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

VIA EMAIL: Mitigation.guidance@ceq.eop.gov

RE: National Environmental Policy Act (NEPA) Draft Guidance, "NEPA Mitigation and Monitoring."

Dear Mr. Boling:

On behalf of Public Lands Advocacy (PLA), Colorado Petroleum Association (CPA), International Association of Geophysical Contractors (IAGC), Montana Petroleum Association (MPA), North Dakota Petroleum Council (NDPC) and the Petroleum Association of Wyoming (PAW), the following comments are in response to CEQ's notice published in the *Federal Register* February 23, 2010 requesting comments on its Draft Guidance for NEPA Mitigation and Monitoring. The draft guidance is intended to clarify that the environmental impacts of a proposed action may be mitigated to the point when the agency may make a FONSI determination, and thereby ease the NEPA review requirements. When the FONSI depends on successful mitigation, however, such mitigation requirements should be made public and be accompanied by monitoring and reporting. The draft guidance reinforces and also applies to monitoring and reporting of mitigation commitments agencies make in an EIS and the Record of Decision that follows.

PLA is a non-profit trade association whose members include major and independent petroleum companies as well as non-profit trade and professional organizations that have joined together to promote the interests of the oil and gas industry relating to responsible and environmentally sound exploration and development oil and gas resources on federal lands. CPA is a non-profit trade organization deeply rooted in the professional representation of the oil and gas industry before state, regional and federal governmental entities. IAGC is the international trade association representing the industry that provides geophysical services (seismic and other geophysical data acquisition, data ownership and licensing, geophysical data processing and interpretation, and associated service and product providers) to the oil and gas industry. MPA is a voluntary, non-profit trade association, whose members include oil and natural gas producers, gathering and pipeline companies, petroleum refineries and service providers and consultants. MPA's government affairs program strives to maintain a positive business climate for the petroleum industry in Montana, and its education program fosters public awareness of the industry's contributions to the state and nation. The North Dakota Petroleum Council represents nearly 100 companies involved in all aspects of the oil and gas industry in the North Dakota, South Dakota, and the Rocky Mountain Region, including exploration and production on the Dakota Prairie Grasslands. PAW is Wyoming's largest and oldest petroleum industry trade association

dedicated to the betterment of the state's oil and gas industry and public welfare. PAW members, ranging from independent operators to integrated companies, account for approximately ninety percent of the natural gas and two-thirds of the crude oil produced in Wyoming.

General

Mitigation is a valuable tool used by the oil and gas industry to avoid, minimize, or reduce adverse environmental impacts associated with proposed actions on federal lands. However, we are concerned by CEQ's interpretation of the National Environmental Policy Act (NEPA) which asserts that "*NEPA was enacted to promote efforts that will prevent or eliminate damage to the human environment.*" In fact, NEPA is a procedural statute; it does not mandate any particular result. NEPA imposes a procedural requirement that agencies take a "hard look" at environmental consequences associated with federal actions. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989) (quoting *Kleppe v. Sierra Club*, 427 U.S. 390, 410, n.21 (1976)). "Although these procedures are almost certain to affect the agency's substantive decision, it is now well settled that NEPA itself does not mandate particular results, but simply prescribes the necessary process." *Id.* (citations omitted). As such, NEPA does not constrain an agency "from deciding that other values outweigh the environmental costs." *Id.* (citations omitted).

Admittedly and appropriately, NEPA requires an agency to discuss possible mitigation measures designed to avoid adverse environmental impacts. 42 U.S.C. § 4332(C)(ii); 40 C.F.R. §§ 1502.14(f), 1502.16(h), 1508.25(b)(3) (2009). The discussion of mitigation measures in an EIS must be "reasonably complete in order to 'properly evaluate the severity of the adverse effects,' and the agency may not merely 'list potential mitigation measures.'" *San Juan Citizens Alliance v. Norton*, 586 F.Supp.2d 1270, 1290 (D.N.M. 2008) (citing *Colo. Env'tl. Coal. v. Dombeck*, 185 F.3d 1162, 1173 (10th Cir. 1999)). The Supreme Court in *Robertson v. Methow Valley Citizens Council*, considered how detailed and specific the discussion of mitigation measures must be in an EIS. After noting the distinction between "a requirement that mitigation be discussed in sufficient detail to ensure that environmental consequences have been evaluated" and "a substantive requirement that a complete mitigation plan be actually formulated and adopted," the Court refused to require "a fully developed plan that will mitigate environmental harm before an agency can act." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 352-53 (1989); see also *Holy Cross Wilderness Fund v. Madigan*, 960 F.2d 1515, 1521 (10th Cir. 1992) (quoting *Robertson*, 490 U.S. at 352-53). The United States District Court for the District of Columbia recently held, in the context of an oil and gas project, that "NEPA does not require a 'flawless' examination of mitigation, only one that is 'reasonably' complete." *Theodore Roosevelt Conservation P'ship. v. Salazar*, 605 F.Supp.2d 263, 275 (D.D.C. 2009) (citing *Citizens Against Burlington Inc. v. Busey*, 938 F.2d 190, 206 (D.D.C. 1991)).

Further, it must be recognized that NEPA does not impose any substantive requirement that mitigation measures be implemented. *Holy Cross Wilderness Fund*, 960 F.2d at 1522 (citing *Robertson*, 490 U.S. at 352-53; *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 206 (D.C. Cir. 1991) ("NEPA not only does not require agencies to discuss any particular mitigation plans that they might put in place, it does not require agencies—or third parties—to effect any.")). "[O]nce environmental concerns are adequately identified and evaluated by the agency, NEPA places no further constraint on agency actions." *Silverton*, 433 F.3d at 780 (citation omitted). When finalizing its guidance, the CEQ must remember that NEPA does not require the implementation of any specific mitigation measures or plans.

NEPA does, however, mandate that certain items be discussed in an environmental impact statement. As provided in Title I, Sec. 102 [42 USC § 4332] of NEPA, the following elements must be addressed by federal agencies in an environmental analysis:

- *The environmental impact of a proposed action is disclosed to the public,*
- *Disclose any adverse environmental effects which cannot be avoided if a proposal is implemented,*
- *Evaluate alternatives to the proposed action*
- *Identify the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity,*
- *And disclose any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.*

As pointed out above, NEPA's mandate is to include environmental consideration into Federal agency planning and actions by understanding the potential environmental impacts of proposed actions. However, nowhere is it stated in NEPA that all potential impacts to the environment must be mitigated to the point of avoidance or rectification (terms derived from the definition section of NEPA). In actuality NEPA, as provided in the above cites, requires that any remaining adverse environmental effects that cannot be mitigated be publicly disclosed in the analysis and decision documents. These are important points which MUST be recognized by CEQ and incorporated throughout the draft guidance.

However, if specific mitigation measures are identified in a NEPA analysis, it is crucial for such mitigation to be acknowledged in the effects analysis in order to clarify that the potential effects of proposed activities may be mitigated through the use of stipulations, conditions of approval and best management practices. However, current agency NEPA practices fail to acknowledge and integrate identified mitigation in the impact analyses. Only by integrating these measures into the effects analysis can an accurate portrayal of potential impacts of a proposed action be disclosed. Mitigation is clearly designed to assist proposed activities to become more compatible with other resource uses, including those in sensitive areas and must not be ignored.

II. Discussion and Guidance

- *“The draft guidance identifies mitigation as an important mechanism for agencies to use to avoid, minimize, rectify, reduce, or compensate the adverse environmental impacts associated with their actions. (40 C.F.R. § 1508.2) CEQ proposes three central goals to help improve agency mitigation and monitoring:*
 - *Proposed mitigation should be considered throughout the NEPA process and result in binding commitments consistent with agency authority.*
 - *A monitoring program should be created or strengthened to ensure mitigation measures are implemented and effective.*
 - *Public participation and accountability should be supported through proactive disclosure of, and access to, agency mitigation monitoring reports and documents.”*

Binding Commitment

- *Decisions to employ mitigation measures should be clearly stated and those mitigation measures that are adopted by the agency should be identified as binding commitments to the extent*

consistent with agency authority, and reflected in the NEPA documentation and any agency decision documents.

Comment: While it has been legally established by the Supreme Court in *Robertson* that NEPA does not, in fact, provide for binding mitigation commitments, the oil and gas industry has typically committed to mitigation measures when they are agreed upon between the project proponent and the agency and where flexibility is retained to allow for unforeseen circumstances as well as adaptive management opportunities. It is critically important that all project mitigation measures be ascertained through a partnership between the agency and the proponent to ensure they are practical and can be successfully accomplished. Once an agreement is reached between the agency and the project proponent, the proponent would likely be willing to commit to the measures.

Mitigation Failure

- *Mitigation commitments should be structured to include adaptive management in order to minimize the possibility of mitigation failure. However, if mitigation is not performed or does not mitigate the effects as intended by the design, the agency responsible should, based upon its expertise and judgment regarding any remaining Federal action and its environmental consequences, consider whether taking supplementary action is necessary. 40 C.F.R. 1502.9(c). In cases involving an EA with a mitigated FONSI, an EIS may have to be developed if the unmitigated impact is significant. If an EIS is required, the agency must avoid actions that would have adverse environmental impacts or limit its choice of reasonable alternatives during the preparation of an EIS. 40 C.F.R. § 1506.1(a).*

Comment: The draft guidance fails to acknowledge the full scope of the regulation under 40 CFR 1506, citing only subpart 1(a). However, Subpart 1(c) of this part provides for instances where action may be allowed if it:

- (1) Is justified independently of the program;
- (2) Is itself accompanied by an adequate environmental impact statement; and
- (3) Will not prejudice the ultimate decision on the program.

Clearly, NEPA provides for management flexibility that is absent from the CEQ guidance. The full scope of the regulation must be addressed rather than selectively choosing sections that support CEQ's apparent objectives.

With respect to adaptive management, goals and objectives, and ultimately decisions, should be performance based rather than fulfilling a list of prescriptions devised by the agency. Use of performance based decisions increases flexibility and promotes diversified biological outcomes. Performance based decisions would allow operators to use a number of different methods for achieving a certain goal, rather than being forced to adhere to an inflexible list of prescriptions. Additionally, the project proponent must play a significant role in defining the AM strategy; and while the agencies should seek public input for AM strategies, it is the full responsibility of the agency to determine and implement land management decisions.

Monitoring

- *“Agencies have the discretion to select the form and method for monitoring, but should be sure to identify the monitoring area and establish the appropriate monitoring system. Subsequently, an effective program should be implemented, followed by a system for reporting results... Monitoring methods include agency-specific environmental monitoring, compliance assessment or auditing*

systems and can be part of a broader system for monitoring environmental performance, or a stand-alone element of an agency's NEPA program."

Comment: Industry supports effective monitoring of effects from federal actions and the effectiveness of mitigation measures implemented for projects. In our view, it is necessary for integrated monitoring to be done on all resource activities, including grazing, mining, wildlife, vegetation management, air and water quality, in addition to oil and gas activities, to assess the effectiveness of federal decisions. With improved monitoring activities, agencies will also improve their resource database and have the ability to determine whether or not adopted measures are effective, ineffective or even excessive. Of utmost importance is that a system for tracking monitoring efforts and their results be established in conjunction with clearly stated and measurable resource management objectives. Only through implementation of a tracking system will the agency have the ability to determine whether planning decisions and mitigation measures are working or whether they require modification.

However, under current practice, cookie cutter mitigation is typically applied in decision records and then agencies require operators to bear the expense of monitoring to prove that their mitigation is working. No triggers or feedback mechanisms are defined. In the BLM's AM approach, for example, monitoring plans are designed to gather an entire universe of data without regard to cause of the effects monitored. No triggers or thresholds are defined. Instead, BLM monitors to determine the effectiveness of its mitigation decisions. The end result is that either monitoring results confirm that mitigation is effective so no change is needed, or results show a negative trend in the resource being monitored and without any real data as to cause, and mitigation is increased.

BLM has also failed to address the cost, personnel, and future commitment needs of a successful AM process. In fact, BLM often appears to view the NEPA process as an opportunity to collect any type of data, more and more at the expense of the proponents, without regard for the necessity of the data or the applicability of the data. BLM must take responsibility for developing a well-reasoned monitoring plan that does not continue to shift the cost burden to operators.

- *The responsibility for development of an implementation monitoring program depends in large part upon who will actually perform the mitigation: a cooperative non-Federal partner; a cooperating agency; the lead agency; applicant; grantee; permit holder; other responsible entity; or a combination of these.*

Comment: The guidance must require that any entity performing monitoring activities have the education, experience and knowledge required in order to effectively perform them. As such, monitoring entities must meet established qualification criteria. It would be inappropriate for the agency to engage anyone who does not have the requisite experience and education necessary to assess such important aspects of a program. Consequently, we object to the use of "public groups" in helping to determine the effectiveness of monitoring unless they meet established qualifications related to the program being monitored.

Conclusion

In conclusion, we are deeply disturbed by the approach reflected in the draft guidance because it is inconsistent with the NEPA statute and existing case law. Specifically, CEQ fails to acknowledge that NEPA is a procedural statute that does not dictate that activities must be "*mitigated to avoid, minimize, rectify, reduce, or compensate for environmental impacts*" as stated in the draft guidance. Nor does NEPA impose any substantive requirement that mitigation measures be must implemented. Rather,

NEPA requirements are limited to identifying and evaluating environmental concerns and identifying potential impacts of federal actions for public disclosure. CEQ's drastic departure from established law must be rectified in the final guidance. Due to the magnitude of inconsistencies between the law and the guidance, we strongly recommend CEQ issue revised draft guidance which addresses and recognizes the actual requirements of NEPA further public review.

We appreciate this opportunity to share our concerns and comments. Please do not hesitate to contact me if you would like to discuss our comments in greater detail.

Yours truly,



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On behalf of itself and:

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