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General Counsel

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The Council on Environmental Quality
Attn: Ted Boling
722 Jackson Place NW
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Dear Mr. Boling:

The Council on Environmental Quality (CEQ) recently released for comment draft guidance on mitigation and monitoring of activities undertaken in a National Environmental Policy Act (NEPA) process ("draft guidance"). 75 Fed. Reg. 8046 (Feb. 23, 2010). This letter sets forth the National Mining Association's (NMA) comments on the draft guidance. The draft guidance, by attempting to impose substantive obligations on federal agencies, exceeds the scope of NEPA, is contrary to U.S. Supreme Court jurisprudence, and ignores existing mitigation and monitoring requirements imposed by federal agencies under statutes other than NEPA. As such, the proposed guidance should be withdrawn.

NMA is the national trade association representing the producers of most of America's coal, metals, industrial and agricultural minerals; the manufacturers of mining and mineral processing machinery, equipment and supplies; and engineering, transportation, financial and other businesses that serve the mining industry. Many NMA members conduct mineral operations on federal lands and have extensive experience with the NEPA process, especially the project delays and escalating costs associated with NEPA compliance. As such, NMA members are exceedingly interested in and supportive of efforts to make that process more streamlined and efficient.

The Role of NEPA

The primary problem with the draft guidance is it misapprehends the role of NEPA by attempting to impose substantive requirements on federal agencies. NEPA is not intended to dictate a particular decision but rather to ensure that agencies take into consideration the environmental impacts of their actions. Since its passage, courts have emphasized the procedural nature of NEPA. For example, an early NEPA Supreme Court decision held that "other statutes may impose substantive environmental obligations but NEPA merely prohibits uninformed – rather than

unwise agency action. " *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 356 (1989) The Supreme Court has consistently held this view of NEPA since NEPA's passage. See *Kleppe v. Sierra Club*, 427 U.S. 390, 406 (1976) ("The procedural duty imposed upon agencies by this section is quite precise"); *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, (435 U.S. 519, 558 (1978) (NEPA's "mandate to the agencies is essentially procedural); *Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726, 737 (1998) ("NEPA . . . simply guarantees a particular procedure, not a particular result."); *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 188 n.34 (1978) ("NEPA essentially imposes a procedural requirement on agencies, requiring them to engage in an extensive *inquiry* as to the effect of federal actions on the environment").

The Role of Mitigation in NEPA Decisions

As suggested by existing CEQ NEPA regulations, mitigation is an important concept that merits discussion and evaluation during the NEPA process. CEQ regulations require discussion of possible mitigation measures in 1) defining the scope of the environmental impact statement (EIS), 2) in discussing the consequences of a proposed action and its alternatives, and 3) in explaining the ultimate decision. 40 CFR §§ 1508.25(b), 1502.14(f), 1502.16(h), 1505.2(c). In addition, agencies also use mitigation to reduce potentially significant impacts to support a finding of no significant impact (FONSI). In such cases, mitigation enables an agency to conclude the NEPA process, satisfy NEPA requirements, and proceed to implementation with the preparation of the more truncated environmental assessment rather than an EIS.

The draft guidance's suggestion, however, that the NEPA process should be used to impose binding mitigation requirements contradicts Supreme Court decisions regarding the procedural nature of NEPA. Furthermore, imposing binding mitigation measures via NEPA directly conflicts with the Supreme Court's decision in *Robertson v. Methow Valley Citizens Council*, which definitively answered the question whether NEPA "requires federal agencies to include in each environmental impact statement a fully developed plan to mitigate environmental harm." In *Robertson*, at issue was a Forest Service's environmental impact statement for a ski area that identified and recommended, but did not mandate, mitigation measures. The Supreme Court found "it 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." 490 U.S. at 372.

The draft guidance repeatedly confuses the procedural requirements under NEPA with substantive legislation that governs specific federal agency actions. For example, in suggesting that "measurable performance standards" should be specified for potential mitigation measures, the guidance inappropriately analogizes to the 2008 Final Compensatory Mitigation Rule and a 2001 report prepared by the National Research Council, both of which addressed wetlands mitigation

requirements under Section 404 of the Clean Water Act. The Clean Water Act, unlike NEPA, provides program-specific mitigation mandates that are set forth in substantive regulations, such as the 404(b)(1) guidelines. 40 CFR Part 230. The Compensatory Mitigation Rule was adopted to further implement those substantive requirements. Moreover, the 2001 National Research Council report was prepared to address how well compensatory wetlands mitigation under Section 404 has contributed to achieving the broad objectives of the Clean Water Act. That Report suggested that performance standards be included in *permits* issued under Section 404 to promote implementation of adopted wetland mitigation measures. That report did not address the scope of analysis that should be included in environmental assessments and environmental impact statements under NEPA. It is incorrect to suggest that these program-specific substantive requirements should be incorporated by all federal agencies in the procedural evaluations conducted under NEPA. As *Robertson* and numerous lower court decisions have confirmed, NEPA does not require the formulation and adoption of complete mitigation plans detailing final mitigation measures.

Monitoring the Effectiveness of Mitigation

CEQ's NEPA regulations indicate agencies may provide for monitoring to assure that their decisions are carried out and should do so in important cases. 40 C.F.R. 1505.3. The draft guidance, however, goes well beyond the existing suggestions regarding monitoring by requiring monitoring any time that a commitment is made in the NEPA process to implement mitigation. The monitoring requirement would be two-fold: ensuring that mitigation is implemented and ensuring that mitigation is effective in achieving its objectives.

Again, CEQ fails to acknowledge the basic nature of NEPA. At best, it can be argued that NEPA imposes some continuing duty on federal agencies to collect and evaluate new information relevant to the environmental impacts of their actions. However, that duty would presumably be limited to the extent of the agency's ongoing jurisdiction to influence the agency actions it had previously authorized as would be the case when new circumstances require an agency to prepare a supplemental EIS. NEPA is not the appropriate process for requiring agencies to engage in post-decision mitigation monitoring as such requirements are beyond the scope of NEPA. Additionally, such a requirement ignores existing regulatory frameworks that require monitoring of mitigation measures.

Mitigation of Mining Activities

Mining in the U.S. cannot happen without mitigation. Mitigation is evaluated and implemented throughout the life of the project from siting and design measures prior through post-operation reclamation. Mitigation of impacts from mining operations is currently required under a variety of federal programs.

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NMA is not suggesting that the NEPA process is not an appropriate tool to disclose and evaluate mitigation, and to allow public comment regarding proposed mitigation alternatives. As discussed above, NEPA is a fitting arena for discussion of environmental impacts. But not only does requiring binding mitigation exceed the scope of CEQ's statutory authority under NEPA, it may also duplicate or hinder existing mitigation efforts under other regulatory programs.

For example, Bureau of Land Management regulations promulgated under the Federal Land Policy and Management Act (FLPMA) apply to the majority of mining of locatable minerals on federal lands and these regulations specifically require mitigation as well as monitoring to ensure mitigation is effective. See 43 C.F.R. 3809.420(a)(4) (You must take mitigation measures specified by BLM to protect public lands); 43 C.F.R. 3809.401(b)(4) (a plan of operations for mining must contain a monitoring plan designed to demonstrate compliance with the approved plan and other federal laws and regulations). Similarly, coal mining operations governed by regulations promulgated pursuant to the Surface Mining Coal and Reclamation Act (SMCRA) require extensive mitigation and monitoring. See the Permanent Program Performance Standards at 30 C.F.R. 816 (requiring minimization of environmental impacts and post-reclamation monitoring to ensure standards are being met).

Conclusion

CEQ should consider ways to make NEPA more effective instead of adding requirements outside the scope of the Act that would place unnecessary or duplicatory burdens on those charged with NEPA compliance. The NEPA process is already extraordinarily time consuming and expensive; additional administrative hurdles should not be imposed. NEPA, as a procedural statute, is not an appropriate vehicle for imposing substantive requirements as contemplated in the draft guidance. As the court declares in *Robertson* "there is a fundamental difference between a requirement that mitigation be discussed in sufficient detail and to ensure 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."

Sincerely,



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