Testimony of Marty Mitchell of Mitchell Best Homes, LLC
To the Senate Environment & Public Works Committee
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Good afternoon Chairman Cardin, Ranking Member Crapo and Committee members. I appreciate the opportunity to testify before you on the Chesapeake Bay Program ("Program"). My name is Marty Mitchell and I am a second generation home builder from Rockville, Maryland. Our family company, Mitchell & Best, has been building single family homes in the Washington, DC area for over 34 years. Although in the past we constructed up to 250 homes in a year, this year we will only construct about 25 homes. I have been actively involved in land development for 16 years as well as a member of the Environmental Issues Committee at The National Association of Home Builders ("NAHB") and my local home building association. In the past ten years I have developed two Environmental Communities of the Year in the suburban Maryland area. I have also the earned the designation of Certified Green Professional from NAHB.

Home builders have always been stewards of the Chesapeake Bay and its ecosystem. Our activities across the watershed have been regulated at the federal, state, and local levels for many, many years, and those regulations have become more stringent over time. For example, in Maryland, we have had to meet strict standards for all activities within designated critical areas since 1984. Likewise, storm water requirements have been mandated in all Bay states since at least 1992. This means, at least in Maryland, that anyone who disturbs more than 5000 square feet of land area must develop and implement a sediment and erosion control plan, including the installation and maintenance of Best Management Practices ("BMPs"), such as silt fences, sediment ponds, and infiltration trenches to keep polluted storm water discharges from flowing to the Bay. Depending on the location and specifics of a site, these plans can be extremely complicated and costly, but, most importantly, they work. As a builder of an Environmental Community in the early 1990's and the developer of one shortly thereafter, I am

aware of stream monitoring reports that show development, with proper BMPs work, even fifteen years ago. Our practices and use of technology has increased dramatically in the past few years.

Home builders have taken other proactive steps to be part of the solution to restore and maintain the valuable resource that is the Chesapeake Bay. In 2002, the Alliance for the Chesapeake Bay, the Center for Watershed Protection, and the National Association of Home Builders launched "Builders for the Bay", a new partnership encouraging the use of Bay-friendly site design principles that reduce the environmental effects of residential and commercial development. Because many local codes and ordinances are out of date and/or do not incorporate the lessons learned over the last 25 years, the heart of this program was working with local governments and developers to assess the current codes and ordinances and provide a platform for change so that the "new" environmentally sensitive design principles and practices could be used. Through this process, the Builders for the Bay program was ultimately able to identify and remove impediments, such as mandates for wider streets and sidewalks on both sides of the road, and facilitate the use of practices and principles that reduce environmental stresses on the watershed. Since 2002, the Builders for the Bay program is responsible for getting these principles adopted in six municipal or county jurisdictions in the Chesapeake Bay watershed. Unfortunately, funding challenges have put a hold on any further activity, but the program clearly succeeded in creating a lasting effect on how developments are regulated at the local level in certain areas of the watershed.

As described, builders clearly are the front line of defense when it comes to protecting the Bay. While challenges still remain, most builders are operating on the edge of technology in terms of what they can feasibly achieve, thus only limited improvements that can be garnered from the industry. While I think we all realize that collectively we can do a better job, collaborative efforts that address all sources and consider the cost and economic feasibility of meeting the specific goals are likely to be most effective in making the progress needed to fully restore the Bay's health.

The changes to Maryland's Storm Water Management ("SWM") program just a few years ago have dramatically increased the cost of developing property. In some cases, the cost has more than doubled. The cost increases associated with the changes to the Maryland SWM program that goes into effect on May 4, 2010 will have even greater cost implications. In many parts of Maryland, the cost of gaining approvals and developing land is more expensive than the value of that developed property. The raw land value would actually have to be negative to make the economics work. Obviously, this is partially a function of the current economic conditions; however, the new layer of costs will mean that it will be many more years before the economics work for new projects, even redevelopment. Handicapping the industry does not seem like a wise decision considering the effect the stoppage in housing and development has had on state and local budgets.

The number of initiatives currently underway to improve the health of this unique resource is many and they cover a broad spectrum of pollutants, areas, and activities. I'd like to specifically address five of those initiatives:

1. The Chesapeake Bay Program

The Clean Water Act specifically sets up an office and grant programs to collect information, coordinate federal and state efforts to improve water quality, and gather data regarding the Bay's health. Pursuant to these directives, the Chesapeake Bay Program has been working for the past two decades to restore the water quality and the living resources of the Bay but has made only marginal progress in that time because too much emphasis is placed on such a small cause of the problem. More progress can be made to improve the health of the Bay, but going forward, the Program needs to properly account for population growth and infrastructure growth in the Bay's watershed. The challenge now is to attain full water quality restoration in the Bay by 2025. That will likely require a level of effort from the Bay states and its citizens that has never been seen before in the U.S. under any water restoration program. There are a number of concerns with the challenges to come because the Bay states have limited

resources, now more than ever, and very difficult choices will be necessary regarding how to spend those limited resources.

2. The Executive Order

On May 12, President Obama issued an Executive Order ("E.O.") directing federal agencies to take a number of steps to protect and restore the Chesapeake Bay, including establishing a new Federal Leadership Committee composed senior representatives of seven federal agencies. The new committee will oversee the development of a coordinated strategy for the Bay restoration and complete seven important reports that address the existing challenges to restoration.

3. Legislative Efforts

Any legislation that is aimed at controlling pollution or storm water runoff into the Bay needs to address the runoff from existing development that does not have state of the art best management practices. Because urban runoff from existing streets and buildings has been identified as a major source of pollutants in the watershed, if progress is to be made, legislation must address all sources of pollution and not just new development. The majority of new development projects are using state of the art techniques to reduce their overall environmental footprints, and as a result, new development is typically not the problem.

4. The Chesapeake Bay Total Maximum Daily Load Rule

The regulatory driver for the Bay Restoration Program will be the Chesapeake Bay Total Maximum Daily Load ("TMDL"), a new rule which is due to be published by EPA next year. The costs associated with the new water quality standards in the TMDL are likely to put enormous strain on the struggling economies of the affected Bay states. It remains to be seen if future growth can be accommodated under the new TMDL considering there has been little success in meeting past water quality standards. Since construction in urban areas will likely be more

costly than construction in nonurban areas, there is also a question regarding how states will try to steer growth to their cities.

While home building will face major challenges under the Bay TMDL, municipalities will likely face the greatest challenge. We now know that impermeable surfaces in our cities quickly deliver damaging pollutants and high-flow storm water discharges to the Bay's streams and Bays. There is a concern that the new TMDL caps on pollutants, when proposed, may cause some cities to cease issuing new storm water permits for construction because the pollutant loading from the city's impermeable surfaces may equal or exceed the pollutant cap provided for the city. Instead of stretching beyond current technology for marginal to zero gains for water quality when building a new project, we should be finding ways to address the complete lack of BMPs in existing developed areas and other areas that pollute to give us a chance to meet the goals of the program.

5. Low Impact Development

One tenet underlying the restoration program and the developing TMDL is the use of low impact development ("LID") to lessen the impact of construction and new infrastructure on the Bay. Maryland, leads the charge in this direction. LID is an environmentally friendly approach to stormwater management because LID seeks to mitigate the impacts of development to land, water, and the air. Each development site is examined to integrate site planning with techniques that conserve the existing natural systems and hydrological functions of the site. Common LID controls include bioretention devices such as rain gardens, permeable pavers, green roofs, rain catchment devices such as barrels or underground chambers, "reverse slope sidewalks" which drain away from the road into vegetated areas, and many other techniques. My concern is that LID does not work on every site. You need the right kinds of soils and in many cases low density development. This will add another barrier to redevelopment. The home building industry has not had an opportunity to provide input to the Bay Program on our experience with LID and yet the Chesapeake Bay Program Office is actively promoting to the

states an “aspirational goal” of “no-discharge” development. The no-discharge goal relies on the use of LID practices to control storm water discharges and new requirements must take into account past experiences where LID used in practice has failed.

Looking Forward

The new Bay restoration program has an increasingly complex mixture of organizations and people overseeing the effort. Active overseers will include:

- Environmental Protection Agency Region III
- Environmental Protection Agency’s Chesapeake Bay Program Office.
- Charles Fox, EPA Senior Advisor on the Chesapeake Bay and Anacostia River
- The “Independent Evaluator” team (yet to be hired by EPA), and
- The Federal Leadership Committee (created in the May 12, 2009 Executive Order on Chesapeake Bay Restoration)

Many questions arise with this level of oversight: What happens when the overseers do not agree? Who has final decision making authority? It is concerning that the regulators have not yet reached out to the affected businesses or to the public on the challenges ahead, such as “no-discharge” development, while the number of regulatory organizations in the Bay grows in number and complexity. It is imperative that the stakeholders – the entities regulated under the Program – have the opportunity to express their concerns with the Program and recommend solutions to move the Program forward.

In summary, my concerns with the restoration effort include the programs overwhelming emphasis on new development that has lead to missing goals for the past two decades, overall financial cost of the effort and the effects that cost may have on the Bay state’s economies and their citizens; how future growth around the Bay will be accommodated; the lack of any stakeholder involvement to this point (beyond the environmental community) in determining what is doable to meet what will be a very difficult restoration program, and the increasing complexity of the many organizations who will oversee the Bay’s restoration.

After my experience with the current program I have a number of suggestions to make to the Committee regarding the Bay's restoration:

1. All sources of pollution must be addressed and the greatest emphasis must be on the biggest sources of pollution. If progress is to be made, all pollutant sources must play a role in making reductions. For example, runoff from existing urban areas and agricultural runoff must be addressed if the restoration efforts are to meet their goals.
2. Efforts must be effective, efficient and affordable. There are numerous options available to meet the stated goals. Interstate water quality trading, for example, is crucial to reduce the overall costs of reducing pollutants to the Bay while ensuring that agriculture is included.
3. Maximum flexibility, options for permit compliance, and workable outcomes are necessary. The public desires restoration of the Bay but realistic and affordable means to accomplish restoration goals must be identified. Maryland homebuilders have initiated conversations with the Maryland Department of Natural Resources to set up focus groups that would discuss how a more watershed or regional approach to storm water management can be implemented. The current approach only focuses on the project under approval and the amount of on-site controls that have little to no benefit but actually compete with smart growth strategies.
4. Immediate and broad opportunities for stakeholder input must be provided. Due to the impacts of the restoration effort on regulated industries and sources, communities, and citizens, a clear and commitment to include the public is vital to the success of the restoration. Accommodations must be made so the affected industry sectors can begin planning now to meet the demands that will come under the new regulatory regime envisioned for the Bay's watershed. EPA has largely neglected this requirement, to date.
5. Though many hands are out to the federal government for financial support these days, this restoration program will sorely test the Bay state economies. Federal support for

this program, which sets the precedent for similar programs to take place around the country and takes place within a stone's throw of the capitol, seems especially deserving.

In conclusion, thank you for allowing me to express my concerns and make a few suggestions on the restoration of the Chesapeake Bay. In addition to being a home builder, I am a lifelong Maryland resident, and have often enjoyed fishing, boating and swimming on and in the Bay. Clearly, the health of the Bay is important to me and my family.