CEQ Draft Guidance for NEPA Mitigation and Monitoring—February 18, 2010

Supplemental Comments from DOT- June 4, 2010

In General:

DOT agrees with CEQ's guidance regarding the importance of implementing NEPA commitments, and that there is a duty on the part of Federal agencies to monitor to assure that mitigation commitments specified in a Record of Decision (ROD) or Finding of No Significant Impact (FONSI) are implemented. DOT has always made it a practice to require implementation of mitigation measures committed to in either in the ROD or the FONSI. State DOTs, working with FHWA, have monitored implementation in a number of ways. Some use sophisticated Environmental Management Systems and others use "Green Sheets" or similar approaches which summarize all environmental commitments and accompany the project from the NEPA decision through final design, preparation of plans, specifications and estimates, and become part of the contract document.

However, as described in the specific comments below, DOT is concerned with that portion of the proposed guidance relating to Mitigation Failure and Monitoring of Mitigation Effectiveness. We believe that as drafted, the guidance will increase uncertainty over mitigation requirements and will significantly delay delivery of necessary infrastructure projects and impede their effect on economic recovery. This new requirement to meet effectiveness criteria or take additional action, including reopening the project with a new or supplemental EIS, will also increase litigation exposure for agencies.

DOT believes that rather than promoting the laudable goal of better mitigation, this additional layer of process could have the effect of stifling innovation. Agencies will be more likely to take the most conservative approach to meeting a particular goal, rather than take a chance on a less proven mitigation technology which may have the potential for a greater environmental benefit. Agencies could decide that the costs, delays, and possible litigation that could occur should the new technology underperform present too great a risk to implement. We believe that there are other means of collecting important information on environmental mitigation best practices rather than through imposition of new monitoring requirements and the development of after the fact EIS's and SEIS's. We have mentioned some of those options in our specific comments.

Specific Comments:

Pages 3 and 4) Mitigation Failure/Monitoring of Mitigation Effectiveness:

First, we (as well as reviewing courts) have always interpreted NEPA to be a procedural statute aimed at making better environmental decisions in an open and collaborative manner. By contrast, the proposed language on mitigation effectiveness and monitoring mitigation effectiveness seem designed to establish substantive requirements. For example, under the draft guidance, NEPA decision-making would be expanded to include a requirement for a successful mitigation outcome, rather than a decision to implement

reasonable mitigation measures. Second, there are a multitude of other substantive environmental laws, on the Federal, state and local level which very often contain requirements for monitoring, and remediation if necessary, as part of a permit or other approval. These often have substantial monitoring timeframes, performance standards and benchmarks which must be met before all conditions are lifted. In view of this, the sections of the guidance which address mitigation failure and effectiveness monitoring seem duplicative and represent an unnecessary use of public time and resources to address an issue that is already being addressed under other statutes.

a) We suggest that the monitoring effectiveness and mitigation failure provisions be reworked to make it clear that post-decision mitigation monitoring for such purposes is recommended, but not required under NEPA. In the mitigation failure section, there should be more discussion of what constitutes a "remaining Federal action" which might be subject to a supplemental EIS. This is an area of the proposed guidance that is likely to create significant new litigation risk for agencies and delay implementation of approved actions.

b) With respect to mitigated FONSIs there seems to be an assumption that these documents are developed without consultation with the public, state and local environmental agencies and Federal agencies with jurisdiction over protected resources. This is not the case for DOT. In development of a mitigated FONSI, there is public involvement and agency coordination. The mitigation decisions are made collaboratively. In some cases they are directed by the community or by the agencies with jurisdiction, based on best available science and professional judgment. A determination that the selected mitigation method has not achieved a particular level of environmental success may often only be made years after a project has been completed. If we had to go back and prepare an EIS in a case such as this, it would create a situation where the NEPA process is open for years following the completion of the Federal project or action. This is not feasible from a logistical standpoint.

c) Agencies will be reluctant to try new methodologies which may have the potential to realize a greater environmental benefit in favor of the standard mitigation techniques if they are required to prepare a new or supplemental EIS in the event the newer technology does not perform as well as anticipated. For example, we have seen this very reluctance in the use of Low Impact Development (LID) techniques for stormwater.

Page 4 Monitoring:
A Federal agency's "continuing duty to gather and evaluate new information relevant to the environmental impact of its actions" under NEPA is focused on information needed to make a decision. We are not aware of that provision having been previously interpreted to impose a post-decision substantive oversight requirement on Federal agencies. We do believe that agencies should be proactive in identifying ways to improve their practices and reduce the environmental effects of actions they approve. There are many ongoing research programs, such as the National Cooperative Highway Research Program, SHRP 2, FHWA's STEP research program, and public and interagency cooperative programs such as the Water Environmental Research Foundation

(WERF) which evaluate and publish best management practices for stormwater on a public website. These programs, and others, accomplish the goal of gathering and evaluating new information in a scientifically based and peer reviewed approach as a means to better understand environmental impacts and the effectiveness of mitigation approaches.