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May 24, 2010

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

RE: AASHTO Comments on CEQ's Draft Guidance for NEPA Mitigation and Monitoring

Dear Mr. Boling:

The American Association of State Highway and Transportation Organizations ("AASHTO") welcomes the opportunity to submit these comments regarding the "Draft Guidance for NEPA Mitigation and Monitoring," which was issued by the Council on Environmental Quality on February 18, 2010 ("Draft Mitigation Guidance").

AASHTO is a nonprofit, nonpartisan association representing highway and transportation departments in the 50 states, the District of Columbia, and Puerto Rico. It represents all five transportation modes: air, highways, public transportation, rail, and water. Its primary goal is to foster the development, operation, and maintenance of an integrated national transportation system.

AASHTO's members are leaders in developing and implementing state-of-the-art mitigation and monitoring programs. It is routine for State DOTs to include detailed environmental commitments in NEPA documents. These measures typically cover a wide range of impact categories, such as wetlands, historic sites, parkland, noise, and air quality. State DOTs also have been in the forefront of developing systems for overseeing the implementation of environmental commitments, including the use of full-time on-site environmental monitors for some especially complex projects. As an indication of the importance of this issue to State DOTs, Center for Environmental Excellence by AASHTO recently published a Practitioner's Handbook on this issue, "*Tracking Compliance with Environmental Commitments/Use of Environmental Monitors.*"<sup>1</sup>

As leaders in this field, AASHTO's members support efforts to ensure that mitigation measures are appropriately considered in the NEPA process and that mitigation commitments are fully implemented. But, while we agree with some aspects of the proposed guidance, we are concerned that the guidance could be construed to impose new federal mandates that would increase administrative burdens, limit State and local flexibility, and create new opportunities for delay and litigation. We have described our principal concerns below. We urge the CEQ to consider these comments carefully when developing the final version of this guidance.

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<sup>1</sup> This handbook is available at <http://environment.transportation.org/pdf/programs/PG04.pdf>.

## AASHTO Comments on Proposed Guidance

We support efforts to ensure that mitigation measures are developed as part of the NEPA process, and to ensure that all mitigation commitments are effectively implemented. At the same time, we also believe it is important to preserve the flexibility to determine the appropriate combination of mitigation and monitoring methods on a case-by-case basis.

Our overall concern with this guidance is that it assumes a need for detailed mitigation planning and monitoring as a standard part of every NEPA document. The approaches outlined in this guidance are appropriate in some cases, but not in others. Individual agencies, including FHWA and FTA, currently have substantial discretion to determine mitigation and monitoring methods for each project. We believe the guidance needs to be revised in order to make clear that it is not intended to reduce flexibility that exists under Supreme Court case law and the CEQ regulations.

1. *The Guidance Should be Clarified to Ensure Consistency with the U.S. Supreme Court's Decision in Robertson v. Methow Valley Citizens Council.*

The basic principles governing consideration of mitigation measures in an EIS were established by the U.S. Supreme Court in *Robertson v. Methow Valley Citizens Council*.<sup>2</sup> The Court held that "NEPA does not impose a substantive duty on agencies to mitigate adverse environmental effects or to include in each EIS a fully developed mitigation plan." The Court explained this holding as follows:

There is a fundamental distinction ... between a requirement that mitigation be discussed in sufficient detail to ensure that environmental consequences have been fairly evaluated .... and a substantive requirement that a complete mitigation plan be actually formulated and adopted .... [I]t would be inconsistent with NEPA's reliance on procedural mechanisms – as opposed to substantive, result-based standards – to demand the presence of a fully developed plan that will mitigate environmental harm before an agency can act.<sup>3</sup>

The principles articulated in *Methow Valley* form the bedrock of the NEPA case law concerning consideration of mitigation measures in an EIS. Since that case, courts have consistently held that NEPA requires only a thorough discussion of mitigation measures; NEPA itself does not require agencies to develop and adopt a complete mitigation plan during the NEPA process.

The thrust of the proposed guidance is in tension with the *Methow Valley* decision. The guidance includes numerous statements that, at the very least, create a strong impression that federal agencies have an obligation under NEPA to develop detailed mitigation plans as a standard part of every EA and EIS. For example, this guidance assumes that every EA and EIS should:

- Include a "mitigation alternatives analysis" in which different potential mitigation measures are compared in the NEPA document;

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<sup>2</sup> *Robertson v. Methow Valley Citizens Council*, 490 U.S. 322 (1989).

<sup>3</sup> 490 U.S. at 352.

- Include “measurable performance standards” for each mitigation measure;
- Include a monitoring plan that tracks compliance with each mitigation measure;
- Require re-opening of the NEPA process, even after a project is under construction, if actual mitigation outcomes differ from expected outcomes.
- Require publication of every monitoring report, regardless of the circumstances of the project.

Many of these approaches are good practices, and are appropriate for many projects. But there is an important distinction between good practices and legal requirements, and we are concerned that that distinction has been lost in this guidance. The *Methow Valley* decision clearly leaves agencies with broad discretion to decide how to address mitigation and monitoring commitments in NEPA documents. It is important for that flexibility to be preserved.

*Recommendation:* The guidance should specifically acknowledge the Supreme Court decision in *Methow Valley*, and should clearly state that agencies are not required to develop and adopt detailed mitigation plans as part of the NEPA process.

2. *The Guidance Should Preserve Flexibility that is Currently Allowed under the CEQ Regulations.*

The CEQ regulations require consideration of mitigation measures, documentation of mitigation commitments, and implementation of those commitments – but they also allow flexibility for agencies to tailor their approaches to the unique circumstances of each project. We are concerned that the proposed guidance could be interpreted by federal agencies – and ultimately the courts – to impose new requirements that are not currently part of the CEQ regulations. Our concerns focus on the following areas:

*Mitigation Alternatives.* The guidance refers to the consideration of “mitigation alternatives” as if that is an established requirement under NEPA. While the CEQ regulations require a discussion of “appropriate mitigation measures” as part of the alternatives analysis, they do not specifically call for “mitigation alternatives” to be developed.<sup>4</sup> The term “mitigation alternatives” implies that agencies must develop *multiple alternatives for mitigating the impacts of each alternative*. The practical effect of this requirement would be to increase the complexity of the alternatives analysis: instead of considering mitigation as part of each alternative, the agencies would need to develop a separate “mitigation alternatives analysis,” in which various approaches to mitigation are compared to one another. While that type of detailed analysis is appropriate in some cases, it is not required by the CEQ regulations.

*Mitigation Goals and Measurable Performance Standards.* The guidance calls for the adoption of “mitigation goals” and says that these goals should be carefully specified in terms of “measurable performance standards” to the greatest extent possible. (p. 2) The CEQ regulations require a discussion of “means to mitigate adverse impacts” as part of the discussion of environmental consequences but do not require quantification of desired mitigation outcomes.<sup>5</sup> The adoption of quantitative goals and measurable performance

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<sup>4</sup> 40 C.F.R. § 1502.14.

<sup>5</sup> 40 C.F.R. § 1502.16.

standards is appropriate in some circumstances, but they are not required by the regulations.

*Monitoring Programs.* The guidance calls for increased monitoring of mitigation commitments and implies that monitoring programs should be implemented any time an agency includes mitigation commitments in an EIS or EA. (pp. 2, 4-6) Such a requirement would be inconsistent with the CEQ regulations, which state that a “monitoring and enforcement program shall be adopted ... *where applicable* for mitigation” and that “agencies *may* provide for monitoring to assure that their decisions are carried out and should do so *in important cases.*”<sup>6</sup> The regulations plainly leave federal agencies discretion to determine when, or whether, monitoring programs are appropriate.

*Publication of Monitoring Reports.* The guidance states that agencies must release monitoring results through online or print media, “as opposed to being limited to requests made directly to the agency.” The CEQ regulations state the opposite: agencies are required to release monitoring results “upon request.”<sup>7</sup> Again, the guidance would reduce flexibility allowed under the regulations. Encouraging greater transparency is appropriate, but decisions about the timing and method of public disclosure should be made by individual agencies on a case by case basis, as allowed under the CEQ regulations.

In sum, we are concerned that the proposed guidance could have the effect of imposing new requirements that are not grounded in the CEQ regulations.

*Recommendation:* We urge CEQ to modify the guidance to make it clear that the guidance does not in any way reduce flexibility that agencies currently possess under the CEQ regulations. We also urge the CEQ to clarify that the use of the term “should” does not mean “must”. The CEQ should clarify that this guidance describes desirable practices, not legal requirements.

3. *The Guidance Should Not Require the NEPA Process to be Re-Opened as the Remedy for Unanticipated Mitigation Outcomes.*

The guidance states that, “if mitigation is not performed ***or does not mitigate the effects as intended by the design***, the agency responsible should, based upon its expertise and judgment regarding any remaining federal action and its environmental consequences, consider whether taking supplementary action is necessary.” (p. 4, emphasis added) It also says that “[i]n cases involving an EA with a mitigated FONSI, an EIS may have to be developed if the unmitigated impact is significant. If an EIS is required, the agency must avoid actions that would have adverse environmental impacts or limit its choice of reasonable alternatives during the preparation of an EIS.”

Clearly, if mandated mitigation is not performed, the federal agency has the authority to take appropriate action to ensure that those mitigation measures are implemented. But this guidance goes much further than that: it says that if mitigation measures are not working “as intended,” an agency may need to halt construction, re-open the NEPA process, and – if the project was approved with a FONSI – potentially start the NEPA process all over again and prepare an EIS. We believe this interpretation of NEPA requirements is incorrect legally, and also is likely to present severe practical difficulties.

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<sup>6</sup> 40 C.F.R. § 1505.2(c) (emphasis added); 40 C.F.R. § 1503.3 (emphasis added).

<sup>7</sup> 40 C.F.R. § 1505.3(c).

First, this interpretation is legally unfounded. The legal sufficiency of a FONSI is determined based on the *information available to the agency at the time it made that decision*. If facts later emerge that indicate the project may have a significant impact, those facts do not retroactively invalidate the FONSI and force the NEPA process to start all over with an EIS. Construing NEPA to include such a requirement would, in effect, penalize agencies for making predictions that later turn out to be incorrect. There is no basis in NEPA for such a requirement.

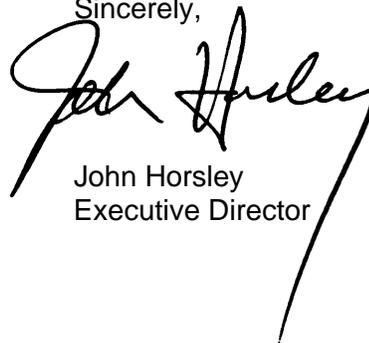
Secondly, this interpretation of NEPA would create significant disruption, delay, and increased cost during the design and construction phases of project implementation, especially in situations where a project sponsor is required to halt construction and start over with an EIS. This interpretation also greatly heightens the potential for litigation to be used during construction as a tactic for delaying or stopping projects based solely on allegations that certain mitigation measures are not working "as intended."

The appropriate remedy, if mitigation is not functioning as intended, is to *not* start NEPA all over again, but to *require additional mitigation* as a way of achieving the level of mitigation that was assumed when the FONSI was issued.

*Recommendation:* We urge CEQ to remove the statement on page 4 of the guidance that calls for agencies to re-open the NEPA process if mitigation measures are not functioning "as intended." If monitoring programs indicate that mitigation measures are not effective, agencies should have the option of modifying or adding to the mitigation measures.

We thank you for considering these comments. If you would like to discuss any of the issues or concerns raised in these comments, please contact Shannon Eggleston, Program Director for Environment, at (202) 624-3649.

Sincerely,

A handwritten signature in black ink, appearing to read "John Horsley". The signature is stylized and fluid, with a long, sweeping underline that extends downwards and to the right.

John Horsley  
Executive Director