

PENNSYLVANIA—OZONE  
[8-Hour standard]

Designated area	Designation <sup>a</sup>		Category/classification	
	Date <sup>1</sup>	Type	Date <sup>1</sup>	Type
Philadelphia-Wilmington-Atlantic City, PA-NJ-MD-DE:				
Bucks County .....		Nonattainment .....		Subpart 2/Moderate. <sup>3</sup>
Chester County .....		Nonattainment .....		Subpart 2/Moderate. <sup>3</sup>
Delaware County .....		Nonattainment .....		Subpart 2/Moderate. <sup>3</sup>
Montgomery County .....		Nonattainment .....		Subpart 2/Moderate. <sup>3</sup>
Philadelphia County .....		Nonattainment .....		Subpart 2/Moderate. <sup>3</sup>

<sup>a</sup> Includes Indian Country located in each county or area, except as otherwise specified.

<sup>1</sup> This date is June 15, 2004, unless otherwise noted.

<sup>2</sup> November 22, 2004.

<sup>3</sup> Attainment date extended to June 15, 2011.

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**COUNCIL ON ENVIRONMENTAL QUALITY**

**40 CFR Parts 1500, 1501, 1502, 1505, 1506, 1507, and 1508**

**Final Guidance for Federal Departments and Agencies on the Appropriate Use of Mitigation and Monitoring and Clarifying the Appropriate Use of Mitigated Findings of No Significant Impact**

**AGENCY:** Council on Environmental Quality.

**ACTION:** Notice of availability.

**SUMMARY:** The Council on Environmental Quality (CEQ) is issuing its final guidance for Federal departments and agencies on the appropriate use of mitigation in Environmental Assessments (EAs) and Environmental Impact Statements (EISs) under the National Environmental Policy Act (NEPA). The guidance was developed to modernize, reinvigorate, and facilitate and increase the transparency of NEPA implementation.

This guidance outlines principles Federal agencies should apply in the development of their NEPA implementing regulations and procedures to guide their consideration of measures to mitigate adverse environmental impacts in EAs and EISs; their commitments to carry out mitigation made in related decision documents, such as the Record of Decision; the implementation of mitigation; and the monitoring of mitigation outcomes during and after implementation. This guidance also

outlines principles agencies should apply to provide for public participation and accountability in the development and implementation of mitigation and monitoring efforts that are described in their NEPA documentation. Mitigation commitments should be explicitly described as ongoing commitments and should specify measurable performance standards and adequate mechanisms for implementation, monitoring, and reporting.

In addition, this guidance affirms the appropriateness of what is traditionally referred to as a “mitigated Finding of No Significant Impact.” Mitigated Findings of No Significant Impact (FONSIs) can result when an agency concludes its NEPA review with an EA that is based on a commitment to mitigate significant environmental impacts, so that a more detailed EIS is not required. As explained in this guidance, an agency does not have to prepare an EIS when the environmental impacts of a proposed action can be mitigated to a level where the agency can make a FONSI determination, provided that the agency or a project applicant commits to carry out the mitigation, and establishes a mechanism for ensuring the mitigation is carried out. When a FONSI depends on successful mitigation, the requisite mitigation commitments should be made public.

**DATES:** The guidance is effective January 21, 2011.

**FOR FURTHER INFORMATION CONTACT:** The Council on Environmental Quality (ATTN: Horst Greczmiel, Associate Director for National Environmental Policy Act Oversight), 722 Jackson Place, NW., Washington, DC 20503. Telephone: (202) 395-5750.

**SUPPLEMENTARY INFORMATION:** This guidance applies to Federal agencies in accordance with sections 1507.2 and

1507.3 of the CEQ Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, 40 CFR Parts 1500-1508. The National Environmental Policy Act (NEPA), 42 U.S.C. 4321-4370, enacted in 1970, is a fundamental tool used to harmonize our environmental, economic, and social aspirations and is a cornerstone of our Nation’s efforts to protect the environment. NEPA recognizes that many Federal activities affect the environment and mandates that Federal agencies consider the environmental impacts of their proposed actions before deciding to adopt proposals and take action. Additionally, NEPA emphasizes public involvement in government actions affecting the environment by requiring that the benefits and risks associated with proposed actions be assessed and publicly disclosed.

The Council on Environmental Quality (CEQ) is charged with overseeing NEPA’s implementation by Federal agencies. CEQ recognizes that NEPA is a visionary and versatile law that can be used effectively to address new environmental challenges facing our nation and also to engage the public widely and effectively. Furthermore, CEQ recognizes that successful NEPA implementation requires agencies to make information accessible to the public to strengthen citizen involvement in government decisionmaking. This guidance is designed to facilitate agency compliance with NEPA, by clarifying the commitments agency decisionmakers may decide to make when complying with NEPA, and ensuring that information about those commitments is accurate and made available to the public.

On February 18, 2010, CEQ announced the issuance of three

proposed draft guidance documents to modernize and reinvigorate NEPA, in conjunction with the 40th anniversary of the statute's enactment.<sup>1</sup> This guidance document is the second of those three to be issued in final form. The first guidance document, on "Establishing, Applying, and Revising Categorical Exclusions Under the National Environmental Policy Act," was released in final form on November 23, 2010.<sup>2</sup> The third guidance document, which addresses when and how Federal agencies should consider greenhouse gas emissions and climate change in their proposed actions, will be the next and last guidance document of this series to be finalized.

In a **Federal Register** notice published on February 23, 2010, CEQ announced the availability of the draft mitigation and monitoring guidance and requested public comments.<sup>3</sup> CEQ appreciates the thoughtful responses it has received on the draft guidance. CEQ received more than sixty comments. Commenters included private citizens, corporations, environmental organizations, trade associations, and federal and state agencies. All of these comments can be viewed online at <http://www.whitehouse.gov/administration/eop/ceq/initiatives/nepa/comments>. Those comments that suggested editorial revisions or requested clarification of terms are addressed in the text of the final guidance. Those comments that raised policy or substantive concerns have been grouped thematically, summarized, and addressed in the following sections of this Notice.

### Mitigation Planning

Some commenters expressed concern that this guidance would impose an obligation on agencies to develop detailed mitigation plans as a standard part of every EA and EIS process. Several commenters asserted that a detailed mitigation planning stage would needlessly increase complexity and reduce project flexibility. Commenters also suggested that mitigation planning might actually decrease mitigation effectiveness, as the burden created would pressure agencies, as well as applicants, to undertake less comprehensive mitigation.

This guidance provides a flexible template for the development of agency

regulations and procedures allowing continued discretion for agencies to respond to individual project characteristics. Not every EA or EIS will require the development of detailed mitigation plans. Plans should be developed and implemented when mitigation described in an EA serves as the basis for the FONSI (that is, the effects might be significant but for the proposed mitigation). CEQ disagrees that increased attention to mitigation planning in appropriate circumstances will needlessly increase complexity or reduce project flexibility. Rather, the purpose of detailed mitigation planning is to ensure that mitigation plans appropriately reflect project or program characteristics, and careful consideration of a range of options for adequate implementation and monitoring should increase agency flexibility in responding to changing or unforeseen circumstances. CEQ also disagrees that increased attention to mitigation planning would decrease mitigation effectiveness. To the extent that this guidance may prompt agencies to propose actions with lesser adverse environmental impacts allowing for the selection of less comprehensive (or no) mitigation alternatives, such a response would likely indicate that agencies have appropriately structured their proposed actions to avoid and minimize impacts up front to the extent feasible. This is the fundamental goal of NEPA. This would increase rather than decrease the likelihood that mitigation would be effective. Furthermore, CEQ believes that a focus on monitoring will help to ensure the actual effectiveness of proposed mitigation efforts. The guidance has been revised to ensure that agencies focus on establishing monitoring plans for important cases.

### Source of Agency Authority To Make Mitigation Commitments

Several commenters, citing *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332 (1989), expressed concern that the tone and wording of this guidance reframes NEPA by imposing substantive rather than procedural requirements. Another commenter suggested that if an agency would lack future authority to rectify a substantial mitigation failure, then that lack of authority should be included in the agency's initial analysis of impacts, significance, and mitigation effectiveness.

This guidance is not intended to impose new substantive requirements on agencies or project applicants. Rather, it ensures that the public and decisionmakers are fully informed of any promised mitigation and an agency's clear commitment to perform

or ensure the performance of that mitigation, which in turn strengthens the basis for the NEPA analysis and documentation that an agency has prepared. This guidance is designed to enhance the integrity of the NEPA analysis when it relies on mitigation. It is an agency's underlying authority that provides the basis for the agency to commit to perform or require the performance of particular mitigation. That authority also allows the agency to implement and monitor, or to require the implementation and monitoring of, those mitigation commitments to ensure their effectiveness. It further provides the authority to take remedial steps, so long as there remains federal decisional involvement in a project or other proposed action. The guidance has been revised to further clarify that existing authorities provide the basis for agency commitments to implement mitigation and monitor its success.

NEPA in itself does not compel the selection of a mitigated approach. But where an agency chooses to base the use of less extensive NEPA analysis on mitigation, then this guidance is designed to assist agencies in ensuring the integrity of that decision.

### Use of Outside Experts

Several commenters requested that in recommending the use of third party experts, this guidance should clarify that such experts should be neutral and unbiased parties without conflicts of interest. For example, third party experts participating in development of mitigation and monitoring plans should not have financial stakes in the implementation of the mitigation and monitoring. CEQ agrees with this suggestion but also recognizes that applicants and delegated parties can, in appropriate circumstances, participate in the development and implementation of mitigation and monitoring. The text of this guidance document has been edited to address and incorporate these concerns.

### Effect of Non-Implemented or Ineffective Mitigation

Several commenters asserted that the guidance document was too rigid in providing guidelines for agencies to use when adopting regulations and procedures for responses to mitigation failure. These commenters argued that flexibility should be allowed in response to mitigation failure, with the type of response dependent upon the project's size and scope. Some comments additionally argued that a "NEPA restart" should not be required in response to mitigation failure, and

<sup>1</sup> For more information about this announcement, see <http://www.whitehouse.gov/administration/eop/ceq/initiatives/nepa>.

<sup>2</sup> National Environmental Policy Act (NEPA) Final Guidance, Establishing, Revising and Using Categorical Exclusions, 75 FR 75628, Dec. 6, 2010.

<sup>3</sup> Draft Guidance for NEPA Mitigation and Monitoring, 75 FR 8046, Feb. 23, 2010.

that any such requirement lacked legal basis.

Mitigation failure occurs when a previously adopted mitigation commitment has not been implemented or is not as effective as predicted in lessening the significance of the impacts. Where an EA with a mitigated FONSI was predicated on the implementation of the mitigation, failure of that mitigation calls into question the basis for the FONSI because impacts were not reduced to below the level of significance in the manner anticipated. In the case of other EAs and EISs, mitigation failure could similarly indicate mistaken environmental consideration in the original analysis. In any case, this guidance imposes no requirement to restart a NEPA process; rather, it suggests that if there is Federal action remaining, it is appropriate for agencies to consider preparing supplemental NEPA analysis and documentation and to pursue remaining opportunities to address the effects of that remaining action. The agency should also consider whether it is appropriate for future NEPA analyses to consider the mitigation failure in order to ensure that unsupported assumptions about mitigation outcomes are not included in future analyses and documentation. Subsequent environmental baselines must, of course, reflect true conditions, as informed by any past experience with mitigation results. The guidance has been revised to include recommendations that agencies employ adaptive management or assess multiple mitigation alternatives, so that they have already-developed options they can use to address situations where mitigation is not implemented or is not as effective as predicted in the NEPA analysis.

Another commenter felt that the document does not clearly distinguish between the role of mitigation in support of a mitigated FONSI and the role of mitigation in other circumstances. The guidance now discusses mitigated FONSIs and other mitigation commitments in separate sections and the text has been revised to clearly distinguish between those two scenarios.

#### **Clarity With Respect to Mitigation**

One commenter asserted that clarification is needed to understand the exact nature of many mitigation measures. This commenter suggested explicitly amending the guidance document to require unambiguous and exact language in explaining potential and adopted mitigation. Although CEQ cannot mandate exact requirements for every agency or project, CEQ agrees

with this commenter that individual agency regulations and procedures should require mitigation to be clearly described where appropriate and mitigation goals to be carefully specified in terms of measurable performance standards to the greatest extent possible. No change to the guidance has been made in response to this comment.

Other commenters suggested providing additional guidelines to clarify how the principles in the guidance would apply to various types of multi-agency projects, in which lead federal agencies may rely in part on NEPA work done by co-lead or cooperating agencies. CEQ cannot specify how this guidance should apply in every situation. CEQ views the guidance as appropriately clear; each individual agency should, based on existing authority, work to ensure appropriate cooperation with other agencies in the development and implementation of mitigation and monitoring. Specifically, the guidance notes that mitigation and monitoring authority may be shared among joint lead or cooperating agencies “so long as the oversight is clearly described in the NEPA documents or associated decision documents” and “responsible parties, mitigation requirements, and any appropriate enforcement clauses are included in documents such as authorizations, agreements, permits or contracts.” With respect to public engagement, the guidance states that “it is the responsibility of the lead agency to make the results of relevant monitoring available to the public.” No change to the guidance has been made in response to these comments.

#### **Monitoring Mitigation**

One commenter requested that the guidance define “important” in 40 CFR 1505.3, which states that agencies should provide for monitoring in “important cases.” CEQ appreciates this concern. Because of the wide range of situations in which NEPA is applied, it would be difficult to define in advance what cases are “important,” and CEQ has edited the guidance document to note that agencies should apply professional judgment and the rule of reason in determining which cases are “important.”

Other commenters noted that analyzing resource conditions prior to implementation can be useful in providing a baseline for judgments of mitigation effectiveness during the monitoring stage. CEQ agrees and has added language to the guidance incorporating this suggestion.

#### **Public Participation in Mitigation Implementation and Monitoring**

A number of comments addressed the role of the public in mitigation implementation and monitoring. Some commenters felt that allowing the public to directly participate in this process could present safety risks. The guidance states that public participation in mitigation implementation and monitoring should be provided where appropriate. Public involvement will not be appropriate in every situation, and the guidance was left unchanged.

Others felt that the guidance’s discussion of the release of monitoring results could inappropriately encourage the release of confidential information or that the need for public access could be met by relying on citizen requests rather than affirmative reporting by agencies. The guidance does not require that all information be released in every instance, and CEQ believes that agencies will be able to balance their responsibilities to provide opportunities for public participation under the Freedom of Information Act (FOIA), NEPA, CEQ regulations and this guidance with the need to protect confidential information as appropriate. CEQ notes, however, that environmental monitoring results are rarely considered confidential information and are explicitly required to be made available to the public under some environmental statutes. The guidance has been changed to include the need to balance competing privacy or confidentiality concerns with the benefits of public disclosure.

#### **Definition of Significant**

A number of commenters requested that CEQ provide additional guidance on the meaning of “significant” impacts. CEQ has already issued regulations on this, e.g., in 40 CFR 1508.27. No change to the guidance has been made in response to these comments.

#### **Inclusion of Appendix or Examples**

Several commenters suggested supplementing the Appendix with additional examples of agency practices or regulations in addition to the Department of the Army regulations detailed in the proposed guidance. Objections to the example were made based on concerns that the example is focused on actions an agency would directly perform, and that the example is a regulation and thereby implies that mitigation and monitoring must be established through a regulatory process. While CEQ appreciates the suggestions, we believe the Department of the Army regulations detailed in the

proposed guidance provide a clear and useful example and that the addition of other examples is unnecessary. Text introducing the example was added to address the regulatory concern.

### The Final Guidance

For reasons stated in the preamble, above, CEQ issues the following guidance on the Appropriate Use of Mitigation and Monitoring and Clarifying the Appropriate Use of Mitigated Findings of No Significant Impact. The final guidance is provided here and is available on the National Environmental Policy Act Web site (<http://www.nepa.gov>) at [http://ceq.hss.doe.gov/ceq\\_regulations/guidance.html](http://ceq.hss.doe.gov/ceq_regulations/guidance.html) and on the CEQ Web site at <http://www.whitehouse.gov/administration/eop/ceq/initiatives/nepa>.

### Memorandum for Heads of Federal Departments and Agencies

*From:* Nancy H. Sutley, Chair, Council on Environmental Quality.

*Subject:* Appropriate Use of Mitigation and Monitoring and Clarifying the Appropriate Use of Mitigated Findings of No Significant Impact.

The Council on Environmental Quality (CEQ) is issuing this guidance for Federal departments and agencies on establishing, implementing, and monitoring mitigation commitments identified and analyzed in Environmental Assessments, Environmental Impact Statements, and adopted in the final decision documents. This guidance also clarifies the appropriate use of mitigated "Findings of No Significant Impact" under the National Environmental Policy Act (NEPA). This guidance is issued in accordance with NEPA, 42 U.S.C. 4321 *et seq.*, and the CEQ Regulations for Implementing the Procedural Provisions of NEPA (CEQ Regulations), 40 CFR Parts 1500–1508.<sup>4</sup> The guidance explains the requirements of NEPA and the CEQ Regulations, describes CEQ policies, and recommends procedures for agencies to use to help them comply with the requirements of NEPA and the CEQ Regulations when they establish mitigation planning and implementation procedures.<sup>5</sup>

<sup>4</sup> The Council on Environmental Quality (CEQ) Regulations for Implementing the Procedural Provisions of the National Environmental Policy Act (CEQ Regulations) are available on <http://www.nepa.gov> at [http://ceq.hss.doe.gov/ceq\\_regulations/regulations.html](http://ceq.hss.doe.gov/ceq_regulations/regulations.html).

<sup>5</sup> CEQ is issuing this guidance as an exercise of its duties and functions under section 204 of the National Environmental Policy Act (NEPA), 42 U.S.C. 4344, and Executive Order No. 11,514, 35 FR 4,247 (Mar. 5, 1970), as amended by Executive

NEPA was enacted to promote efforts that will prevent or eliminate damage to the human environment.<sup>6</sup> Mitigation measures can help to accomplish this goal in several ways. Many Federal agencies and applicants include mitigation measures as integral components of a proposed project's design. Agencies also consider mitigation measures as alternatives when developing Environmental Assessments (EA) and Environmental Impact Statements (EIS). In addition, agencies have increasingly considered mitigation measures in EAs to avoid or lessen potentially significant environmental effects of proposed actions that would otherwise need to be analyzed in an EIS.<sup>7</sup> This use of mitigation may allow the agency to comply with NEPA's procedural requirements by issuing an EA and a Finding of No Significant Impact (FONSI), or "mitigated FONSI," based on the agency's commitment to ensure the mitigation that supports the FONSI is performed, thereby avoiding the need to prepare an EIS.

This guidance addresses mitigation that an agency has committed to implement as part of a project design and mitigation commitments informed by the NEPA review process. As discussed in detail in Section I, below, agencies may commit to mitigation measures considered as alternatives in an EA or EIS so as to achieve an environmentally preferable outcome. Agencies may also commit to mitigation measures to support a mitigated FONSI, so as to complete their review of potentially significant environmental impacts without preparing an EIS. When agencies do not document and, in important cases, monitor mitigation commitments to determine if the mitigation was implemented or

Order No. 11,991, 42 FR 26,927 (May 24, 1977). This guidance is not a rule or regulation, and the recommendations it contains may not apply to a particular situation based upon the individual facts and circumstances. This guidance does not change or substitute for any law, regulation, or other legally binding requirement and is not legally enforceable. The use of language such as "recommend," "may," "should," and "can" is intended to describe CEQ policies and recommendations. The use of mandatory terminology such as "must" and "required" is intended to describe controlling requirements under the terms of NEPA and the CEQ Regulations, but this document does not independently establish legally binding requirements.

<sup>6</sup> 42 U.S.C. 4321 (stating that the purposes of NEPA include promoting efforts which will prevent or eliminate damage to the environment).

<sup>7</sup> This trend was noted in CEQ's Twenty-Fifth Anniversary report on the effectiveness of NEPA implementation. See CEQ, "NEPA: A Study of its Effectiveness After Twenty-Five Years" 20 (1997), available at <http://ceq.hss.doe.gov/nepa/nepa25fn.pdf>.

effective, the use of mitigation may fail to advance NEPA's purpose of ensuring informed and transparent environmental decisionmaking. Failure to document and monitor mitigation may also undermine the integrity of the NEPA review. These concerns and the need for guidance on this subject have long been recognized.<sup>8</sup> While this guidance is designed to address these concerns, CEQ also acknowledges that NEPA itself does not create a general substantive duty on Federal agencies to mitigate adverse environmental effects.<sup>9</sup>

Accordingly, in conjunction with the 40th Anniversary of NEPA, CEQ announced that it would issue this guidance to clarify the appropriateness of mitigated FONSI and the importance of monitoring environmental mitigation commitments.<sup>10</sup> This new guidance affirms CEQ's support for the appropriate use of mitigated FONSI, and accordingly amends and supplements previously issued

<sup>8</sup> See, e.g., CEQ, 1987–1988 Annual Report, available at <http://www.slideshare.net/whitehouse/august-1987-1988-the-eighteenth-annual-report-of-the-council-on-environmental-quality> (stating that CEQ would issue guidance on the propriety of an Environmental Assessment (EA) and Finding of No Significant Impact (FONSI) rather than requiring an Environmental Impact Statement (EIS) when the environmental effects of a proposal are significant but mitigation reduces those impacts to less than significant levels). In 2002, CEQ convened a Task Force on Modernizing NEPA Implementation, which recommended that CEQ issue guidance clarifying the requirements for public involvement, alternatives, and mitigation for actions that warrant longer EAs including those with mitigated FONSI. CEQ NEPA Task Force, "Modernizing NEPA Implementation" 75 (2003), available at <http://ceq.hss.doe.gov/ntf/report/totaldoc.html>. NEPA experts and public stakeholders have expressed broad support for this recommendation, calling for consideration of monitoring and public involvement in the use of mitigated FONSI. CEQ, "The Public and Experts' Review of the National Environmental Policy Act Task Force Report 'Modernizing NEPA Implementation'" 7 (2004), available at [http://ceq.hss.doe.gov/ntf/CEQ\\_Draft\\_Final\\_Roundtable\\_Report.pdf](http://ceq.hss.doe.gov/ntf/CEQ_Draft_Final_Roundtable_Report.pdf); see also CEQ, "Rocky Mountain Roundtable Report" 8 (2004), available at <http://ceq.hss.doe.gov/ntf/RockyMtnRoundTableReport.pdf> (noting that participants in a regional roundtable on NEPA modernization identified "developing a means to enforce agency commitments to monitoring and mitigation" as one of the top five aspects of NEPA implementation needing immediate attention); "Eastern Round Table Report" 4 (2003), available at <http://ceq.hss.doe.gov/ntf/EasternRoundTableReport.pdf> (reporting that, according to several panelists at a regional roundtable, "parties responsible for monitoring the effects of \* \* \* mitigation measures are rarely identified or easily held accountable," and that a lack of monitoring impedes agencies' ability to address the cumulative effects of EA actions).

<sup>9</sup> *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 352 (1989).

<sup>10</sup> CEQ, "New Proposed NEPA Guidance and Steps to Modernize and Reinventorize NEPA" (Feb. 18, 2010), available at <http://www.whitehouse.gov/administration/eop/ceq/initiatives/nepa>.

guidance.<sup>11</sup> This guidance is intended to enhance the integrity and credibility of the NEPA process and the information upon which it relies.

CEQ provides several broad recommendations in Section II, below, to help improve agency consideration of mitigation in EISs and EAs. Agencies should not commit to mitigation measures considered in an EIS or EA absent the authority or expectation of resources to ensure that the mitigation is performed. In the decision documents concluding their environmental reviews, agencies should clearly identify any mitigation measures adopted as agency commitments or otherwise relied upon (to the extent consistent with agency authority or other legal authority), so as to ensure the integrity of the NEPA process and allow for greater transparency.

Section III emphasizes that agencies should establish implementation plans based on the importance of the project and its projected effects. Agencies should create new, or strengthen existing, monitoring to ensure that mitigation commitments are implemented. Agencies should also use effectiveness monitoring to learn if the mitigation is providing the benefits predicted. Importantly, agencies should encourage public participation and accountability through proactive disclosure of, and provision of access to, agencies' mitigation commitments as well as mitigation monitoring reports and related documents.

Although the recommendations in this guidance are broad in nature, agencies should establish, in their NEPA implementing procedures and/or guidance, specific procedures that create systematic accountability and the mechanisms to accomplish these goals.<sup>12</sup> This guidance is intended to assist agencies with the development and review of their NEPA procedures, by specifically recommending:

- How to ensure that mitigation commitments are implemented;
  - How to monitor the effectiveness of mitigation commitments;
  - How to remedy failed mitigation;
- and
- How to involve the public in mitigation planning.

<sup>11</sup> This previous guidance is found in CEQ, "Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations," 46 FR 18,026, Mar. 23, 1981, available at <http://ceq.eh.doe.gov/nepa/regs/40/40P1.htm> (suggesting that the existence of mitigation measures developed during the scoping or EA stages "does not obviate the need for an EIS").

<sup>12</sup> 40 CFR 1507.3 (requiring agencies to issue, and continually review, policies and procedures to implement NEPA in conformity with NEPA and CEQ Regulations).

Finally, to assist agencies in the development of their NEPA implementing procedures, an overview of relevant portions of the Department of the Army NEPA regulations is appended to this guidance as an example for agencies to consider when incorporating the recommendations of this guidance as requirements in their NEPA programs and procedures.<sup>13</sup>

### I. The Importance of Mitigation Under NEPA

Mitigation is an important mechanism Federal agencies can use to minimize the potential adverse environmental impacts associated with their actions. As described in the CEQ Regulations, agencies can use mitigation to reduce environmental impacts in several ways. Mitigation includes:

- Avoiding an impact by not taking a certain action or parts of an action;
- Minimizing an impact by limiting the degree or magnitude of the action and its implementation;
- Rectifying an impact by repairing, rehabilitating, or restoring the affected environment;
- Reducing or eliminating an impact over time, through preservation and maintenance operations during the life of the action; and
- Compensating for an impact by replacing or providing substitute resources or environments.<sup>14</sup>

Federal agencies typically develop mitigation as a component of a proposed action, or as a measure considered in the course of the NEPA review conducted to support agency decisionmaking processes, or both. In developing mitigation, agencies necessarily and appropriately rely upon the expertise and experience of their professional staff to assess mitigation needs, develop mitigation plans, and oversee mitigation implementation. Agencies may also rely on outside resources and experts for information about the ecosystem functions and values to be protected or restored by mitigation, to ensure that mitigation has the desired effects and to develop appropriate monitoring strategies. Any outside parties consulted should be neutral parties without a financial interest in implementing the mitigation and monitoring plans, and should have expert knowledge, training, and experience relevant to the resources potentially affected by the actions and—if possible—the potential effects from

<sup>13</sup> See *id.*; see also *id.* § 1507.2 (requiring agencies to have personnel and other resources available to implement NEPA reviews and meet their NEPA responsibilities).

<sup>14</sup> *Id.* § 1508.20 (defining mitigation to include these activities).

similar actions.<sup>15</sup> Further, when agencies delegate responsibility for preparing NEPA analyses and documentation, or when other entities (such as applicants) assume such responsibility, CEQ recommends that any experts employed to develop mitigation and monitoring should have the kind of expert knowledge, training, and experience described above.

The sections below clarify practices Federal agencies should use when they employ mitigation in three different contexts: As components of project design; as mitigation alternatives considered in an EA or an EIS and adopted in related decision documents; and as measures identified and committed to in an EA as necessary to support a mitigated FONSI. CEQ encourages agencies to commit to mitigation to achieve environmentally preferred outcomes, particularly when addressing unavoidable adverse environmental impacts. Agencies should not commit to mitigation, however, unless they have sufficient legal authorities and expect there will be necessary resources available to perform or ensure the performance of the mitigation. The agency's own underlying authority may provide the basis for its commitment to implement and monitor the mitigation. Alternatively, the authority for the mitigation may derive from legal requirements that are enforced by other Federal, state, or local government entities (e.g., air or water permits administered by local or state agencies).

#### A. Mitigation Incorporated Into Project Design

Many Federal agencies rely on mitigation to reduce adverse environmental impacts as part of the planning process for a project, incorporating mitigation as integral components of a proposed project design before making a determination about the significance of the project's environmental impacts.<sup>16</sup> Such mitigation can lead to an environmentally preferred outcome and in some cases reduce the projected impacts of agency actions to below a threshold of significance. An example of mitigation measures that are typically included as part of the proposed action are agency standardized best

<sup>15</sup> See *id.* § 1506.5 (providing that agencies are responsible for the accuracy of environmental information submitted by applicants for use in EISs and EAs, and requiring contractors selected to prepare EISs to execute disclosure statement specifying that they have no financial or other interest in the outcome of the project).

<sup>16</sup> CEQ NEPA Task Force, "Modernizing NEPA Implementation" at 69.

management practices such as those developed to prevent storm water runoff or fugitive dust emissions at a construction site.

Mitigation measures included in the project design are integral components of the proposed action, are implemented with the proposed action, and therefore should be clearly described as part of the proposed action that the agency will perform or require to be performed. Consequently, the agency can address mitigation early in the decisionmaking process and potentially conduct a less extensive level of NEPA review.

#### *B. Mitigation Alternatives Considered in Environmental Assessments and Environmental Impact Statements*

Agencies are required, under NEPA, to study, develop, and describe appropriate alternatives when preparing EAs and EISs.<sup>17</sup> The CEQ Regulations specifically identify procedures agencies must follow when developing and considering mitigation alternatives when preparing an EIS. When an agency prepares an EIS, it must include mitigation measures (not already included in the proposed action or alternatives) among the alternatives compared in the EIS.<sup>18</sup> Each EIS must contain a section analyzing the environmental consequences of the proposed action and its alternatives, including “[m]eans to mitigate adverse environmental impacts.”<sup>19</sup>

When a Federal agency identifies a mitigation alternative in an EA or an EIS, it may commit to implement that mitigation to achieve an environmentally-preferable outcome. Agencies should not commit to mitigation measures considered and analyzed in an EIS or EA if there are insufficient legal authorities, or it is not reasonable to foresee the availability of sufficient resources, to perform or ensure the performance of the mitigation. Furthermore, the decision document following the EA should—and a Record of Decision (ROD) must—identify those mitigation measures that the agency is adopting and committing to implement, including any monitoring

and enforcement program applicable to such mitigation commitments.<sup>20</sup>

#### *C. Mitigation Commitments Analyzed in Environmental Assessments To Support a Mitigated FONSI*

When preparing an EA, many agencies develop and consider committing to mitigation measures to avoid, minimize, rectify, reduce, or compensate for potentially significant adverse environmental impacts that would otherwise require full review in an EIS. CEQ recognizes the appropriateness, value, and efficacy of providing for mitigation to reduce the significance of environmental impacts. Consequently, when such mitigation measures are available and an agency commits to perform or ensure the performance of them, then these mitigation commitments can be used to support a FONSI, allowing the agency to conclude the NEPA process and proceed with its action without preparing an EIS.<sup>21</sup> An agency should not commit to mitigation measures necessary for a mitigated FONSI if there are insufficient legal authorities, or it is not reasonable to foresee the availability of sufficient resources, to perform or ensure the performance of the mitigation.<sup>22</sup>

Mitigation commitments needed to lower the level of impacts so that they are not significant should be clearly described in the mitigated FONSI document and in any other relevant decision documents related to the proposed action. Agencies must provide for appropriate public involvement during the development of the EA and FONSI.<sup>23</sup> Furthermore, in addition to

<sup>20</sup> *Id.* § 1505.2(c) (providing that a record of decision must state whether all practicable means to avoid or minimize environmental harm from the alternative selected have been adopted, and if not, why they were not; and providing that a monitoring and enforcement program must be adopted and summarized where applicable for any mitigation).

<sup>21</sup> This guidance approves of the use of the “mitigated FONSI” when the NEPA process results in enforceable mitigation measures. It thereby amends and supplements previously issued CEQ guidance that suggested that the existence of mitigation measures developed during the scoping or EA stages “does not obviate the need for an EIS.” See CEQ, “Forty Most Asked Questions Concerning CEQ’s National Environmental Policy Act Regulations,” 46 FR 18,026, Mar. 23, 1981, available at <http://ceq.eh.doe.gov/nepa/regs/40/40P1.htm>.

<sup>22</sup> When agencies consider and decide on an alternative outside their jurisdiction (as discussed in 40 CFR 1502.14(c)), they should identify the authority for the mitigation and consider the consequences of it not being implemented.

<sup>23</sup> 40 CFR 1501.4(b) (requiring agencies to involve environmental agencies, applicants, and the public, to the extent practicable); *id.* § 1501.4(e)(1) (requiring agencies to make FONSI available to the affected public as specified in § 1506.6); *id.* § 1501.4(e)(2) (requiring agencies to make FONSI available for public review for thirty days before making any final determination on whether to prepare an EIS or proceed with an action when the

those situations where a 30-day public review of the FONSI is required,<sup>24</sup> agencies should make the EA and FONSI available to the public (e.g., by posting them on an agency Web site). Providing the public with clear information about agencies’ mitigation commitments helps ensure the value and integrity of the NEPA process.

#### **II. Ensuring That Mitigation Commitments Are Implemented**

Federal agencies should take steps to ensure that mitigation commitments are actually implemented. Consistent with their authority, agencies should establish internal processes to ensure that mitigation commitments made on the basis of any NEPA analysis are carefully documented and that relevant funding, permitting, or other agency approvals and decisions are made conditional on performance of mitigation commitments.

Agency NEPA implementing procedures should require clear documentation of mitigation commitments considered in EAs and EISs prepared during the NEPA process and adopted in their decision documents. Agencies should ensure that the expertise and professional judgment applied in determining the appropriate mitigation commitments are described in the EA or EIS, and that the NEPA analysis considers when and how those mitigation commitments will be implemented.

Agencies should clearly identify commitments to mitigation measures designed to achieve environmentally preferable outcomes in their decision documents. They should also identify mitigation commitments necessary to reduce impacts, where appropriate, to a level necessary for a mitigated FONSI. In both cases, mitigation commitments should be carefully specified in terms of measurable performance standards or expected results, so as to establish clear performance expectations.<sup>25</sup> The agency

proposed action is, or is closely similar to, one which normally requires the preparation of an EIS under agency NEPA implementing procedures, or when the nature of the proposed action is one without precedent); *id.* § 1506.6 (requiring agencies to make diligent efforts to involve the public in preparing and implementing their NEPA procedures).

<sup>24</sup> *Id.* § 1501.4(e)(2).

<sup>25</sup> In 2001, the Committee on Mitigating Wetland Losses, through the National Research Council (NRC), conducted a nationwide study evaluating compensatory mitigation, focusing on whether the process is achieving the overall goal of “restoring and maintaining the quality of the nation’s waters.” NRC Committee on Mitigating Wetland Losses, “Compensating for Wetland Losses Under the Clean Water Act” 2 (2001). The study’s recommendations were incorporated into the 2008 Final Compensatory Mitigation Rule promulgated jointly

<sup>17</sup> 42 U.S.C. 4332(2)(C) (mandating that agencies’ detailed statements must include alternatives to the proposed action); *Id.* § 4332(E) (requiring agencies to study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources).

<sup>18</sup> 40 CFR 1502.14(f) (listing mitigation measures as one of the required components of the alternatives included in an EIS); *id.* § 1508.25(b)(3) (defining the “scope” of an EIS to include mitigation measures).

<sup>19</sup> *Id.* § 1502.16(h).

should also specify the timeframe for the agency action and the mitigation measures in its decision documents, to ensure that the intended start date and duration of the mitigation commitment is clear. When an agency funds, permits, or otherwise approves actions, it should also exercise its available authorities to ensure implementation of any mitigation commitments by including appropriate conditions on the relevant grants, permits, or approvals.

CEQ views funding for implementation of mitigation commitments as critical to ensuring informed decisionmaking. For mitigation commitments that agencies will implement directly, CEQ recognizes that it may not be possible to identify funds from future budgets; however, a commitment to seek funding is considered essential and if it is reasonably foreseeable that funding for implementation of mitigation may be unavailable at any time during the life of the project, the agency should disclose in the EA or EIS the possible lack of funding and assess the resultant environmental effects. If the agency has disclosed and assessed the lack of funding, then unless the mitigation is essential to a mitigated FONSI or necessary to comply with another legal requirement, the action could proceed. If the agency committing to implementing mitigation has not disclosed and assessed the lack of funding, and the necessary funding later becomes unavailable, then the agency should not move forward with the proposed action until funding becomes available or the lack of funding is appropriately assessed (*see* Section III, below).

#### *A. Establishing a Mitigation Monitoring Program*

Federal agencies must consider reasonably foreseeable future impacts and conditions in a constantly evolving environment. Decisionmakers will be better able to adapt to changing circumstances by creating a sound mitigation implementation plan and through ongoing monitoring of environmental impacts and their mitigation. Monitoring can improve the quality of overall agency decisionmaking by providing feedback on the effectiveness of mitigation techniques. A comprehensive approach to mitigation planning, implementation, and monitoring will therefore help agencies realize opportunities for

reducing environmental impacts through mitigation, advancing the integrity of the entire NEPA process. These approaches also serve NEPA's goals of ensuring transparency and openness by making relevant and useful environmental information available to decisionmakers and the public.<sup>26</sup>

Adaptive management can help an agency take corrective action if mitigation commitments originally made in NEPA and decision documents fail to achieve projected environmental outcomes and there is remaining federal action. Agencies can, in their NEPA reviews, establish and analyze mitigation measures that are projected to result in the desired environmental outcomes, and can then identify those mitigation principles or measures that it would apply in the event the initial mitigation commitments are not implemented or effective. Such adaptive management techniques can be advantageous to both the environment and the agency's project goals.<sup>27</sup> Agencies can also, short of adaptive management, analyze specific mitigation alternatives that could take the place of mitigation commitments in the event the commitment is not implemented or effective.

Monitoring is fundamental for ensuring the implementation and effectiveness of mitigation commitments, meeting legal and permitting requirements, and identifying trends and possible means for improvement. Under NEPA, a Federal agency has a continuing duty to ensure that new information about the environmental impact of its proposed actions is taken into account, and that the NEPA review is supplemented when significant new circumstances or information arise that are relevant to environmental concerns and bear on the proposed action or its impacts.<sup>28</sup> For agency decisions based on an EIS, the CEQ Regulations explicitly require that "a monitoring and enforcement program shall be adopted and summarized where applicable for any mitigation."<sup>29</sup> In addition, the CEQ Regulations state that agencies may "provide for monitoring to assure that their decisions are carried out and should do so in important cases."<sup>30</sup> Accordingly, an agency should also commit to mitigation monitoring in

important cases when relying upon an EA and mitigated FONSI. Monitoring is essential in those important cases where the mitigation is necessary to support a FONSI and thus is part of the justification for the agency's determination not to prepare an EIS.

Agencies are expected to apply professional judgment and the rule of reason when identifying those cases that are important and warrant monitoring, and when determining the type and extent of monitoring they will use to check on the progress made in implementing mitigation commitments as well as their effectiveness. In cases that are less important, the agency should exercise its discretion to determine what level of monitoring, if any, is appropriate. The following are examples of factors that agencies should consider to determine importance:

- Legal requirements of statutes, regulations, or permits;
- Human health and safety;
- Protected resources (e.g., parklands, threatened or endangered species, cultural or historic sites) and the proposed action's impacts on them;
- Degree of public interest in the resource or public debate over the effects of the proposed action and any reasonable mitigation alternatives on the resource; and
- Level of intensity of projected impacts.

Once an agency determines that it will provide for monitoring in a particular case, monitoring plans and programs should be described or incorporated by reference in the agency's decision documents.<sup>31</sup> Agencies have discretion, within the scope of their authority, to select an appropriate form and method for monitoring, but they should identify the monitoring area and establish the appropriate monitoring system.<sup>32</sup> The form and method of monitoring can be informed by an agency's past monitoring plans and programs that tracked impacts on similar resources, as well as plans and programs used by other agencies or entities, particularly those with an interest in the resource being monitored. For mitigation commitments that warrant rigorous oversight, an Environmental Management System (EMS), or other

by the U.S. Army Corps of Engineers and the U.S. Environmental Protection Agency. *See* U.S. Army Corps of Engineers & U.S. Environmental Protection Agency, "Compensatory Mitigation for Losses of Aquatic Resources," 73 FR 19,594, Apr. 10, 2008.

<sup>26</sup> 40 CFR 1500.1(b).

<sup>27</sup> *See* CEQ NEPA Task Force, "Modernizing NEPA Implementation" at 44.

<sup>28</sup> 40 CFR 1502.9(c) (requiring supplementation of EISs when there are substantial changes to the proposed action, or significant new information or circumstances arise that are relevant to the environmental effects of the proposed action).

<sup>29</sup> *Id.* § 1505.2(c).

<sup>30</sup> *Id.* § 1505.3.

<sup>31</sup> The mitigation plan and program should be described to the extent possible based on available and reasonably foreseeable information in cases where the NEPA analysis and documentation are completed prior to final design of a proposed project.

<sup>32</sup> The Department of the Army regulations provide an example of this approach. *See* 32 CFR part 651 App. C. These regulations are summarized in the Appendix to this guidance.

data or management system could serve as a useful way to integrate monitoring efforts effectively.<sup>33</sup> Other possible monitoring methods include agency-specific environmental monitoring, compliance assessment, and auditing systems. For activities involving third parties (e.g., permittees or grantees), it may be appropriate to require the third party to perform the monitoring as long as a clear accountability and oversight framework is established. The monitoring program should be implemented together with a review process and a system for reporting results.

Regardless of the method chosen, agencies should ensure that the monitoring program tracks whether mitigation commitments are being performed as described in the NEPA and related decision documents (i.e., implementation monitoring), and whether the mitigation effort is producing the expected outcomes and resulting environmental effects (i.e., effectiveness monitoring). Agencies should also ensure that their mitigation monitoring procedures appropriately provide for public involvement. These recommendations are explained in more detail below.

#### B. Monitoring Mitigation Implementation

A successful monitoring program will track the implementation of mitigation commitments to determine whether they are being performed as described in the NEPA documents and related decision documents. The responsibility for developing an implementation monitoring program depends in large part upon who will actually perform the mitigation—the lead Federal agency or cooperating agency; the applicant, grantee, or permit holder; another responsible entity or cooperative non-

Federal partner; or a combination of these. The lead agency should ensure that information about responsible parties, mitigation requirements, as well as any appropriate enforcement clauses are included in documents such as authorizations, agreements, permits, financial assistance awards, or contracts.<sup>34</sup> Ultimate monitoring responsibility rests with the lead Federal agency or agencies to assure that monitoring is occurring when needed and that results are being properly considered. The project's lead agency can share monitoring responsibility with joint lead or cooperating agencies or other entities, such as applicants or grantees. The responsibility should be clearly described in the NEPA documents or associated decision documents, or related documents describing and establishing the monitoring requirements or expectations.

#### C. Monitoring the Effectiveness of Mitigation

Effectiveness monitoring tracks the success of a mitigation effort in achieving expected outcomes and environmental effects. Completing environmental data collection and analyses prior to project implementation provides an understanding of the baseline conditions for each potentially affected resource for reference when determining whether the predicted efficacy of mitigation commitments is being achieved. Agencies can rely on agency staff and outside experts familiar with the predicted environmental impacts to develop the means to monitor mitigation effectiveness, in the same way that they can rely on agency and outside experts to develop and evaluate the effectiveness of mitigation (see Section I, above).

When monitoring mitigation, agencies should consider drawing on sources of information available from the agency, from other Federal agencies, and from state, local, and tribal agencies, as well as from non-governmental sources such as local organizations, academic institutions, and non-governmental organizations. Agencies should especially consider working with agencies responsible for overseeing land management and impacts to specific resources. For example, agencies could consult with the U.S. Fish and Wildlife and National Marine Fisheries Services (for information to evaluate potential impacts to threatened and endangered

species) and with State Historic Preservation Officers (for information to evaluate potential impacts to historic structures).

#### D. The Role of the Public

Public involvement is a key procedural requirement of the NEPA review process, and should be fully provided for in the development of mitigation and monitoring procedures.<sup>35</sup> Agencies are also encouraged, as a matter of transparency and accountability, to consider including public involvement components in their mitigation monitoring programs. The agencies' experience and professional judgment are key to determining the appropriate level of public involvement. In addition to advancing accountability and transparency, public involvement may provide insight or perspective for improving mitigation activities and monitoring. The public may also assist with actual monitoring through public-private partnership programs.

Agencies should provide for public access to mitigation monitoring information consistent with NEPA and the Freedom of Information Act (FOIA).<sup>36</sup> NEPA and the CEQ Regulations incorporate the FOIA by reference to require agencies to provide public access to releasable documents related to EISs, which may include documents regarding mitigation monitoring and enforcement.<sup>37</sup> The CEQ Regulations also require agencies to involve the public in the EA preparation process to the extent practicable and in certain cases to make a FONSI available for public review before making its final determination on whether it will prepare an EIS or proceed with the action.<sup>38</sup> Consequently, agencies should

<sup>35</sup> 40 CFR 1506.6 (requiring agencies to make diligent efforts to involve the public in preparing and implementing their NEPA procedures).

<sup>36</sup> 5 U.S.C. 552.

<sup>37</sup> 42 U.S.C. 4332(2)(C) (requiring Federal agencies to make EISs available to the public as provided by the FOIA); 40 CFR 1506.6(f) (requiring agencies to make EISs, comments received, and any underlying documents available to the public pursuant to the provisions of the FOIA without regard to the exclusion for interagency memoranda where such memoranda transmit comments of Federal agencies on the environmental impact of the proposed action).

<sup>38</sup> 40 CFR 1501.4(b) (requiring agencies to involve environmental agencies, applicants, and the public, to the extent practicable); *id.* § 1501.4(e)(1) (requiring agencies to make FONSI available to the affected public as specified in § 1506.6); *id.* § 1501.4(e)(2) (requiring agencies to make a FONSI available for public review for thirty days before making its final determination on whether it will prepare an EIS or proceed with the action when the nature of the proposed action is, or is similar to, an action which normally requires the preparation of an EIS); *id.* § 1506.6 (requiring agencies to make diligent efforts to involve the public in preparing and implementing their NEPA procedures).

<sup>33</sup> An EMS provides a systematic framework for a Federal agency to monitor and continually improve its environmental performance through audits, evaluations of legal and other requirements, and management reviews. The potential for EMS to support NEPA work is further addressed in CEQ, "Aligning National Environmental Policy Act Processes with Environmental Management Systems" 4 (2007) available at [ceq.hss.doe.gov/nepa/nepapubs/Aligning\\_NEPA\\_Processes\\_with\\_Environmental\\_Management\\_Systems\\_2007.pdf](http://ceq.hss.doe.gov/nepa/nepapubs/Aligning_NEPA_Processes_with_Environmental_Management_Systems_2007.pdf) (discussing the use of EMSs to track implementation and monitoring of mitigation). In 2001, the Department of the Army announced that it would implement a recognized environmental management standard, ISO 14001, across Army installations. ISO 14001 represents a standardized system to plan, track, and monitor environmental performance within the agency's operations. To learn more about how EMS implementation has resulted in an effective EMS for monitoring purposes at an Army installation, see the Sustainability Web site for the Army's Fort Lewis installation, available at [sustainablefortlewis.army.mil](http://sustainablefortlewis.army.mil).

<sup>34</sup> Such enforcement clauses, including appropriate penalty clauses, should be developed as allowable under the applicable statutory and regulatory authorities.

involve the public when preparing EAs and mitigated FONSI.s.<sup>39</sup> NEPA further requires all Federal agencies to make information useful for restoring, maintaining, and enhancing the quality of the environment available to States, counties, municipalities, institutions, and individuals.<sup>40</sup> This requirement can include information on mitigation and mitigation monitoring.

Beyond these requirements, agencies are encouraged to make proactive, discretionary release of mitigation monitoring reports and other supporting documents, and to make responses to public inquiries regarding mitigation monitoring readily available to the public through online or print media. This recommendation is consistent with the President's Memorandum on Transparency and Open Government directing agencies to take affirmative steps to make information public without waiting for specific requests for information.<sup>41</sup> The Open Government Directive, issued by the Office of Management and Budget in accordance with the President's Memorandum, further directs agencies to use their web sites and information technology capabilities to disseminate, to the maximum extent practicable, useful information under FOIA, so as to promote transparency and accountability.<sup>42</sup>

Agencies should exercise their judgment to ensure that the methods and media used to provide mitigation and monitoring information are commensurate with the importance of the action and the resources at issue, taking into account any risks of harm to affected resources. In some cases, agencies may need to balance competing privacy or confidentiality concerns (e.g., protecting confidential business information or the location of sacred sites) with the benefits of public disclosure.

### III. Remedying Ineffective or Non-Implemented Mitigation

Through careful monitoring, agencies may discover that mitigation commitments have not been implemented, or have not had the

environmental results predicted in the NEPA and decision documents. Agencies, having committed to mitigation, should work to remedy such inadequacies. It is an agency's underlying authority or other legal authority that provides the basis for the commitment to implement mitigation and monitor its effectiveness. As discussed in Section I, agencies should not commit to mitigation considered in an EIS or EA unless there are sufficient legal authorities and they expect the resources to be available to perform or ensure the performance of the mitigation. In some cases, as discussed in Section II, agencies may exercise their authority to make relevant funding, permitting, or other agency approvals and decisions conditional on the performance of mitigation commitments by third parties. It follows that an agency must rely on its underlying authority and available resources to take remedial steps. Agencies should consider taking remedial steps as long as there remains a pending Federal decision regarding the project or proposed action. Agencies may also exercise their legal authority to enforce conditions placed on funding, grants, permits, or other approvals.

If a mitigation commitment is simply not undertaken or fails to mitigate the environmental effects as predicted, the responsible agency should further consider whether it is necessary to prepare supplemental NEPA analysis and documentation.<sup>43</sup> The agency determination would be based upon its expertise and judgment regarding environmental consequences. Much will depend upon the agency's determination as to what, if any, portions of the Federal action remain and what opportunities remain to address the effects of the mitigation failure. In cases where an EIS or a supplementary EA or EIS is required, the agency must avoid actions that would have adverse environmental impacts and limit its choice of reasonable alternatives during the preparation of an EIS.<sup>44</sup>

In cases where there is no remaining agency action to be taken, and the mitigation has not been fully implemented or has not been as

effective as predicted, it may not be appropriate to supplement the original NEPA analysis and documentation. However, it would be appropriate for future NEPA analyses of similar proposed actions and relevant programs to consider past experience and address the potential for environmental consequences as a result of mitigation failure. This would ensure that the assumed environmental baselines reflect true conditions, and that similar mitigation is not relied on in subsequent decisions without more robust provisions for adaptive management or analysis of mitigation alternatives that can be applied in the event of mitigation failure.

### IV. Conclusion

This guidance is intended to assist Federal agencies with the development of their NEPA procedures, guidance, and regulations; foster the appropriate use of Findings of No Significant Impact; and ensure that mitigation commitments are appropriately and effectively documented, implemented, and monitored. The guidance also provides Federal agencies with recommended actions in circumstances where mitigation is not implemented or fails to have the predicted effect. Questions regarding this guidance should be directed to the CEQ Associate Director for NEPA Oversight.

### Appendix

#### *Case Study: Existing Agency Mitigation Regulations & Guidance*

A number of agencies have already taken actions to improve their use of mitigation and their monitoring of mitigation commitments undertaken as part of their NEPA processes. For example, the Department of the Army has promulgated regulations implementing NEPA for military installations and programs that include a monitoring and implementation component.<sup>45</sup> These NEPA implementing procedures are notable for their comprehensive approach to ensuring that mitigation proposed in the NEPA review process is completed and monitored for effectiveness. These procedures are described in detail below to illustrate one approach agencies can use to meet the goals of this Guidance.

#### *a. Mitigation Planning*

Consistent with existing CEQ guidelines, the Army's NEPA implementing regulations place significant emphasis on the planning and implementation of mitigation

<sup>39</sup> *Id.* § 1501.4.

<sup>40</sup> 42 U.S.C. 4332(2)(G).

<sup>41</sup> Presidential Memorandum for Heads of Executive Departments and Agencies Concerning the Freedom of Information Act, 74 FR 4,683, Jan. 21, 2009; accord DOJ, Memorandum for Heads of Executive Departments and Agencies Concerning the Freedom of Information Act (Mar. 19, 2009), available at <http://www.usdoj.gov/ag/foia-memo-march2009.pdf>.

<sup>42</sup> Office of Mgmt. & Budget, Executive Office of the President, *Open Government Directive*, (Dec. 8, 2009), available at <http://www.whitehouse.gov/open/documents/open-government-directive>.

<sup>43</sup> 40 CFR 1502.9(c) (requiring an agency to prepare supplements to draft or final EISs if the agency makes substantial changes in the proposed action that are relevant to environmental concerns, or if there are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts).

<sup>44</sup> *Id.* § 1506.1(a) (providing that until an agency issues a Record of Decision, no action concerning the proposal may be taken that would have an adverse environmental impact or limit the choice of reasonable alternatives).

<sup>45</sup> The Department of the Army promulgated its NEPA implementing procedures as a regulation.

throughout the environmental analysis process. The first step of mitigation planning is to seek to avoid or minimize harm.<sup>46</sup> When the analysis proceeds to an EA or EIS, however, the Army regulation requires that any mitigation measures be “clearly assessed and those selected for implementation will be identified in the [FONSI] or the ROD,” and that “[t]he proponent must implement those identified mitigations, because they are commitments made as part of the Army decision.”<sup>47</sup> This is notable as this mitigation is a binding commitment documented in the agency NEPA decision. In addition, the adoption of mitigation that reduces environmental impacts below the NEPA significance threshold is similarly binding upon the agency.<sup>48</sup> When the mitigation results in a FONSI in a NEPA analysis, the mitigation is considered legally binding.<sup>49</sup> Because these regulations create a clear obligation for the agency to ensure any proposed mitigation adopted in the environmental review process is performed, there is assurance that mitigation will lead to a reduction of environmental impacts in the implementation stage and include binding mechanisms for enforcement.

Another important mechanism in the Army’s regulations to assure effective mitigation results is the requirement to fully fund and implement adopted mitigation. It is acknowledged in the regulations that “unless money is actually budgeted and manpower assigned, the mitigation does not exist.”<sup>50</sup> As a result, a proposed action cannot proceed until all adopted mitigation is fully resourced or until the lack of funding is addressed in the NEPA analysis.<sup>51</sup> This is an important step in the planning process, as mitigation benefits are unlikely to be realized unless financial and planning resources are committed through the NEPA planning process.

#### b. Mitigation Monitoring

The Army regulations recognize that monitoring is an integral part of any mitigation system.<sup>52</sup> As the Army regulations require, monitoring plans and implementation programs should be summarized in NEPA documentation, and should consider several important factors. These factors include anticipated changes in environmental conditions or project activities,

unexpected outcomes from mitigation, controversy over the selected alternative, potential impacts or adverse effects on federally or state protected resources, and statutory permitting requirements.<sup>53</sup> Consideration of these factors can help prioritize monitoring efforts and anticipate possible challenges.

The Army regulations distinguish between implementation monitoring and effectiveness monitoring. Implementation monitoring ensures that mitigation commitments made in NEPA documentation are implemented. To further this objective, the Army regulations specify that these conditions must be written into any contracts furthering the proposed action. In addition, the agency or unit proposing the action is ultimately responsible for the performance of the mitigation activities.<sup>54</sup> In a helpful appendix to its regulations, the Army outlines guidelines for the creation of an implementation monitoring program to address contract performance, the role of cooperating agencies, and the responsibilities of the lead agency.<sup>55</sup>

The Army’s effectiveness monitoring addresses changing conditions inherent in evolving natural systems and the potential for unexpected environmental mitigation outcomes. For this monitoring effort, the Army utilizes its Environmental Management System (EMS) based on the standardized ISO 14001 protocols.<sup>56</sup> The core of this program is the creation of a clear and accountable system for tracking and reporting both quantitative and qualitative measures of the mitigation efforts. An action-forcing response to mitigation failure is essential to the success of any mitigation program. In the context of a mitigated FONSI, the Army regulations provide that if any “identified mitigation measures do not occur, so that significant adverse environmental effects could be reasonably expected to result, the [agency actor] must publish a [Notice of Intent] and prepare an EIS.”<sup>57</sup> This is an essential response measure to changed conditions in the proposed agency action. In addition, the Army regulations address potential failures in the mitigation systems identified

through monitoring. If mitigation is ineffective, the agency entity responsible should re-examine the mitigation and consider a different approach to mitigation. However, if mitigation is required to reduce environmental impacts below significance levels are found to be ineffective, the regulations contemplate the issuance of a Notice of Intent and preparation of an EIS.<sup>58</sup>

The Army regulations also provide guidance for the challenging task of defining parameters for effectiveness monitoring. Guidelines include identifying a source of expertise, using measurable and replicable technical parameters, conducting a baseline study before mitigation is commenced, using a control to isolate mitigation effects, and, importantly, providing timely results to allow the decision-maker to take corrective action if necessary.<sup>59</sup> In addition, the regulations call for the preparation of an environmental monitoring report to determine the accuracy of the mitigation impact predictions made in the NEPA planning process.<sup>60</sup> The report is essential for agency planning and documentation and promotes public engagement in the mitigation process.

#### c. Public Engagement

The Army regulations seek to integrate robust engagement of the interested public in the mitigation monitoring program. The regulations place responsibility on the entity proposing the action to respond to inquiries from the public and other agencies regarding the status of mitigation adopted in the NEPA process.<sup>61</sup> In addition, the regulations find that “concerned citizens are essential to the credibility of [the] review” of mitigation effectiveness.<sup>62</sup> The Army specifies that outreach with the interested public regarding mitigation efforts is to be coordinated by the installation’s Environmental Office.<sup>63</sup> These regulations bring the public a step closer to the process by designating an agency source responsible for enabling public participation, and by acknowledging the important role the public can play to ensure the integrity and tracking of the mitigation process. The success of

<sup>53</sup> *Id.* §§ 651.15(h)(1)–(4) Appendix C to 32 CFR part 651, 67 FR 15,290, 15,326–28, Mar. 29, 2002.

<sup>54</sup> *Id.* § 651.15(i)(1).

<sup>55</sup> *See* Appendix C to 32 CFR part 651, 67 FR 15,290, 15,326–28, Mar. 29, 2002.

<sup>56</sup> *See also* CEQ, “Aligning NEPA Processes with Environmental Management Systems” (2007), available at [http://ceq.hss.doe.gov/nepa/nepapubs/Aligning\\_NEPA\\_Processes\\_with\\_Environmental\\_Management\\_Systems\\_2007.pdf](http://ceq.hss.doe.gov/nepa/nepapubs/Aligning_NEPA_Processes_with_Environmental_Management_Systems_2007.pdf).

<sup>57</sup> 32 CFR 651.15(c).

<sup>58</sup> *See id.* § 651.35(g) (describing the implementation steps, including public availability and implementation tracking, that must be taken when a FONSI requires mitigation); *id.* § 651.15(k).

<sup>59</sup> *See* subsections (g)(1)–(5) of Appendix C to 32 CFR part 651, 67 FR at 15,327.

<sup>60</sup> 32 CFR 651.15(l).

<sup>61</sup> *Id.* § 651.15(b).

<sup>62</sup> *Id.* § 651.15(k).

<sup>63</sup> 32 CFR 651.15(j).

<sup>46</sup> *See* 40 CFR 1508.2.

<sup>47</sup> 32 CFR 651.15(b).

<sup>48</sup> *Id.* § 651.35(g).

<sup>49</sup> *Id.* § 651.15(c).

<sup>50</sup> *Id.* § 651.15(d).

<sup>51</sup> *Id.* § 651.15(d).

<sup>52</sup> *Id.* § 651.15(i).

agency mitigation efforts will be bolstered by public access to timely information on NEPA mitigation monitoring.

**Nancy H. Sutley,**

*Chair, Council on Environmental Quality.*

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## **NATIONAL SCIENCE FOUNDATION**

### **45 CFR Part 680**

**RIN 3145-AA51**

#### **National Science Foundation Rules of Practice and Statutory Conflict-of-Interest Exemptions**

**AGENCY:** National Science Foundation.

**ACTION:** Final rule.

**SUMMARY:** The National Science Foundation (NSF) is amending its regulations to remove the provisions concerning statutory conflict-of-interest exemptions.

**DATES:** The final rule is effective on January 21, 2011.

**FOR FURTHER INFORMATION CONTACT:** Robin Clay, Deputy Ethics Official, Office of the General Counsel, National Science Foundation, 4201 Wilson

Boulevard, Room 1265, Arlington, Virginia 22230; Telephone: (703) 292-8060; Facsimile: (703) 292-9041; e-mail: *COI@nsf.gov*.

**SUPPLEMENTARY INFORMATION:** The National Science Foundation (NSF) is amending its regulations to remove the provisions in 45 CFR 680.20 (subpart B) in their entirety. On December 18, 1996 (61 FR 66830), the Office of Government Ethics (OGE) issued executive branch-wide regulations on exemptions and waivers for financial interests under 18 U.S.C. 280(b) (codified at 5 CFR part 2640). The portion of the OGE regulations on exemptions under 18 U.S.C. 208(b)(2) supersedes the provisions of subpart B of the NSF regulations (45 CFR part 680).

#### **Background**

In accordance with OGE's issuance of the final rule regarding 18 U.S.C. 208(b) exemptions and waivers (5 CFR 2640), the Foundation is issuing this final rule removing 45 CFR part 680 subpart B in its entirety.

Because the Foundation is required to delete the superseded provisions of 45 CFR part 680 subpart B relating to 208(b)(2) exemptions, with no discretion in the matter, the Foundation finds, pursuant to 5 U.S.C. 533(b)(B), that there is good cause not to seek

public comment on this rule, as such comment is unnecessary. Furthermore, for the reasons stated above, the Foundation finds, pursuant to 5 U.S.C. 533(d)(3), that good cause exists to make this rule effective upon publication of this notice.

#### **List of Subjects in 45 CFR Part 680**

Conflict of interests.

Accordingly, 45 CFR part 680 is amended as follows:

#### **PART 680—NATIONAL SCIENCE FOUNDATION RULES OF PRACTICE**

■ 1. The authority citation for part 680 is revised to read as follows:

**Authority:** 5 U.S.C. 7301; 42 U.S.C. 1870(a); 5 CFR 2635.105(c)(3).

■ 2. The heading of part 680 is revised to read as set forth above.

#### **Subpart B—[Removed and Reserved]**

■ 3. Subpart B, consisting of § 680.20, is removed and reserved.

Dated: January 10, 2011.

**Lawrence Rudolph,**

*General Counsel.*

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