

May 24, 2010

Via E-Mail: [gcc.guidance@ceq.eop.gov](mailto:gcc.guidance@ceq.eop.gov)

The Council on Environmental Quality  
*Attention:* Ted Boling  
722 Jackson Place N.W.  
Washington, D.C. 20503

Dear Mr. Boling:

*Re: Comments on National Environmental Policy Act (NEPA) Draft Guidance, "NEPA Mitigation and Monitoring".*

San Juan Coal Company (SJCC) and BHP Navajo Coal Company (BNCC) appreciate the opportunity to comment on the U.S. Council on Environmental Quality (CEQ) draft guidance "NEPA Mitigation and Monitoring". SJCC operates an underground coal mine, the San Juan Mine, approximately fifteen (15) miles west of Farmington, New Mexico on state and federal land. BNCC operates a surface coal mine on the Navajo Indian Reservation. Together we employ over 1,000 people, of which approximately 63% are Native American. These positions are among the highest paying jobs within the Navajo Nation, which has been plagued by unemployment. Navajo Nation President Joe Shirley indicated last year that unemployment among the tribe approaches 50%.

It is clear that the National Environmental Policy Act (NEPA) was intended primarily as a policy and procedural statute. Its purpose was to incorporate environmental considerations into federal agency planning. Our review of your draft proposed guidance "NEPA Mitigation and Monitoring" suggests that your primary goals are:

- 1) To ensure that that mitigation is properly designed and implemented,
- 2) To ensure that sufficient monitoring occurs to make sure that the required mitigation is successful, and
- 3) To include "the public" in the mitigation and monitoring development and implementation process.

Unlike most other environmental statutes, the National Environmental Policy Act (NEPA) is primarily a policy and procedural statute designed to incorporate environmental considerations into federal agency planning and decision-making. In *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, the U.S. Supreme Court directly addressed the issue whether federal agencies should include mitigation of impacts as part of the NEPA process. In this decision, Justice Paul Stevens stated for the unanimous Court 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. Although the EIS requirement and NEPA's other "action-forcing" procedures implement that statute's sweeping policy goals by ensuring that agencies will take a "hard look" at environmental consequences and by guaranteeing broad public dissemination of relevant information, it is well settled that NEPA itself does not impose substantive duties mandating particular results, but simply prescribes the necessary process for preventing uninformed - rather than unwise - agency action. While a reasonably complete discussion of possible mitigation measures is an important ingredient of an EIS, and its omission therefrom would undermine NEPA's "action-forcing" function, 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...More significantly, it 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 mitigation plan.

While NEPA is a procedural statute, there are many other environmental statutes that impose mitigation and monitoring requirements. These statutes also include procedural requirements that ensure that the views of the interested public are considered by the responsible agency when designing and implementing mitigation and monitoring programs. With respect to our operations, there are two important regulatory programs that include such requirements:

- The federal Surface Mining Control and Reclamation Act (SMCRA), and
- The federal Water Pollution Control Act (*i.e.*, the Clean Water Act).

Both of these statutes include very extensive and detailed substantive requirements for monitoring and mitigation. These are enforced through rigorous enforcement programs administered by the U.S. Environmental Protection Agency (EPA), the U.S. Office of Surface Mining Reclamation & Enforcement (OSM), and the U.S. Army Corps of Engineers (ACOE) along with other federal, state, and tribal agencies. These programs require the restoration, mitigation, and enhancement of disturbed lands and water courses. They also require continued monitoring of soil, surface water, ground water, reclamation, vegetation, and wildlife. In addition, the SMCRA program requires the bonding of reclamation and re-vegetation efforts to ensure that that reclamation and mitigation is successful. Extensive public hearings and comment procedures are included as a part of the SMCRA, Clean Water Act § 402, and Clean Water Act § 404 permitting process.

For operations such as ours, NEPA is already an expensive and time consuming process that can take anywhere from three to eight years or longer. In our view, the proposed guidance would duplicate existing requirements and expose the entire NEPA process to even more delay and litigation – all without providing any additional environmental benefit.

Thank you for the opportunity to express our views on this proposed guidance. Should you have any questions or comments, you may contact me by e-mail at [paul.a.nazaryk@bhpbilliton.com](mailto:paul.a.nazaryk@bhpbilliton.com), or by telephone at (505) 598-2217.

Yours sincerely,

A handwritten signature in blue ink that reads "Paul Nazaryk". The signature is written in a cursive style with a large initial "P" and a long, sweeping tail on the "k".

Paul Nazaryk  
Environmental Regulatory Affairs Coordinator