

**Oregon Department of Transportation Comments  
Federal Register Notice 2/23/10**

**DRAFT GUIDANCE FOR NEPA MITIGATION AND MONITORING**

General	Finalizing the guidance will result in the need for agencies to acquire and devote additional resources (time, personnel, money). It will also increase the length of a NEPA document. Has CEQ identified and assessed any unintended consequences that may result from issuing this guidance – could there be a reduction in the amount of “above and beyond” mitigation that some agencies currently include in their decisions (and NEPA documents), just to keep the amount of additional documentation to a minimum?
General	NEPA’s 40 Most Asked Questions, question 19b, discusses mitigation measures that our outside the jurisdiction of the lead or cooperating agency jurisdiction or unlikely to be adopted or enforced by the responsible agency. The draft CEQ guidance does not distinguish between the two. Please identify applicability, as the additional efforts suggested in this guidance should not be applied equally.
General	The guidance “is intended to reinforce existing requirements and responsibilities”; however, it reads throughout as if the goal is to reduce agency flexibility by imposing new “suggested” requirements. As an alternative, consider reviewing the CEQ regulations and 40 Questions and provide guidance on vague terms found within that language. For instance, 19a of 40 Questions states “Once the proposal itself is considered as a whole to have significant effects, all of its specific effects on the environment (whether or not “significant”) must be considered, and mitigation measures must be developed where it is feasible to do so”. “Where it is feasible to do so” is a vague phrase that some would suggest could benefit from guidance.
Section I paragraph 2	References to 40 CFR 1507.2 and 1507.3 appear out of place.
Section II and Appendix	Definition of “mitigation” is in 40 CFR 1508.20, not 40 CFR 1508.2. Check CFR references throughout. In addition, the definition of “mitigation” is defined in the guidance at least three times. It is first defined in Section II, paragraph one. It’s defined two more times in that same section, under subsection A and subsection A.2. Consider reducing redundancy.
Section II, and Section II.B.2	“...a monitoring program should be created or strengthened to ensure mitigation measures are implemented and effective.” At times, effectiveness can be difficult to measure. What one expert sees as effective, another expert sees as ineffective, as effectiveness often depends on the subjective assumptions of variables that come into play. In addition, an effectiveness rating may change over time. Something might be considered effective when assessed at 6 months post-implementation, but when assessed after 3 years, it may be deemed ineffective. It can also be challenging to determine effectiveness of mitigation measures related to socio-economics, visual quality, etc. If the main intent is to make sure that mitigation used in mitigated FONSI’s need to be implemented and effective at reducing an impact below the level of significance, consider narrowing the guidance language related to the word “effectiveness” to reflect this intent.
Section II	“Third, public participation and accountability should be supported through proactive disclosure of, and access to, agency mitigation monitoring reports and documents”. Proactively posting reports and documents will encumber already taxed personnel, and detract from their focus on making better decisions. Consider changing “reports and documents” to “results”. It may be far less taxing to agencies to post results via documentation such as annual reports versus posting each report/document. The public, if interested, can request further information via FOIA after reading the overall results.
Section II. A paragraph 1	Remove parenthesis in (42 USC 4332(E)) to be consistent with rest of guidance.
Section II.B.2	Remove “potential” from “Sources of information within the agency...should be considered in helping to both identify and monitor potential mitigation measures”. One cannot monitor a “potential” mitigation measure.

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Section II A.1	A reference of 40 CFR 1505.2 is used for “The EIS should and the ROD must, describe those mitigation measures that the agency is adopting and committed to implementing.” This guidance seems to overstate the regulation. Perhaps the reference quoted should be NEPA 40 Most Asked Questions.
Footnote 2	Thank you for approving the use of the “mitigated FONSI”. Please reconsider the location of this approval. Embedded in a footnote of a similar but different guidance document (vs. the 40 Questions themselves), doesn’t seem to be the appropriate place. It leads one to believe that this route was chosen so as not to open the 40 Questions up for public comment.
Section II.A.4	“...it may be appropriate for future NEPA analyses to address the environmental consequences of the mitigation failure to ensure it is not repeated in subsequent decisions that rely on that mitigation and that environmental baselines reflect true conditions”. It is extremely unlikely that an agencies future proposed actions are going to include activities to correct a mitigation failure that occurred 2, 10 or perhaps 15 years prior, and to suggest it is well beyond the intent of NEPA. Consider removing language that suggests addressing mitigation failure in future NEPA analyses, and simply state what you’d like agencies to think about if they do discover a mitigation measure has failed.
Appendix	Remove “fully” from “fully fund”; it doesn’t add any additional meaning to the statement.
Appendix	Consider including the most recent date of the Army regulations (2002?) so as we review this guidance in 20 years we know what version CEQ based their support on (your support may change over time).
Appendix	Has the Army or CEQ determined the effectiveness of these regulations? Is it too early to determine “effectiveness” of their regulation? Should CEQ be in complete support of the Army’s regulations at this time? Some regulators would say that the intended outcome of a regulation is often times not realized; hence, guidance is created in order to steer people towards meeting that intent. After 8 years of implementing the regulations, the Army could be experiencing challenges, and may be considering updating the regulations or supplementing them with guidance. Please include a brief summary of how effective the Army’s Mitigation and Monitoring regulations are at this point in time.
Appendix	The Appendix states that “A number of agencies already have taken actions to improve their NEPA monitoring of mitigation commitments”; however, the guidance only references the Army regulations. Rather than summarizing the Army’s regulations in such detail, consider providing examples of (and effectiveness of) other federal agency regulations CEQ is currently supportive of. Briefly identify the agency and citation, the highlights of their regulation and it’s effectiveness– the reader can then conduct an Internet search to review an agency’s regulation in more detail.
Appendix	Because the Army regulations are the only regulations that are highlighted in the guidance, it can be interpreted that the CEQ believes the Army is the only federal agency that’s meeting the intent of NEPA in regards to mitigation and monitoring. Perhaps the Army is going above and beyond the intent of NEPA - not a bad thing, but also not required.