

COMMENTS SUBMITTED BY THE COAL UTILIZATION RESEARCH COUNCIL (CURC) ON DRAFT GUIDANCE CLARIFYING APPROPRIATENESS OF “FINDINGS OF NO SIGNIFICANT IMPACT” AND SPECIFYING WHEN THERE IS A NEED TO MONITOR ENVIRONMENTAL MITIGATION COMMITMENTS

General Comments

The Coal Utilization Research Council (CURC) supports the principles of mitigation, monitoring and public involvement embodied in NEPA and its implementing regulations. However, CURC is concerned that the proposed guidance will be construed by agencies as direction to implement new mitigation monitoring and enforcement procedures without full analysis and consideration of the commercial implications of those procedures. CURC’s primary interest is private sector led research, development, and demonstration projects involving advanced coal technology. Current research is oriented toward development of technologies to reduce greenhouse gas emissions to the atmosphere. Many such projects receive federal financial support and/or require federal permits that trigger an agency NEPA review. However, CEQ’s guidance will also impact private sector projects outside of the coal sector. As explained under the detailed comments below, CEQ and the agencies must proceed cautiously in developing and implementing mitigation enforcement mechanisms with due regard for commercial issues outside of the NEPA domain.

CURC is encouraged by CEQ’s efforts to streamline the NEPA process through the use of tools such as the mitigated Findings of No Significant Impact (FONSI). The length of agency NEPA documents and time for NEPA review has grown considerably over the years. CEQ’s guidance in 40 CFR 1502.7, suggesting that final environmental impact statements should normally be less than 150 pages or 300 pages for proposals of unusual scope or complexity, is routinely ignored. As NEPA documents approach encyclopedic proportion, their value to the public and decision makers becomes questionable.

Detailed Comments

1. *CEQ recommends that agencies create internal processes to ensure that mitigation actions adopted in any NEPA process are documented and that monitoring and appropriate implementation plans are created to ensure that mitigation is carried out. Methods to ensure implementation should include appropriate conditions in financial agreements, grants, permits or other approvals, and conditioning funding on implementing the mitigation. Mitigation commitments should be structured to include adaptive management in order to minimize the possibility of mitigation failure. A substantial mitigation failure, in either implementation or effectiveness, should trigger a response from the agency. (Memorandum pp 3-4)*

- a. CURC agrees that mitigation adopted by agencies during the NEPA process should be properly documented, reflected in monitoring and implementation plans where appropriate, and incorporated as a bilateral condition

of financial agreements, grants, permits or other approvals. Companies that accept mitigation as a condition of their agreement or permit likewise should be held accountable for performance of the mitigation. However, open-ended remedies for mitigation failure, despite the good faith efforts on the part of the company, may create an unacceptable degree of uncertainty and chill the private sector's willingness to proceed with a project from the outset. Accordingly, such remedies: (1) must be carefully considered; (2) should be clearly defined at the time of agreement execution or permit issuance; (3) should not be left to the unilateral discretion of agency officials at the time of the failure; and, (4) should not result in the suspension of performance or termination of an agreement or permit.

- b. CEQ's guidance, if not properly implemented, could have significant negative impact on private sector projects. Since the impacts are largely outside of the NEPA domain, CURC recommends the creation of a multi-disciplinary industry/agency task force to analyze commercial and financial issues associated with adaptive management including mitigation failure, remedies, and enforcement. The task force would be chartered to make recommendations to CEQ and the Agencies concerning the use and implementation of adaptive management techniques on private sector projects. The task force should include: (1) NEPA professionals, (2) agency procurement, grant, and loan officials; (3) representation from permitting agencies, and (4) commercial, financial and legal experts from industry.
 - c. CURC's recommendation is consistent with and a logical follow-on to the recommendations made by the 2004 NEPA Task Force on Modernizing NEPA. There the Task Force recommended creation of a working group to assess the applicability of NEPA guidance and regulations related to adaptive management. The Task Force also recommended that the work group prepare the appropriate guidance and regulatory changes. See Task Force Report Section 4.8 Summary of Findings.
2. *CEQ recommends that agencies fully integrate public involvement into agencies' mitigation and monitoring processes in order to assist NEPA compliance. CEQ's guidance also states that mitigation and monitoring reports, access to documents, and responses to public inquiries should be readily available to the public through online or print media, as opposed to being limited to requests made directly to the agency.*
- a. Initially, CURC points out that CEQ's guidance concerning readily available online or print media access to monitoring reports goes beyond CEQ's current regulatory coverage which requires agencies to make available to the public, upon request, the results of relevant monitoring. See 40 CFR 1505.3(d).
 - b. CEQ's guidance also states that agencies have an obligation to make available, through computer telecommunications, releasable NEPA documents

and monitoring results which, because of the nature of their subject matter, are likely to become the subject of FOIA requests. The guidance references 5 U.S.C. § 552(a)(2) and 40 C.F.R. § 1506.6(f). (See Memorandum p.6). We point out that Section 1506.6(f), only addresses the EIS, comments received and underlying documents. Section 1506.6(f) does not address monitoring reports. Furthermore, 5 U.S.C. § 552(a)(2) is directed at records that have previously been released rather than records which might be releasable in response to a future request. Accordingly, the statute and the regulation may not be appropriate references.

- c. CURC recommends that CEQ's guidance emphasize to agencies that only relevant information needs to be made available to the public and that agencies should not be overly prescriptive in their approach but instead work with the private sector project proponents to avoid unnecessary cost and burden.
- d. CURC also recommends that CEQ remind agencies to be respectful of proprietary and confidential information that may be contained in monitoring information and encourage agencies to work with the private sector to develop non-proprietary reports sufficient to inform the public.