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Comments on Draft Guidance for NEPA Mitigation and Monitoring submitted by Barrick Gold, North America Inc.

### Introduction

On February 18, 2010, the Council on Environmental Quality (CEQ) released for review and comment draft guidance for departments and agencies of the Federal government regarding mitigation and monitoring of activities undertaken in a National Environmental Policy Act (NEPA).

These comments on the draft guidance are submitted by Barrick Gold, North America Inc., on behalf of itself and affiliated and related companies that are directly affected by the implementation of NEPA (collectively “Barrick”). Barrick is a gold industry leader, with interests in 26 operating mines and a pipeline of projects located across five continents. In the U.S., Barrick owns, in whole or in part, mines and mining claims throughout the United States, including seven operating mines in Nevada and one in Montana. In Nevada and Montana alone, Barrick’s mines directly employ approximately 4,000 people and thousands more support those mines as contractors and suppliers. In the United States, most of Barrick’s activities occur on public lands managed by the U.S. Bureau of Land Management or U.S. Forest Service. Decisions by these agencies to approve exploration and mining activities are subject to NEPA. Barrick’s exploration and mining activities have been the subject of dozens of environmental assessment and environmental impact statements. Barrick is currently involved as an applicant in several NEPA processes. Barrick is also currently an intervenor-defendant in litigation over the adequacy of an EIS prepared by the Bureau of Land Management. Barrick has extensive first hand and direct knowledge of NEPA implementation at the front lines of agency decision-making. We have a direct and particular interest in the correct and effective implementation of NEPA by federal agencies. From the perspective of an applicant, it is important that the federal decisionmakers have clear guidance from CEQ and the courts. CEQ guidance should resolve, not create, uncertainty.

### NEPA’s Requirements for Mitigation are Procedural, Not Substantive

Unfortunately, the draft guidance for NEPA mitigation and monitoring fails in several important respects. Most importantly, it appears that the guidance is based on a fundamental misstatement of NEPA. As a result, the draft guidance should be withdrawn and reconsidered until this error is corrected. It is black letter NEPA law that the provisions of section 102(c) are procedural, not

substantive. Particularly in the context of mitigation, the U.S. Supreme Court has held that NEPA does not require federal agencies to implement mitigation measures. In Robertson v. Methow Valley Citizen Council, 490 U.S. 332 (1989), the Court rejected the argument that an EIS was inadequate because it did not require implementation of mitigation measures. The Court drew a “fundamental distinction” between an agency’s procedural responsibility to identify and discuss mitigation measures in the EIS and “a substantive requirement that a complete mitigation plan be actually formulated and adopted.” This requirement rejected by the Supreme Court in Methow Valley – that “a complete mitigation plan be actually formulated and adopted”—appears to be the central theme of this draft guidance. The Court found such a requirement to be “inconsistent with NEPA’s reliance on procedural mechanisms.” That same legal impediment applies with equal force to the draft guidance.<sup>1</sup> The central premise of the draft guidance is in conflict with NEPA and it should be rewritten.

Revised draft guidance should state clearly that an agency’s authority to adopt and implement mitigation measures (whether for an internal agency action or by imposing those measures on the plans of a third party) does not come from NEPA but must arise from some other source of agency authority. For example, the BLM’s regulations governing hard rock mining on public land include the requirement that an operator “must take mitigation measures specified by BLM to protect public lands.” 43 C.F.R. § 3809.420(4). For purposes of those regulations, BLM has adopted NEPA’s definition of “mitigation.” See 43 C.F.R. § 3809.5. BLM’s authority to promulgate these regulations, and to impose mitigation requirements on mining operations on public lands, derives from the Federal Land Policy and Management Act. See 43 C.F.R. Subpart 3809 (authority). When BLM uses NEPA to evaluate a proposed action under its “3809 regulations,” NEPA requires that the agency evaluate and discuss mitigation measures in the appropriate NEPA document, but the authority to select, adopt and implement such measures does not come from NEPA, but from FLPMA. This is an important distinction that seems to be almost completely overlooked by the draft guidance.<sup>2</sup>

#### Language on “Public Involvement” in Monitoring is Confusing and Ambiguous

Existing regulations state that agencies must, “upon request, make available to the public the results of relevant monitoring.” 40 C.F.R. § 1505.3(d). The draft guidance suggests that such information “should be readily available to the public through online or print media, as opposed to being limited to requests made directly to the agency.” Draft Guidance at page 6. Barrick agrees with the statement in the draft guidance: monitoring information should be more readily available (though making that requirement mandatory would require a change in the regulations).

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<sup>1</sup> To the extent that the draft guidance means to state that mitigation must be developed and implemented in those cases where the agency relies on mitigation measures to support a finding of no significant impact (“FONSI”), Barrick agrees with that statement, though it is still clear that the authority to implement or impose those measures must come from other authority than NEPA. But the draft guidance is broadly written and extends the substantive mitigation requirement beyond the “mitigated FONSI.”

<sup>2</sup> The draft guidance acknowledges this important distinction on page 4, when it states that “[m]ethods to ensure implementation [of mitigation measures] should include, as appropriate to the agency’s underlying authority for decisionmaking, . . .” (emphasis added). But in other provisions of the draft guidance, that distinction is entirely lost. The requirement that the agency look to its “underlying authority” to adopt and implement mitigation measures should be featured as a central theme in any revised draft of this guidance.

Today, the public expects that information to be available online and, in most circumstances, agencies should be able to meet that goal. Unfortunately, the language of the draft guidance goes far beyond that simple informational guideline and suggests—without explaining what it means—that agencies facilitate “public involvement in the development and implementation of monitoring plans and programs.” Draft Guidance at page 6. The vague language included in Section II. C. is neither appropriate nor helpful to agencies in implementing their NEPA responsibilities. For example, it would not be appropriate and might even be dangerous for the public to be “involved” in data gathering under a monitoring plan for a mining operation. Monitoring plans typically involve quality assurance provisions for data collection and evaluation that can not be met by the “public.” This aspect of the guidance is poorly thought out and poorly written and will inevitably lead to litigation. It should be carefully reevaluated and rewritten to assure that monitoring information is freely available to the public, and that the public has appropriate means of acting on such information, but beyond that there is no public role in “implementing” mitigation measures or monitoring plans. Any revised guidance should also acknowledge, consistent with our initial comment, that the public’s role in any monitoring or implementation of mitigation should also be consistent with the underlying legal authority for the decision.

#### Language on “Mitigation Alternatives” Is Confusing and may be Contrary to NEPA

NEPA requires that an agency consider “reasonable” alternatives to a proposed action, whether that action is evaluated in an environmental assessment or environmental impact statement. See 40 C.F.R. §§ 1502.14 (EIS), 1508.9 (b) (EA). The scope of alternatives has been the subject of scores, if not hundreds, of judicial decisions, and an agency’s responsibility to consider alternatives has been fleshed out in great detail by the common law of NEPA. Loose language in the draft guidance confuses these long-established rules by suggesting that there may be a separate duty to consider “mitigation alternatives” in either an EIS or EA. Draft Guidance at page 3. For example, section II. A. (1) states that “[i]n situations where an agency is preparing an [EIS], the agency will be considering reasonable alternative mitigation measures.” Id. That is not necessarily correct. Certainly, the agency may consider different means of mitigation potential impacts, and those may or may not be embodied in different alternatives, but there is no separate duty under NEPA to look at alternative mitigation measures. The existing NEPA regulations regarding alternatives say that an agency should “include appropriate mitigation measure not already included in the proposed action or alternatives.” 40 C.F.R. §1502.14(f). Neither the regulations nor NEPA caselaw requires a separate analysis of “alternative mitigation measures.” For example, an agency might consider a proposed action and a range of reasonable action alternatives (in addition to the “no action” alternative) together with a set of mitigation measures that would apply to all of the action alternatives, but to a greater or lesser extent depending upon potential impacts. NEPA does not require that the agency also look at a range of mitigation alternatives. Again, to prevent confusion, the guidance should be revised to comport with existing law on this issue.