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SUBMITTED VIA ELECTRONIC MAIL

RE: National Environmental Policy Act (NEPA) Draft Guidance, NEPA Mitigation and Monitoring

Dear Mr. Boling:

May 24, 2010

The Western Environmental Law Center (WELC) is a non-profit public interest law firm that works to protect and restore western wildlands and advocates for healthy environments on behalf of communities throughout the West. Wildlands CPR is a non-profit conservation organization headquartered in Missoula, Montana that focuses on promoting watershed restoration through road removal, preventing new wildland road construction, and stopping off-road vehicle abuse.

We appreciate the opportunity to provide comments to the Council on Environmental Quality (CEQ) on its draft guidance pertaining to mitigation and monitoring in the context of NEPA compliance. We join our colleagues Center for Biological Diversity, The Center For Food Safety, Clean Air-Cool Planet, Conservation Law Foundation, Defenders of Wildlife, Earthjustice, The Humane Society of the United States, The International Center for Technology Assessment, The Lands Council, Natural Resources Defense Council, National Trust for Historic Preservation, National Wildlife Federation, Sierra Club, Southern Environmental Law Center, Western Watersheds Project, and The Wilderness Society in their comment letter to CEQ on this topic dated May 20, 2010.¹ In addition to those comments, we offer the following feedback on CEQ's proposed mitigation and monitoring guidance.

I. Implementing Mitigation.

The draft CEQ guidance states that "if funding for implementation of mitigation is not available at the time the decision on the proposed action and mitigation measures is made, then the impacts of a lack of funding resultant environmental effects if the mitigation is not implemented warrant disclosure in the EA or EIS." Draft Guidance, 4. We believe that this issue goes beyond the typical NEPA disclosure requirement. Instead, CEQ should adopt guidance similar to that

¹ A copy of this letter is attached.

found in a provision of the now-defunct 2000 National Forest Management Act planning regulations:

(b) Monitoring of site-specific actions. The decision document authorizing a site specific action should describe any required monitoring and evaluation for the site specific action. The responsible official must determine that there is a reasonable expectation that anticipated funding is adequate to complete any required monitoring and evaluation prior to authorizing a site-specific action.

36 C.F.R. § 219.11(b) (2000) (emphasis added).

In our experience, action agencies such as the Forest Service and Bureau of Land Management frequently base a finding of no significant impact (or, even a Record of Decision) on monitoring and mitigation of various natural resources. However, there is very little, if any, funding available to complete the required mitigation and monitoring. The result is a project that often has greater environmental consequences than analyzed in the NEPA documentation. It is our view that an action should not go forward if funding for mitigation and monitoring is not already in-hand or readily available.

The Appendix to CEQ's draft guidance includes examples of this type of binding mitigation, found in the Army's NEPA procedures:

Another important mechanism in the Army's regulations to assure effective mitigation results is the requirement to fully fund and implement proposed mitigation measures. It is acknowledged in the regulations that "unless money is actually budgeted and manpower assigned, the mitigation does not exist." 32 C.F.R. § 651.15(a)(5)(d). As a result, a proposed action cannot proceed until all adopted mitigation measures are fully resourced or until the lack of funding is addressed in the NEPA analysis.

Draft Guidance, 7. This is the type of direction that CEQ should require all agencies to adopt in some fashion. This concept is also found in various Environmental Management Systems, including ISO 14001.

II. CEQ Should Update and Republish *Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations.*

During June and July of 1980 the Council on Environmental Quality, with the assistance and cooperation of EPA's EIS Coordinators from the ten EPA regions, held one-day meetings with federal, state and local officials in the ten EPA regional offices around the country. In addition, on July 10, 1980, CEQ conducted a similar meeting for the Washington, D.C. NEPA liaisons and persons involved in the NEPA process. At these meetings CEQ discussed (a) the results of its 1980 review of Draft EISs issued since the July 30, 1979 effective date of the NEPA regulations, (b) agency compliance with the Record of Decision requirements in Section 1505 of the NEPA regulations, and (c) CEQ's preliminary findings on how the scoping process is working.

Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations, 46 Fed. Reg. 18,026 (1981). Out of these meetings came CEQ's "Forty Questions" direction, which provides helpful guidance regarding CEQ's interpretation of NEPA and CEQ's NEPA regulations. Since 1981, when the Forty Questions direction was published, the courts' and agencies' understanding of and familiarity with NEPA has changed.

Given the intervening 30 years, and the new challenges that face federal agencies (i.e., climate change), CEQ should consider updating and republishing the Forty Questions guidance. CEQ's interpretation of the proper use of NEPA in the 21st Century could address such issues as how climate change should be considered in NEPA analyses, the proper use of mitigated and model EAs, the role of public notice and comment on NEPA documents (including CEs), and the way in which past actions should be included in an adequate cumulative effects analysis.

III. Conclusion.

In sum, we support CEQ's proposed guidance to clarify the role of mitigation and monitoring in NEPA compliance, and have offered some suggestions for improvement. We also recommend that CEQ take this opportunity to clarify existing CEQ and other federal agency guidance regarding compliance with NEPA. If you have any questions regarding this letter, please do not hesitate to contact me.

Sincerely,



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- Center for Biological Diversity - The Center For Food Safety -
- Clean Air-Cool Planet - Conservation Law Foundation - Defenders of Wildlife -
- Earthjustice - The Humane Society of the United States -
- The International Center for Technology Assessment - The Lands Council -
- Natural Resources Defense Council - National Trust for Historic Preservation -
- National Wildlife Federation - Sierra Club -
- Southern Environmental Law Center - Western Watersheds Project -
- The Wilderness Society -

May 20, 2010

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

Dear Mr. Boling:

This letter provides comments from the undersigned organizations on the proposed guidance for “NEPA Mitigation and Monitoring,” published for review and comment in the *Federal Register* on February 23, 2010. We sincerely commend the Council on Environmental Quality (CEQ) for proposing guidance on this extremely important and virtually neglected area of NEPA law and practice. Although many NEPA decisions incorporate and depend on mitigation measures, there has never been a systematic effort by CEQ or by most federal agencies to track the success of mitigation measures. The interests of both agency decisionmakers and the public have been harmed by the lack of focus and resources on systematic monitoring. Further, public trust and confidence in the environmental impact assessment process has been eroded by a lack of confidence in the durability of commitments made for mitigation and the lack of oversight to ensure that the promised mitigation does occur and that it achieves anticipated goals. CEQ guidance can be a significant step in addressing these issues. Our suggestions for strengthening the draft guidance document follow:

Mitigation Alternatives in Environmental Assessments, p. 3: We believe this discussion can be strengthened in three ways. First, when the original proposal would have triggered preparation of an Environmental Impact Statement (EIS) under the agency’s NEPA procedures, but the agency believes that proposed mitigation lowers the threshold such that an EIS is no longer required, CEQ should direct agencies to provide for a 30-day period for public notice and comment for the proposed mitigated Finding of No Significant Impact (FONSI). This would be consistent with CEQ’s regulation that requires an agency to make a FONSI available for public review (including State and area wide clearinghouses) for 30 days before making its final determination whether to prepare an EIS and before the action may begin if the proposed action

is, or is closely similar to, one which normally requires the preparation of an EIS under the lead agency's NEPA procedures. 40 CFR §1501.4(2)(e)(i).

Second, we urge that the guidance be modified to specify that a mitigated FONSI is only appropriate when there is a mitigation commitment that is legally enforceable. Important public interests are implicated by the NEPA process. Public participation and access to information ought not be circumscribable by agencies without recourse, should the basis for truncating the process not materialize.

Third, CEQ should ensure that mitigated FONSI serve the ultimate goal of the NEPA process, that agency actions not only "protect" but also "restore and enhance the environment." See 40 C.F.R. §1500.1(c). The tendency in environmental assessments (EAs) is to consider fewer alternatives than in an EIS, regrettably in some instances limited to only one action alternative. Mitigated FONSI create an incentive to look only at enough mitigation to avoid the full EIS process. Guidance on mitigating the impacts of major federal actions that otherwise would significantly affect the environment should remind agencies of their obligations to study alternatives in EAs, pursuant to NEPA section 102(2)(E), 42 U.S.C. §4332(2)(E), including alternatives that improve a project's or decision's environmental profile beyond the "no significant impact" level. Ensuring that reasonable alternatives are considered in EAs would, in turn, require that agencies solicit public input and develop alternatives suggested either in a scoping phase or in comments on draft EAs and FONSI.

Environmental Management Systems, p. 3, fn. 3: We appreciate the potential of environmental management systems (EMS) to be a valuable mechanism for tracking implementation and monitoring of mitigation. However, we have also observed serious failures on the part of some agencies to effectively implement EMS and instances where an EMS's application is narrowed in such a manner that it is no longer used to track mitigation for the impacts that are of the most concern to our organizations and much of the public. We encourage CEQ to increase oversight in this area, especially given its relevance to the monitoring and mitigation direction set forth in this draft guidance.

Mitigation Failure, p. 4: Lessons learned through mitigation can inform subsequent decisions and help avoid repeating past failures. The effectiveness of some mitigation measures is well established, and these can serve as models to be replicated in similar situations, but mitigation measures that fail to achieve their intended purpose also need to be well publicized and understood. In any case, agencies and the public can benefit enormously from understanding the impacts of implemented mitigation. It would be enormously useful for CEQ to show leadership in this area by promoting the systematic and ready availability of this type of information. While an across-the-government program would be most desirable, CEQ could begin by working with one particular department or agency to establish a program that could serve as a model for other agencies. The scientific credibility of mitigation generally and in the context of the NEPA process would be greatly enhanced by systematic monitoring, especially when an agency is implementing or overseeing mitigation techniques the effectiveness of which is not well established.

Linkages Between This Draft Guidance Document and Other CEQ Guidance Documents:

We note the very important relationship between the direction set forth in this draft guidance document and the draft guidance documents CEQ published on February 23, 2010 on NEPA and climate change and on establishing and implementing categorical exclusions. The effectiveness of CEQ direction in both of these quite different areas of NEPA law depends in no small degree on the effectiveness of agencies' monitoring measures and, as appropriate, mitigation measures. Monitoring is necessary to the proper use of categorical exclusions and mitigation measures to ensure that effects do not rise to the level of significance. Monitoring of projected impacts to assess the accuracy of environmental impact assessments and the underlying methodologies will support categorical exclusions, enhance impact assessment methodologies, and improve mitigation measures. For categorical exclusions, particularly those classes of action that involve ground disturbing activity, monitoring is necessary to verify the agencies' assumptions about the level of environmental effects. Monitoring is also an important check on ongoing implementation of categorical exclusions and both their direct and cumulative effects. For climate change, monitoring is essential, both for actions that contribute to climate change and for determination of the effects of climate change on the affected environment. Mitigation measures need to be incorporated to address both of these concerns, along with implementation and effectiveness monitoring of mitigation measures. We recommend that both the categorical exclusion and climate change final guidance documents identify appropriate linkages to the mitigation and monitoring final guidance document.

Adaptive Management: The direction in the draft guidance is key to any credible implementation of adaptive management. The implementation of adaptive management has suffered significantly from the lack of credible monitoring in many agencies and indeed is often cited as the reason that adaptive management is the subject of considerable discussion but little on-the-ground implementation. The monitoring of uncertain environmental effects will also allow agencies to integrate analyses of the influence of climate change on the affected environment and projected environmental effects, thus bolstering the effectiveness of adaptive management measures. In addition to determining the success or failure of mitigation actions, effectiveness monitoring data should be used adaptively to inform future mitigation actions and modify ongoing actions as appropriate to increase the likelihood of success. We recommend that the final guidance address the essential linkage between monitoring and adaptive management.

Further, CEQ should make clear that adaptive management is a methodology for assessing the effectiveness of mitigation measures, and not as a replacement for identifying mitigation measures in the first instance. For example, the Bureau of Land Management (BLM) in several NEPA documents has declined to analyze or adopt measures to mitigate the impacts of methane venting at coal mines. In place of mitigation, BLM has proposed an "adaptive management strategy" that lets the coal mine lease holder determine whether mitigation measures may be implemented in a way and on a timeline that profits the lease holder. CEQ should make clear that approaches that seek to postpone the adoption of mitigation measures does not meet the definition of "adaptive management."

Information Quality Act: We urge CEQ to consider adding direction in the draft guidance reminding agencies of their obligation to comply with the Information Quality Act, since that Act and the agency procedures promulgated under it reinforce the need for transparent and

credible data collection and analytical methodologies. This obligation was noted in the draft guidance on categorical exclusions but is equally important in the context of monitoring and mitigation.

Initiating Systematic Monitoring: We realize that the draft guidance is specifically intended to be applied in the context of implementing NEPA's procedural requirements. However, as noted in the draft guidance, NEPA's reach extends beyond the construct of monitoring impacts of particular federal actions for particular periods of time to an obligation to "gather and evaluate new information" on a continuing basis. The success of mitigation actions is strongly dependent on larger-scale processes, and site-level monitoring may not provide sufficient information about the effectiveness of these actions. Where relevant nation, state, or landscape-scale monitoring programs already exist, site-level protocols should be made compatible with them, and data collected at the site level should be fed into these larger-scale monitoring efforts whenever possible. Additionally, assessments of mitigation effectiveness should draw on existing larger-scale data sources whenever possible to create a more complete picture of the impacts of mitigation impacts.

We urge CEQ to build upon and continue its past leadership in this area through systematic, government-wide monitoring program of ecological systems and resources in partnership with other federal agencies. Such a program is consistent with CEQ's many mandates under NEPA and under the Environmental Quality Improvement Act to identify and analyze conditions and trends in the quality of the environment, to review the adequacy of existing systems for monitoring and predicting environmental changes, and to recommend to the President national policies to foster and promote improvement in environmental quality to meet the conservation, social, economic, health, and other requirements and goals of the nation. This type of work is particularly vital now that we are already experiencing some of the effects of climate change and can anticipate many additional changes occurring more rapidly in the future. Without a baseline, meaningful monitoring, measurement, and evaluation of mitigation is not possible. Agencies need to determine a baseline before they can credibly judge the value or additionality of proposed mitigation and the effectiveness of that mitigation once implemented.

Again, we appreciate the opportunity to comment and would be pleased to discuss these issues further if that would be useful.

Sincerely,

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