

# IRRIGATION & ELECTRICAL DISTRICTS ASSOCIATION OF ARIZONA

R.D. JUSTICE  
PRESIDENT  
  
ELSTON GRUBAUGH  
VICE-PRESIDENT

SUITE 140  
340 E. PALM LANE  
PHOENIX, ARIZONA 85004-4603  
(602) 254-5908  
Fax (602) 257-9542  
E-mail: [rslynch@rslynchaty.com](mailto:rslynch@rslynchaty.com)

WILLIAM H. STACY  
SECRETARY-TREASURER  
  
ROBERT S. LYNCH  
COUNSEL AND  
ASSISTANT SECRETARY-TREASURER

E-MAILED ONLY  
([Mitigation.guidance@ceq.eop.gov](mailto:Mitigation.guidance@ceq.eop.gov))

May 24, 2010

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

Re: Notice of Availability, Draft Guidance, "NEPA Mitigation and Monitoring", 75 Fed.Reg.  
8046 (February 23, 2010)

Dear Mr. Boling:

The Irrigation & Electrical Districts Association of Arizona (IEDA) is an Arizona non-profit association of public bodies and other entities that, among other things, buy, use and resell federal hydropower to consumers in Arizona. IEDA's 26 members and associate members thus have an abiding interest in anything that would affect the generation and delivery of hydropower in Arizona, including expanding subject matter requirements for federal action screening under the National Environmental Policy Act (NEPA). We are providing the following comments from that perspective.

We are troubled by the tone of the CEQ proposal. It appears to represent that CEQ can force federal agencies to take mitigation actions and to force federal decision-makers to include conditions concerning mitigation in documents that relate to the proposed federal action including the record of decision under the National Environmental Policy Act (NEPA) and whatever substantive documents come out of that decision.

We do not understand why CEQ would want to pick this fight now. There is absolutely no doubt that CEQ has no regulatory authority over any of the federal agencies. There is no substantive requirement for mitigation in NEPA. These issues very clearly have been decided by the Supreme Court and at least two federal appellate courts.

The only thing we can see coming out of this approach is more litigation. Some of it will come in the form of plaintiffs attempting to force mitigation on a federal activity or a federally-permitted activity. Some of it will come in the form of litigation by a non-federal entity seeking some required federal action and being told that some, perhaps irrelevant, mitigation program will be required by the agency because it is required by CEQ. The litigation trail that will follow will ultimately lead to further examination of the role of CEQ with regard to NEPA. The advisory role of the CEQ will become much more clearly defined in such litigation.

The other adverse consequence we see from this approach is that entities dealing with federal agencies will never again volunteer any sort of mitigation if they believe that some sort of mitigation will be required. They will uniformly be afraid that if they offer X, the agency will then require them to do X + Y. Not wanting to bid

against themselves, they will resist any mitigation activity until they can gauge what the agency itself might require and whether they can go along with it. Voluntary, negotiated programs, such as the Multi-Species Conservation Program on the Lower Colorado River, will cease to be considered. No one will be able to voluntarily step forward concerning a mitigation program when the threat of forced mitigation lurks in the shadows.

All in all, this is a bad public policy direction to attempt and one that will serve the legal community well but not advance public policy concerning environmental mitigation. In our view, this guidance should be withdrawn.

Sincerely,

/s/

Robert S. Lynch  
Counsel and Assistant Secretary/Treasurer

RSL:psr

cc: Arizona Congressional Delegation  
Anne Castle, Assistant Secretary for Water and Science, Department of the Interior  
Mike Connor, Commissioner of Reclamation  
Larry Walkoviak, Regional Director, Bureau of Reclamation, Salt Lake City  
Lorri Gray-Lee, Regional Director, Bureau of Reclamation, Nevada  
Joe Nipper, American Public Power Association  
Joy Ditto, American Public Power Association  
Tom Donnelly, National Water Resources Association  
Dan Keppen, Family Farm Alliance  
Leslie James, Colorado River Energy Distributors Association  
IEDA Members