

May 24, 2010

Council on Environmental Quality
722 Jackson Place, N.W.
Washington, D.C. 20503

ATTENTION: Ted Boling, Senior Counsel, Council on Environmental Quality

Dear Mr. Boling:

This letter provides the comments of The Nature Conservancy on the proposed guidance for “NEPA Mitigation and Monitoring,” published for review and comment in the *Federal Register* on February 23, 2010.

The Nature Conservancy is an international, non-profit conservation organization working around the world to protect ecologically important lands and waters for nature and people. Our mission is to preserve the plants, animals and natural communities that represent the diversity of life on Earth by protecting the lands and waters they need to survive. We are best known for our science-based, collaborative approach to developing creative solutions to conservation challenges. Our on-the-ground conservation work is carried out in all 50 states and more than 30 foreign countries and is supported by approximately one million individual members. We have helped conserve nearly 15 million acres of land in the United States and Canada and more than 102 million acres with local partner organizations globally.

Private and public expenditures for compensatory mitigation under the existing major federal programs total approximately \$3.8 billion annually. *Environmental Law Institute. 2007. Mitigation of Impacts to Fish and Wildlife Habitat: Estimating Costs and Identifying Opportunities.* Despite the expenditure of compensation funds under the mitigation protocol, many projects have fallen short of their potential for achieving tangible results. We must do better.

We commend CEQ for preparing detailed guidance to agencies on the critical topics of effective and meaningful incorporation of the mitigation hierarchy, mitigation measures, and monitoring protocols into documentation prepared pursuant to the National Environmental Policy Act (NEPA). We believe that detailed guidance from CEQ on these topics in a NEPA context will be an important step forward to better allow for:

- Informed and effective participation by the public in the process of agency decision-making.
- Providing agency decision-makers with better and more realistic information concerning the environmental impacts of proposed agency actions and the

effective measures available to avoid, minimize, or if necessary compensate for and offset the impacts of proposed agency action.

- Obtaining the maximum environmental benefit possible as a result of mitigation measures adopted, especially by applying, wherever possible, a broader, ecosystem or watershed approach and by integrating mitigation measures with existing local, state, and federal environmental plans and processes.
- Establishing an effective system of monitoring the actual outcomes of mitigation (as distinct from mitigation inputs), based on specific, measurable ecological performance standards combined with effective systems for collecting and analyzing data derived from such monitoring to allow agencies and the federal government as a whole to comprehensively apply lessons learned and apply those lessons to the design and implementation of mitigation measures in related future proposed federal actions considered under NEPA

It is with a view to suggesting changes to the draft guidance to assist in advancing the objectives above that we offer the following observations and suggestions.

On August 4, 2009, The Nature Conservancy and the Environmental Law Institute published a white paper entitled *The Next Generation of Mitigation: Linking Current and Future Mitigation Programs with State Wildlife Action Plans and Other State and Regional Plans* (hereafter *Mitigation White Paper*) We have attached that paper to these comments, and commend it for your consideration as you finalize your guidance. We especially commend your attention to the recommendations in the *Mitigation White Paper* that agencies:

- Consider and develop mitigation and monitoring measures in an ecosystem or watershed context.
- Develop those measures in consideration of ongoing relevant mitigation measures tied to previous actions and in consideration of state and federal conservation plans and programs developed at the watershed or ecosystem scale.

We recommend that the guidance be modified to require NEPA documents addressing mitigation and monitoring measures to explicitly state which of the measures represent:

- Commitments that are within the agency's authority to impose and that the agency has in fact made made binding;
- Commitments that are not binding as being beyond the authority of the agency to impose; and
- Commitments that are within the agency's authority to make binding, but which the agency elected to not to make binding, with an explanation of why the agency elected not to make them binding.

This proposed "requirement to explain in detail" is procedural in nature and, as such, is appropriate for inclusion in the final guidance. Describing mitigation in those three broad categories will help allow fully informed public comments about the mitigation aspect of NEPA documents and will assist in ensuring that decision-makers fully consider the available options and make fully informed decisions.

We support the provisions in the draft guidance stressing the importance of describing mitigation measures in terms of performance standards. However, we recommend that the guidance clearly distinguish between "administrative performance measures", which focus on inputs (steps taken, reports filed, etc), and "ecological performance measures", which describe specific and measurable ecological outcomes to be obtained as a result of mitigation measures. We also recommend that the guidance be modified to contain a definition of these two very different types of performance standards.

Accordingly, we suggest that the guidance be modified to recommend the use in NEPA documentation, whenever possible, of specific *ecological* performance standards based on actual, measurable outcomes, and not simply *administrative* performance standards such as steps to be taken, reports to be filed, etc. We also recommend that the guidance require an explanation in NEPA documents of why mitigation measures are not described in terms of measurable ecological performance standards - that is, in terms of specific anticipated outcomes - if that is the case for the proposed action being considered. Requiring this explanation in NEPA documents will help focus public comments and will better inform the decision-maker of the choices available as part of the decision to be made, including the choices regarding how mitigation will be measured and evaluated.

In that regard, we commend your attention to the following definition of "performance standards" contained in the rule regarding "Compensatory Mitigation for Losses of Aquatic Resources" (codified at 33 C.F.R. pt. 325, and hereafter referred to as the "*Rule*"). Specifically, we commend your attention to the following definition contained in section 332.2 of the *Rule*:

"Performance standards are observable or measurable physical (including hydrological), chemical and/or biological attributes that are used to determine if a compensatory mitigation project meets its objectives."

We recommend that the draft guidance be modified to require an explanation in NEPA documentation of the duration and timeline for any mitigation and monitoring measures being considered. Where mitigation is described in ecological performance standards (i.e., measurable anticipated ecological outcomes), the guidance should be modified to require agencies to specify when those outcomes are anticipated to be fully realized.

We also recommend that the guidance be modified to require agencies to specify in NEPA documentation "the parameters to be monitored, the length of the monitoring period, the party responsible for conducting the monitoring, the frequency for submitting monitoring reports... and the party responsible for submitting those monitoring reports..." See sections 332.6(a)(1) and 332.6(b)) of the *Rule*. We also recommend that the guidance be modified to require agencies to describe in their NEPA documentation:

- How reports and data concerning the observed and measured outcomes of mitigation measures for the proposed action under consideration can be obtained both during the course of implementing required mitigation measures and at the conclusion of those measures; or
- A statement that such reports and data will not be available to the public, with an explanation of the reasons for and basis of making such reports and data unavailable.

We commend CEQ for the provisions of the draft guidance relating to incorporation of adaptive management approaches in mitigation and monitoring. We encourage CEQ to consider strengthening this guidance as much as possible. Specifically, we recommend inclusion in the guidance of more explicit language linking adaptive management approaches to the adoption of ecological performance standards (see above) necessary to an adaptive management approach. We also recommend that the guidance be modified to more strongly stress the need for agencies to:

- Develop and use effective measures to gather and analyze data with regard to those standards during the course of the project; and
- Develop appropriate modifications as required to the original program of mitigation measures to adjust for any changed conditions or results that have been less successful than originally anticipated.

We also recommend that the guidance be modified to require agencies to clearly state in NEPA documentation whether an adaptive management approach to mitigation is being proposed, or, if such an approach is not being proposed, an explanation of the reasons why such an approach is not being proposed. Again, this information will demonstrate that the agency has taken a "hard look" at adopting this approach, and will result in better informed comments from the public and better informed decisions by agency personnel.

In a real sense, mitigation measures are in effect scientific experiments, with the working hypothesis being that the measures to be taken will result in the ecological outcome anticipated. As with scientific experimentation generally, rigorous data standards for measuring observed outcomes coupled with analysis of those data to confirm or refute the working hypothesis are at the core of systematic improvement over time of decisions regarding effective mitigation to be incorporated into agency decision-making. Again, as is the case with science generally, the full potential of the "experimentation" represented by mitigation measures to result in progress cannot be realized without systematic sharing of and peer review of the results.

Accordingly, we recommend that the guidance address the critical importance of agencies establishing an adequately resourced, centralized "mitigation outcomes data collection, assessment, and lessons learned" process so that the agency can in fact both obtain and apply lessons learned from the success or failure of mitigation in particular projects and have those lessons learned readily available both to the public and to agency decision-makers and associated NEPA documentation relating to future proposed actions of a similar nature.

Finally, we note the important role that CEQ can play in developing systems to gather these "lessons learned" on a government-wide basis and provide those "lessons learned" to all federal agencies so that their future decision-making of all can be systematically improved over time as a result of applying those "lessons learned". We encourage CEQ to take steps to make realize the full potential presented by such a government-wide "lessons learned" system.

Thank you for the opportunity to present The Nature Conservancy's recommendations for CEQ's proposed guidance for "NEPA Mitigation and Monitoring".

Sincerely yours,



Robert Bendick
Director, U.S. Government Relations

Enclosure