

May 21, 2010

Mitigation.guidance@ceq.eop.gov

The Council on Environmental Quality

Attn: Ted Boling

722 Jackson Place, NW.

Washington, DC 20503

Dear CEQ,

We offer the following as comments on the February 18, 2010 *Draft Guidance for NEPA Mitigation and Monitoring*.

The Draft Guidance is, for the most part, clear and helpful. Especially welcome is the recognition that, “Monitoring responsibility can be shared with joint lead or cooperating agencies or other entities. . .” There are many professional experts as well as qualified citizen scientists outside agencies that can help with the large tasks of ensuring that mitigation measures are being performed and that outcomes are as planned/hoped for in the EA or EIS.

Similarly, it is appreciated that the “Degree of public interest in the resource or public debate over the effects of the proposed action and any reasonable mitigation alternatives on the resource . . .” should be considered when prioritizing monitoring.

The major issue that needs to be addressed in the Final Guidance is clarification of what happens if agencies do **not** implement mitigation measures or do **not** monitor to insure that mitigation is not a failure.

The case might be clearest when an Environmental Impact Statement (EIS) would have been required but for promised mitigation, which allowed the agency to issue an Environmental Assessment (EA) and a Finding of No Significant Impact (FONSI). A failure to either implement the mitigation or monitor for the outcome of the mitigation (i.e., did the mitigation reduce the impacts to no significance?) should be enforceable.

However, there is also concern when a given alternative was chosen in an EIS over a less environmentally impacting alternative on the basis that mitigation of the selected alternative would be (a) implemented; (b) monitored; and (c) effective. Absent a consequence for failing to implement or monitor the mitigation, it often does not occur. At the very least, failure to implement the mitigation measures should be enforceable.

In particular the “may” in the following sentence appears unjustifiably weak and should be replaced by “would”:

In those cases where there is no remaining agency action, and the mitigation has not been effective or fully implemented, then it *may* be appropriate for future NEPA analyses to address the environmental consequences of the mitigation failure to ensure it is not repeated in subsequent decisions that rely on that mitigation and that environmental baselines reflect true conditions.” [Emphasis added.]

The ending phrase in the above sentence is not clear: “. . . and that environmental baselines reflect true conditions.”

As stated in the Army's regulations cited in the Draft Guidance, "An action-forcing response to mitigation failures is essential to the success of any mitigation program." The same could be said for monitoring a activity that could have significant environmental impacts.

Thank you for consideration of these comments.

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