

April 7, 2010

Nancy Suttley, Chair
Council on Environmental Quality
Executive Office of the President
Washington, D.C. 20503

Comments re: Draft Guidance for NEPA Mitigation and Monitoring

Dear Ms. Suttley:

The Wyoming Outdoor Council would like to offer the following comments on the above referenced guidance that the Council on Environmental Quality (CEQ) is proposing to issue. The Wyoming Outdoor Council is Wyoming's oldest and largest independent statewide environmental organization, having advocated for protection of Wyoming's public lands, air, water, and wildlife since 1967.

In general we are supportive of this proposed guidance, in particular the recommendation that agencies should adopt requirements similar to the Department of the Army regulations that are referenced and presented in the Appendix. That said, we feel that too often the guidance is presented using highly conditional language ("should") rather than providing for more mandatory obligations. For example, rather than stating that agencies "should" consider adopting requirements similar to the Army's, we feel the sentence on page 1 of the guidance should be reworded to state, "Agencies **will** consider adopting similar requirements when developing their NEPA programs and procedures." While this wording change would change the guidance to more of a mandatory obligation to bring all agency programs and procedures into accord with the Army procedures, something CEQ clearly views as desirable, agencies would still have substantial latitude as to the details of their programs and procedures due to the use of the word "similar," so this would not be a heavy-handed intrusion on agency discretion.

This issue of mandatory versus conditional language is probably of most concern with respect to "mitigated FONSI's." Some of the language in the draft guidance indicates that provisions for mitigation in an EA supporting a FONSI does not necessarily have to be mandatory (e.g., "That commitment [to perform mitigation] *should* be presented in the FONSI and other decision document." (emphasis added)). We feel this is an incorrect interpretation of the law; court's approving of the use of mitigated FONSI's have made it clear that any mitigation supporting such a decision must be mandatory. *See, e.g., Davis v. Mineta*, 302 F.3d 1104, 1125 (10th Cir. 2002) ("Mitigation measures may be relied upon to make a finding of no significant impact *only* if they are imposed by statute or regulation, or submitted by an applicant or agency as part of the original proposal."). We urge CEQ to review the language in the draft guidance to ensure it is stated in a mandatory light, especially with respect to the use of mitigated FONSI's.

We would also like to mention several other issues that are of concern to us. First, as an organization we have reviewed many, many EISs and EAs, mostly prepared by the Bureau of Land Management and the Forest Service. All too often in our experience the mitigation that is

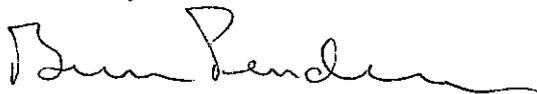
proposed in a NEPA document is spread here and there throughout the document, in various parts of the EIS and in various appendices. This makes it very difficult ascertain what exactly is being proposed or committed to relative to mitigation and monitoring. To correct this problem, which hampers informed public involvement in the NEPA process, the CEQ in our opinion should direct that all mitigation and monitoring that is committed to in an EIS or EA should be consolidated in one, clearly identified section of the NEPA document. This would greatly facilitate informed public participation in the NEPA process.

Second, there is some confusion as to whether mitigation commitments made in a record of decision (ROD) are legally enforceable. While the regulation at 40 C.F.R. § 1505.3 provides that, "Mitigation . . . and other conditions . . . committed as part of the decision shall be implemented by the lead agency or other appropriate consenting agency", some courts have viewed ROD commitments as legally enforceable by citizens, and others have not. *See generally Tyler v. Cisneros*, 136 F.3d 603, 609 (9th Cir. 1998) (recognizing that when an agency commits to mitigation "it has voluntarily assumed an obligation that is enforceable") (quoting and citing *Waterford Citizens' Ass'n v. Reilly*, 970 F.2d 1287 (4th Cir. 1992)). Thus, it would be helpful if the CEQ were to clarify to what degree it views mitigation commitments made by an agency as being legally enforceable obligations. It is certainly our view that mitigation commitments made in a ROD or other decision document should be legally enforceable by citizens.

Finally, the importance of the new guidance proposed by CEQ is emphasized by experience in Wyoming. Attached to these comments is a document entitled "Commitments Made in Decision Documents not yet Achieved" that documents how the decisions made in the ROD for the Pinedale Anticline Oil and Gas project—a massive natural gas field outside of Pinedale, Wyoming that contains literally hundreds of existing wells with approval in place for 4,399 others—were not implemented as promised by the BLM. The environmental implications of this failure have been grave. Among other things, mule deer herds in this area declined by 46 percent after natural gas development began, and this area is now poised to be designated in nonattainment with the National Ambient Air Quality Standard for ozone, with the State of Wyoming having determined this is almost solely due to the natural gas development occurring in the area. This emphasizes the critical importance of effective mitigation and monitoring in order to implement the promise of NEPA, and the need to put in place obligations that ensure these mitigation and monitoring needs are adhered to. It also emphasizes the importance of ensuring that ROD commitments are legally enforceable by citizens.

Thank you for considering these comments.

Sincerely,

A handwritten signature in black ink, appearing to read "Bruce Pendery". The signature is fluid and cursive, with a long horizontal stroke at the end.

Bruce Pendery
Program Director