Comments of Southern Company
on Draft Guidance for NEPA Mitigation and Monitoring
75 Fed. Reg. 8046 (Feb. 23, 2010)
CEQ-2010-0001

I. Background

On February 23, 2010, the Council on Environmental Quality ("CEQ") released a draft guidance memorandum to assist Federal agencies with the mitigation and monitoring activities associated with their National Environmental Policy Act ("NEPA") evaluations. *See* 75 Fed. Reg. 8046 (Feb. 23, 2010) ("draft guidance"). Because Southern Company[1] has been and will continue to be a private applicant for various Federal actions, including permitting, loan guarantees, cost-shared funding, etc., Southern Company submits the following comments on the draft guidance. These comments are in addition to and supportive of the comments submitted by the Utility Water Act Group ("UWAG").

II. Comments

A. CEQ's guidance should recognize and address the involvement of a private applicant for a proposed project requiring Federal action.

Southern Company suggests CEQ address more directly the role of mitigation and monitoring in the Environmental Impact Statement ("EIS") or Environmental Assessment ("EA")/ Finding of No Significant Impact ("FONSI") for the approval of a private applicant's proposed project. CEQ should remind agencies that this guidance should be tailored in situations where a Federal agency is considering the application by a private applicant for permitting, licensing, funding, or similar occasions for Federal involvement.

[1] As a leading supplier of electricity, Southern Company subsidiaries operate over 42,000 megawatts of electric generating capacity in the Southeast and have over 4 million customers. Southern Company's service territory is the Southeast encompasses more than 120,000 square miles, spanning four states – most of Alabama and Georgia, the panhandle of Florida, and twenty-three counties in southeastern Mississippi.

For instance, the draft guidance suggests that "[m]itigation and monitoring reports, access to documents, and responses to public inquiries should be readily available to the public through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." Draft guidance at 6. CEQ should specifically remind agencies that where a private applicant is involved in a Federal action, some information that would fall within this category of documentation would also be considered Confidential Business Information ("CBI") by the applicant and is not releasable under FOIA and should therefore not be disclosed. In its guidance, CEQ should encourage agencies who intend to publicize information, via website or otherwise, to take specific steps to provide a clear opportunity for private applicants to assert any CBI claims it may have.

B. CEQ's guidance should make clear that an agency's ability to use substantive mitigation must be based on its organic statute.

Southern Company supports and reiterates UWAG's comments seeking clarification from CEQ reminding Federal agencies that they may impose binding mitigation or monitoring only when authorized by their organic statutes, and not as a function of NEPA. NEPA is a procedural statute and cannot be used by an agency to require mitigation. *See Robertson v. Methow Valley Citizens Council*, 490 U.S. 332 (1989). Moreover, the purpose of NEPA is to require agencies to consider significant environmental impacts and to ensure that the agencies will inform the public of their consideration of environmental concerns in the decisionmaking process. *See Baltimore Gas & Elec. Co. v. Natural Res. Def. Council, Inc.,*, 462 U.S. 87 (1983). Because the purpose of NEPA is to ensure that the agency's decision, i.e., the "Federal action" is informed by its consideration of environmental impacts, once an agency takes its "Federal action," **its NEPA obligations end.** *Cf. Cold Mountain v. Garber*, 375 F.3d 884, 894 (9th Cir. 2004) (concluding Forest Service was not required to prepare a supplemental analysis for a

Bison-testing facility operated by the State of Montana on federal land pursuant to a Forest Service permit because the Forest Service's NEPA obligations ended when the permit was issued and approved). Southern Company is concerned that agencies might read CEQ's guidance to extend their NEPA obligations beyond the Federal action in question and the analysis needed to support that decision.

Even when an agency is authorized (independently from NEPA) to require mitigation and monitoring, CEQ should caution Federal agencies to be careful not to combine their reliance on their organic statute to require mitigation for permitting with their separate NEPA obligations in a way that makes the authorized mitigation requirement unnecessarily inefficient or more cumbersome. When considering the environmental impacts of a proposed project, a Federal agency must consider the mitigation measures that will be required. However, because the NEPA analysis necessarily precedes the Federal action, and therefore, precedes any mitigation authorized by the agency's organic statute, CEQ should caution agencies to not entangle these requirements, as explained below.

CEQ uses the Department of Army's NEPA regulations as an example of how agencies may meet the goal of the guidance. *See* Draft guidance at 7. As an initial matter, CEQ should clarify that the Department of Army was able to intertwine these requirements only because it was authorized to do so by its organic statute. Additionally, CEQ should urge agencies to consider ways to avoid allowing the mitigation requirements of a substantive statute to stall the NEPA analysis and ultimately the agency's decision on the proposed Federal action. This is especially relevant when the Federal action is a decision on a private applicant's request, in situations where other lead or coordinating agencies are involved, and when similar, connected or cumulative actions are being analyzed in a single NEPA document.

Specifically with respect to mitigation, CEQ should clarify that at the time an agency is preparing its NEPA analysis, the best available information standard is applicable; therefore, conceptual mitigation plans are sufficient for NEPA analyses. While NEPA analyses may not be avoided by reliance on other regulatory requirements, agencies can and should take into consideration such regulatory requirements in their NEPA analyses. Using a conceptual mitigation plan as a conservative, bounding limit, an agency can evaluate the impacts of the project and issue a Record of Decision ("ROD") or FONSI without undue delay.

C. CEQ should differentiate between the role of mitigation following preparation of an EIS and the role of mitigation to support an agency's preparation of an EA and "mitigated FONSI."

Southern Company is concerned that the draft guidance does not distinguish sufficiently between the role of mitigation discussed in an EIS and mitigation relied upon to support a FONSI. As explained above, NEPA does not grant an agency authority to impose substantive mitigation requirements. *See Robertson v. Methow Valley Citizens Council,* 490 U.S. 332 (1989). Thus, where an agency has already committed to preparation of an EIS, while the agency is required to discuss mitigation measures, the agency is plainly not required to adopt or enforce those measures, unless they stem from the agency's organic statute. *See Nat'l Parks & Conservation Ass'n v. U.S. Dep't of Transp.*, 222 F.3d 677 (9th Cir. 2000). An agency or private applicant may, however, choose to commit to such voluntary mitigation measures. In the context of a "mitigated FONSI," however, the purpose of mitigation measures is to, in effect, revise the project so that impacts are not significant enough to require an EIS. In these cases, mitigation and monitoring are much more important to ensure that the impacts of the project do not change so much as to invalidate the FONSI.

Southern Company urges CEQ to remind agencies that mitigation and monitoring play different roles in the context of EISs than they do for mitigated FONSIs. CEQ should recognize in its guidance that voluntary mitigation measures to reduce impacts in an EIS are distinguishable from committing to adopt mitigation measures specifically in order to reduce impacts and therefore avoid preparation of an EIS (as is the case for mitigated FONSIs).

III. Conclusion

Southern Company appreciates this opportunity to provide comments on CEQ's draft guidance on NEPA mitigation and monitoring. Southern Company requests that CEQ consider, and revise the draft guidance to reflect, these comments to ensure the guidance is consistent with NEPA's statutory and regulatory goals.