



May 24, 2010

The Council on Environmental Quality
Attn: Ted Boling
722 Jackson Place, N.W.
Washington, DC 20503

Re: *National Environmental Policy Act (NEPA) Draft Guidance, "NEPA Mitigation and Monitoring"*

VIA ELECTRONIC MAIL (Mitigation.guidance@ceq.eop.gov)

Good afternoon:

The Interstate Natural Gas Association of America ("INGAA") submits this comment letter pursuant to the notice issued under the referenced heading by the Council on Environmental Quality ("CEQ") on February 18, 2010, and published in the *Federal Register* on February 23, 2010.¹ **It is imperative CEQ expressly acknowledge that the suggestions contained in its guidance memorandum are advisory only. Agencies that already fully recognize mitigation and monitoring, such as the Federal Energy Regulatory Commission ("FERC"), need not and should not be required to alter existing and effective NEPA procedures.**

INGAA is a non-profit trade association representing interstate natural gas pipeline companies operating in the United States and interprovincial pipelines operating in Canada. INGAA's U.S. members operate over 200,000 miles of pipeline, carrying over 90% of all natural gas transported and sold in interstate commerce.

Interstate natural gas pipeline facilities cannot be built or modified without first receiving a certificate of public convenience and necessity from FERC.² Issuing a certificate is a "major federal action" under NEPA,³ and in assessing certificate applications, FERC complies with NEPA and CEQ's implementing regulations through an extensive set of NEPA procedures.⁴

Through application content requirements (applied both during the voluntary, "pre-filing" stage and during formal consideration),⁵ FERC's NEPA procedures generate and analyze

¹ 75 Fed. Reg. 8046.

² See generally 15 U.S.C. § 717f(c).

³ The Energy Policy Act of 2005, Pub. L. 109-58, 119 Stat. 594 (2005) (codified as amended in scattered sections of 42 U.S.C.), designated FERC as the lead agency for NEPA review of interstate natural gas pipeline projects.

⁴ 18 C.F.R. Part 380.

⁵ *Id.* § 157.21(b) (content requirements for initial filings at pre-filing stage); § 157.6(b) (content requirements for certificate applications).

possible mitigation measures⁶ for FERC to *consider*⁷ in assessing specific certificate applications.

Under FERC's NEPA procedures, possible mitigation measures are developed directly by FERC or, indirectly by other agencies with expertise and jurisdiction over the proposed pipeline project. As part of each certificate application involving ground disturbance, the applicant must submit an environmental report listing the affected soils and their erosion potential,⁸ and identifying the project's potential to cause soil erosion "due to water, wind, or loss of vegetation."⁹ The certificate applicant must "[d]escribe proposed mitigation measures to reduce the potential for adverse impact,"¹⁰ and assess its mitigation proposals against FERC's benchmark for erosion and sedimentation ("E&S") mitigation, a document entitled Upland Erosion Control, Revegetation and Maintenance (the "E&S Plan").¹¹ The E&S Plan consists of 17 pages of highly detailed standards governing E&S mitigation, such as pre-construction planning; the installation of temporary and permanent E&S controls; and post-construction monitoring, maintenance and reporting.

If a proposed construction project involves any wetlands or waterbodies, as is usually the case for linear pipeline construction of any significance, the certificate application's environmental report must also include a resource report concerning water use and quality.¹² The applicant is required to identify the project's potential impact on wetlands and waterbodies and assess the effectiveness of proposed protective measures. More specifically, the applicant

⁶ FERC's regulations implementing NEPA require certificate applicants to file a set of resource reports, many requiring an applicant to identify mitigation measures: *E.g.*, §§ 380.12(d)(2) (water use and quality), 380.12(e)(7) (fish, wildlife and vegetation); 380.12(h)(3) (geological resources); 380.12(i)(5) (soils); 380.12(j)(9) (land use, recreation and aesthetics); 380.12(k)(5) (air and noise quality); 380.12(l) (alternatives to the proposed project).

⁷ NEPA requires federal agencies to "study, develop and describe" alternative courses of action, 42 U.S.C. § 4332(2)(E), and CEQ regulations interpret these alternative courses to include mitigation, 40 C.F.R. § 1502.14(f). These are procedural measures. NEPA does not mandate specific substantive results, and specifically does not require agencies to impose substantive mitigation measures. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332 (1989). CEQ guidance on mitigation and monitoring should consistently and expressly recognize this fundamental limitation, yet some passages in the draft guidance memorandum could be read to require agencies not to *consider* mitigation measures but to *impose* them, *e.g.*, mitigation measures "should be carefully specified in terms of measurable performance standards," and "a monitoring program should be created or strengthened to ensure mitigation measures are implemented and effective" (draft guidance memorandum, page 2). The draft guidance memorandum should clearly articulate that NEPA requires agencies only to consider mitigation, noting that an agency's authority to impose specific mitigation and monitoring requirements or standards is determined by the agency's authorizing statute.

⁸ *Id.* § 380.12(i)(1).

⁹ *Id.* § 380.12(i)(3).

¹⁰ *Id.* § 380.12(i)(5).

¹¹ The E&S Plan is available online at <http://www.ferc.gov/industries/gas/enviro/uplndctl.pdf>.

¹² 18 C.F.R. § 380.12(d).

must assess its mitigation proposals against Wetland and Waterbody Construction and Mitigation Procedures (the “Procedures”),¹³ the FERC handbook for measures to protect against sedimentation migration to waterbodies.¹⁴ To depart from the Procedures, an applicant must demonstrate that “the proposed alternative mitigation would provide equivalent or greater protection to the environment.”¹⁵

FERC’s procedures also recognize the role of monitoring. For example, under FERC’s E&S Plan, environmental inspectors are responsible for (1) identifying E&S control and soil stabilization needs in all areas; (2) ensuring compliance with the E&S plan; and (3) overseeing remedial activities, should any be needed.

FERC’s NEPA procedures also allow for possible mitigation measures to be developed by sister agencies with expertise and jurisdiction over a proposed pipeline project. A natural gas pipeline can run several hundred miles and temporarily impact thousands of water bodies and wetlands. For that reason, certificate applicants must frequently obtain permits from the U.S. Army Corps of Engineers (“Corps”) under the Clean Water Act (“CWA”) for, among other things, the discharge of dredged or fill material into navigable waters. The Corps has authority pursuant to the CWA to impose mitigation measures for impacts to aquatic resources, and it has promulgated detailed regulations to implement this authority, as recognized by CEQ in the Mitigation Memorandum. Because the Corps has superior knowledge of the mitigation and monitoring measures appropriate for impacts to aquatic resources, FERC’s NEPA process allows FERC to incorporate the Corps’ mitigation measures into FERC’s certificate deliberations, often resulting in a construction certificate that is conditioned on the applicant’s compliance with the Corps’ mitigation measures.

FERC’s NEPA procedures also facilitate transparency and provide ample opportunity for public participation. Certificate applicants are required to provide both direct notice to affected landowners and published public notice that describes a proposed project, invites public comment and describes how comments may be registered.¹⁶ In addition, FERC provides the public with ready, Internet access to all project files to facilitate public involvement in the development, imposition and monitoring of possible mitigation measures.

FERC’s NEPA implementation process is rigorous and thorough, and it has also proven effective and successful. In 2007, FERC certificated nearly 2800 miles of new pipeline facilities,

¹³ The Procedures document is available online at <http://www.ferc.gov/industries/gas/enviro/wetland.pdf>.

¹⁴ 18 C.F.R. § 380.12(d)(2).

¹⁵ *Id.*

¹⁶ *E.g.*, 18 C.F.R. § 157.6(d) (specifying procedures for providing actual and published notification to landowners); *see also* 18 C.F.R. § 157.21(d)(11) (requiring applicants using FERC’s pre-filing procedures to provide a Public Participation Plan identifying “specific tools and actions to facilitate stakeholder communications and public information, including a project web site and a single point of contact.”).

and in 2008, FERC certificated nearly 2100 miles of new pipeline facilities.¹⁷ Even in 2009, amid a global downturn in energy markets, FERC certificated an additional 1100 miles.¹⁸ FERC's activities are critical. For the foreseeable future, the cornerstone of an effective U.S. climate change policy can be summed up in two words: natural gas. Natural gas is abundant, domestically produced and secure. Burning natural gas also results in far fewer greenhouse gas emissions than other fossil fuels. The natural gas transmission pipeline network is indispensable for delivering this clean fuel, and through its NEPA process FERC has maintained environmental vigilance while allowing that network to develop and expand.

FERC's NEPA process — from pre-filing, public notice, and scoping meetings (with public notice and opportunity to comment), through post-construction environmental monitoring and assessment — considers mitigation measures, imposes accountability, recognizes the role of monitoring and facilitates public participation.

In sum, FERC's NEPA process is already rigorous and effective, and it meets all of the legally recognized objectives behind the mitigation and monitoring draft guidance memorandum. When it issues final guidance in this area, CEQ should emphasize that its suggestions are advisory and agencies like FERC¹⁹ should not have to change their NEPA procedures since effective procedures for considering mitigation and monitoring are already in place.

Respectfully submitted,



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¹⁷ *Approved Pipeline Projects (Present-2003) (FERC)*, available under “2007” and “2008” tabs at, <http://www.ferc.gov/industries/gas/indus-act/pipelines/approved-projects/2003-2008.asp>.

¹⁸ *Approved Pipeline Projects (Present-2003) (FERC)*, available at, <http://www.ferc.gov/industries/gas/indus-act/pipelines/approved-projects.asp>.

¹⁹ While INGAA's comments center on FERC, there are a number of federal agencies, *e.g.*, the Corps and the Environmental Protection Agency, that routinely incorporate mitigation and monitoring in their permitting programs. In these cases, CEQ's proposed mitigation and monitoring guidance is at best redundant. To avoid confusion, CEQ should expressly assure these agencies that they do not have to change successful procedures already in place.