result in greater permitting delays as the agencies are flooded with paperwork.

Michigan has a unique permitting system because the state has the authority to administer Section 404 of the CWA. In most states an applicant must submit their 404 permit application to the Corps; however, Michigan applicants generally submit permitting requests to the Department of Environmental Quality. The state-administered 404 program must be consistent with the requirements of the federal CWA. While we may comply with the CWA differently in Michigan; the consequences of this rule will be the same.

Many federal statues tie their approval/consultation requirements to those of the CWA, i.e. if one has to obtain a CWA permit, he/she must also obtain others. If more areas are considered jurisdictional, more CWA permits will be required. More federal permitting actions will trigger additional statutory reviews – by agencies other than the permitting agency – under laws including the Endangered Species Act, National Historic Preservation Act, and National

Environmental Policy Act. Project proponents do not have a seat at the table during these additional reviews, nor are consulting agencies bound by a specific time limit. Lengthened permitting times will include an increased number of meetings, formal and informal hearings, and appeals. These federal consultations are just another layer of red tape that the federal government has placed on small businesses and it is doubtful the agencies will be equipped to handle this inflow.

OSHA Crystalline Silica Rulemaking

Occupational Safety Health Administration (OSHA) recently proposed a comprehensive and complicated new regulatory structure for the control of crystalline silica in the construction environment. The proposed rule is potentially the most far-reaching regulatory initiative ever proposed for the construction industry.

Crystalline silica is ubiquitous in construction. It is a basic component of soil, sand, and granite and is found in numerous building materials. Crystalline silica can be disturbed by a number of construction activities such as: mixing mortar; cutting brick/block; tuck pointing; sawing, grinding, or drilling concrete; and sanding/finishing drywall joints.

The current respirable silica Permissible Exposure Limit (PEL), or the maximum amount of silica dust to which a worker may be exposed to during an 8-hour shift of a 40-hour week, is 250 micrograms per cubic meter of air. Employers are required to ensure that employees are not exposed to silica levels above the PEL by using administrative or engineering controls. However, protective equipment (e.g., respirators) or other protective measures may be used to keep workers' exposure below the PEL whenever implementing controls are not feasible.

OSHA is proposing an 80% reduction in the Permissible Exposure Limit (PEL) for respirable silica dust. In addition to the significantly reduced PEL,OSHA's proposal includes requirements for regulated areas or written access control plans, prohibitions on work practices on construction sites such as compressed air, dry sweeping, and dry brushing, medical surveillance, respiratory protection, training and hazard communication, and recordkeeping.

OSHA has not explained how a drastically lower PEL/action level will effectively reduce the number of silica-related illnesses and deaths. The agency itself has admitted a failure to properly enforce existing standards, while the CDC has reported a 93 percent drop in silica-related deaths between 1968 and 2007.

Additionally, NAHB believes OSHA should withdraw the proposed silica regulation until it can demonstrate that the proposal is technologically justified, economically feasible, and that it can be applied and understood in the "real world" of residential construction. OSHA's proposal prescribes control methods that contradict existing safety practices and **will ultimately cost the industry $3 billion dollars annually.**

Federal Involvement in Local Building Energy Codes

Building energy codes, such as the International Energy Conservation Code (IECC) are used across the country to establish minimum standards for building energy efficiency. The codes are

developed by private entities, but are then adopted by state and local governments. The Department of Energy (DOE) participates in this process. While they do not develop the codes themselves, they are authorized to provide "technical assistance." NAHB has serious concerns that this has been broadly interpreted to allow DOE to advocate for or against certain proposals.

Over the last few years, the industry has seen some negative trends in code development leading to less choice and decreased value to the consumer. First, there has been a move towards using a more prescriptive approach – mandating the use of certain products or techniques. Unfortunately, some businesses have realized that by inserting specific products into the IECC, they can require the use of their products and increase their profits. Instead of allowing the builder to make decisions in the interest of the buyer – based on personal preferences, cost, behavior, etc. – the IECC, in some instances, dictates how to build and what products to use.

DOE has supported such efforts in the past, including measures to give preferential treatment to foam sheathing over wood products. The Department also sought to delete measures aimed to promote flexibility in the IECC – one such provision allowed builders to trade off energy measures - wall insulation, for example, provided they installed more efficient mechanical equipment. The same net energy use would be maintained, but the builder would have more design and construction options. Unfortunately the Department was successful and this was removed from the code in 2009.

Another unfortunate trend is the attempt to mandate further energy use reductions, without real consideration of economic costs. I know how valuable energy savings can be to a consumer, but some of these products and technologies come with a significant upfront cost. Energy savings measures mandated by these codes must weigh costs with savings.

According to an NAHB market report, "What Home Buyers Really Want," buyers are willing to pay more for lower utility costs, but according the data, buyers need a 14 percent return on investment, which corresponds to a 7-year payback period. The 2012 version of the IECC had such significant cost increases that it would take the average family 13.3 years just to break even on required mandates. That is the national average. For half of the state of Michigan, the payback period is actually 16.1 years. Some companies and advocacy groups are now pushing Michigan to adopt this onerous and expensive code because it benefits their business, treating certain products favorably. The Home Builders Association of Michigan is trying to find a reasonable solution.

NAHB is supporting soon-to-be introduced legislation that would reign in DOE by reestablishing their original role as a "technical advisor," increasing transparency in the process and ensuring that the codes are more cost-effective. I believe these reforms will help to create a more fair development process that allows for all voices to be heard and I hope you can support us in this effort.

Please keep in mind that the energy code is not an "option" for buyers looking for a more efficient home. Rather, this is a requirement for every single home in that jurisdiction – including low-income housing and homes for first-time homebuyers. The energy code is a baseline for all homes. Energy efficiency tax credits, such as the section 25C and 45L credits,

stand out as examples of this better approach. In contrast, increasing housing costs for all homebuyers will have the unintended consequence of reducing housing affordability and driving lower cost buyers into older, less-efficient housing.

EPA's Lead Renovation, Repair and Painting Rule (RRP)

Amendments and changes to the EPA's Lead Renovation Repair and Painting rule (RRP) have seriously constrained our businesses. The final rule, which took effect April 22, 2010, requires renovation work that disturbs more than six-square feet in a home built before 1978 to follow new lead-safe work practices supervised by an EPA-certified renovator and performed by an EPA-certified renovation firm. Poor development and implementation of the rule by EPA has resulted in considerable compliance costs and has hindered both job growth and energy efficiency upgrades in older homes.

The first important change to the RRP was finalized on July 6, 2010, and eliminated a consumer's ability to waive compliance requirements if no children under six or a pregnant woman resides in the home. Not only does this change further restrict a consumer's choice about critical renovation work in older homes, but it also dismantles everything EPA originally included in the original 2008 RRP rule to ensure that it was not overly costly to small businesses. As a means of regulatory flexibility, the EPA allowed homeowners in pre-1978 homes that do not have young children or a pregnant woman residing in the home to waive a contractor's compliance obligations, or "opt out" of the RRP. The EPA stated that the inclusion of the "opt out" provision decreased the number of homes subject to the RRP from 77.8 million down to 37.6 million. Furthermore, EPA states that the removal of the "opt out" costs an additional $507 million for small businesses in the first year alone.

Without even giving the original rule a chance to work, the EPA immediately amended it by removing the "opt-out", thereby taking away a key measure that made it easier for homeowners to absorb the regulatory impact.

According to the U.S. Census Bureau's American Community Survey, approximately 38,317,131 owner-occupied housing units built before 1978 do not have a child under six living there. This is roughly 88.5% of all the housing stock in the U.S. built before 1979. With the removal of the "opt out" provision, those homeowners no longer have the option of foregoing the costs of compliance with RRP when hiring a professional remodeler to work on an older house. For the small contractors, these additional costs have to be passed onto the consumer which increases the chances a consumer will hire another, likely uncertified, contractor to do the work, or worse, do the work themselves and actually increase the likelihood of disturbing lead-based paint. The restoration of the "opt out" provision would allow households that do not have young children or pregnant women the chance to undertake professional renovation work – most frequently energy efficiency upgrades – without facing compliance costs for a regulation that legitimately does not apply to anyone in the household.

In addition to incorporating the "opt out" to reduce the number of homes subject to RRP, the 2008 RRP also relied on the existence of a accurate test kit that, at the time the rule was enacted, was not available. Under the rule, if a pre-1978 home is tested and the results indicate there is no

presence of lead-based paint, the contractor can bypass RRP compliance. This is a reasonable component to the rule, but it also hinges on the existence of an accurate testing kit.

In drafting the rule, the EPA claimed that an accurate test kit would be commercially available by September 1, 2010. As a result, they explicitly rejected other options to reduce the cost of the regulation because of the anticipated test kit. The new test kit (Phase II) was to supposed to replace the first version (Phase I), which EPA acknowledges has a significantly high false-positive result rate, with false positive rates ranging from 47%-78%.

EPA said it was committed to having more accurate kits, thereby reducing the number of false positives and saving costs on RRP compliance. In fact, EPA's cost calculations rely upon the availability of the Phase II kits beginning in September 2010. As of today, 4 years after the EPA thought they would be on the market, Phase II test kits are still not available. To make matters worse, the EPA has no estimate as to when they will be available.

Although EPA is still allowing contractors to use Phase I test kits, the entire benefit of having better kits that would reduce the compliance costs for small businesses has been entirely overlooked. After months of informal pleas to EPA to adjust the RRP to account for the substantially higher compliance costs, NAHB formally petitioned EPA to undertake a rulemaking and develop a revised economic analysis on September 27, 2010. The EPA has never responded to NAHB's petition however, they recently informed us that they are no longer working to develop an improved test kit. With inaccurate and overly-sensitive test kits, and the removal of the "opt out," there is little opportunity for relief for remodelers undertaking renovation work in pre-1978 homes. Given the unreliability of commerically available lead testing kits, NAHB believes EPA should delay the rule's effective date.

Regulatory Barriers to Housing Production Credit

Despite signs of improvement in recent months, many home builders continue to deal with a significant adverse shift in terms and availability on land acquisition, land development and home construction (AD&C) loans and builders with outstanding loans have faced numerous challenges. Lenders are reluctant to extend new AD&C credit or to modify outstanding AD&C loans in order to provide more time to complete projects and pay off loans. Lenders themselves often cite regulatory requirements or examiner pressure on banks to shrink their AD&C loan portfolios as reasons for their actions. While federal bank regulators maintain that they are not encouraging institutions to stop making loans or to indiscriminately liquidate outstanding loans, reports from NAHB members in a number of different geographies continue to suggest that bank examiners in the field have adopted a more aggressive posture.

While the home building industry is no longer experiencing the dramatic declines in the outstanding stock of AD&C loans that immediately followed the economic downturn, there still exists a lending gap between home building demand and available credit. Since the beginning of 2007, the dollar value of the pace of single-family permitted construction is down 39 percent. During this same period, home building lending for AD&C purposes is down 78 percent. This lending gap is being filled by other sources of capital, including equity investments from non-

depository institutions and lending from other private sources, which may generally offer less favorable terms for home builders than traditional AD&C loans.
The home building industry is predominantly made up of small businesses and these companies have traditionally relied on community banks for AD&C loans. With regulatory pressures unfortunately still impacting the cost and availability of construction credit, congressional action is needed to help open the flow of credit to home builders. Without such action, there can be no sustainable housing recovery, which has major implications for our nation's ability to recover from the economic downturn.

NAHB appreciates the efforts of Representative Gary Miller (R-CA) and Carolyn McCarthy (D-NY) for introducing The *Home Construction Lending Regulatory Improvement Act of 2013 (H.R. 1255)* that would address several regulatory barriers to sound construction lending, and looks forward to working with congress to advance regulatory reform in this area. Going forward, it does not seem likely that community banks will again resume the levels of AD&C lending previously undertaken unless some form of secondary market outlet is created to allow these institutions to sell their AD&C output and obtain liquidity for additional lending.

NAHB is also very supportive of H.R. 1553, the *Financial Institutions Examination Fairness and Reform Act* introduced by Representative Shelley Moore Capito (R-WV) and Representative Carolyn Maloney (D-NY), that would provide new standards for bank examinations. Of particular note to the home building industry, such new standards would specify that a commercial loan (including AD&C loans) cannot be placed in nonaccrual status solely because the collateral has deteriorated in value. Additionally, the legislation would clarify that a new appraisal is not required on a commercial loan unless an advance of new funds is involved.

Last July, H.R. 1553 was incorporated into H.R. 2767, the *Protecting American Taxpayers and Homeowners Act of 2013 (PATH Act)*. While there are policy elements of the PATH Act that NAHB supports, we strongly oppose the legislation because of its lack of federal support for housing. NAHB looks forward to working with congress to advance key elements of our AD&C credit crisis legislative agenda.

<u>OSHA's Fall Protection Standard</u>

In December 2010, OSHA changed its residential construction fall protection regulation. OSHA rescinded its Interim Fall Protection Guidelines, which set out a temporary policy that allowed employers engaged in certain residential construction activities to use alternative procedures instead of conventional fall protection, such as guardrail systems, safety net systems, or personal fall arrest systems, for any work that is conducted six feet or more above lower levels. Returning to the original fall protection standard has proven to be challenging because OSHA has not provided specific guidance regarding how it will interpret the standard or how builders are expected to comply in determining when the use of conventional fall protection is considered infeasible or its use creates a greater hazard. Given these uncertainties, builders have little assurance that their actions will meet OSHA's requirements, and could be saddled with costly fines or citations even though they were making good faith efforts to comply. We believe OSHA's fall protection regulation should be reviewed under Executive Order 13563, "Improving Regulation and Regulatory Review," to help make it more effective and less burdensome for small businesses, exactly as envisioned by the President.

In conclusion, I appreciate the opportunity to share the thoughts of my trade association, the National Association of Home Builders, on federal regulations impacting small businesses and job creation in Michigan. While I focused my testimony on regulations that concern our industry, NAHB is not against appropriate, balanced, regulation. Our members understand that regulation is needed, for example, to protect the nation's water supply and to limit a child's exposure to lead paint. Regulations that are workable and sensible - where the rules are easily understood and applied - could be the type generally supported by our industry. Unfortunately, our industry is participating in several rulemaking processes, some of which I have highlighted above, where agencies avoid well-established policies of the Administrative Procedures Act and neglect the safeguards of the Regulatory Flexibility Act, all in the interest of promulgating rules for self-serving political gain.