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Via Fed-Ex & E-mail

Alfred M. Pollard
General Counsel
Federal Housing Finance Agency,
Fourth Floor
1700 G Street, NW
Washington, D.C. 20552

Re: Public Comments, "Guidance on Private Transfer Fee Covenants"
(No. 2010-N-11)

Dear Mr. Pollard:

On behalf of the Natural Resources Defense Council, the Sierra Club, Audubon California, and the Endangered Habitats League, and the millions of members those groups represent, Shute, Mihaly and Weinberger LLP provides these comments on the issuance of the proposed "Guidance on Private Transfer Fee Covenants" ("Guidance") by the Federal Housing Finance Agency ("FHFA"). Adoption of the proposed Guidance is a major federal action subject to National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321 et seq. Because elimination of private transfer fees ("PTFs" or "transfer fees") will substantially impact hundreds of thousands of acres of open space and wildlife habitat to be preserved and restored with such fees under existing and future agreements, deeds, and covenants, FHFA may not adopt the proposed Guidance without first preparing an Environmental Assessment ("EA") or Environmental Impact Statement ("EIS").

1. NEPA's Purpose Is To Ensure That the Environmental Implications of All Major Federal Actions Are Fully Analyzed.

NEPA is the "basic national charter for protection of the environment." 40 C.F.R. §1500.1. Its purpose is to ensure that "public officials make decisions that are

based on understanding of environmental consequences, and take actions that protect, restore, and enhance the environment” and to “insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken.” *Id.* § 1500.1(b)-(c). NEPA is designed to “[e]ncourage and facilitate public involvement in decisions which affect the quality of the human environment.” *Id.* § 1500.2(d).

To achieve these purposes, NEPA requires all federal agencies to prepare a “detailed statement,” the EIS, regarding all “major Federal actions significantly affecting the quality of the human environment.” 42 U.S.C. § 4332(c). Where an agency does not know whether the effects of its proposed action will be “significant,” it may prepare an EA. 40 C.F.R. § 1501.4(b). An EA consists of an analysis of the need for the proposed action, of alternatives to the proposed action, and of the environmental impacts of both the proposed action and the alternatives. *Id.* § 1508.9.

2. FHFA’s Approval of the Proposed Guidance Is a Major Federal Action Subject to NEPA.

A “major Federal action” is broadly defined under NEPA regulations, to include “projects and programs . . . regulated[] or approved by federal agencies,” “new or revised agency rules, regulations, plans, policies, or procedures,” and “[a]doption of official policy, such as rules, regulations, and interpretations.” 40 C.F.R. §§ 1508.18(a)-(b). FHFA’s proposed Guidance clearly falls within this broad definition. If adopted in final form, the Guidance would be a major change in federal policy.

FHFA acknowledges the argument that transfer fees “are beneficial when used to . . . enhance community investments through homeowners associations or through affordable housing groups, environmental groups, or other charitable organizations.” 75 Federal Register 49932 (August 16, 2010). It also recognizes that, currently, some states that otherwise restrict transfer fees permit them in cases where they “benefit a homeowners association or community organization.” *Id.* at 49933. While recognizing the distinction made by many members of the public and numerous states between transfer fees that benefit private investors or developers and those that provide community benefits, FHFA chooses to ignore this distinction. It summarily concludes, without detailed analysis or evidence, that all transfer fees -- “regardless of their purposes” – are “not counterbalanced by sufficient positive effects.” *Id.*

The proposed Guidance therefore directs that Fannie Mae and Freddie Mac “should not purchase or invest in any mortgages encumbered by private transfer fee covenants or securities back by such mortgages” and that the Federal Home Loan Banks

“should not purchase or invest in such mortgages or securities or hold them as collateral for advances.” *Id.* at 49934. FHFA’s new policy would effectively abolish the use of PTFs nationwide and thus would clearly be a “major Federal action” subject to NEPA. *See Humane Soc’y of the United States v. Johanns*, 520 F.Supp.2d 8, 22 (D.D.C., 2007) (promulgation of Interim Final Rule governing fee-for-inspection program for slaughter facilities “unquestionably constitutes a major Federal action”).

3. Approval of the Proposed Guidance Will Have Significant Environmental Impacts.

a. NEPA Requires Analysis of All Reasonably Foreseeable Direct and Indirect Environmental Impacts.

NEPA has two primary goals. “First, it places upon an agency the obligation to consider every significant aspect of the environmental impact of a proposed action.” *Baltimore Gas & Elec. Co. v. Natural Res. Def. Council*, 462 U.S. 87, 97 (1983) (internal quotation omitted). “Second, it ensures that the agency will inform the public that it has indeed considered environmental concerns in its decisionmaking process.” *Id.* Compliance with NEPA forces an agency to examine environmental impacts that might otherwise be overlooked:

Simply by focusing the agency's attention on the environmental consequences of a proposed project, NEPA ensures that important effects will not be overlooked or underestimated only to be discovered after resources have been committed or the die otherwise cast.

Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 349 (1989).

NEPA review is required for all foreseeable direct and indirect impacts of an agency action. Direct effects “are caused by the action and occur at the same time and place.” 40 C.F.R. § 1508.8(b). Indirect effects:

are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable. Indirect effects may include . . . effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems.

Id. § 1508.8(b). “Effects” are defined to include “ecological . . . aesthetic, historic, cultural, economic, social, or health, whether direct, indirect, or cumulative.”

Id. § 1508.8. “Indirect impacts need only to be ‘reasonably foreseeable’ to require an assessment of the environmental impact.” *Friends of the Earth, Inc. v. United States Army Corps of Eng'rs*, 109 F.Supp.2d 30, 41 (D.D.C. 2000). As explained in *Brady Campaign to Prevent Gun Violence v. Salazar*, 612 F.Supp.2d 1, 22 (D.D.C. 2009), “NEPA requires an agency to consider environmental impacts even if the effects are not entirely certain.”

b. The Proposed Guidance Will Have Substantial Environmental Impacts Nationwide.

Because the FHFA has proceeded without NEPA compliance, the proposed Guidance gives no hint as to the scope of the environmental impacts associated with its adoption. In fact, these impacts will be substantial.

The proposed Guidance would halt or substantially interfere with the implementation of existing programs that depend upon transfer fees to support environmental and other community benefits. (Examples of projects and excerpts from fee agreements that would be impacted are attached as exhibits to this letter.) In California alone, this will impact hundreds of thousands of acres of land, including the following:

- **Tejon Ranch.** In May of 2008, a coalition of environmental groups entered into an historic agreement to protect 240,000 acres in Tejon Ranch in southern California, one of the largest conservation deals in the State’s history. *See* Exhibit A (Tejon Ranch Conservation & Land Use Agreement). PTFs are an integral part of the Agreement, as the funds generated from these fees will provide permanent funding for the independent non-profit Tejon Ranch Conservancy to protect critical habitat linkages and viewsheds and maintain, restore, and enhance habitat for the California condor and over two-dozen other rare plant and animal species.
- **Martis Valley.** PTFs are a central component of land use management in Lake Tahoe’s pristine Martis Valley. There, PTFs provide a funding stream for community benefits, including the preservation and enhancement of open space and natural resources, from a variety of projects. *See, e.g.*, Exhibit B (Truckee Land Stipulation); Exhibit C (Old Greenwood Community Benefit Agreement); Exhibit D (Gray’s Crossing Community Benefit Fee Agreement); Exhibit E (Northstar Village Agreement); and Exhibit F (Siller Ranch Settlement Agreement). The Truckee Donner Land Trust, a non-profit organization that

administers PTFs for Martis Valley, has already used a portion of the funding to permanently protect Waddle Ranch, an undeveloped 1,481-acre property serving as a corridor to the Tahoe National Forest, Martis Creek Lake National Recreation Area, and Mount Rose Wilderness Area. *See id.* The proposed Guidance would affect PTFs that attach to thousands of properties in Martis Valley.

- **Placer County.** In 2004, the City of Roseville established a 0.5% PTF on a 3,000 acre development just outside its city limits in Placer County. *See* Exhibit G (Roseville Stipulated Final Judgment). The PTF, which expires 20 years from the sale of each unit, establishes funds to be administered by the non-profit Placer Land Trust for the permanent protection of open space/habitat land. Since the establishment of the PTF program, over 2,000 acres of vernal pool grasslands and habitat in the Central Valley have been preserved, secured by future revenues from the PTF agreement.
- **Ballona Wetlands.** The Ballona Wetlands Conservancy, a non-profit public benefit corporation with directors appointed by the Friends of Ballona Wetlands, City of Los Angeles Council District No. 11, the California State Resources Secretary, and Playa Capital Company LLC, uses PTFs to partially fund operation and maintenance of Playa Vista's Freshwater Wetlands System in southern California. The 51-acre Freshwater Wetlands System includes the Ballona Freshwater Marsh, located on land owned by the State of California, and a riparian corridor, which runs along the base of the Westchester Bluffs. The System provides wildlife habitat and natural stormwater treatment for a watershed in excess of 1,000-acres. In 2000, the Conservancy entered into a Mutual Benefit Agreement with Playa Vista Community Services (formerly called "The Club at Playa Vista") under which proceeds from a 0.75% Community Enhancement Fee levied at the time of transfer of residential condominiums at Playa Vista contribute to Wetlands maintenance costs. *See* Exhibit H (Mutual Benefit Agreement and form Community Enhancement Fee Agreement).

As shown by these examples, by prohibiting the generation of revenue from future sales through transfer fees, FHFA's new PTF policy will cripple open space, wildlife and mitigation programs affecting hundreds of thousands of acres of land in California alone and is likely to cause many other community benefit programs to be significantly reduced or eliminated.

The impacts of the proposed Guidance will, of course, extend nationwide. For example, the September 25, 2010 Comment Letter from Hyatt & Stubblefield, P.C. ("Hyatt & Stubblefield Comment") attaches an exhibit identifying transfer fees on

hundreds of thousands of homes throughout the United States. Many of the fees are designated for the acquisition or management of wildlife habitat, nature preserves, community gardens, conservation easements, and other conservation programs. *See, e.g.*, the Ridge project in Alabama (preservation and restoration of Lake Martin and surrounding forests and wetlands); the Cornerstone project in Colorado (maintenance and preservation of open space); the Frederica Township in Georgia (protection of endangered wood stork colony); and the Reserve at Lake Keowee in South Carolina (protection and preservation of nature preserves and open space); *see also* Exhibit I (management of 1,000 acre nature reserve and other open spaces funded by transfer fees on Spring Island in South Carolina).

These are merely a few of many possible examples of existing transfer fee programs that demonstrate the widespread, immediate environmental impacts of the proposed Guidance if adopted. The impacts clearly would include adverse impacts on open space, wildlife habitat, recreation and wilderness acquisition, management, and preservation programs. In addition, the loss of open space protections is likely to have growth-inducing consequences as new development moves into land that would otherwise be protected. The proposed Guidance would also result in impacts on transportation, air quality, and greenhouse gas emissions due to cuts in transit programs funded by PTFs. *See, e.g.*, Exhibit J (Transit Benefit Fee Agreement for the development and maintenance of the West Dublin/Pleasanton Bay Area Rapid Transit (BART) Station). Cuts in affordable housing programs funded by PTFs would lead to additional social, economic, and environmental justice impacts. In short, the impacts of the proposed Guidance on existing programs would be widespread and cumulatively considerable, and must be analyzed in an environmental review document.

The Guidance would also have enormous impacts on future projects. With a substantial majority of mortgages (by some estimates 90%) insured or backed by Freddie Mac or Fannie Mae, the proposed Guidance would effectively preclude the use of transfer fees for community benefits, removing a critical tool for protecting and preserving important open space and wildlife habitat. The loss of this financing tool is especially devastating in light of the current economic climate, in which both private and public financing for preservation and restoration projects is extremely limited.

c. The FHFA Must Conduct Environmental Review for the Proposed Guidance.

As noted above, the environmental impacts associated with the proposed elimination of transfer fees would be significant and widespread, and have been

documented in many comments submitted to FHFA. *See, e.g.*, September 23, 2010 Letter from Endangered Habitats League *et al.* (noting the essential role played by PTFs in conservation); Hyatt & Stubblefield Comment. These impacts are sufficient to compel review under NEPA. As recently explained in the Ninth Circuit, “The threshold that triggers the requirement for environmental analysis under [NEPA] is relatively low: ‘It is enough for the plaintiff to raise substantial questions whether a project may have a significant effect on the environment.’” *California ex rel. Lockyer v. United States Dept. of Agriculture*, 575 F.3d 999, 1012 (9th Cir. 2009) (quoting *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1212 (9th Cir. 1998) (citation and internal quotation marks omitted)).

Thus, NEPA review is required whenever the direct or indirect environmental impacts of a federal action are potentially significant. In *Lockyer*, for example, the Court rejected the agency’s assertion that new rules governing the consideration of state-specific land management rules were merely “procedural” and therefore exempt from NEPA. *Id.* at 1012-18. Because the rules would repeal existing protections for roadless areas containing protected species and unique wilderness attributes, the Court found that an EA should have been prepared. *Id.* at 1017-18. Likewise, in *Citizens for Better Forestry v. United States Dept. of Agric.*, 341 F.3d 961, 972-974 (9th Cir. 2003), the court held that impacts from a new Plan Development Rule, which affected substantive and procedural standards for future federal land use plans, were not too indirect to support standing for NEPA claims. *See also Reed v. Salazar*, 2010 WL 3853218 (D.D.C. 2010) (U.S. Fish and Wildlife Service required to comply with NEPA before entering into annual funding agreement for operation and management of federal land). NEPA review of proposed guidance or other policy documents is particularly critical where, as here, implementation of the policy is unlikely to be subject to further environmental review. *Forest Service Employees for Environmental Ethics v. United States Forest Service*, 397 F.Supp.2d 1241, 1250 (D. Mont., 2005) (decision to use chemical fire-fighting retardants subject to NEPA where policy is formalized in agency guidance documents and specific application may not be subject to further NEPA review).

The fact that the precise scope of the environmental impacts of FHFA’s new policy may be difficult to define does not mean that the policy is exempt from NEPA. Indeed, “one of the functions of a NEPA statement is to indicate the extent to which environmental effects are essentially unknown. . . . Reasonable forecasting and speculation is thus implicit in NEPA” *Scientists’ Inst. for Pub. Info. v. Atomic Energy Comm’n*, 481 F.2d 1079, 1092 (D.C. Cir. 1973). Thus, NEPA analysis must be prepared even where proposed regulations will result in “many actions” by other entities

“all across the country,” and where the potential environmental effects are “difficult to predict.” *American Pub. Transit Ass’n v. Goldschmidt*, 485 F.Supp. 811, 832-33 (D.D.C. 1980) (EIS must be prepared for federal regulations requiring transit to be accessible to the handicapped), *rev’d on other grounds*, 655 F.2d 1272 (D.C. Cir. 1981).

Nor does the need for more data to determine the full extent of the potential impacts excuse compliance with NEPA. Indeed, gathering relevant data about the potential environmental impacts of a federal rule or action is one of the primary functions of an EIS. “Preparation of an EIS is mandated where uncertainty may be resolved by further collection of data [citation omitted], or where the collection of such data may prevent ‘speculation of potential . . . effects.’” *National Parks & Conservation Ass’n v. Babbitt*, 241 F.3d 722, 732 (9th Cir. 2001), *abrogated on other grounds by Monsanto Co. v. Geertson Seed Farms*, 130 U.S. 2743 (2010). Thus, while this letter and other comments provide sufficient evidence to establish the significant environmental impacts on specific projects, it is incumbent upon FHFA under NEPA to gather data on and analyze the full extent of the impacts of its proposed action nationwide.

d. Pursuant to NEPA, FHFA Must Consider Alternatives to the Proposed Guidance That Would Minimize Environmental Impacts.

Compliance with NEPA would not only ensure that FHFA has taken a hard look at the environmental consequences of its actions, it would also require FHFA to consider alternatives that would reduce the environmental impacts of any new regulation. NEPA requires that an EA consider a reasonable range of alternatives to the proposed project that would achieve the project’s basic purpose. *See* 42 U.S.C. § 4332(2)(E); 40 C.F.R. § 1508.9(b); *Bob Marshall Alliance v. Hodel*, 852 F.2d 1223, 1229 (9th Cir. 1988); *Native Ecosystem Council v. United States Forest Serv.*, 428 F.3d 1233, 1245-46 (9th Cir. 2005).

We therefore urge the FHFA to seriously consider an alternative that would permit transfer fees that: 1) accrue to non-profit or homeowners associations, and 2) support natural resource protection, acquisition and management, as well as other community benefits, such as schools, transit, and affordable housing. Such an alternative would prohibit the use of PTFs solely for private gain, while eliminating all or most of the adverse environmental impacts associated with implementing the proposed Guidance.

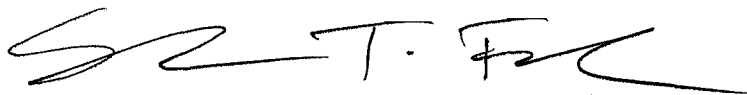
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4. Conclusion

For the foregoing reasons, we request that FHFA comply with NEPA before taking any further action on the proposed Guidance. We further request that FHFA narrow the proposed Guidance to protect PTFs that provide community benefits. Finally, we request that the comment period be extended to January 31, 2011 to provide more time for the public and FHFA to address the major environmental consequences of the proposed Guidance.

Very truly yours,

SHUTE, MIHALY & WEINBERGER LLP



Susannah T. French

LIST OF EXHIBITS

- Exhibit A Tejon Ranch Conservation & Land Use Agreement, June 17, 2008
- Exhibit B *Mountain Area Preservation Foundation v. Town of Truckee et al.* (Nevada County Superior Court, State of California), Stipulation and [Proposed] Order for Entry of Judgment Pursuant to Terms of Settlement
- Exhibit C Old Greenwood Community Benefit Agreement, October 29, 2003
- Exhibit D Gray's Crossing Community Benefit Fee Agreement, December 22, 2003
- Exhibit E Northstar Village Agreement, December 23, 2003
- Exhibit F Settlement Agreement by and between Sierra Watch, Mountain Area Preservation Foundation, Planning and Conservation League, Sierra Club and League to Save Lake Tahoe and DMB/Highlands Groups, LLC, March 23, 2006
- Exhibit G *Catalano et al. v. City of Roseville* (Sacramento County Superior Court, State of California), Stipulated Final Judgment
- Exhibit H Mutual Benefit Agreement (The Club at Playa Vista); form Community Enhancement Fee Agreement (Playa Vista)
- Exhibit I "What is the Spring Island Trust?", www.springislandtrust.org/about.html, October, 13, 2010
- Exhibit J Transit Benefit Fee Agreement (West Dublin Condominiums), March 10, 2006