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10 N Post St Ste 305 | Spokane WA 99201-0705

Phone: 509.624.1158 | Fax: 509.623.1241

E-mail: nwma_info@nwma.org | Web: www.nwma.org

May 24, 2010

The Council on Environmental Quality
Attn: Ted Boling
722 Jackson Place, NW
Washington, D.C. 20503

Re: Draft Guidance for NEPA Mitigation and Monitoring

Dear Mr. Boling:

The Northwest Mining Association (NWMA) appreciates the opportunity to comment on the Council on Environmental Quality (CEQ) National Environmental Policy Act (NEPA) Draft Guidance, “NEPA Mitigation and Monitoring.”

NWMA is a 115 year old, 2,000 member, non-profit, non-partisan trade association based in Spokane, Washington. NWMA members reside in 40 states and are actively involved in exploration and mining operations on public and private lands, especially in the West. Our diverse membership includes every facet of the mining industry including geology, exploration, mining, engineering, equipment manufacturing, technical services, and sales of equipment and supplies. NWMA’s broad membership represents a true cross-section of the American mining community from small miners and exploration geologists to both junior and large mining companies. More than 90% of our members are small businesses or work for small businesses. Most of our members are individual citizens.

Many NWMA members conduct mineral operations on federal lands and have extensive experience with the NEPA process, especially the project delays and escalating costs associated with NEPA compliance. Therefore, NWMA members are interested in and supportive of efforts to make the NEPA process more streamlined and efficient. However, we are concerned that the proposed guidance from CEQ on mitigation and monitoring will have the opposite effect, and should be withdrawn.

Proposed Guidance for NEPA Mitigation and Monitoring is Contrary to the Role of NEPA

The stated intent of the guidance is to clarify that agencies have a responsibility to advance mitigation and monitoring when establishing NEPA program and procedures. The draft guidance also clarifies that when a “finding of no significant impact” (FONSI) depends on successful mitigation, those requirements should be made public and be accompanied by monitoring and reporting.

However, the draft guidance is inconsistent with NEPA, contrary to U.S. Supreme Court jurisprudence, and ignores existing mitigation and monitoring requirements imposed by federal agencies under statutes other than NEPA.

The primary problem with the draft guidance is it misapprehends the role of NEPA by attempting to impose substantive requirements on federal agencies. Since its passage, courts have emphasized the procedural nature of NEPA. NEPA is not intended to dictate a particular decision or to impose substantive requirements but rather is a procedural process to ensure that agencies take into consideration the environmental impacts of major federal actions.

The Role of Mitigation in NEPA Decisions

As suggested by existing CEQ NEPA regulations, mitigation is an important concept that merits discussion and evaluation during the NEPA process. CEQ regulations require discussion of possible mitigation measures in 1) defining the scope of the environmental impact statement (EIS), 2) in discussing the consequences of a proposed action and its alternatives, and 3) in explaining the ultimate decision. 40 CFR §§ 1508.25(b), 1502.14(f), 1502.16(h), 1505.2(c). In addition, agencies also use mitigation to reduce potentially significant impacts to support a FONSI. In such cases, mitigation enables an agency to conclude the NEPA process, satisfy NEPA requirements, and proceed to implementation with the preparation of the more truncated environmental assessment (EA) rather than an EIS.

The draft guidance's suggestion, however, that the NEPA process should be used to impose binding mitigation requirements contradicts Supreme Court decisions regarding the procedural nature of NEPA.

CEQ fails to note that many of the examples of mitigation discussed in the draft guidance are measures undertaken by agencies outside of the NEPA process. For example, the draft guidance mentions the 2008 Final Compensatory Mitigation rule promulgated jointly by the Corps of Engineers and EPA, ostensibly as a good example of measurable performance standards for mitigation goals. However, the Compensatory Mitigation Rule was promulgated under the Corps and EPA's section 404 Clean Water Act authority as opposed to part of any NEPA regulations.

Monitoring the Effectiveness of Mitigation

CEQ's NEPA regulations indicate agencies may provide for monitoring to assure that their decisions are carried out and should do so in important cases. 40 C.F.R. 1505.3. The draft guidance, however, goes well beyond the existing suggestions regarding monitoring by requiring monitoring any time that a commitment is made in the NEPA process to implement mitigation. The monitoring requirement would be two-fold: ensuring that mitigation is implemented and ensuring that mitigation is effective in achieving its objectives.

Again, CEQ fails to acknowledge the basic nature of NEPA. NEPA is not the appropriate process for requiring agencies to engage in post-decision mitigation monitoring as such requirements are beyond the scope of the statute. Additionally, such a requirement ignores existing regulatory frameworks that require monitoring of mitigation measures.

Mitigation of Mining Activities

Mining in the U.S. cannot happen without mitigation. Mitigation is evaluated and implemented throughout the life of the project from siting and design measures through post-operation reclamation. Mitigation of impacts from mining operations is currently required under a variety

of federal programs including but not limited to the Bureau of Land Management's (BLM) 43 C.F.R 3809 and the U.S. Forest Service's (USFS) 36 C.F.R 228A surface management regulations. Mining is a highly regulated industry and must comply with more than 30 federal environmental laws and regulations as well as state environmental laws. NWMA members have extensive experience with mitigation and monitoring activities under these statutes and regulations.

NWMA allows that the NEPA process can be an appropriate tool to disclose and evaluate mitigation, and to allow public comment regarding proposed mitigation alternatives. As discussed above, NEPA is designed to facilitate a discussion of environmental impacts. However, not only does requiring binding mitigation exceed the scope of CEQ's statutory authority under NEPA, it also may duplicate or hinder existing mitigation efforts under other regulatory programs.

For example, BLM regulations promulgated under the Federal Land Policy and Management Act (FLPMA) apply to the majority of mining of locatable minerals on federal lands and these regulations specifically require mitigation as well as monitoring to ensure mitigation is effective. *See* 43 C.F.R. 3809.420(a)(4) (You must take mitigation measures specified by BLM to protect public lands); 43 C.F.R. 3809.401(b)(4) (a plan of operations for mining must contain a monitoring plan designed to demonstrate compliance with the approved plan and other federal laws and regulations).

Also, the USFS 36 CFR 228A regulations require that all locatable mineral operations "be conducted so as, where feasible, to minimize adverse environmental impacts on National Forest surface resources," including complying with all applicable federal and state environmental laws and regulations (36 C.F.R. 228.8).

Conclusion

CEQ should consider ways to make NEPA more effective instead of adding requirements outside the scope of the statute that would place unnecessary or duplicative burdens on those charged with NEPA compliance. The NEPA process is already extraordinarily time consuming and expensive; additional administrative hurdles should not be imposed. NEPA, as a procedural statute, is not an appropriate vehicle for imposing substantive requirements as contemplated in the draft guidance.

Thank you for the opportunity to comment.

Sincerely,



Laura Skaer
Executive Director

