

FEDERAL ENERGY REGULATORY COMMISSION
WASHINGTON, DC 20426
May 20, 2010

OFFICE OF ENERGY PROJECTS

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

Reference: Comments on Draft NEPA Mitigation and Monitoring, Climate Change/Greenhouse Gas Emissions, and Categorical Exclusions Guidance

Dear Mr. Boling:

We enclose comments on the following three draft guidance documents issued by CEQ on February 18, 2010:

- Draft Guidance for NEPA Mitigation and Monitoring
- Draft Guidance Establishing and Applying Categorical Exclusions under the National Environmental Policy Act
- Draft NEPA Guidance on Consideration of the Effects of Climate Change and Greenhouse Gas Emissions

In general, the Commission staff supports the goals of the draft guidance for mitigation and monitoring and believes that the guidance is consistent with the Commission's approach to NEPA compliance. The Commission staff also finds that the thrust of the draft guidance on categorical exclusion is consistent with Commission policy and practice. With regard to the consideration of climate change, the Commission staff agrees with the need for analysis and mitigation of greenhouse gas emissions. However, such efforts must be supported by substantial, project-specific evidence. As a result, we believe the guidance should recognize the need for case-by-case evaluation of the issues rather than adopt a prescriptive approach.

We appreciate the opportunity to comment on the draft guidance documents.

If you have any questions, please contact Alan Mitchnick at (202) 502-6074 or alan.mitchnick@ferc.gov.

Sincerely,

A handwritten signature in black ink, appearing to read "Jeff C. Wright". The signature is fluid and cursive, with a large loop at the end.

Jeff C. Wright
Director
Office of Energy Projects

Enclosure: Comments of Staff of the Federal Energy Regulatory Commission
on Council on Environmental Quality Draft NEPA Guidance

**COMMENTS OF STAFF OF THE FEDERAL ENERGY REGULATORY
COMMISSION ON COUNCIL ON ENVIRONMENTAL QUALITY DRAFT
NEPA GUIDANCE**

The following are the comments of staff of the Federal Energy Regulatory Commission (Commission) on three proposed guidance documents drafted by the Council on Environmental Quality (CEQ). As an initial matter, Commission staff notes that as an independent regulatory agency the Commission may not be legally bound by CEQ's guidance, except to the extent it chooses to bind itself. Nonetheless, the Commission has always recognized CEQ's expertise with respect to the National Environmental Policy Act (NEPA) and related matters, has appreciated CEQ's efforts to assist government agencies in fulfilling their roles as environmental stewards, and has benefited from CEQ's leadership role on environmental issues. Commission staff below provides comments on each of the draft guidance documents.

Draft Guidance for NEPA Mitigation and Monitoring

Commission staff believes that this document is almost entirely consistent with the Commission's approach to environmental mitigation and monitoring. Commission staff also agrees with the three goals set forth by CEQ -- the consideration of mitigation throughout the NEPA process, establishment of an effective monitoring program, and public involvement. In authorizing energy infrastructure projects, the Commission always considers environmental mitigation throughout the NEPA process and, as warranted, requires environmental mitigation and appropriate levels of monitoring. The Commission's approach to monitoring varies depending on the nature of the project involved. For example, with respect to hydropower projects, the Commission generally is responsible for projects throughout the life of the federal authorization. Thus, where the Commission imposes mitigation and monitoring measures, the Commission retains authority to ensure compliance with the measures. In fact, the Commission's Office of Energy Projects contains a Division of Hydropower Administration and Compliance, the purpose of which is to monitor and ensure compliance with license conditions, including environmental measures.

With respect to natural gas pipelines and liquefied natural gas (LNG) terminals, the Commission imposes environmental conditions and monitors compliance during the preconstruction and construction phases. Although most mitigation and monitoring is complete by the time that these facilities are placed in service, the Commission imposes reporting requirements to ensure longer-term monitoring of certain resources (for example, wetlands and agricultural areas). During pipeline operation, ongoing oversight passes to the Department of Transportation's Pipeline and Hazardous Material Safety Administration. Once an

LNG terminal goes into service, the Commission conducts safety inspections throughout the life of the terminal. Also, the Commission has an effective enforcement program, including the authority to impose civil penalties for failures to comply with Commission requirements. With respect to public participation, the Commission seeks and welcomes input through federal, state, and local agencies, tribes, members of the public, and other stakeholders from the beginning to the end of the NEPA process. The results of monitoring are available to the public and, where appropriate, the Commission requires that stakeholders who are particularly affected by, or have expertise with respect to, impacts on specific resources be consulted during the development and implementation of mitigation and monitoring.

Staff's specific comments follow.

- In the third paragraph on page 1, CEQ notes that studies have shown agency monitoring and mitigation to be wanting. This is not the case with the Commission, which, as noted, has vigorous and effective monitoring and enforcement programs in place.
- In the second full paragraph on page 4, CEQ discusses the impact of insufficient funding to implement mitigation. The Commission requires entities to which it issues authorizations to pay for mitigation and monitoring; the presence or absence of government funding is not an issue.
- In the first full paragraph on page 4, CEQ refers to including monitoring conditions in grants or contracts. As noted, the Commission requires authorization holders to fund mitigation and monitoring.
- In the list of factors for prioritizing monitoring activities (page 5), CEQ includes the degree of public interest in the resource. Commission staff is not sure that this is an appropriate consideration because the public may be unaware of or unconcerned with species or other resources that may be important to an ecosystem.
- In the third full paragraph on page 5, CEQ states that the responsibility for developing an enforcement monitoring program will depend on who will perform the mitigation. The Commission always retains the responsibility to oversee and approve monitoring programs. While monitoring may be conducted by an authorization holder or its contractor, the Commission often requires public input in the development of monitoring programs and the review of

resultant data, and the Commission retains the authority to review, modify, and require additional mitigation based on monitoring results.

- In the third full paragraph on page 4, CEQ suggests that, when mitigation fails, an agency must take supplementary action, and possibly prepare an EIS, because the finding of no significant impact would no longer be valid. Commission staff questions this conclusion. In practice, the Commission issues an authorization, following which action may be taken by the authorization holder. In the course of monitoring compliance, Commission staff may determine that further, possibly different, mitigation is required. This does not, however, invalidate the original EA or EIS. Rather, Commission staff will develop new mitigation measures supported by the updated record and will prepare whatever environmental documentation is needed to support the proposed additional or revised mitigation measures.

Draft Guidance Regarding Categorical Exclusions

Again, Commission staff finds the thrust of the proposed guidance on establishing, applying, and revising categorical exclusions under NEPA to be consistent with Commission policy and practice. The Commission uses categorical exceptions only in appropriate, limited instances, where exclusions can expedite regulatory review without sacrificing necessary environmental analysis. Commission staff agrees with CEQ's discussion of establishing categorical exceptions, the conditions that warrant new exceptions, the elements of exceptions, the substantiation of new exceptions, public involvement in establishing exceptions, and applying exclusions. Staff agrees generally with the sections regarding procedures for establishing new exceptions and periodic review of established exceptions.

Staff's specific comments follow.

- In the first paragraph on page 2, CEQ states that there has been an expansion in the number, range, and use of categorical exceptions. Commission staff notes that the Commission has not in recent years increased the number, scope, or use of categorical exceptions. As a general matter, the section on procedures for establishing new categorical exclusions might appear overly prescriptive.

- With respect to the procedures beginning on page 8, rather than consulting specifically with CEQ before proposing a new categorical exception, the Commission would engage in a public, notice-and-comment rulemaking, in which all stakeholders would have the opportunity to present their views. Nonetheless, Commission staff would welcome comments from CEQ.
- Also in the section on proposing new exclusions, it may be unduly burdensome to require an EA, an EIS, or a demonstration project to support a new exclusion.
- On page 9, CEQ suggests that agencies must consult with CEQ regarding how to address public comments, and receive an affirmative statement from CEQ as part of the process. Again, while Commission staff would welcome CEQ advice and comments, the Commission has many years of experience in independently conducting rulemakings, including responding to public comments, and staff is not aware of any deficiencies in that process that require change.
- In the section on periodic review of categorical exceptions, the Commission and its staff, assisted by comments from stakeholders, engage in a constant process of ensuring that all of its regulations and procedures continue to meet the public interest. When any Commission activity appears to no longer satisfy the purpose for which it is developed, the Commission will revise or revoke it. While the Commission always welcomes suggestions from any entity as to how it can improve its actions, Commission staff sees no need for a formal outside review of the Commission's categorical exception program.
- At page 10, CEQ suggests that in some cases agencies should document that a proposal has properly been categorically excluded. Commission staff notes that this appears to be a change to long-term CEQ guidance, which discourages "procedures that would require the preparation of additional paperwork to document that an activity has been categorically excluded," *Guidance Regarding NEPA Regulations*, 48 Fed. Reg. 34263 (July 28, 1983), as well as to Commission practice.

Draft NEPA Guidance on Consideration of the Effects of Climate Change and Greenhouse Gas Emissions

The Commission is committed to understanding and, where possible, mitigating the impacts of climate change and greenhouse gas emissions. To assist in doing so, the Commission has undertaken a number of initiatives to promote the

rare instance where a pipeline is being built to serve a particular facility (such as a new gas-fired generating plant), the Commission cannot reasonably determine where gas will ultimately be used. Moreover, because gas is often delivered through backhaul or exchange, rather than direct delivery, the Commission cannot determine the chemical composition of natural gas that a particular end-user will receive. Thus, while the Commission studies direct impacts of projects it authorizes, it will not often be possible to study indirect or connected impacts. It is also difficult to study cumulative impacts, except in the case of direct impacts.

Similarly, hydropower projects, which provide renewable power, generally do not have air quality or climate change impacts. It has occasionally been suggested that the existence of reservoirs results in more methane (CH₄) emissions than if the waterway in question were free-flowing. However, there is little, if any, hard science supporting this thesis. Moreover, the Commission has rarely been asked in recent years to authorize new dam and reservoirs. Thus, in the vast majority of hydropower cases, the Commission is being asked to authorize the continuing of the existing environmental situation (almost invariably with additional mitigation and enhancement measures), rather than to permit new environmental impacts. As with pipeline projects, it is difficult, if not impossible, with the current state of scientific knowledge to study connected or cumulative air quality and climate change impacts with respect to hydropower projects.

Commission staff is also concerned about the suggestion that agencies should analyze in NEPA documents the impacts of climate change on proposed projects. Staff is unaware of any current climate model that would allow the Commission to predict matters such as water flows in a given basin during the 30-50 year term of a typical hydropower license in such a manner as to support reasoned decisionmaking. Commission staff does review a range of historical flows (e.g., dry, medium, and wet years) as part of its analysis of project operation and resource effects in NEPA documents and often includes monitoring and adaptive management provisions in licenses. Commission staff also believes that the Commission's long-term practice of including in hydropower licenses reopener provisions that allow the Commission to alter license requirements in response to changed environmental conditions provides appropriate environmental safeguards and, indeed, provides more certain protection than predictions about the future environment.

In sum, Commission staff firmly agrees with the need for analysis and mitigation of greenhouse gas emissions and climate change. However, staff also believes that such efforts must be supported by substantial, project-specific evidence, and that guidance on these matters should recognize that the ability to deal with these issues may vary from case to case, so that a prescriptive approach will be inefficient, and could lead to the waste of time, governmental and private

sector resources, and money. This issue is of sufficient importance that Commission staff respectfully suggests that CEQ allow additional time for the Commission and CEQ to more thoroughly engage on this issue before issuing the guidance document.
