



# Texas Department of Transportation

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May 19, 2010

## Comments on CEQ's Draft Guidance NEPA Mitigation and Monitoring

The Council on Environmental Quality

Attention: Mr. Ted Boling

722 Jackson Place, NW.

Washington, DC 20503

Dear Mr. Boling:

This is in response to the Council on Environmental Quality's (CEQ) February 18, 2010, Notice of Availability requesting public comments on the National Environmental Policy Act (NEPA) Draft Guidance document titled "NEPA Mitigation and Monitoring." The Texas Department of Transportation (TxDOT) agrees that minimizing mitigation failure is a worthy goal; we suggest, however, that there are more effective ways to minimize mitigation failure than adaptive management tied to the NEPA process, and that the guidance as presented represents a new requirement as opposed to guidance.

TxDOT also wishes to express its support for the comments submitted by the American Association of State Highway and Transportation Officials (AASHTO). AASHTO's comments capture the major points of concern for state transportation agencies; however, TxDOT requests CEQ's consideration of some additional concerns.

As a state transportation agency, TxDOT actively pursues an appropriate environmental process to comply with NEPA as well as with the range of environmental laws and regulations (such as the Endangered Species Act, Clean Water Act, and the National Historic Preservation). As such, TxDOT also actively develops suitable mitigation for required environmental impacts related to these and other laws and regulations.

Our overall concern with this guidance is that it appears to require detailed mitigation planning and monitoring as a standard part of every NEPA document. Individual agencies, including Federal Highway Administration (FHWA) and Federal Transit Administration (FTA), currently have substantial discretion to determine mitigation and monitoring methods for each project. We believe the guidance needs to be revised in order to make clear that it is not intended to reduce flexibility that exists under existing case law and the CEQ regulations.

The guidance includes numerous statements that, at the very least, create a strong impression that federal agencies have an obligation under NEPA to develop detailed mitigation plans as a standard part of every EA and EIS. For example, this guidance assumes that every EA and EIS should:

- Include a "mitigation alternatives analysis" in which different potential mitigation measures are compared in the NEPA document;

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- Include “mitigation goals and measurable performance standards” for each mitigation measure;
- Include a monitoring plan that tracks compliance with each mitigation measure;
- Require re-opening of the NEPA process, even after a project is under construction, if actual mitigation outcomes differ from expected outcomes.
- Require publication of every monitoring report, regardless of the circumstances of the project.

Goals, measurable performance standards, and monitoring plans are typically addressed by laws and regulations as administered by the federal/state agency whenever they grant a permit or approval. The CEQ regulations do not require that permits or other approvals actually be obtained before a NEPA decision is rendered (43 CFR 1502.25). However, it does require listing of those permits and other approvals and a commitment to implement the required mitigation in order for a NEPA decision to be made (43 CFR 15.3).

In addition, this guidance will likely lead to confusion regarding the statutory requirements and decision-making of the federal and state agencies issuing these permits and other approvals versus the federal agency making the NEPA decision.

As written the guidance implies that all permits and other approvals must be obtained prior to obtaining the final NEPA approval or risk the re-opening of the NEPA process. This will likely require final design, which is beyond what is required for the NEPA process and in conflict with FHWA requirements (23 CFR 771.113(a)), in order to obtain the needed permits and other approvals or risk the re-opening of the NEPA process. As a result, additional time to complete the NEPA process will result due to the time necessary to develop the final design needed and to obtain the permits and other approvals.

FHWA currently provides for re-evaluations of projects with a completed NEPA process. Re-evaluations are prepared for design changes, changes in land use, regulatory updates and for other reason. However, re-evaluations do not reopen the entire NEPA process; they just affect the project changes. In addition, supplementals are prepared whenever FHWA determines there are changes, new information or further development on the project which result in significant impacts not identified in the original approval. TxDOT considers this to be an appropriate and effective way to address project changes, including any changes in mitigation.

There is also the issue of Section 139(l) of the Safe, Accountable, Flexible, Efficient Transportation Act – A Legacy for Users (SAFETEA-LU). This section is meant to expedite resolution of issues affecting transportation projects by limiting the time period for filing claims that challenge permits, licenses, or approvals issued by federal agencies for a highway or public transportation capital project. Section 139(l) allows a federal agency to issue a notice imposing a 180 day period for claims to be presented following the announcement that the permit, license, or approval is final. This does not prevent the Federal agency from requiring a

supplement, issuing/reissuing a permit, license, other approval and establishing another 180 day period for the new final action, or requiring a re-evaluation of an environmental document based on new information. The guidance as proposed appears to affect this process.

Please note that TxDOT is in the process of developing an Environmental Management System to address the life cycle of projects, including monitoring mitigation during construction, so we do recognize that mitigation needs to be effective.

We are also concerned how the guidance would relate to Section 6002 of the Safe, Accountable, Flexible, Efficient, Transportation Act – A Legacy for Users. (23 U.S.C 139(l).) The law expedites resolution of issues by setting a deadline for filing a claim to challenge permits, licenses, or approvals issued by federal agencies for a highway or public transportation capitol project. The law allows a federal agency to issue notice imposing a 180 day period for claims to be presented following the announcement that the permit, license, or approval is final. Later, the agency may require a supplement, issue or reissue a permit, license or other approval. Under those circumstances the agency will issue a second notice imposing a new 180 day period. Although not covered in the guidance document, we are concerned that an agency's compliance with the guidance document will lead the agency to republish the notice even though it is not needed, and delay the project.

We thank you for the opportunity to review and provide comments on draft guidance. If you have any questions regarding our comments, please feel free to contact me at (512) 416-3001.

Sincerely,

A handwritten signature in blue ink, appearing to read "Dianna F. Noble".

Dianna F. Noble, P.E.  
Director of Environmental Affairs  
Texas Department of Transportation