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VIA EMAIL (Mitigation.guidance@ceq.eop.gov)

Council on Environmental Quality
Attn: Ted Boling
722 Jackson Place NW
Washington, D.C. 20503

Re: Comments on *Draft Guidance for NEPA Mitigation and Monitoring*, 75 Fed. Reg. 8046 (Feb. 23, 2010)

Dear Sir or Madam:

Denali – The Alaska Gas Pipeline LLC (“Denali”) appreciates this opportunity to comment on the Council for Environmental Quality’s (“CEQ’s”) proposed *Draft Guidance for NEPA Mitigation and Monitoring* (“Draft Guidance”). Below, we first provide context describing Denali’s interest in the Draft Guidance and then set forth in detail our substantive comments.

I. Denali’s Interest In The Draft Guidance

Jointly owned by ConocoPhillips Denali Company and BP Alaska Gas Pipelines LLC, Denali is planning to construct and operate an Alaska natural gas transportation system as defined in Section 103 of the Alaska Natural Gas Pipeline Act. This natural gas transportation system will include both a gas treatment plant (“GTP”) on the North Slope of Alaska and a pipeline more than 1,700 miles long extending from the North Slope to Alberta, Canada. This historic project will provide decades of reliable, clean and secure energy from a domestic U.S. source for consumers in the Lower 48 states, Alaska and Canada. Specifically, the Denali project is being designed to deliver approximately 4.5 billion cubic feet of clean-burning natural gas from Alaska’s North Slope to North American markets. An overview description and a map of the project location are available at <http://denalipipeline.com>. The GTP will remove carbon dioxide (CO₂), water and other impurities from the gas before it is shipped in the pipeline, making the gas “pipeline ready.” The CO₂ will then be re-injected and sequestered. The plant will compress the gas and chill it to prevent thawing of permafrost near the pipeline. The GTP will be the largest of its kind in the world. The pipeline will be large diameter (48 inches) with thick walls (~1 inch). The actual diameter of the pipeline will be a function of the volume of gas nominated by shippers through the open season process. The pipeline will be coated to protect it from corrosion and will be buried underground. A number of other features will be incorporated into the design to ensure safe, reliable and environmentally sound operations.

The Denali project will require review under the National Environmental Policy Act (“NEPA”) and will undoubtedly include a variety of measures aimed to mitigate the potential environmental effects of the project. Denali has been working with affected agencies to ensure that environmental impacts are minimized and resources are protected. We have a strong interest in NEPA being applied responsibly, efficiently, and effectively. This Draft Guidance, if issued in final, could directly affect the scope and nature of the NEPA review for the Denali project.

II. Denali’s Comments On The Draft Guidance

The Draft Guidance purports to “enable agencies to create successful mitigation planning and implementation procedures with robust public involvement and monitoring programs.” Draft Guidance at 1. The Draft Guidance is premised upon the idea that “[m]itigation is an important mechanism for agencies to use to avoid, minimize, rectify, reduce, or compensate the adverse environmental impacts associated with their actions.” *Id.* Denali agrees that successful mitigation planning and implementation is important and that applicable mitigation measures must be addressed in the project’s NEPA review process.

NEPA does not, however, provide substantive authority for NEPA lead agencies “to ensure mitigation measures are implemented and effective.” Draft Guidance at 2 (emphasis added). The Draft Guidance does not clearly explain whether the suite of mitigation-related concepts it proposes are procedural or substantive in nature. Indeed, at numerous points, the Draft Guidance appears to suggest that agencies *require* mitigation implementation or monitoring *under the authority of NEPA*. In this respect, the Draft Guidance runs afoul of well-established NEPA principles.

A. *Robertson v. Methow Valley Citizens Council*

Robertson v. Methow Valley Citizens Council, 490 U.S. 332 (1989) is the seminal U.S. Supreme Court case addressing the scope of federal agencies’ authority regarding the consideration of mitigation measures in the NEPA process. The principles set forth in *Robertson* are directly relevant to the subjects covered in the Draft Guidance and, therefore, a discussion of *Robertson* is warranted here.¹

In *Robertson*, the plaintiffs challenged an environmental impact statement (“EIS”) prepared by the U.S. Forest Service, arguing that the EIS violated NEPA because it merely listed a suite of mitigation measures that *might* be taken by state and local government and would “be made more specific as part of the design and implementation stages of the planning process.” *Id.* at 339, 343-44. The Ninth Circuit Court of Appeals ruled for plaintiffs, finding that the Forest Service had an affirmative duty to “develop the necessary mitigation measures *before* the permit [was] granted.” *Id.* at 347 (internal quotation marks omitted). The Ninth Circuit concluded that “an EIS must include a thorough discussion of measures to mitigate the adverse environmental impacts of a proposed action.” *Id.* A *unanimous* Supreme Court reversed.

¹The Draft Guidance does not mention *Robertson*.

The Supreme Court explained that NEPA’s “action forcing” purpose is furthered in two ways:

1. NEPA “ensures that the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts”; and
2. NEPA “guarantees that the relevant information will be made available to the larger audience that may also play a role in both the decisionmaking process and the implementation of that decision.” *Id.* at 349.

The Court recognized that “it is now well settled that NEPA itself does not mandate particular results, but simply prescribes the necessary process.” *Id.* at 350-51. Moreover, the Court reiterated that “[o]ther statutes may impose substantive environmental obligations on federal agencies, but NEPA merely prohibits uninformed – rather than unwise – agency action.” *Id.* at 350-51.

With respect to mitigation, the *Robertson* Court explained that the “requirement that an EIS contain a detailed discussion of possible mitigation measures flows both from the language of the Act and, more expressly, from CEQ’s implementing regulations.” *Id.* at 351-52 (citing 40 C.F.R. §§ 1508.25(b), 1502.14(f), 1502.16(h), and 1505.2(c)). However, and importantly, the Court also recognized that “[t]here is a fundamental distinction...between a requirement that mitigation be discussed in sufficient detail to ensure that environmental consequences have been *fairly evaluated*, on the one hand, and a substantive requirement that a complete mitigation plan be *actually formulated and adopted*, on the other.” *Id.* at 352 (emphases added). On these principles, the Court concluded that “NEPA does not require a fully developed plan detailing what steps *will* be taken to mitigate adverse environmental impacts.” *Id.* at 359 (emphasis by Court).

Therefore, *Robertson* clarifies that NEPA does *not* require (i) that the adverse effects of federal actions be mitigated or (ii) that an EIS specify mitigation measures that are certain to be implemented. *See also S. Fork Band Council of W. Shoshone v. U.S. Dept. of Interior*, 588 F.3d 718, 727 (9th Cir. 2009) (recognizing that EIS must discuss mitigation measures and assess their effectiveness while noting that “NEPA, of course, does not require that [significant environmental harms] actually be mitigated”). Aspects of the Draft Guidance conflict with these well-established principles.

B. The Draft Guidance Cannot Lawfully Require Agencies To Implement Or Monitor Mitigation Under The Authority Of NEPA

The Draft Guidance contains various statements suggesting that federal agencies have authority *under NEPA* to require mitigation implementation or monitoring. The following are examples in which the Draft Guidance appears to conflict with the *Robertson* principles:

- “[A] comprehensive approach to mitigation planning, implementation and monitoring will help ensure the integrity of the entire NEPA process.” Draft Guidance at 2.
- “To provide for the performance of mitigation, agencies should create internal processes to *ensure* that mitigation actions adopted in any NEPA process are documented and that

monitoring and appropriate implementations are created to *ensure* that mitigation is carried out.” Draft Guidance at 3 (emphasis added).

- “When an agency identifies mitigation in an EIS and commits to implement that mitigation to achieve an environmentally preferable outcome, or commits in an Environmental Assessment (EA) to mitigation to support a Finding Of No Significant Impact (FONSI) and proceeds without preparing an EIS, *then the agency should ensure that the mitigation is adopted and implemented.*” Draft Guidance at 4 (emphasis added).
- “Implementation monitoring is designed to ensure that the mitigation measures are being performed as described in the NEPA documents and related decision documents.... Monitoring responsibility can be shared with joint lead or cooperating agencies or other entities so long as the oversight is clearly described in the NEPA documents or associated decision documents.” Draft Guidance at 5.

There is an important distinction between a lead agency’s authority to describe – i.e. “fairly evaluate” – mitigation as part of the NEPA process and the permitting agency’s authority, pursuant to the underlying substantive statutory framework, to “actually formulate and adopt” mitigation measures. *Robertson*, 490 U.S. at 352. The Draft Guidance does not clearly recognize this distinction and, in many places, suggests or implies that NEPA provides agencies with substantive authority to “ensure” that mitigation is adopted, implemented, or monitored. NEPA provides no such authority. Rather, the obligation to “ensure” that mitigation is adopted, implemented, or monitored rests with local, state, or federal permitting agencies acting *under the authority of the underlying substantive statutes and regulations*. *Id.* (NEPA does not impose a “substantive requirement that a complete mitigation plan be actually formulated and adopted” before agency can act); *Rockland v. FAA*, 335 Fed. Appx. 52, 55 (D.C. Cir. 2009) (NEPA does not require agency to develop a mitigation monitoring plan).

In practice, the mitigation measures proposed as part of an action are generally addressed in a NEPA document in the description of the proposed action or in the description of alternatives. With respect to the latter, any mitigation measures described as part of an alternative proposed by a lead agency must satisfy the purpose and need of the project. See *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 195-96 (D.C. Cir. 1991), *cert. denied*, 502 U.S. 994 (1991). The Draft Guidance should recognize this fundamental principle in its discussion of the use of alternatives as a platform for describing potential mitigation. Moreover, whether the action moves forward as proposed by the applicant or as described in an alternative, it is ultimately the responsibility of the local, state, and/or federal permitting agency to require and, if applicable, oversee implementation of mitigation measures. The Draft Guidance also correctly notes that, if there is a “mitigation failure,” the manner of response “depends on whether there is any remaining Federal action.” Draft Guidance at 4. The Draft Guidance should further specify that whether or not supplemental NEPA review must be reinitiated in such an instance is a case-specific analysis governed by existing legal authorities. See 40 C.F.R. § 1502.9(c); *Marsh v. Oregon Natural Resources Defense Council*, 490 U.S. 360, 377-85 (1989).

Finally, the suggestion in the Draft Guidance that an after-the-fact EIS may have to be prepared if there is a “mitigation failure” where a mitigated FONSI was issued for a project is without legal precedent, contrary to NEPA practice and principles, grossly impracticable and an invitation to endless litigation.

Insofar as we are aware, there is no authority for the stated proposition that if assumptions underlying an EA and FONSI later prove to be inaccurate, the lead agency should evaluate whether to require the preparation of a post-hoc EIS. In practice, this would require the preparation of an EIS for a project that has already been constructed and is in operation. While there may well be substantive authority under other statutes or under the terms of a specific federal authorization for an agency to address and remedy failed or inadequate mitigation measures in a variety of ways, there is no authority or logic to the proposition that NEPA requires preparation of a post-hoc EIS. Were it otherwise, there would be no end to NEPA process and related litigation by determined project opponents. Rather, project opponents would routinely contend that assumptions underlying a NEPA analysis have been proven wrong, that a new EIS is required, and that a fully constructed and operating project should be enjoined and/or dismantled. Such an outcome would be contrary to NEPA supplementation principles and inconsistent with the intent of Congress and well-developed NEPA jurisprudence.

III. Conclusion

Denali agrees that the potential mitigation measures associated with a proposed action should be addressed in the action's NEPA documentation. The description of the action's proposed mitigation measures should address the feasibility of the proposed measures as well the manner in which the measures may be implemented and monitored, if applicable. These basic concepts are not new and are addressed in existing NEPA regulations and guidance. See 40 C.F.R. §§ 1505.2, 1505.3, 1502.14, and 1502.16; *Forty Most Asked Questions Concerning CEQ's NEPA Regulations*, Nos. 19(a) and 19(b). However, to the extent the Draft Guidance suggests that NEPA provides substantive authority under NEPA to agencies to "ensure" that mitigation is implemented and monitored, it runs afoul of well-established legal principles. The Draft Guidance unnecessarily blurs the clear and well-established distinction between an agency's procedural and substantive duties under NEPA.

Respectfully, we request that CEQ reconsider the need for this guidance in light of the already well-established rules applicable to mitigation in the NEPA context. If CEQ decides to proceed, we request that the Draft Guidance be re-written to clearly address the fundamental principle that NEPA provides agencies with no substantive authority and is a procedural statute only.

Thank you for consideration of Denali's comments regarding CEQ's Draft Guidance on NEPA mitigation and monitoring.

Sincerely,



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Vice-President Regulatory Affairs and
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Cc: Larry Persily, Federal Coordinator, OFC