

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

Re: Draft Guidance for NEPA Mitigation and Monitoring

Dear Mr. Boling:

The Western Business Roundtable appreciates the opportunity to comment on the Council on Environmental Quality's (CEQ) National Environmental Policy Act (NEPA) Draft Guidance, "NEPA Mitigation and Monitoring" (hereafter referred to as "Guidance").

The Roundtable watched with interest, CEQ's methodical, multi-year inter-agency initiative focused on improving the efficiency of the federal NEPA process. That initiative -- which drew heavily on the input from career professionals in the federal agencies -- resulted in CEQ regulations (*40 CFR 1507.3*) that require federal agencies to adopt procedures as necessary to supplement CEQ's National Environmental Policy Act (NEPA) regulations. The effort culminated in 2007, when federal land management agencies formalized the overhaul of their NEPA procedures.¹

ABOUT THE ROUNDTABLE

The Western Business Roundtable (hereafter "Roundtable") is a broad-based coalition of companies doing business in the Western United States. Our members are engaged in a wide array of enterprises, including: manufacturing; retail energy sales; mining; electric power generation and transmission; energy infrastructure development; oil and gas exploration development, transportation and distribution; and energy services. We work to defend the interests of the West and support policies that encourage economic growth and opportunity, freedom of enterprise and a common-sense, balanced approach to conservation and environmental stewardship.

Revisions to the NEPA process have very serious implications for Roundtable members, many of whom are involved in energy and natural resource development activities on the vast swathes of federal lands in the West. Our members have extensive experience with the NEPA process including, unfortunately, the project delays and escalating costs associated with compliance under the Act.

ROUNDTABLE POSITION ON CEQ'S DRAFT NEPA GUIDANCE REGARDING NEPA MITIGATION AND MONITORING

1. <http://edocket.access.gpo.gov/2007/pdf/e7-15746.pdf> and <http://edocket.access.gpo.gov/2007/pdf/e7-15867.pdf>

*“Through this draft guidance, CEQ proposes three central goals to help improve agency mitigation and monitoring. First, proposed mitigation should be considered throughout the NEPA process. 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. Second, a monitoring program should be created or strengthened to ensure mitigation measures are implemented and effective. Third, public participation and accountability should be supported through proactive disclosure of, and access to, agency mitigation monitoring reports and documents”[emphasis added]. (Guidance, page 2)*

The Roundtable appreciates the desire by CEQ to assure that environmental impacts of projects/activities managed by federal agencies on federal lands are properly evaluated. Unfortunately, the proposed “reforms” to CEQ NEPA regulations are fraught with problems, particularly when analyzed in the context of the Council’s pending Draft Guidance on Consideration of the Effects of Climate Change and Greenhouse Gas Emissions (75 Fed. Reg. 8046, February 23, 2010), substantive environmental statutes and legal precedent.

ROUNDTABLE SPECIFIC CONCERNS WITH CEQ’S PROPOSED GUIDANCE

- **CEQ is Pushing the Envelope of NEPA’s Legal Authority – Binding Mitigation Requirements**

Mitigation is clearly an important aspect, when considering the environmental impacts of activities and projects. As noted by CEQ, existing regulations articulate its importance throughout the NEPA process. CEQ regulations require discussion of possible mitigation measures in: defining the scope of the environmental impact statement (EIS); discussing the consequences of a proposed action and its alternatives; and in explaining the ultimate decisions.² In addition, agencies also use mitigation to reduce potentially significant impacts to support a finding of “no significant impact” (FONSI). In such cases, mitigation is particularly useful, in that it allows an agency to satisfy the NEPA process using an environmental assessment (EA) rather than engaging the time and expense of a full-blown EIS.

The Roundtable supports this use of mitigation under NEPA. It is a helpful tool that provides federal agencies with flexibility in responding to proposed projects and activities on the lands they manage. The proposed Guidance’s suggestion, however, that NEPA itself should pose binding mitigation requirements contradicts a long series of Supreme Court decisions regarding the specific purpose of the Act.

NEPA is a procedural statute. Its purpose is to ensure that agencies take into consideration the environmental impacts of their actions, not to dictate a particular outcome. The Supreme Court has been clear on this point, stating “*Other statutes may impose substantive environmental obligations but NEPA merely prohibits uniformed – rather than unwise agency action.*”³

² See 40 CFR §§ 1508.20, 1508.25(b), 1502.14(f), 1502.16(h), 1505.2(c)

³ *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 356 (1989). See also *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, (435 U.S. 519, 558 (1978) and *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 188 n.34 (1978)

In *Robertson v. Methow Valley Citizens Council*, the Court found:

“It would be inconsistent with NEPA’s reliance on procedural mechanisms – as opposed to substantive, result-based standards – to demand the presence of a fully developed plan that will mitigate environmental harm before an agency can act.”⁴

“There is a fundamental difference between a requirement that mitigation be discussed in sufficient detail and to ensure 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.”⁵

- **The Belts and Suspenders” Issue – Mitigation Already a Feature of Substantive Environmental Statutes**

CEQ fails to note that many of the examples of mitigation discussed in the draft Guidance are measures undertaken by agencies outside of the NEPA process. For example, the Guidance mentions the 2008 Final Compensatory Mitigation rule, promulgated jointly by the Corps of Engineers and EPA, as a good example of measurable performance standards for mitigation goals. For clarity’s sake, it is important to emphasize that the Compensatory Mitigation Rule was promulgated under the Corps and EPA’s Section 404 Clean Water Act authority, as opposed to part of any NEPA regulations.

Perhaps another illustration would be useful. In the U.S. mining sector, mitigation is evaluated and implemented throughout the life of projects, from siting and design measures through post-operation reclamation. Those mitigation requirements are required under a variety of federal programs including but not limited to:

- The Bureau of Land Management’s (BLM) 43 C.F.R 3809 and the U.S. Forest Service’s (USFS) 36 C.F.R 228A surface management regulations.
- BLM regulations promulgated under the Federal Land Policy and Management Act (FLPMA) apply to the majority of mining of locatable minerals on federal lands and these regulations specifically require mitigation, as well as monitoring, to ensure mitigation is effective: projects take mitigation measures specified by BLM to protect public lands;⁶ a plan of operations for mining must contain a monitoring plan designed to demonstrate compliance with the approved plan and other federal laws and regulations.⁷
- USFS regulations require that all locatable mineral operations “*be conducted so as, where feasible, to minimize adverse environmental impacts on National Forest surface resources,*” including complying with all applicable federal and state environmental laws and regulations.⁸

⁴ 490 U.S. at 372

⁵ Id.

⁶ 43 C.F.R. 3809.420(a)(4)

⁷ 43 C.F.R. 3809.401(b)(4)

⁸ (36 C.F.R. 228.8)

Roundtable Member, the Northwest Mining Association, sums up the problem succinctly in their comments to CEQ on this matter:

“NEPA is designed to facilitate a discussion of environmental impacts. However, not only does requiring binding mitigation exceed the scope of CEQ’s statutory authority under NEPA, it also may duplicate or hinder existing mitigation efforts under other regulatory programs.”⁹

- **Monitoring the Effectiveness of Mitigation**

“Implementing Federal agency actions and mitigation involves consideration of future impacts and conditions in an environment that is evolving and not static; therefore, monitoring can help decision-makers adapt to changed circumstances. Monitoring can also improve the quality of overall agency decision making by providing feedback on the effectiveness of mitigation techniques and commitments. With the opportunity for reducing environmental impacts through mitigation, a comprehensive approach to mitigation planning, implementation and monitoring will help ensure the integrity of the entire NEPA process.” (Guidance, page 2)

CEQ’s NEPA regulations indicate agencies may provide for monitoring to assure that their decisions are carried out and should do so in important cases.¹⁰ The draft Guidance, however, goes much further by requiring monitoring any time that a commitment is made in the NEPA process to implement mitigation.

Again, CEQ fails to acknowledge the basic nature of NEPA. NEPA is not the appropriate process for requiring agencies to engage in post-decision mitigation monitoring as such requirements are beyond the scope of the statute. Additionally, such requirements ignore existing regulatory frameworks that require monitoring of mitigation measures.

- **Problems of Mitigation & Monitoring Guidance in the Context of Proposed NEPA Climate Guidance**

“When a proposed federal action meets an applicable threshold for quantification and reporting, CEQ proposes that the agency should also consider mitigation measures and reasonable alternatives to reduce action-related GHG emissions.” (CEQ NEPA Climate Guidance, page 5)

“For proposed actions evaluated in an EIS...agencies should evaluate GHG emissions associated with energy use (40CRS 1502.16(e) and mitigation opportunities and use this as a point of comparison between reasonable alternatives.” (CEQ NEPA Climate Guidance, page 5)

“To the extent that a federal agency evaluates proposed mitigation of GHG emissions, the quality of that mitigation – including its permanence, verifiability, enforceability and additionality should be carefully evaluated.” (CEQ NEPA Climate Guidance, page 6)

⁹ Northwest Mining Association, Comments to CEO on Draft NEPA Guidance on Consideration of the Effects of Climate Change and Greenhouse Gas Emissions, May 24, 2010, page 3.

¹⁰ 40 C.F.R. 1505.3

It is impossible to evaluate the full impact of the proposed Guidance, without considering it in conjunction with the Council's other proposed guidance relating to climate impacts under NEPA (hereafter "NEPA Climate Guidance") and emerging policies of EPA and federal land management agencies regarding climate change.

We have cataloged our concerns regarding the Administration's push to use climate change as the justification for a broad expansion of federal regulatory authority, based primarily on qualitative, predictive modeling of possible future climate impacts.¹¹ Those concerns are particularly relevant here. To suggest that binding mitigation and monitoring requirements should trigger under NEPA, when NEPA itself is triggered based on qualitative evaluations and predictive modeling is particularly alarming. The Roundtable has further outlined our concerns regarding the use of such "qualitative" tools in our comments to CEO on its NEPA Climate Guidance.¹² We ask that you consider those comments in the context of this proposed Guidance as well.

- **The Cascading Problem: Overlaying CEQ NEPA Guidance Over Other Federal Policies Dealing With "Vulnerability" Species and Ecosystems**

As we have noted, in its draft NEPA Climate Guidance CEQ correctly concedes that there is no way to link climate change or environmental impacts thereof to a particular project or its emissions. (*NEPA Climate Guidance, page 3*) CEQ also concedes that it is not currently "possible to quantify with great specificity (i.e. geographic) the various health effects from climate change." (*NEPA Climate Guidance, page 11*). Yet, the Council expects federal agencies to evaluate ecosystem and species "vulnerabilities."

¹¹ Roundtable Comments, EPA GHG Endangerment Finding:

http://docs.westernroundtable.com/air/2010/WBRT_EPA_GHG_CAA_Rulemaking_FINAL.pdf (74 Fed. Reg. 18886, April 24, 2009);

Roundtable Comments, EPA GHG Tailoring Rule:

http://docs.westernroundtable.com/air/2010/WBRT_Comments_EPA_GHGTailoring_Rule_FINALSUBMIT.pdf (74 Fed. Reg. 55292, October 29);

Roundtable Comments, USFWS Climate Strategic Plan, Five-Year Action Plan:

http://docs.westernroundtable.com/public_lands/2010/WBRT_USFWSClimatePlan_FINAL.pdf (November 23, 2009);

Roundtable Comments, USFS NOI to Prepare EIS Associated With Revised Forest Planning Rule:

http://docs.westernroundtable.com/public_lands/2010/Comments_USFSPlan_final_Signed.pdf (74 Fed. Reg. 67167, February 16, 2010);

Roundtable Comments, EPA Draft Framework for Categorizing the Relative Vulnerability of Threatened and Endangered Species to Climate Change:

http://docs.westernroundtable.com/public_lands/2010/WBRT_EPAVulnerabilityFramework_FINALLINKED.pdf (74 Fed. Reg. 61671, November 25, 2009).

Roundtable Comments: CEQ Draft NEPA Guidance Categorical Exclusions

http://docs.westernroundtable.com/public_lands/2010/WBRT_comments_NEPA_CEGuidance_4-9-10_FINALLINKED.pdf

(Fed. Reg. 8045, February 23, 2010)

¹² Roundtable Comments, CEQ NEPA Guidance on Consideration of the Effects of Climate Change and

Greenhouse Gas Emissions http://docs.westernroundtable.com/air/2010/WBRT_comments_NEPA_Climate_5-23-10_FinalLinked.pdf

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

The Roundtable finds alarming the growing body of regulatory declarations seeking to justify unilateral agency regulations/actions based on predicted future impacts to “vulnerable” species and ecosystems. Throughout these declarations, “vulnerability” is a vaguely defined term and explanations of the statutory authorities that justify regulations remain unexplained. We discussed this issue in detail, in the context of related comments to U.S. Fish and Wildlife Service and the EPA.¹³

We are concerned that overlaying this Guidance and CEQ’s NEPA Climate Guidance over these efforts, the Administration is seeking a broad expansion of regulatory requirements and responsibilities placed upon all those sectors – including those represented in our membership – that seek to carry out productive activities and projects on federal lands.

CONCLUSION

For the many reasons discussed in these comments, we recommend the Council to withdraw the draft mitigation and monitoring Guidance.

On behalf of the many member organizations of the Western Business Roundtable, thank you for the opportunity to provide input on this issue, the impacts of which are so linked with the economic vitality of the West.

Sincerely,



Holly Propst
General Counsel / Director of Policy
Western Business Roundtable

¹³ **Roundtable Comments, EPA Draft Framework for Categorizing the Relative Vulnerability of Threatened and Endangered Species to Climate Change:**

http://docs.westernroundtable.com/public_lands/2010/WBRT_EPAVulnerabilityFramework_FINALLINKED.pdf

(74 Fed. Reg. 61671, November 25, 2009)

Roundtable Comments, USFWS Climate Strategic Plan, Five-Year Action Plan:

http://docs.westernroundtable.com/public_lands/2010/WBRT_USFWSClimatePlan_FINAL.pdf (November 23, 2009);