

May 24, 2010

Via Electronic Submission & First-Class Mail  
The Council on Environmental Quality  
Attn: Ted Boling  
722 Jackson Place, N.W.  
Washington, D.C. 20503

Re: National Environmental Policy Act (NEPA) Draft Guidance, NEPA  
Mitigation and Monitoring 75 Fed. Reg. 8,046 (Feb. 23, 2010) Comments of Gulf  
Coast Lignite Coalition

Dear Mr. Boling:

Thank you for the opportunity to submit comments on the Council on Environmental Quality's (CEQ) draft guidance, NEPA Mitigation and Monitoring under the National Environmental Policy Act (NEPA). The Gulf Coast Lignite Coalition (GCLC) is a coalition of entities that own or operate lignite and coal-fired power plants in Texas, Louisiana, and Mississippi. In Texas alone, these industries represent over 10 billion dollars in annual expenditures and over 33,000 permanent jobs. GCLC believes that the Draft Guidance attempts to impose substantive obligations on federal agencies and private project developers, which is inconsistent with the purpose of NEPA as defined by the U.S. Supreme Court. Fundamentally, GCLC believes that NEPA, as a procedural statute, is an inappropriate tool for requiring federal agencies to carry out mitigation measures and conduct monitoring activities. GCLC supports and joins in the comments of the National Mining Association (NMA) and would emphasize the specific comments laid out below:

1. The CEQ's Draft Guidance, contrary to U.S. Supreme Court jurisprudence, would expand the role of NEPA to impose substantive requirements on federal agencies conducting NEPA reviews. The role of NEPA has long been defined by the courts as a statute intended to inform and guide federal decisionmaking, not to dictate particular results. The Supreme Court held that other statutes may impose substantive environmental obligations but NEPA merely prohibits uniformed rather than unwise agency action. In *Robertson v. Methow Valley Citizens Council*, the Court included significant discussion about the role and purpose of NEPA in federal decisionmaking: The sweeping policy goals announced in Â§ 101 of NEPA are thus realized through a set of action-forcing procedures that require that agencies take a hard look at environmental consequences, and that provide for broad dissemination of relevant environmental information. Although these procedures are almost certain to affect the agency's substantive decision, it is now well settled that NEPA itself does not mandate particular results, but simply prescribes the necessary process. The Draft Guidance seeks to mandate particular results in addition to prescribing the necessary environmental review process.

2. The Supreme Court has definitively held that under NEPA, federal agencies are required to fairly evaluate environmental consequences but are not required to fully develop [a] plan that will mitigate environmental harm. The CEQ's Draft Guidance would require federal agencies to create internal processes to ensure that mitigation actions adopted in any NEPA process are documented and that monitoring and appropriate implementation plans are created to ensure that mitigation is carried out. This mandate goes well beyond the statutory scope of NEPA, as it seeks to impose a substantive

requirement through NEPA, which the Court has held to be essentially procedural.

In *Robertson v. Methow Valley Citizens Council*, the Forest Service prepared an environmental impact statement (EIS) as a part of the decision whether to issue a special use permit authorizing a destination Alpine ski resort at Sandy Butte in the North Cascade Mountains. As a part of this EIS, the Forest Service described certain mitigation measures that could be taken to protect the mule deer, which fawned in the area where the resort would be located, but these mitigation measures were not mandated by the EIS. A citizen group sued the Forest Service, arguing that the EIS should have formally mandated these mitigation measures. The Supreme Court unanimously disagreed, holding that mitigation plans need only be discussed in sufficient detail to ensure that the environmental consequences have been fairly evaluated and that NEPA does not include a substantive requirement that a complete mitigation plan be actually formulated and adopted. The Court went on to explain its position more fully:

[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. Cf. *Baltimore Gas & Electric Co.*, 462 U.S. 87, 100 (NEPA does not require agencies to adopt any particular internal decisionmaking structure). In certain circumstances, federal agencies have an independent statutory obligation to require mitigation measures. These situations arise frequently in the mining context. Further, GCLC believes that the NEPA process is an appropriate context to discuss and analyze potential mitigation measures. However, GCLC strongly believes that the Draft Guidance should be revised to the extent that it seeks to impose additional, substantive mitigation requirements through NEPA, contrary to Supreme Court jurisprudence.

3. The CEQ's Draft Guidance should not mandate the implementation of monitoring measures and measures that ensure that mitigation is effective. Under the current NEPA regulations, agencies may provide for monitoring in important cases. The Draft Guidance goes far beyond existing NEPA regulations by requiring monitoring any time that a commitment is made in the NEPA process to implement mitigation measures, even when those mitigation measures are mandated under statutory authority distinct from NEPA. The CEQ's Draft Regulations fail to acknowledge the role of NEPA in federal decisionmaking, planning, and permitting.

The Draft Guidance should be modified to limit the scope of monitoring requirements to the jurisdiction of the federal agency to modify the decision previously authorized. NEPA may be used to inform the public about such monitoring requirements imposed by other statutes, but NEPA cannot be used as a separate means for requiring monitoring and reopening federal decisions for further discussion and review.

Thank you again for your consideration of these comments. Should you have any questions, please do not hesitate to contact me.

Respectfully submitted,

Michael J. Nasi  
Counsel for Gulf Coast Lignite Coalition  
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