



**PEABODY ENERGY**

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May 21, 2010

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

Dear Mr. Boling:

The Council on Environmental Quality (CEQ) recently released for comment draft guidance on mitigation and monitoring (draft guidance) of activities undertaken in a National Environmental Policy Act (NEPA) process. 75 Fed. Reg. 8046 (Feb 23, 2010). This letter sets forth Peabody Energy's (Peabody) comments on the draft guidance. The draft guidance takes the form of regulations requiring mitigation, and monitoring that leads to the address of assurance and success requirements for the mitigation measures. Further, the draft guidance addresses "binding commitments" which would require federal agencies to assume a regulatory role and impose requirements for mitigation standards and responses for mitigation failures under the NEPA process. The proposed draft guidance is inconsistent with NEPA, contrary to U.S. Supreme Court opinion, and ignores existing mitigation and monitoring requirements imposed by regulatory agencies under other federal statutes.

Peabody is the world's largest private-sector coal company, with 2009 sales of 244 million tons. Peabody's coal fuels approximately 10 percent of all U.S. electricity and 2 percent of worldwide electricity. The Company has mines in the states of Wyoming, New Mexico, Arizona, Colorado, Illinois, and Indiana. Peabody conducts coal mining operations on federal lands and has extensive experience with the NEPA process, especially the lengthy NEPA reviews that delay projects and increase project costs. Further, Peabody already is engaged in extensive mitigation and monitoring requirements under various federal statutes. The draft guidance on mitigation and monitoring is duplicative in many cases, and this has not been addressed in the draft guidance. Peabody believes the NEPA process should be less prescriptive, more streamlined, and more efficient.

This draft guidance establishes new requirements on federal agencies. NEPA is not intended to dictate a particular decision but requires federal agencies to consider the environmental impacts of their actions. The U.S. Supreme Court has repeatedly viewed the procedural nature of NEPA. The Supreme Court found in *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 356 (1989) that "other statutes may impose substantive environmental obligations but NEPA merely prohibits unformed – rather than unwise agency action." Similarly, in *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 Assn 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 ...".

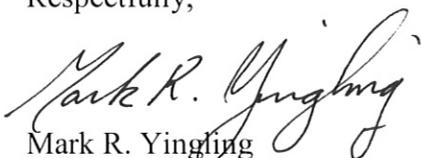
Federal agencies already use mitigation to reduce potential environmental impacts. The Bureau of Land Management (BLM) under the Federal Land Policy and Management Act (FLPMA) requires mitigation and monitoring on its actions. BLM requires an operating plan that protects public lands and a monitoring plan to demonstrate the latter. The Surface Mining Coal and Reclamation Act (SMCRA) requires extensive mitigation of all environmental impacts and monitoring through the coal mining and reclamation process to demonstrate that environmental protection and reclamation success are achieved. The Army Corps of Engineers and the Environmental Protection Agency require extensive mitigation and monitoring for disturbances to jurisdictional wetlands and streams under Section 404 of the Clean Water Act. Federal agencies already routinely use mitigation to reduce potential environmental impacts. The draft guidance does not recognize this fact.

CEQ regulations currently require discussion of potential mitigation measures. Federal agencies routinely use mitigation to reduce potential environmental impacts. The draft guidance addresses "binding commitments" which would require federal agencies to assume a regulatory role and impose requirements for mitigation standards and responses for mitigation failures under the NEPA process, and not under the specific statute for which the agency is charged with enforcement. The draft guidance takes the form of regulations requiring mitigation, and monitoring that leads to the address of assurance and success requirements for the mitigation measures under the NEPA process.

Peabody believes the NEPA process is not intended to dictate a particular decision, but requires federal agencies to consider the environmental impacts of their actions. NEPA is a procedural statute and is not intended to institute a new layer of environmental regulation. The NEPA process is already time consuming and expensive. The draft guidance on mitigation and monitoring is duplicative in many cases, and this has not been addressed in the draft guidance. The draft guidance is an additional administrative hurdle that should not be imposed. Peabody believes the NEPA process should be less prescriptive, more streamlined, and more efficient.

Peabody Energy appreciates the opportunity to comment on the CEQ's recently released draft guidance on mitigation and monitoring of activities undertaken in a NEPA process. Any questions regarding these comments can be directed to Eric Fry or Bernard Rottman, Peabody Energy (efry@peabodyenergy.com brottman@peabodyenergy.com).

Respectfully,

  
Mark R. Yingling  
Vice President Environmental