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May 24, 2010

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Via Electronic Mail

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

Re: Comments of the Utility Water Act Group on CEQ National Environmental Policy Act (NEPA) Draft Guidance "NEPA Mitigation and Monitoring," 75 Fed. Reg. 8046 (Feb. 23, 2010)

Dear Sir:

Enclosed are written comments of the Utility Water Act Group on CEQ's proposed guidance on mitigation and monitoring requirements under NEPA, 75 Fed. Reg. 8046 (Feb. 23, 2010).

Yours very truly,

A handwritten signature in black ink that reads 'Ed Keith' followed by the initials 'HBB'.

Ed Keith
Chairman, 404 Committee Utility Water Act Group



**Comments of the Utility Water Act Group on
Draft Guidance for NEPA Mitigation and Monitoring**

75 Fed. Reg. 8046 (Feb. 23, 2010)

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I. STATEMENT OF UWAG INTEREST

The Council on Environmental Quality (“CEQ”) has released for public comment draft guidance on the mitigation and monitoring of activities undertaken in a National Environmental Policy Act (“NEPA”) process. 75 Fed. Reg. 8046 (Feb. 23, 2010); Memorandum from Nancy H. Sutley, Chair, CEQ, to Heads of Federal Departments and Agencies, Draft Guidance for NEPA Mitigation and Monitoring (Feb. 18, 2010) (hereinafter “Mitigation Memorandum”). The following comments are submitted on behalf of the Utility Water Act Group (“UWAG”).¹

In the course of providing electricity, UWAG’s members must engage in activities that sometimes take place in wetlands and other waters of the United States and require permits under Section 404 of the Clean Water Act (“CWA”), Section 10 of the Rivers and Harbors Act, or both. The issuance of an individual permit by the U.S. Army Corps of Engineers (“Corps”) under either of these Acts is a federal action requiring review pursuant to NEPA. Accordingly, the implementation of NEPA, particularly in connection with permits issued pursuant to the regulatory program under Section 404 of the CWA and Section 10 of the Rivers and Harbors

¹ UWAG is a voluntary, *ad hoc*, non-profit, unincorporated group of 212 individual energy companies and three national trade associations of energy companies: the Edison Electric Institute, the National Rural Electric Cooperative Association, and the American Public Power Association. The individual energy companies operate power plants and other facilities that generate, transmit, and distribute electricity to residential, commercial, industrial, and institutional customers. The Edison Electric Institute is the association of U.S. shareholder-owned energy companies, international affiliates, and industry associates. The National Rural Electric Cooperative Association is the association of nonprofit energy cooperatives supplying central station service through generation, transmission, and distribution of electricity to rural areas of the United States. The American Public Power Association is the national trade association that represents publicly owned (municipal and state) energy utilities in 49 states representing 16 percent of the market. UWAG’s purpose is to participate on behalf of its members in EPA’s rulemakings under the CWA and in litigation arising from those rulemakings.

Act, is important to UWAG members as well as to the public at large, whose health, safety, and general welfare depend on a cost-effective and reliable supply of electricity. Due to the nature of electric utility companies' operations, UWAG members can expect to have a continuing need for Section 404 permits and Section 10 permits, and each individual permit must undergo NEPA review.

UWAG has a longstanding interest in the Corps's regulatory program, including the Corps's NEPA regulations. UWAG has filed comments on numerous aspects of the Corps's regulatory program, including nationwide general permits, the proper scope of "waters of the United States," and the definition of "fill." Of more direct interest to this guidance, UWAG also has filed substantial comments on the Corps and U.S. Environmental Protection Agency ("EPA") compensatory mitigation regulations, which appear to be one of the models for the Mitigation Memorandum. With respect to NEPA in particular, UWAG filed comments on the Corps's amendment to its implementing rules in 1984 and participated on behalf of the Corps in the referral of those rules for review by CEQ, which upheld the rules in 1987. 52 Fed. Reg. 22,517 (1987). In all of these regulatory activities, UWAG has sought a Corps regulatory program that is administratively workable as well as protective of the aquatic environment.

II. COMMENTS

A. **CEQ Needs To Affirm Clearly That the Draft 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 affirm clearly 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 does not bind 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.²

Such a statement would help affirm CEQ's intended use of the Memorandum to federal agencies and the public.

B. CEQ Should Clarify That an Agency May Impose Binding Mitigation Only If Authorized Under Its Organic Statute.

According to CEQ, one of the "central goals" of the Mitigation Memorandum is for federal agencies to state clearly decisions to adopt mitigation measures as part of the NEPA process and to identify those measures in NEPA documentation and agency decision documents as "binding commitments to the extent consistent with agency authority." Mitigation Memorandum at 2. UWAG is concerned that the source of agency authority to impose binding mitigation requirements is not clearly identified in the Mitigation Memorandum and that, as a result, the Memorandum may lead to confusion regarding the ability of agencies to impose and enforce mitigation measures.

Under longstanding case law, NEPA does not provide federal agencies with authority to impose substantive mitigation requirements. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 352-53 (1989). NEPA is a procedural statute only; it mandates that federal agencies follow certain "action-forcing" procedures, but it does not impose substantive standards on the decisionmaking process. *Id.* at 350, 353. Thus, although NEPA requires federal agencies to discuss mitigation measures in NEPA documentation, it does not require agencies to adopt or enforce those measures. *Nat'l Parks & Conservation Ass'n v. Dep't of Transp.*, 222 F.3d 677,

² 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 ("OMB") in January 2007. Memorandum from Rob Portman, Director, OMB, to Heads of Executive Departments and Agencies, Issuance of OMB's "Final Bulletin for Agency Good Guidance Practices" (Jan. 18, 2007), *available at* www.whitehouse.gov/omb/memoranda/fy2007/m07-07.pdf.

681 n.4 (9th Cir. 2000) (“[A] mitigation plan need not be legally enforceable, funded or even in final form to comply with NEPA’s procedural requirements.”).

Consistent with its procedural nature, NEPA does not expand an agency’s substantive powers. *NRDC v. EPA*, 859 F.2d 156, 169 (D.C. Cir. 1988). Accordingly, any substantive action taken by a federal agency, including adopting mitigation measures, must fall within the agency’s province under its organic statute. *Id.* If an agency does not have jurisdiction over a particular action or resource under its organic statute, it may not require mitigation measures related to that action or resource, even if such measures are discussed in the NEPA documentation for the proposed action. *Id.* at 169-70.

The *NRDC* case is of particular interest because it dealt with the limitations of the CWA and the appropriate relationship between the CWA and NEPA. In the *NRDC* case, the U.S. Court of Appeals for the D.C. Circuit struck down a regulation adopted by EPA implementing the National Pollutant Discharge Elimination System (“NPDES”) permit program, established under the CWA, that purported to allow EPA to subject NPDES permits to conditions unrelated to water quality on the basis of NEPA. 859 F.2d at 168-70. The NPDES program, like the Corps’s regulatory program under Section 404 of the CWA, is directed only at the discharge of pollutants into “waters of the United States.”

The D.C. Circuit held that, although EPA must consider all direct, indirect, and cumulative environmental effects of the discharge of pollutants to fulfill its duty under NEPA, “[h]aving done so, EPA can properly take only those actions authorized by the CWA -- allowing, prohibiting, or conditioning the pollutant discharge.” *Id.* at 169-70. EPA could not “under the

guise of carrying out its responsibilities under NEPA transmogrify its obligation to regulate discharges into a mandate to regulate the plants or facilities themselves.”³ *Id.* at 170.

The limits of an agency’s authority to impose mitigation, as established in the *NRDC* case, may be illustrated by an example. If, pursuant to the CWA, a manufacturing plant applied to EPA for a NPDES permit, EPA, as part of its NEPA analysis, would be obliged to consider the direct, indirect, and cumulative effects of the discharge of pollutants into waters of the United States. If a commenter asked EPA to consider the environmental impact of the increased traffic and associated air emissions generated by the operation of the plant, it would be highly questionable whether these traffic impacts would qualify as “indirect effects” under *Department of Transportation v. Public Citizen*, 541 U.S. 752, 769-70 (2004). But, in any event, EPA could not condition the issuance of the NPDES permit on the adoption of any mitigation measures related to the operational traffic impacts, because the CWA does not provide EPA with jurisdiction over traffic. And NEPA cannot supply authority that is absent from the relevant EPA organic statute.

While the Mitigation Memorandum acknowledges that binding mitigation commitments may be made only “to the extent consistent with agency authority,” UWAG believes that this key limitation may get lost amid the many detailed assertions about the content of mitigation plans and that the Memorandum may be misinterpreted to impermissibly expand federal agencies’ authority under NEPA. This is particularly true in light of the fact that CEQ encourages federal

³ EPA also adopted a regulation banning construction of any on-site portion of a plant during the NPDES permitting process, claiming the CWA and NEPA as the legal authority for this sweeping condition. *NRDC v. EPA*, 822 F.2d 104, 127 (D.C. Cir. 1987). The D.C. Circuit held that the ban on overall plant construction exceeded EPA’s authority under the CWA and NEPA. *Id.* at 128-29. The court again noted that NEPA does not broaden an agency’s substantive powers and that the “major federal action” that is subject to environmental review is

agencies to adopt mitigation requirements similar to those promulgated by the Corps and EPA in regulations. Mitigation Memorandum at 1, 7. The Corps's mitigation regulations, which include mandatory implementation and financial assurance requirements, reflect the fact that the Corps specifically was authorized by congressional directive to impose mitigation measures related to wetland effects under the CWA, its enabling statute.⁴ NEPA does not authorize the mandatory implementation provisions of the Corps's mitigation regulations. *See Robertson*, 490 U.S. at 352-53. CEQ should clarify this point in the Mitigation Memorandum and specifically should affirm that a federal agency may adopt binding mitigation measures only if, and to the extent that, such measures are authorized by the agency's organic statute.⁵

C. **CEQ Should Clarify That an Agency May Impose Binding Monitoring Requirements Only If Authorized Under Its Organic Statute.**

In addition to binding mitigation commitments, CEQ identifies the creation of monitoring programs for both the implementation and effectiveness of mitigation measures as one of the “central goals” of the Mitigation Memorandum. Mitigation Memorandum at 2. The

the issuance of a NPDES permit to discharge pollutants, not the authorization of construction. *Id.* at 129.

⁴ “Section 314 of the National Defense Authorization Act (NDAA) for Fiscal Year 2004 (section 314) requires the Secretary of the Army, acting through the Chief of Engineers, to issue regulations ‘establishing performance standards and criteria for the use, consistent with section 404 of the Federal Water Pollution Control Act (33 U.S.C. 1344, also known as the Clean Water Act), of on-site, off-site, and in-lieu fee mitigation and mitigation banking as compensation for lost wetlands functions in permits issued by the Secretary of the Army under such section.’” Compensatory Mitigation for Losses of Aquatic Resources, 73 Fed. Reg. 19,594, 19,595 (Apr. 10, 2008).

⁵ Likewise, CEQ should clarify that a federal agency may not impose enforceable mitigation measures to support a mitigated finding of no significant impact (“FONSI”) if such mitigation measures are not authorized by the agency's organic statute. CEQ states in the Mitigation Memorandum that it “approves of the use of the ‘mitigated FONSI’ when the NEPA process results in enforceable mitigation measures.” Mitigation Memorandum at 3 n.2. As discussed above, NEPA does not expand agencies' substantive authority, and thus, requiring enforceable mitigation measures is beyond the authority granted to CEQ under NEPA.

Memorandum indicates that monitoring programs should be “clearly described” in NEPA documentation and agency decision documents, and that enforcement clauses with respect to monitoring should be included in permits, authorizations, and similar documents. *Id.* at 5.

As discussed above, NEPA does not mandate substantive standards for federal agencies, *Robertson*, 490 U.S. at 350, or expand the substantive authority of federal agencies, *NRDC*, 859 at 169. Thus, for an agency to adopt monitoring requirements or impose such requirements on a project proponent, the agency’s organic statute must provide authority for mitigation monitoring. The Corps’s monitoring regulations, which are cited by CEQ as a model for other agency regulations, are authorized by section 404 of the CWA and section 314 of the NDAA and thus do not run afoul of the principles set forth in *Robertson* and *NRDC*. CEQ should clarify, however, that federal agencies may not mandate the implementation of mitigation monitoring programs for specific environmental impacts unless mitigation for such impacts is similarly authorized under their organic statutes.

D. 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. CEQ regulations and longstanding case law do not support the suggestion that NEPA documentation should include “measurable performance standards” or any other detailed mitigation requirements, including monitoring programs.

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 U.S. Supreme Court has held that such

standards are not required for compliance with NEPA. In *Robertson*, 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.” 490 U.S. at 352-53. Since a fully developed mitigation plan is not required to comply with NEPA, then *a fortiori* the specification of measurable performance standards also is not required. Moreover, as NEPA is a procedural rather than substantive statute, such substantive and prescriptive performance standards are beyond the scope of the authority conferred by NEPA.

Given the Court’s holding in *Robertson*, CEQ appears to 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. 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 them, and the content and specificity of those standards must be determined by the agency’s organic statute and regulations, not by NEPA.

E. Mitigation Failure Should Be Addressed Through Supplemental NEPA Action Only in Rare Cases, and Further Documentation, If Needed, Should Focus on Mitigation Alternatives.

1. Mitigation failure will necessitate supplemental action under NEPA in rare cases only.

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 mitigate fully 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 must 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. Most of the mitigation goals of the project are being served, however, and the benefit of a wetland attaining 70 percent vegetative cover is 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 or far advanced by the time the mitigation failure is evident. Again, the wetlands context provides a useful example. In many instances, the impacts on a wetland will occur concurrently with the commencement of mitigation measures. The construction of wetland mitigation measures, however, may take an entire growing season to complete, and the success of the mitigation measures may not be determined until several years after the completion of their construction. Performance standards for vegetative cover, for example, may become applicable anywhere from two to five years after the wetland has been created, restored, or enhanced due to the time necessary for vegetation to survive and grow to the appropriate levels. By the time the mitigation measures can be measured against applicable performance standards, the federal action may be completed or so far advanced that the preparation of supplemental NEPA documentation would not provide meaningful information for the decisionmaking process because no federal agency decisions with practical effect remain to be made. Thus, CEQ should clarify that mitigation failure will necessitate supplemental action under NEPA only in unusual circumstances.

2. The appropriate response to mitigation failure where the federal action is complete or far advanced is the discussion of such failure in NEPA documents for future agency actions.

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.*

UWAG agrees that the appropriate response to 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, have recognized that, when 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).

UWAG believes that CEQ should acknowledge that this response also is appropriate for agency actions that are far advanced. In such cases, requiring an agency to prepare a supplemental EIS on mitigation failure would produce little, if any, information of value, while requiring a significant commitment of agency resources. Federal courts have recognized that, in cases 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. *E.g., Morris County Trust for Historic Preservation v. Pierce*, 714 F.2d 271, 277 (3d Cir. 1983). Because preparing a supplemental EIS for mitigation failure when an agency action is far advanced 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.

3. If it is necessary, supplemental NEPA documentation should address alternatives to the failed mitigation measures only, and not alternatives to the federal action itself.

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) relates solely 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.⁶ Thus, UWAG urges CEQ to clarify in the Mitigation Memorandum that supplemental NEPA documentation prepared in response to mitigation failure should evaluate only alternatives to the failed mitigation measures 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.

III. CONCLUSION

UWAG appreciates the opportunity to comment on CEQ's proposed guidance on the mitigation and monitoring of activities undertaken in a NEPA process, and asks that CEQ make the modifications and clarifications suggested in these comments.

⁶ 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 may have existed prior to initiation of the federal action.