



NUCLEAR ENERGY INSTITUTE

Ellen Ginsberg
Vice President, General Counsel
and Secretary

May 24, 2010

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

Dear Mr. Boling:

The Nuclear Energy Institute (NEI),¹ on behalf of the commercial nuclear energy industry, is pleased to submit these comments on the draft guidance document entitled "NEPA Mitigation and Monitoring" (Draft Guidance) that was published for comment in the *Federal Register* on February 23, 2010.²

The nuclear industry fully supports government efforts to ensure the protection of the environment and directly contributes to those efforts by providing more than 70 percent of the nation's clean air electricity generation.³ Nuclear energy's vital role in greenhouse gas mitigation has clearly been established in a variety of studies by the Intergovernmental Panel on Climate Change, Columbia University's Earth Institute, the National Academies of Science, and the International Energy Agency. Further, nuclear energy is an important resource as it has the smallest environmental impact of any clean air electricity source, with among the lowest life-cycle impacts of any form of electricity.⁴ The industry believes that every effort should be made to advance the national interest in establishing and maintaining a clean, healthy environment and that strong federal and state leadership is necessary to ensure long-term environmental stewardship.

¹ NEI is the organization responsible for establishing unified nuclear industry policy on matters affecting the nuclear energy industry, including the regulatory aspects of generic operational and technical issues. NEI's members include all utilities licensed to operate commercial nuclear power plants in the United States, nuclear plant designers, major architect/engineering firms, fuel fabrication facilities, nuclear material licensees, and other organizations and individuals involved in the nuclear energy industry.

² Notice of Availability, Draft Guidance, "NEPA Mitigation and Monitoring," 75 Fed. Reg. 8,046 (Feb. 23, 2010)(Draft Guidance).

³ Nuclear power plants generate about 20 percent of U.S. electricity. They do not burn hydrocarbons when producing electricity, so they do not produce any greenhouse gases or combustion products.

⁴ "Life-Cycle Assessment of Electricity Generation Systems and Applications for Climate Change Policy Analysis," Paul J. Meier, University of Wisconsin-Madison, August 2002.

The nuclear energy industry has extensive experience with the National Environmental Policy Act (NEPA), as NEPA compliance is incorporated into Nuclear Regulatory Commission's regulations for licensing nuclear power plants and other nuclear facilities. Viewed from the vantage point of having participated in all aspects of the NEPA process, the industry believes NEPA has been effective in achieving its original purposes. Specifically, as the United States Supreme Court has explained, the NEPA requirement to prepare an Environmental Impact Statement serves the dual purposes of (1) ensuring that federal agencies will have available, and carefully consider, detailed information on significant environmental impacts; and (2) that such information will be made available to a larger audience (i.e., the public and other stakeholders) that may also play a role in the decision-making process.⁵ With respect to public disclosure, NEPA – as currently implemented – offers the public multiple opportunities to articulate its views on proposed federal actions, most notably through the opportunity to participate in the scoping process; provide comments on the Draft Environmental Impact Statement (and receive a response to those comments); and seek judicial review of alleged violations of NEPA. Thus, in the industry's view, overall, NEPA has resulted in better informed and more environmentally responsible federal agency decision-making, well serving a critically important national interest.

In its Draft Guidance, however, CEQ seeks to “enable agencies to create successful mitigation planning and implementation procedures with robust public involvement and monitoring programs.”⁶ CEQ cites three studies in support of its statement that “ongoing agency implementation and monitoring of mitigation measures is limited and in need of improvement.”⁷

CEQ proposes the following “goals” to help improve agency mitigation and monitoring:

1. Agencies should consider proposed mitigation throughout the NEPA process;
2. A monitoring program should be created or strengthened to ensure mitigation methods are implemented and effective; and
3. Public participation and accountability should be supported “through proactive disclosure of, and access to, agency mitigation monitoring reports and documents.”⁸

To achieve these mitigation goals, the Draft Guidance proposes that: (1) NEPA analyses consider mitigation among alternatives and as an integral element of project design; (2) the Record of Decision for actions involving an Environmental Impact Statement document and establish binding commitments for mitigating measures; and (3) when mitigation measures

⁵ *Dep't. of Transp. v. Public Citizen*, 541 U.S. 752, 768 (2004), citing *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332 (1989).

⁶ Draft Guidance at 1.

⁷ *Id.*

⁸ *Id.* at 2.

support a Finding of No Significant Impact (FONSI), the commitment to take mitigating action should be included in the FONSI and any other decision document.

The Draft Guidance directs agencies to “ensure that the mitigation is adopted and implemented” and suggests that the mitigation measures be included as conditions in “financial agreements, grants, permits or other approvals.”⁹ The Draft Guidance elaborates, stating “[t]he agency should also identify the duration of the agency action and the mitigation measures in its decision document to ensure that the terms of the mitigation and how it will be implemented are clear.”¹⁰ Significantly, The Draft Guidance also states that a “substantial mitigation failure . . . should trigger a response from the agency.”¹¹

The Draft Guidance proposes that agencies monitor mitigation implementation as well as the effectiveness of mitigation actions. The obligation to monitor does not appear to be limited in duration and would seemingly require agencies to re-open past decisions in response to monitoring results.

Finally, the Draft Guidance seeks to create an affirmative obligation for the lead agency to provide the public with information on mitigation monitoring. CEQ proposes that agencies post mitigation information that may be of interest to the public on their websites. CEQ would not limit the agency’s disclosure obligation and the Draft Guidance does not address how the proposed publication requirements relate to NEPA’s existing public notice requirements.

In stark contrast to the *substantive* nature of the Draft Guidance, it is well-settled that NEPA’s primary purpose is to establish *procedural* requirements to ensure that federal agencies take a “hard look” at the environmental consequences of their actions. Further, NEPA does not require a federal agency to undertake mitigation as a result of its “hard look,” let alone commit to establishing legally binding mitigation plans and prospective monitoring programs. In *Robertson v. Methow Valley Citizens Council*,¹² the seminal U.S. Supreme Court decision addressing mitigation under NEPA, the Court explained:

There 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.¹³

⁹ *Id.* at 4

¹⁰ *Id.*

¹¹ *Id.*

¹² 490 U.S. 332 (1989).

¹³ 490 U.S. at 352.

Based in large part on this distinction, the Court unequivocally held that:

[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.¹⁴

The Supreme Court's decision in *Methow Valley* continues to be cited by federal courts to support holdings concluding that mitigation plans need not be legally enforceable, funded, or even in final form to comply with NEPA's procedural requirements;¹⁵ and that NEPA does not require agencies to commit to detailed mitigation monitoring programs.¹⁶

Contrary to the long-standing legal precedent establishing the procedural nature of NEPA, the Draft Guidance inappropriately ventures into the realm of substantive regulation of federal action by suggesting that agencies: (1) develop, and make binding commitments to implement, detailed mitigation plans prior to undertaking projects; (2) base future, post-decision actions on the implementation and effectiveness of mitigation monitoring programs; (3) reconsider past decisions in light of mitigation monitoring; and (4) impose conditions in financial agreements, grants, permits, or other approvals, and condition funding on the implementation of mitigation.¹⁷ The incongruity between the Draft Guidance and the legal precedent in this area is striking in light of the fact that the Draft Guidance contains no discussion of *Methow Valley*, or any other NEPA case law. It is inappropriate to propose such guidance without so much as an attempt to reconcile it with the legal precedent in this area, or to articulate whether the suggested actions are actually required by NEPA or CEQ's current regulations. Publishing the Draft Guidance without this discussion seriously undermines stakeholders' ability to meaningfully comment on the document, as CEQ has not articulated its legal basis for suggesting that federal agencies and private entities undertake the actions described therein. This opaqueness is inconsistent with the principles of transparency and openness that, as the Draft Guidance explains, are hallmarks of the NEPA process.¹⁸

In sum, the "action-forcing" function of NEPA mandates that an agency take a "hard look" at environmental consequences of its actions, and provide a reasonably complete discussion of possible mitigation measures. NEPA does not, however, require implementation and ongoing monitoring of a binding mitigation plan as a condition of issuance of a grant, permit or license.

¹⁴ *Id.* at 353.

¹⁵ *Nat'l Parks & Conservation Ass'n v. U.S. Dep't of Trans.*, 222 F.3d 677, 681 n.4 (9th Cir. 2000).

¹⁶ *County of Rockland v. Fed. Aviation Admin.*, 335 Fed.Appx. 52 (DC.Cir. 2009).

¹⁷ See Draft Guidance, at 2-6

¹⁸ Draft Guidance, at 1.

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Based on the concerns described above, NEI urges CEQ not to finalize the Draft Guidance. In the alternative, if CEQ decides to pursue issuance of this guidance, it should redraft the document to include a full explanation of the legal basis for suggesting that federal agencies and private entities undertake the proposed mitigation measures, and republish it to facilitate meaningful public comment.

If you have any questions concerning these comments, please feel free to contact me.

Very truly yours,

A handwritten signature in black ink that reads "Ellen C. Ginsberg". The signature is written in a cursive, flowing style.

Ellen C. Ginsberg

cc: Stephen Burns, General Counsel, U.S. NRC