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**SALT RIVER PROJECT
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**Ray D. Hedrick
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VIA E-MAIL (Mitigation.guidance@ceq.eop.gov)

May 24, 2010

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

Re: Draft Guidance for NEPA Mitigation and Monitoring

Dear Mr. Boling:

On February 23, 2010, the Council on Environmental Quality ("CEQ") released for public comment draft guidance on the mitigation and monitoring of activities undertaken in a National Environmental Policy Act ("NEPA") process. 75 Fed. Reg. 8046 (Feb. 23, 2010). See Memorandum from Nancy H. Sutley, CEQ Chair, to Heads of Federal Departments and Agencies, Draft Guidance for NEPA Mitigation and Monitoring (Feb. 18, 2010) (hereinafter referred to as "Mitigation Guidance"). The Salt River Project Agricultural Improvement and Power District and Salt River Valley Water Users' Association (hereinafter collectively referred to as "SRP") submits these comments on the draft Mitigation Guidance.

Statement of Interest

SRP is one of the nation's largest not-for-profit public power systems, providing electrical power to about 946,000 customers in the Phoenix area, and in certain rural areas of central Arizona. Most of SRP's power is generated from natural gas, nuclear and coal-fired power plants in Arizona, Colorado and New Mexico, which are either operated by SRP or in which SRP has an ownership interest. SRP also generates power through water delivery from SRP's dams and reservoirs, and is expanding its portfolio of other renewable energy resources. In addition to its generation facilities, SRP constructs, operates and maintains electrical transmission and distribution lines and rights-of-way throughout Arizona. More than 500 miles of these power lines are located on federal or tribal lands.

SRP is also a multi-purpose federal reclamation project authorized and constructed under the Reclamation Act of 1902, 43 U.S.C. § 371 *et seq.* Pursuant to contracts with the United States, SRP operates the Project works, which include, among other things, six dams and reservoirs on the Salt and Verde rivers in central Arizona, and one dam and reservoir on East Clear Creek in northern Arizona. Water is stored by SRP in these reservoirs for subsequent delivery to municipal, industrial and agricultural water rights and uses. The watersheds for these dams include part of several national forests. SRP's delivery system in the metropolitan Phoenix area encompasses 1,300 miles of canals and laterals serving cities, Indian communities, irrigation districts, homes and agricultural enterprises.

Actions and projects undertaken by SRP are frequently subject to federal permits or approvals and therefore subject to NEPA compliance. The most significant factor that influences the frequency of NEPA compliance is that over 70 percent of Arizona is federal or tribal land. SRP is very interested in the CEQ Guidance, as it will affect SRP operations when finalized.

Comments on the Mitigation Guidance

SRP is a member of the Utility Water Act Group ("UWAG") and joins in the UWAG comments on the draft Mitigation Guidance. SRP submits the following additional comments, which supplement or amplify the points made by UWAG.

At the outset, it is true that "one important ingredient of an [environmental impact statement] is the discussion of steps that can be taken to mitigate adverse environmental consequences." *Robertson v. Methow Valley Citizens' Council*, 490 U.S. 332, 351 (1989). The Mitigation Guidance also correctly recognizes that "mitigation at times can serve to reduce the projected impacts of agency actions to below a threshold of significance or to otherwise minimize the effects of agency action." Mitigation Guidance, at 1. But as the Supreme Court recognized in *Robertson*, it is well settled that "NEPA itself does not mandate particular results, but simply prescribes the necessary process." *Id.* at 350. As a procedural rather than substantive statute, NEPA does not contain "a substantive requirement that a complete mitigation plan be actually formulated and adopted." *Id.* 352.

Consequently, any action taken by an agency, including mitigation actions, "must fall within the agency's appropriate province under its organic statute(s)." *Natural Resources Defense Council ("NRDC") v. U.S. Environmental Protection Agency*, 859 F.2d 156, 169 (D.C. Cir. 1988). NEPA does not "expand the range of final decisions an agency is authorized to make." *Id.*

CEQ's Mitigation Guidance, the authority for which emanates from NEPA itself and not any substantive law, must therefore be narrowly focused to address procedural, rather than substantive, concerns. CEQ notes that "ongoing implementation and monitoring of mitigation measures is limited and in need of improvement." Mitigation Guidance, at 1. Whether or not this is true, SRP questions whether it is appropriate for CEQ to impose what may amount to more stringent requirements for mitigation implementation, monitoring and, in some cases, additional measures, than exist under an agency's organic statute or under the financial agreements, grants, permits or other approvals issued under authority of the agency's organic statute. Because "NEPA does not expand an agency's powers" (*NRDC*, 859 F.2d at 169), the

agency's organic statute governs the extent to which an agency may, or must, adopt and implement mitigation and monitoring measures in taking any federal action. *See Robertson, supra.*

The draft Mitigation Guidance also briefly addresses funding for mitigation. In SRP's view, any funding requirements for mitigation must likewise emanate from an agency's organic statute and not from NEPA itself. The draft Mitigation Guidance states that if mitigation is deemed necessary but mitigation funding is not available, "the agency may still be able to move forward with the proposed action once the funding does become available." Mitigation Guidance, at 4. This statement implies that an action cannot proceed until mitigation funding has been secured. Again, SRP does not believe it is proper for CEQ to impose a substantive requirement for mitigation funding pursuant to its NEPA authority, which is exclusively procedural. An agency's organic statute may (or may not) require that funding for mitigation be in place before an agency can proceed with its action. In the absence of such a requirement, NEPA cannot fill the void. The Mitigation Guidance should be limited to procedural safeguards; therefore, the final guidance should make clear that funding for mitigation is only required to the extent required by agency's organic statute or underlying substantive decision document.

SRP appreciates the opportunity to comment on the Mitigation Guidance proposed by CEQ.

Sincerely,



Ray Hedrick
Manager, Siting and Studies
Salt River Project