Council on Environmental Quality
722 Jackson Place NW
Washington DC 20503

Attn: Mr. Ted Boling, Senior Counsel

May 24, 2010

Delivered by Email and Registered Mail:

RE: Comments from the Society for Conservation Biology (SCB) on Docket ID No. fr23fe10-52, Comments on the National Environmental Policy Act (NEPA) Draft Guidance, "NEPA Mitigation and Monitoring," http://www.whitehouse.gov/administration/eop/ceq/initiatives/nepa

SYNOPSIS

The Society supports the proposed guidance and suggests that it be strengthened to require earlier and more complete assurances that mitigation relied upon by agencies be funded, monitored and revised in cooperation with independent scientific experts and authorities to ensure the continued use of the best scientific evidence and management protocols as conditions evolve.

INTRODUCTION

The Society for Conservation Biology is taking this opportunity to submit comments in response to the National Environmental Policy Act (NEPA) Draft Guidance, "NEPA Mitigation and Monitoring."

The Society for Conservation Biology is an international professional organization dedicated to promoting the scientific study of the phenomena that affect the maintenance, loss, and restoration of biological diversity. The Society's membership comprises a wide range of people interested in the conservation and study of biological diversity: resource managers, educators, government and private conservation professionals, and students make up the more than 10,000 members worldwide.

In early December 2008, SCB briefed several members of the Obama transition team and provided them with SCB's published recommendations for the Administration and the Congress. These included several steps with regard to NEPA reprinted below. We think that although these

did not address mitigation generally they do provide important contextual material which the CEQ should consider here and beyond. We commend the CEQ for proposing reforms for its guidance on categorical exclusions and on climate change as we recommended.

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From the SCB's December 2008 transition recommendations--

National Environmental Policy Act (NEPA)

Implementation of the Act would benefit from the following actions by the Council onEnvironmental Quality (CEQ).

• Issue guidance to all federal agencies on rigorous, scientifically credible analysis of the effects of climate change and the effects of alternative proposed programs, projects, and other actions in mitigating net greenhouse gas emissions and adapting to climate change within the context of NEPA compliance.

• Reestablish NEPA at the programmatic level to facilitate early assessment of impacts and alternatives that can improve the ability of science to inform decision-making.

• Initiate a government-wide review of conflict of interest and ethics policies that pertain to federal agencies' selection of contractors for preparation of environmental impact statements and exclude any contractors that have conflicts of interest, financial or otherwise.

• Review the categorical exclusions of resource management, transportation, and other agencies to ensure that the only proposed federal actions excluded from documented analysis are those that would not, individually or cumulatively, have significant environmental effects.

• Consider expanding the scope of NEPA guidance and expanding cooperation with states to capture earlier in the process actions that eventually will entail Federal actions or support, such as adding sources for interstate electric supplies in order to identify and better control significant sources of greenhouse gas emissions.

BACKGROUND

CEQ noted the following in its proposed guidance, among other things:

> Mitigation is an important mechanism for agencies to use to avoid, minimize, rectify, reduce, or compensate the adverse environmental impacts associated with their actions.[1] Proposed mitigation should be considered throughout the NEPA process, and 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.[2] Further, a monitoring program should be created or strengthened to ensure mitigation measures are implemented and effective.[3] Finally, public participation and agency accountability should be supported through proactive disclosure of, and access to, agency mitigation monitoring reports and documents.[4]

The Society offers the following points in regard to mitigation, monitoring and public participation as addressed in the draft Guidance:

1. Mitigation

With regard to the text on page four, first full paragraph two, CEQ says that the action could be delayed pending mitigation funding but in the case of significant delay, the agency should check to ensure that conditions have not changed substantially before relying upon dated mitigation options.

a. If a Federal Agency Uses Outside Experts to Develop Mitigation Implementation, the Outside Experts Should Be Independent.

As the draft Guidance states in the following:

> Agencies necessarily and appropriately rely upon the expertise and experience of their professional staff in determining mitigation needs, appropriate mitigation plans, and mitigation implementation. In making those determinations, the agency staff may refer to outside resources when establishing mitigation requirements in order to ensure the efficacy of the desired outcomes, including sufficient attention to ecosystem functions and

[1] 40 C.F.R. § 1508.2.
[2] Nancy H. Sutley, Memorandum for Heads of Federal Departments and Agencies, DRAFT GUIDANCE FOR NEPA MITIGATION AND MONITORING at 2 (February 18, 2010), [hereinafter *the draft Guidance*].
[3] The draft Guidance at 2.
[4] The draft Guidance at 2 suggests such support through access and SCB adds that financial help would expedite that work.

values protected or restored by mitigation. A Federal agency may use outside experts when developing the mitigation and monitoring. The individuals helping to develop the measures and plans should have expert knowledge, training, and experience relevant to the resources potentially affected by the actions and, if possible, the potential effects from similar actions.[5]

The Society urges CEQ to make clear that outside experts must be independent and have no conflicts of interest.

b. Methods to Insure Mitigation Implementation Should Include Rewards for Mitigation Results That Exceed Their Targets.

Successful mitigation efforts that surpass their goals should be rewarded. The draft Guidance states, "Methods to ensure implementation should include, as appropriate to the agency's underlying authority for decision making, appropriate conditions in financial agreements, grants, permits or other approvals, and conditioning funding on implementing the mitigation."[6]

The Society suggests that extraordinarily successful mitigation efforts by publicly-traded entities whose permit or other applications triggered the mitigation be rewarded. For example, civil service retirees and Federal employees now have a fairly narrow pool of investment options. Top-performing entities (in terms of exceeding mitigation goals and other environmental performance) could be recommended by the CEQ or affected agencies for inclusion in a socially and environmentally responsible portfolio for civil service retirement investment purposes. CEQ and other agencies could produce a report for OPM, Civil Service retirees, the Administration and investors in general on these more environmentally responsible entities and ways that they might be considered for a Federal "SRI" pool or portfolio and for consideration in procurement decisions. This might be addressed under the National Adaptation Program report that the President called for in his Executive Order of October 5, 2009, which report is due by October 5, 2010.

c. Costs of Unmitigated Impacts Should Be Part of the EA and the FONSI.

The draft guidance document states that NEPA provides that compliance can be accomplished with an Environmental Assessment (EA) coupled with a Finding of No Significant Impact (FONSI)[7] and that in many such cases, the basis for not preparing the EIS is the commitment to perform those mitigation measures identified as necessary to reduce the environmental impacts of the proposed action to a point or level where they are determined to no

[5] The draft Guidance at 2.
[6] The draft Guidance at 4.
[7] The draft Guidance at 3.

longer be significant. The guidance states that that commitment should be presented in the FONSI and any other decision document.[8]

SCB recommends that the commitment to perform the mitigation measures should be a binding contract made enforceable on behalf of third party beneficiaries as represented by affected persons such as conservation or scientific groups whose members are likely to be harmed by any failure to successfully implement such measures.

d. A Substantial Mitigation Failure Must Trigger a Response From the Agency.

First, the draft Guidance currently states that, "A substantial mitigation failure, in either implementation or effectiveness, should trigger a response from the agency."[9] The Society takes the position that a substantial failure ***must*** trigger a response and that if the agency has too few personnel to monitor compliance then a trust fund should be established to pay for reports from independent monitors to the public and the parties and agencies affected.

Second, a response to a substantial mitigation failure should not be qualified by whether there is "any remaining Federal action."[10] The draft Guidance states the following:

> The manner of response [to a substantial mitigation failure] depends on whether there is any remaining Federal action and, if so, the opportunities that remain to address the effects of mitigation failure. In those cases where there is no remaining agency action, and the mitigation has not been effective or fully implemented, then 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.[11]

The Society argues that, if there is a substantial mitigation failure, then there is still Federal agency responsibility as a matter of consistency with NEPA's policies, so it should be treated as a continuing action, particularly when it affects related duties such as the ESA Section 7(a)(1) duty to use agency authority to help in the recovery of listed species. Therefore, methods such as those noted in the first full paragraph on page four as well as performance bonds should be used by the agency to protect against both failure to implement and unsuccessful implementation.

It is illogical to inextricably tie the goals of the mitigation to the initial Federal agency action's life-span, when the mitigation may have little, if anything, to do with the action's life-span. Said another way, if a short-term Federal action that substantially fails in its mitigation efforts, it is contrary to the purpose of the NEPA to abandon the environmental issues simply

[8] The draft Guidance at 3.
[9] The draft Guidance at 5.
[10] The draft Guidance at 5.
[11] The draft Guidance at 5.

because the initial Federal action is no longer ongoing if the final Federal compliance with NEPA or other Federal responsibilities (e.g. Trust responsibilities, ESA Section 7(a)(1) duties to assist in the recovery of listed species, etc.,) depended upon effective mitigation.

Third, if mitigation has not been effective or fully implemented, then further NEPA analyses ***should*** take place because the approval of the mitigated FONSI is contingent upon the success of the mitigation. To have a finding of no significant impact based on mitigation (which reduces otherwise significant impacts), and subsequently the mitigation fails, then by simple logic the impacts are probably now significant. This is an additional argument against the concept that the Federal action somehow "ends", although the consequence of the Federal action, due to the failure of the mitigation, is a now-significant impact on the environment. In other words, the active role may end but the responsibility cannot, any more than torts of nuisance do not end once the activity creating the nuisance ends.

Fourth, if mitigation has not been effective or fully implemented, then further NEPA analyses ***should clearly*** address the environmental consequences of the mitigation failure to ensure it is not repeated in subsequent decisions that rely on that mitigation. To not determine why the mitigation effort failed undermines the whole effort. Requiring further analysis sends a clear message that mitigation success is expected, and anything less is unacceptable.

Fifth, the Society recommends that EISs should outline any recourse available if there is failure to properly mitigate. It should enumerate the applicable Federal, State, and local law that could provide relief. This could also include local land use law and nuisance law.

Sixth, the Society recommends that in order to avoid mitigation failure as a result of insufficient funding, a trust fund be established to hold performance bonds paid by the lead agency, contractor, permittee or combination (whoever is responsible for the execution of the mitigation plan). The bond should be released upon verifiable successful completion of the mitigation plan. The fund should be overseen by an independent, paid Master. In addition, if the permittee can verify a pre-determined net increase of environmental health, then the permittee should be rewarded for that effort with any interest or earnings achieved through the investment or depositing of the performance bond above the bonded amount posted or the pre-agreed interest rate and through such other means as may be available such as recommendation for inclusion in a Federal Socially and Environmentally responsible investment pool.

Although the CEQ is issuing Guidance, the frequent use of "should" can be ambiguous to the detriment of NEPA. Instead, please revise the guidance to read "shall, in a manner appropriate to the agency's operations", or specify the kinds of situations in which exemptions or exceptions could be provided.

2. Monitoring

a. If a Federal Agency Uses Outside Experts to Develop Monitoring Implementation, the Outside Experts Should Be Independent.

CEQ notes the following:

Implementation monitoring is designed to ensure that the mitigation measures are being performed as described in the NEPA documents and related decision documents.[12] 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.[13] The lead Federal agency should ensure that responsible parties, mitigation requirements, and any appropriate enforcement clauses are included in documents such as authorizations, agreements, permits or contracts. [14] [15] Monitoring responsibility can be shared with joint lead or cooperating agencies or other entities so long as the oversight is clearly described in the NEPA documents or associated decision documents. [16]

SCB Recommends:

As pointed out above, the Society urges transparency and an affirmative process to avoid conflicts of interest by those performing the monitoring. Transparency can suffice when conflicts are not direct, current or significant. Law firms use conflicts checks as a standard procedure, of course. Those with monitoring responsibility should be identified in easily accessible public records.

3. Public Participation

SCB recommended to the Obama Transition team and to Congress that they realize that transparency was necessary but not sufficient to garner the active and detailed engagement in agency proceedings and in the consideration of NEPA documents. Rather than assume that the public or public interest or scientific societies have the time and money to match that of parties with economic interests potentially affected by agency actions, agencies should take such steps as may be necessary to secure expert, independent assistance. Toward that end, SCB recommended that the Congress and the Administration work together to restore a balance that has been lost in this process and --

• Resume the practice developed under Executive Order 12044, which directed all agencies to ensure that opportunity exists for early public

[12] The draft Guidance at 5.
[13] The draft Guidance at 5.
[14] Such enforcement clauses, including appropriate penalty clauses, should be developed based on a review of the agency's statutory and regulatory authorities.
[15] The draft Guidance at 5.
[16] The draft Guidance at 5.

participation in the development of agency regulations. This included paying not-for-profit organizations and individuals for providing substantial scientific evidence in administrative proceedings that would be unlikely to be available but for that compensation. Expand this practice with regard to science used in successful litigation to uphold or improve environmental and scientific standards.

The Federal Energy Regulatory Commission adopted such procedures to ensure balanced representation and a full evidentiary record. Related recommendations for notice, selection of witnesses, and so forth were presented in reports commissioned by DOE and developed by the Energy Policy Task Force of the Consumer Federation of America and the law firm Boasberg, Hewes, Finklestein and Klores, including "Funding public participation in Department of Energy proceedings: a report prepared by the Energy Policy Task Force." Berman, E., Boasberg, T., 1 September 1978.[17]

a. If a Federal Agency Uses Outside Experts to Develop Mitigation and Monitoring Implementation, the Outside Experts Should Be Made Known to the Public.

As mentioned above, the Society urges transparency to help avoid conflicts of interest in those charged with mitigation and monitoring responsibilities.

b. The Public Availability of EA/FONSI Documents Is Inadequate.

40 C.F.R. § 1506.6 requires agencies to involve the public in implementing their NEPA procedures, and this includes public involvement in the preparation of EAs and FONSIs.[18] These are public "environmental documents" under Section 1506.6(b), and, therefore, agencies must give public notice of their availability.[19] Currently, a combination of methods may be used to give notice.[20]

The Society suggests that CEQ develop its own database for access to these documents in addition to the individual agencies' efforts. A central database will allow for more

[17] The reports prepared by Boasberg et al., for the DOE set out criteria and a process for determining which persons would be likely to provide unique expertise to the agency that would help ensure a full basis upon which to make a decision and proper follow-through. The reports also outlined ways to ensure that such evidence would not be likely to be redundant or available without charge to the agencies affected. This process was curtailed by Congress when it incluced in an appropriations bill a rider banning the practice, despite its approval by the Comptroller General. The rider was sponsored by Rep. Mollohan (D-W.Va.) -- the father of the current Member of the same name.) Rep. Mollohan was defeated in the primary election of May 2010.
[18] Forty Most Asked Questions Concerning CEQ's NEPA Regulations, 46 Fed. Reg. 18026 (March 23, 1981), *as amended*, 51 Fed. Reg. 15618 (April 25, 1986), *available at* http://ceq.hss.doe.gov/nepa/regs/40/30-40.HTM, *accessed* May 2010.
[19] Forty Most Asked Questions, Question 38.
[20] Forty Most Asked Questions, Question 38.

comprehensive analysis of cumulative effects. The database should be coordinated with other agencies and made available to the public. If stored (or searchable) by geographic location, a lead agency could quickly assess all the other federal actions and proposed actions in the surrounding area, being better able to calculate environmental impacts because the agency would have a clearer understanding of the current conditions.[21]

Thank you for considering our comments.

Sincerely,

John M. Fitzgerald, J.D.,
Policy Director
Society for Conservation Biology

Lyn Arnold, J.D.
Policy Associate
Society for Conservation Biology

[21] In fact, Section 4366a of title 42 of the U.S. Code, enacted in the Environmental Research Geographic Location Information Act" of 1990 once required that EPA develop and maintain for ten years a similar data base indexed by geographic location but that provision expired in the fall of 2000.