

1.2 NEPA-CEQ FRAMEWORK

>> C. Humphrey: Now, it's time to go back to Kerry Rodgers in Washington, D.C. Kerry, could you talk to us about the CEQ regulations and other legal authorities that support and require mitigation?

>> K. Rodgers: Sure. Thanks, Cathy. The Council on Environmental Quality, or CEQ, which oversees NEPA policy for federal agencies issued comprehensive guidance on mitigation in 2011, which I'll refer to as the 2011 CEQ guidance. It includes regulatory requirements, CEQ policies and recommended procedures.

I will highlight aspects of this guidance, "Appropriate Use of Mitigation and Monitoring and Clarifying the Appropriate Use of Mitigated Findings of No Significant Impact", relevant to the BLM's interim policy, the draft Regional Mitigation Manual. I also will point out topics that the CEQ guidance addresses. I encourage you to consult the guidance as you consider opportunities for regional or onsite mitigation. It is available at the web site shown on the screen.

Mitigation is integral to one of NEPA's goals, namely promoting efforts which will prevent or eliminate damage to the environment. CEQ regulations direct federal agencies to use the NEPA process to identify and assess the reasonable alternatives to proposed actions that will avoid or minimize their average effects on the quality of the human environment.

Using the NEPA process to identify, establish, and implement mitigation involves the lead agency's evaluation of alternatives, cooperating agencies' input, and the involvement of the project proponents, the public, stakeholders and partners over time.

The 2011 CEQ guidance discusses three ways mitigation can be evaluated in NEPA documents:

First, mitigation measures may be included as part of the proposed project design. In this situation, mitigation measures are central to, and implemented and described as part of, the proposed action. As Gloria explained, the BLM refers to these as *design features*.

Second, mitigation measures must be included in the alternatives analysis. CEQ regulations require agencies to include appropriate mitigation measures not already included in the proposed action or alternatives when preparing an EIS. The environmental consequences section of an EIS must describe the environmental impact of a proposed action and its alternatives and analyze them as well as means to develop mitigation measures.

Third, they may be analyzed in an environmental assessment, or EA, and mitigation commitments restricting the level of impacts of a proposed action may be used to support a finding of no significant impact, or FONSI. This describes a so-called mitigated FONSI.

Now, NEPA broadly requires the lead agency identify and evaluate measures even if the lead agency lacks authority to implement the measures or to require another agency, a project proponent or a

partner to do so. CEQ guidance from 1981 explains that all relevant, reasonable mitigation measures that could improve the project are to be identified, even if they are outside the jurisdiction of the lead agency or the cooperating agencies. Meaning that they would not be committed as part of the records of decision of the proposed actions. The CEQ guidance explains because the EIS is the most comprehensive environmental document, it is an ideal vehicle in which to lay out the full spectrum of appropriate mitigation.

In addition, cooperating agencies with jurisdiction by law have special responsibilities regarding mitigation if they have concerns about another agency's proposed action. They must specify the mitigation measures they consider necessary in order for the lead agency to approve the action. Discussing mitigation with other agencies and partners may be beneficial, as well.

Before committing to mitigation measures, a lead agency should consider the relevant legal authorities and available resources, as well. The 2011 guidance cautions, "agencies should not commit to measures considered analyzed in a NEPA document if there are insufficient legal authorities or it is not reasonable to foresee the availability of sufficient resources to implement or perform or ensure the performance of the mitigation".

Typically, the BLM's authority to require or implement mitigation itself stems from the Federal Land Policy and Management Act, or FLPMA, or other statutes besides NEPA itself. It outlines the guidelines for the BLM.

Other federal agencies, state, local or tribal agencies may have authority to implement or requirement implementation of mitigation measures as well. And they may be willing to do so. In light of agency authorities and resources, it is important to discuss the probability of mitigation measures actually being implemented.

According to CEQ guidance from 1981, the EIS should indicate the likelihood such measures will be adopted or enforced by the responsible agencies. This is to ensure the environmental effects of a proposed action are presented in NEPA documents.

Now, decision documents, a record of decision for an EIS, or another decision document in the case of a less extensive NEPA analysis, provides for mitigation implementation. The 2011 CEQ guidance provides that agencies should clearly identify commitments to mitigation measures designed to achieve environmentally preferable outcomes in their decision documents. They should specify measurable performance standards for expected results so as to establish clear performance expectations. Start and end dates and the duration of mitigation should be included.

CEQ regulations provide for implementation of mitigation established in an EIS. The lead agency is required to include appropriate conditions in grants, permits or other approvals to condition the funding of actions on mitigation or to take other steps to ensure that mitigation is implemented. The 2011 CEQ guidance extends the expectations to EAs as well as EISs.

Finally, the CEQ framework addresses monitoring. CEQ regulations state that agencies may provide

for monitoring to assure their decisions are carried out and should do so in important cases. The 2011 CEQ guidance offers examples of factors agencies can use to evaluate monitoring with respect to mitigation. The guidance discusses monitoring of mitigation implementation, mitigation effectiveness, and the role of the public.

Lastly, the 2011 CEQ guidance addresses options for addressing mitigation that proves ineffective or is simply not implemented.

>> C. Humphrey: Thanks, Kerry. Thanks for that review of the recent CEQ guidance and for reminding us of our mitigation requirements.