

May 24, 2010

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

Re: Comments of Spectra Energy Corp on the National Environmental Policy Act Draft Guidance on Mitigation and Monitoring, 75 Fed. Reg. 8046 (Feb. 23, 2010)

To Whom It May Concern:

Provided below are the comments of Spectra Energy Corp (“Spectra Energy”) on the Council on Environmental Quality’s (“CEQ”) draft guidance on mitigation and monitoring under the National Environmental Policy Act (“NEPA”).¹

Spectra Energy owns and operates a large and diversified portfolio of natural gas-related energy assets and is one of North America’s premier midstream natural gas companies. For close to a century, Spectra Energy and its predecessor companies have developed critically important pipelines and related energy infrastructure connecting natural gas supply sources to premium markets. Spectra Energy operates in three key areas of the natural gas industry: transmission and storage; distribution and gathering; and processing. Spectra Energy’s U.S. pipeline systems consist of more than 14,300 miles of transmission pipelines, with seven transmission system components located in 26 states. These operations include Texas Eastern Transmission, L.P.; Algonquin Gas Transmission, L.L.C.; East Tennessee Natural Gas, L.L.C.; Maritimes & Northeast Pipeline, L.L.C.; and Ozark Gas Transmission, L.L.C. Additionally, Spectra Energy has significant underground natural gas storage operations.

Spectra Energy’s core customers are local distribution companies, marketers and traders, natural gas producers, gas-fired electric generators, and residential, commercial, and industrial facilities. Spectra Energy provides infrastructure that is vital to meet the Nation’s energy demands, and the company is constantly developing new projects to keep up with the growing demand for natural gas as well as ensuring its existing pipelines are properly maintained and functioning. In particular, Spectra is currently spending over \$1 billion per year on new capital projects.

¹ 75 Fed. Reg. 8046 (Feb. 23, 2010); Memorandum from Nancy H. Sutley, CEQ Chair, to Heads of Federal Departments and Agencies, Draft Guidance for NEPA Mitigation and Monitoring (Feb. 18, 2010) (hereinafter “Mitigation Memorandum”).

The siting, construction, and operation of interstate natural gas pipelines is regulated by the Federal Energy Regulatory Commission (“FERC”) pursuant to the Natural Gas Act (“NGA”).² Prior to the commencement of new construction or expansion, the FERC must issue a Certificate of Public Convenience and Necessity (“Certificate”) finding that there is a need for the project and that it is in the public interest. The issuance of a Certificate is a “major federal action” under NEPA, and thus, as part of the Certificate process, the FERC conducts a thorough review of the proposed pipeline route and environmental impacts under NEPA. Pursuant to the Energy Policy Act of 2005, which amended the NGA, the FERC is designated as the lead agency for purposes of NEPA review of interstate natural gas pipeline projects.³

As part of the NEPA process, the FERC may require Spectra to undertake mitigation measures, including monitoring programs, for impacts associated with the construction, operation, and maintenance of its pipelines. FERC often relies on other federal agencies with jurisdiction over the project to provide the substantive mitigation and monitoring standards for the environmental resources within that agency’s jurisdiction and expertise. For example, Spectra Energy’s natural gas projects can run several hundred miles and temporarily impact thousands of water bodies and wetlands. As such, Spectra must frequently obtain permits from the U.S. Army Corps of Engineers (“Corps”) under the Clean Water Act (“CWA”) for, among other things, the discharge of dredged or fill material into navigable waters. The Corps has authority pursuant to the CWA to impose mitigation measures for impacts to aquatic resources, and it has promulgated detailed regulations to implement this authority, as recognized by CEQ in the Mitigation Memorandum. Because the Corps has superior knowledge of the mitigation and monitoring measures appropriate for impacts to aquatic resources, FERC often relies on these mitigation measures as part of the NEPA process and conditions permits issued to Spectra Energy on compliance with these measures. Thus, Spectra Energy stands to be impacted by the CEQ’s proposed guidance on NEPA mitigation and monitoring requirements.

I. Executive Summary

As an initial matter, CEQ needs to affirm clearly that the Mitigation Memorandum is non-binding guidance and does not modify or superseded existing NEPA regulations. To this end, Spectra Energy has proposed language for CEQ to insert in the Memorandum to clarify its intended use.

Spectra Energy believes that CEQ may be exceeding the bounds of its authority under NEPA with its seemingly unqualified statement that NEPA documents and agency decision documents should include measureable performance standards for mitigation.

² 15 U.S.C. §§ 717 *et seq.* (2008); 18 C.F.R. § 157 (2008).

³ Pub. L. 109-58, 119 Stat. 594 (2005) (codified as amended in scattered sections of 42 U.S.C.).

Such standards are not required by CEQ regulations or longstanding case law. CEQ should qualify its statement by noting that measureable performance standards for mitigation are required only if and to the extent that a federal agency's organic statute and regulations require or authorize them.

Moreover, CEQ should acknowledge that federal agencies, such as the FERC, may rely on mitigation measures developed and imposed by another agency with greater expertise in a particular environmental resource during the NEPA process.

Finally, CEQ should recognize in the Mitigation Memorandum that supplemental NEPA action for mitigation failure will be required on an infrequent basis and that, when supplemental action is necessary under NEPA, it should focus solely on alternatives to the failed mitigation.

Each of these points is discussed in greater detail below.

II. CEQ needs to clearly affirm that the Mitigation Memorandum is only guidance.

CEQ characterizes the Mitigation Memorandum as “draft guidance,” as opposed to an amendment to CEQ's NEPA regulations. Mitigation Memorandum at 1; 75 Fed. Reg. at 8046-47. The distinction is important because only legislative rules, promulgated in accordance with the procedures set forth in the Administrative Procedure Act, 5 U.S.C. §§ 500 *et seq.*, have the force and effect of law. *See, e.g., Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1020-21 (D.C. Cir. 2000). Guidance documents, on the other hand, are not binding on Federal agencies and do not modify or supersede existing legislative rules. *Id.* Importantly, guidance documents do not create rights or obligations, and legal consequences do not flow from such documents. *Id.* at 1022.

Although CEQ characterizes the Mitigation Memorandum as guidance, several aspects of the memorandum may be viewed by federal agencies or members of the public as obligatory and binding on federal agencies -- the hallmarks of a legislative rule. For example, the memorandum states that mitigation requirements “should be identified as binding commitments” and “should be carefully specified in terms of measureable performance standards to the greatest extent possible.” Mitigation Memorandum at 2. Additionally, the memorandum states that agencies should prepare monitoring programs for both implementation and effectiveness of mitigation measures. Although these statements may have been intended differently, CEQ's use of specific standards and types of mitigation requirements may be viewed as prescriptive, and agencies may feel compelled to follow such suggestions.

In the interest of avoiding confusion and clarifying the role of the Mitigation Memorandum, CEQ needs to clearly affirm that the Memorandum is only guidance and not an amendment to CEQ's NEPA regulations. Furthermore, CEQ needs to affirm that, as a guidance document, the Memorandum is not binding on Federal agencies and does not modify or supersede CEQ's NEPA regulations or any agency's regulations

implementing NEPA, which have been tailored for that agency's specific programs and duly adopted by the agency.

To that end, CEQ could conclude the Mitigation Memorandum by inserting the following statement:

This guidance represents CEQ's current thinking on this topic. It does not create or confer any rights on any person and is not binding on any agency or member of the public. This guidance is not intended to and does not supersede CEQ NEPA regulations or any agency regulations implementing NEPA.⁴

Although such a statement would not be legally dispositive of the nature of the Mitigation Memorandum, the statement would affirm CEQ's intended use of the Memorandum to federal agencies and the public.

III. Measurable performance Standards are not required under CEQ regulations or NEPA case law.

The Mitigation Memorandum indicates that mitigation goals "should be carefully specified in terms of measurable performance standards to the greatest extent possible." Mitigation Memorandum at 2, 4. The suggestion that NEPA documentation should include "measurable performance standards" or any other detailed mitigation requirements, including monitoring programs, is not supported by CEQ regulations nor longstanding case law.

CEQ's NEPA regulations simply require that agencies include "appropriate mitigation measures" in defining the scope of an environmental impact statement ("EIS") and in discussing alternatives to the proposed action. 40 C.F.R. §§ 1508.25(b), 1502.14(f). The regulations do not require measurable performance standards, and the Supreme Court of the United States has held that such standards are not required for compliance with NEPA. In *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 352-53 (1989), the Court dismissed the argument that NEPA requires "a fully developed plan that will mitigate environmental harm before an agency can act," holding that "[t]here is a fundamental distinction ... between a requirement that mitigation be discussed in sufficient detail to ensure that environmental consequences have been fairly evaluated, on the one hand, and a substantive requirement that a complete mitigation plan be actually formulated and adopted, on the other." Since a fully developed mitigation plan is not required to comply with NEPA, then a fortiori the specification of measurable performance standards is not required either. Moreover, as NEPA is a

⁴ This statement is patterned after several elements in a suggested disclaimer for guidance documents set forth in the "Final Bulletin for Agency Good Guidance Practices" issued by the Office of Management and Budget in January 2007.

procedural rather than substantive statute, these substantive and prescriptive performance standards cannot be justified by the authority conferred by NEPA.

Under the Court's holding in *Robertson*, CEQ may be exceeding the bounds of its authority under NEPA with its seemingly unqualified statement that environmental impact statements and agency decision documents should include measurable performance standards for mitigation. In order to assure consistency with the ruling in *Robertson*, CEQ should qualify its statement by noting that measurable performance standards are required for environmental resources only if a federal agency's organic statute and regulations require or authorize them, and that the content and specificity of those standards, if authorized, must be determined by the agency's organic statute and regulations, not by NEPA.

IV. CEQ needs to acknowledge that a federal agency may rely on mitigation measures developed and imposed by another agency.

The Mitigation Memorandum indicates that "mitigation goals should be stated clearly" in NEPA documentation and in agency decision documents, and that such goals should be defined in terms of "measureable performance standards to the greatest extent possible." Mitigation Memorandum at 4. The Memorandum further states that agency decision documents should identify the duration of mitigation measures, and how and when such measures will be implemented. *Id.*

These proposals imply that an agency should have a fully developed mitigation program prior to the completion of its NEPA documentation and prior to taking any action under a decision document. As discussed above, this implication is not supported by longstanding NEPA case law, which holds that an agency is not required to formulate or adopt a mitigation program in order to comply with NEPA. *Robertson*, 490 U.S. at 352-53.

Moreover, as a practical matter, an agency may not have formulated mitigation measures or determined when and how those measures should be implemented before it is ready to take action. This is often the case where multiple agencies have jurisdiction over a project, and the agency with primary jurisdiction intends to rely on mitigation measures for impacts to a specific environmental resource that are developed and imposed by the agency with jurisdiction over those impacts. In such a case, the agency with primary jurisdiction may have completed its permitting process, including its NEPA review, and may be prepared to take action, even though the second agency has not yet completed its permitting process or the development of mitigation requirements.

Spectra Energy often encounters this situation when seeking permits for the construction of new interstate natural gas pipelines or the operation or maintenance of existing pipelines. The FERC, as the agency with primary jurisdiction, generally relies on mitigation measures developed and imposed by other agencies for impacts to environmental resources within those agencies' jurisdiction and expertise. The Corps, for example, has jurisdiction over impacts to aquatic resources pursuant to the CWA. If the

construction, operation or maintenance of an interstate pipeline results in impacts to aquatic resources, Spectra Energy must obtain a permit from the Corps, and the Corps may impose mitigation and monitoring measures for those impacts pursuant to its authority under the CWA. Because the Corps has extensive knowledge and experience with respect to aquatic resources and the mitigation measures that are appropriate for addressing impacts to those resources, the FERC generally relies on the mitigation measures imposed by the Corps to satisfy its mitigation requirements under NEPA.

In certain cases, due to differences in the permitting procedures employed by the FERC and by the Corps and in the timing of jurisdictional impacts, the FERC may have completed its NEPA documentation and may be ready to take action before the Corps has determined the appropriate mitigation measures for impacts to aquatic resources.⁵ In such a case, the FERC's NEPA documentation would discuss its reliance on the Corps's mitigation measures, but it would not include "clearly stated" mitigation goals as proposed by CEQ in the Mitigation Memorandum.

CEQ should acknowledge in the Mitigation Memorandum that federal agencies may rely on mitigation measures developed by other agencies with greater expertise in NEPA documentation and decision documents. This type of cooperation between agencies is not only efficient, but it also results in more appropriate and effective mitigation measures, as the agency with the greater experience and knowledge of an environmental resource is responsible for developing the mitigation measures for that resource. Moreover, cooperation on mitigation measures between federal agencies and state and local agencies furthers the mandate in CEQ's regulations that such agencies cooperate "to the fullest extent possible to reduce duplication between NEPA and State and local requirements." 40 C.F.R. § 1506.2.

Furthermore, CEQ should acknowledge that, pursuant to the Supreme Court's holding in *Robertson*, a federal agency that relies on mitigation measures developed and imposed by another agency may take action pursuant to its completed NEPA process and decision document, even if such mitigation measures have not yet been finalized. This is critically important to Spectra Energy, which typically performs pipeline construction and maintenance activities on tight schedules designed to ensure the safety, security, and reliability of the natural gas pipeline network. The ability of the FERC to take action, despite the fact that the mitigation measures it is relying on have not been finalized, is

⁵ Despite the fact that the mitigation measures have not been fully developed, the general types and amount of mitigation required by the Corps are known to the FERC and to other interested parties, because, as the CEQ recognized in the Mitigation Memorandum, the Corps has very detailed regulations governing its mitigation and monitoring program. *See* Mitigation Memorandum at 7 (The Corps's regulations "are notable for their comprehensive approach to ensuring that mitigation proposed in the NEPA review process is completed and monitored for effectiveness.").

necessary to keep such activities on schedule.⁶ Delays in the construction and maintenance of pipeline facilities are not only costly to pipeline companies and consumers, but they also undermine the industry's ability to provide secure and reliable energy supplies needed to meet current and future energy demand while protecting both human health and environmental concerns.

V. Supplemental NEPA action for mitigation failure will be required on an infrequent basis and, where necessary, should focus solely on mitigation alternatives.

A. Mitigation failure will necessitate supplemental action under NEPA on an infrequent basis.

The Mitigation Memorandum suggests that federal agencies may need to take supplementary action under NEPA if mitigation adopted pursuant to the NEPA process fails to be implemented or to be effective. Mitigation Memorandum at 4. In doing so, the Mitigation Memorandum implies that any mitigation failure will automatically trigger further NEPA review and documentation, including the preparation of an EIS, and require the cessation of federal action. *See id.* (“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.”). CEQ should recognize that, although mitigation measures may occasionally fail to satisfy all of the specified performance standards or to fully mitigate certain environmental effects as designed, such technical failure seldom will result in “significant” impacts that necessitate the preparation of supplemental NEPA documentation. In many cases, mitigation measures that fail to meet a specific performance standard nevertheless may provide a substantial benefit to the environmental resource at issue, such that the overall environmental impacts remain “insignificant.”

In the CWA section 404 context, for example, mitigation measures for wetland impacts generally are required to meet performance standards related to hydrology, soils, and/or vegetative cover. A common performance standard used in determining the success of mitigation measures -- such as wetlands creation, restoration, or enhancement projects -- is vegetative cover in each stratum of at least 80 percent. If a wetlands creation, restoration, or enhancement project results in 70 percent vegetative cover in one stratum after the designated number of growing seasons, it does not technically satisfy this performance standard. However, most of the mitigation goals of the project are being served, and the benefit of a wetland attaining 70 percent vegetative cover is

⁶ The final agency action taken by the FERC prior to the finalization of mitigation measures is the issuance of the Certificate of Public Convenience and Necessity. The Certificate restricts Spectra Energy's ability to perform construction activities until other permits have been issued, including permits with binding mitigation requirements. Once these permits have been obtained, the FERC issues a final authorization to proceed, which permits Spectra Energy to perform construction activities.

substantial. In this case and similar cases, the project's impacts on the resource at issue, as mitigation, will continue to be "insignificant," and the federal agency would not be required to prepare supplemental NEPA documentation because the technical mitigation failure has not led to significant changes in the proposed action or significant new circumstances. 40 C.F.R. § 1502.9(c).

Additionally, CEQ should recognize that supplemental NEPA action will not be required in many cases of mitigation failure because the federal agency action will be complete by the time the mitigation failure is evident. This is especially true for natural gas pipeline construction and maintenance projects, because mitigation measures for these projects generally cannot be implemented until construction or maintenance activities are complete. In the case of new pipeline construction, for example, mitigation measures may be required for impacts to soils, vegetation, endangered and threatened species, and aquatic resources, if any, resulting from construction activities such as land clearing, earth moving, and filling of wetlands or waters. Because the mitigation measures for these impacts, which are largely temporary, are generally restorative and take place at the construction site, they cannot be implemented until the construction activities are complete. As a result, in most cases, the federal agency action that results in impacts to the environment (here, the authorization of construction activities) is complete before any mitigation is even started, and thus, it is long complete before mitigation failure is evident.

Moreover, even if construction activities are not complete prior to the commencement of mitigation measures, it may take several growing seasons after the completion of the mitigation to determine whether or not the mitigation has been successful. In the context of wetland restoration measures, for example, performance standards for vegetative cover may not be applicable for the first two to five years after wetland restoration, because the vegetation needs time to grow and establish its viability. Thus, by the time the mitigation measures can be measured against applicable performance standards, construction activities may be completed or so far advanced that the preparation of supplemental NEPA documentation would not provide meaningful information for the decisionmaking process, as no federal agency decisions with practical effect remain to be made.

For these reasons, CEQ should clarify in the Mitigation Memorandum that mitigation failure will necessitate supplemental action under NEPA on an infrequent basis.

B. CEQ should acknowledge that supplemental NEPA action is not required for mitigation failure where the impacts resulting from an agency action have already occurred.

The Mitigation Memorandum notes that, when there is mitigation failure, "[t]he manner of response depends on whether there is any remaining Federal action and, if so, the opportunities that remain to address the effects of mitigation failure." Mitigation Memorandum at 4. In cases where there is "no remaining agency action," CEQ proposes

that agencies address the environmental consequences of the mitigation failure in subsequent NEPA documentation for actions that rely on the same type of mitigation. *Id.*

Spectra Energy agrees that the appropriate response for mitigation failure in circumstances where there is no remaining agency action is the discussion of such failure in NEPA documentation for future agency actions. Federal courts, including the Supreme Court of the United States, have recognized that, where no “major Federal action” remains to occur, supplementary actions under NEPA are not required. *See, e.g., Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 73 (2004).

Spectra Energy believes that this response also is appropriate where all meaningful impacts resulting from an agency action have already occurred, even if the action is not fully complete. In this circumstance, construction on the agency action has advanced to a point where there are no practical alternatives to the action, and thus, requiring an agency to prepare a supplemental EIS for mitigation failure would serve no meaningful purpose. Federal courts have repeatedly recognized that the informational purpose of NEPA is not served by requiring agencies to prepare NEPA documentation when the impacts to be considered in that documentation have already occurred. *E.g., Morris County Trust for Historic Preservation v. Pierce*, 714 F.2d 271, 277 (3d Cir. 1983) (where an irretrievable commitment of resources has already produced most of the environmental harm that a NEPA document would consider, an agency is not required to prepare a NEPA document, even if the agency action is not wholly complete).

Because preparing a supplemental EIS for mitigation failure when an agency action is advanced to the point that most, if not all, of the impacts from the action have already occurred would not serve the informational purpose of NEPA, CEQ should recommend that agencies evaluate the consequences of such mitigation failure in NEPA documentation for future federal actions that rely on the same type of mitigation.

C. Supplemental NEPA documentation, if necessary, should focus on alternatives to the failed mitigation measures only.

In the event that supplemental action under NEPA is appropriate and necessary because mitigation failure results in significant effects on the environment and substantial federal action remains to be completed, the alternatives to be evaluated in the supplemental NEPA documentation should be limited to mitigation alternatives, not alternatives to the completion of the proposed action. This limitation of alternatives is appropriate because the new circumstance or information requiring supplemental action (*i.e.*, the mitigation failure) solely relates to the mitigation of the effects of the proposed action, not the purpose of the proposed action, the underlying effects of the proposed action, or the alternatives to the proposed action as a whole.⁷ Thus, Spectra Energy urges

⁷ Moreover, once significant construction has commenced and is proceeding on a federal action, as a practical matter, the agency no longer has the same alternatives as existed prior to initiation of the federal action.

CEQ to clarify in the Mitigation Memorandum that supplemental NEPA documentation prepared in response to mitigation failure should evaluate alternatives to the failed mitigation measures only, and that the actions to be avoided by the federal agency under 40 C.F.R. § 1506.1(a) should be those actions that preclude or limit the choice among reasonable mitigation alternatives, not the actions needed to complete the proposed federal action.

VI. Conclusion

We appreciate the opportunity to provide these comments on the draft NEPA guidance regarding mitigation and monitoring. Please feel free to contact me at (617) 560-1377 if you have questions or need additional information.

Sincerely,

A handwritten signature in black ink that reads "Patrick J. Hester". The signature is written in a cursive, slightly slanted style.

Patrick J. Hester
Associate General Counsel
Spectra Energy Corp