

Virginia Department of Transportation

Richmond, VA

We appreciate the opportunity to provide comments on the “Draft Guidance for NEPA Mitigation and Monitoring,” issued by the Council on Environmental Quality (CEQ) on February 18, 2010. The purpose of this draft document is to provide guidance on mitigation and monitoring of activities undertaken during the NEPA process. The proposed guidance references “several studies” indicating that “ongoing agency implementation and monitoring of mitigation measures is limited and in need of improvement” (page 1 of guidance). In response, CEQ proposes three goals related to mitigation and monitoring. First, mitigation should be considered throughout the NEPA process. Second, a monitoring program should be created or strengthened to ensure mitigation is implemented. Third, public participation should be supported through proactive disclosure of and access to mitigation monitoring reports.

The Virginia Department of Transportation recognizes and complies with multiple federal environmental laws and regulations requiring mitigation and monitoring. These laws and regulations relate to environmental resources including threatened and endangered species, water quality, historic properties, etc. Mitigation and monitoring are linked to specific resources already protected by the wide range of resource-specific environmental laws and regulations. We believe, however, that as a procedural statute requiring informed decisions, NEPA does not impose a substantive obligation to require mitigation. In fact, the word “mitigation” (or any derivation of the word) does not appear in the statute. NEPA established a process that supports a decision.

We believe CEQ went beyond their authority when they expanded upon NEPA requirements in their regulations (40 CFR 1500-1508) by first introducing the concept of mitigation as a consideration in NEPA decision-making. CEQ is now proposing to further expand their authority through this guidance that addresses the implementation and monitoring of mitigation commitments, going beyond the NEPA decision-making process. The Guidance exceeds the requirements of NEPA by taking it beyond a decision-based procedural statute to one trending towards requiring the implementation and monitoring of mitigation. We believe this guidance will increase project costs and create delays by adding to the burden of litigation. In addition, we believe this guidance is duplicative of existing resource-specific laws and regulations already requiring mitigation and monitoring. While we recognize the obligation to comply with requirements relating to mitigation and monitoring already established in a complex assortment of federal laws and regulations, we do not support giving project opponents another basis to challenge federal actions nor do we support the self-imposed expansion of CEQ’s authority.

Finally, the guidance says “CEQ seeks to enable agencies to create successful mitigation planning and implementation procedures with robust public involvement and monitoring programs” (page 1). We believe that agencies already are empowered to create whatever mitigation procedures they determine

to be appropriate. We are not aware of a law or regulation that limits project related environmental mitigation. If CEQ is truly interested in enabling more rigorous mitigation procedures, however, they should enable additional funding to support that objective.