NAEP
The National Association of Environmental Professionals
TM *Promoting Excellence in the Environmental Profession*

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August 20, 2018

Council on Environmental Quality
730 Jackson Place, NW
Washington, DC 20503

Advance Notice of Proposed Rulemaking – Update to the Regulations for Implementing the Procedural Provisions of the National Environmental Policy Act – Docket No. CEQ-2018-001

Dear Associate Director Edward Boling,

The National Association of Environmental Professionals (NAEP) is an interdisciplinary organization dedicated to developing the highest standards of ethics and proficiency in the environmental professionals. We represent more than 800 environmental professionals working across the country in the public and private sectors. The National Environmental Policy Act (NEPA), 42 U.S.C. § 4321 *et seq*., has been a major focus area of the NAEP for many years and we work closely with CEQ and other agencies and organizations to promote efficient and effective compliance with NEPA.

We respectfully submit the attached comments on the Advance Notice of Proposed Rulemaking. Individual NAEP members have expressed a variety of opinions on proposed answers to the 20 questions in the ANPR and the attached comments represent the opinion of the NAEP as a whole.

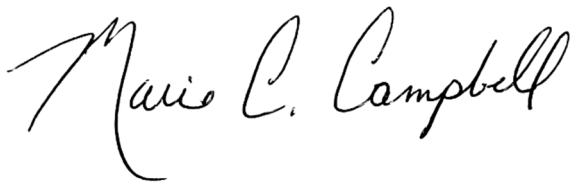
The current CEQ regulations, 40 C.F.R. § 1500.1 *et seq.*, have withstood the test of time and any update to them should maintain their purpose and intent. In combination with the Act, they have been emulated throughout the country and the world, promoting the timely, open, public review of proposed agency actions and more informed decisionmaking. This process is a hallmark of democracy, here and abroad. By design, the current regulations do not mandate detailed procedures; this process was wisely left to the individual federal agencies. This process has, overall, worked very well and federal courts have rarely intervened.

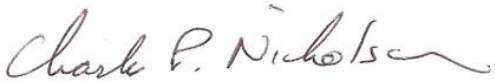
Since early in its history, NEPA has been blamed for being too time-consuming, too costly, and hampering agencies and private-sector applicants from completing worthy projects. We acknowledge that the overall NEPA compliance and project approval process can be lengthy. Multiple investigations by governmental and non-governmental entities have shown that in a large majority of the cases, excessive delays and costs were not caused by the requirements of NEPA but by poorly planned actions, inadequate coordination, and shifting and competing agency priorities. A continuing problem contributing to delays and costs has been the lack of trained, experienced professional agency NEPA compliance staff. Such staff is critical to

providing timely leadership of the NEPA process and as a result, many important decisions in the NEPA compliance process are relegated to consultants and applicants. The lack of trained staff also hinders agency's ability to conduct the necessary interdisciplinary reviews of NEPA documents prepared by contractors working directly for the agency or for an applicant. This agency resource issue is not directly addressed in the 20 questions in the ANPR.

Thank you for your consideration of these comments. We look forward to continuing to work closely with CEQ and other agencies to improve the implementation of NEPA. Should you have any questions about our comments, please contact Charles P. Nicholson at cpnicholson53@gmail.com.

Sincerely,





Marie Campbell
President, NAEP

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National Association of Environmental Professionals (NAEP) Response to ANPR on Revision of CEQ Regulations for Implementing NEPA

NEPA Process

1. **Should CEQ's NEPA regulations be revised to ensure that environmental reviews and authorization decisions involving multiple agencies are conducted in a manner that is concurrent, synchronized, timely, and efficient, and if so, how?**

Yes, within limits. The CEQ NEPA regulations at 40 CFR §1500.5(b), (g), and (h) already require this in order to reduce delay. §1501.6 requires that agencies with jurisdiction by law participate as cooperating agencies and encourages the participation by other agencies with special expertise. It also provides for lead agencies to fund the activities of cooperating agencies. §1501.7(a)(6) requires the lead agency to integrate the review and consultation requirements of other statutes, including those specific to the associated actions of cooperating agencies. The regulations should be only revised to require the establishment of coordinated review schedules. Beyond this, we do not believe additional revisions are necessary because of the differing legal mandates and authorization/permitting requirements of lead and cooperating agencies.

2. **Should CEQ's NEPA regulations be revised to make the NEPA process more efficient by better facilitating agency use of environmental studies, analysis, and decisions conducted in earlier Federal, State, tribal or local environmental reviews or authorization decisions, and if so, how?**

This topic is adequately addressed for environmental impact statements (EISs) at §1502.20 – Tiering, §1502.21 – Incorporation by reference, §1506.3 – Adoption, §1506.4 – Combining documents, and elsewhere. These sections provide agencies the authority to make use of relevant previous analyses that they or other agencies conducted, as well as additional CEQ guidance, training, and education. Such guidance and/or training should explain the current regulations on the topic and emphasize the benefits as well as the limitations of incorporation by reference. Many environmental reviews and authorization decisions issued by state agencies, for example, are very narrowly focused on the resource area that is the subject of the state authority (e.g., air pollutants, hazardous waste) and do not provide the interdisciplinary analysis required by NEPA.

We encourage CEQ to consider extending the above-mentioned requirements to environmental assessments (EAs) which comprise the vast majority of the NEPA reviews for actions that are not categorically excluded.

3. **Should CEQ's NEPA regulations be revised to ensure optimal interagency coordination of environmental reviews and authorization decisions, and if so, how?**

No. While the definition of “optimal interagency coordination” is open to interpretation, lead and cooperating agencies should be encouraged to more closely work together. Federal agencies with authorization, funding, and permitting decisions should be automatically included as

cooperating agencies. This inclusion, however, needs to consider the reality of staffing and funding resources available to the agency. The recent "one federal decision" process provides some guidance on how this increased coordination could be implemented. Because it is new, we believe that it is premature at this time to incorporate the one federal decision process into regulations.

Scope of NEPA Review

4. Should the provisions in CEQ's NEPA regulations that relate to the format and page length of NEPA documents and time limits for completion be revised, and if so, how?

Document Format:
§1502.10 describes a recommended format for EISs and the following sections §1502.11 – §1502.18 describe this format in more detail. §1502.10 also states that agencies "shall use a format for environmental impact statements which will encourage good analysis and clear presentation of the alternatives including the proposed action" and authorizes agencies to use other formats when there is a "compelling reason" to do so. As long as the cover sheet, summary, table of contents, list of preparers, list of agencies, organizations, and persons to whom copies of the statement are sent, and index, as well as the substance of the other sections listed in §1502.10, are included, agencies are authorized to adopt an appropriate format that best facilitates the review of a particular proposed action. In practice, most EISs closely follow the format recommended in §1502.10. Combining the affected environment and environmental consequences sections into a single chapter should be encouraged as it often results in a more readable and potentially shorter document.

The CEQ regulations are largely silent on the format of EAs, many of which closely follow the format recommended for EISs. This format is not necessary for most EAs, which should focus on the evaluation of the key issues and mitigation. The NAEP prepared a report on Best Practice Principles for Environmental Assessments in 2014 as a CEQ Pilot Project. This report addressed, among other things, the format of EAs. We understand that CEQ has been preparing guidance on the preparation of EAs based, in part, on the NAEP report. We urge CEQ to complete and issued this guidance.

Page Limits:
No. Making EISs and EAs shorter should be a goal for all NEPA practitioners as it usually makes the documents more reader-friendly and more useful in informing the decisonmakers and the public. Although §1501.7(b) authorizes a lead agency to set page limits and §1502.7 "recommends" 150/300-page limits for final EISs, such page limits appear arbitrary. A large portion of EISs exceed these page limits in an effort to meet the "hard look" standard of the U.S. Supreme Court and the associated "arbitrary and capricious" standard of the Administrative Procedure Act. Some agencies have tried to meet these page limits, and they were recently ordered for Department of Interior EISs. An approach that is being used to meet these limits is to move much of the text that would otherwise be in the main body of the EIS, particularly in the alternatives description, existing environment, and environmental consequences sections, into appendices. While this reduces the length of the main body of the EIS, it does not reduce the overall length of the EIS or the effort required to produce the EIS. It also remains to be seen whether the page limits imposed by, for example, the Department of Interior will withstand litigation over the lack of detailed explanations that would otherwise have been included in the EISs. For some agencies legislation and/or regulations mandate the preparation of EISs that are combined with detailed management plans, feasibility studies, or other analyses; page limits are

not feasible for these EISs.

A long-standing principle of NEPA is that the length of the analysis should be appropriate to the level of impacts. This applies equally to an EIS, an EA, or documentation of a categorical exclusion determination and should be emphasized in regulations, guidance, and training.

Time Limits:
No. We do not support setting overall time limits for the completion of EISs or EAs. As with page limits, time limits would be arbitrary and would likely not consider the complexity of some proposed actions. The preparation times for recent FEISs (e.g., NOI to ROD, mean of 4.6 years and median of 3.7 years for all 2010-2017 FEISs; mean of 4.9 years and median of 3.7 years for 2010-2017 infrastructure EISs (CEQ data)) are a result of many factors, many of which are out of the control of the EIS preparers. Recent legislation on transportation NEPA reviews (e.g., MAP-21) and infrastructure NEPA reviews (FAST Act Title 41), as well as the one federal decision part of EO 13807 address some of these factors. It is premature, however, to set overall time limits given the relatively small number of EISs completed under these recent initiatives.

The minimum time limits specified in §1501.4 for public review of certain draft FONSIs and in §1506.10 for making the final decision after publication of the draft EIS and for commenting on a draft EIS are reasonable. We support the recent changes under the FAST Act (*23 U.S.C. §139(n)(2))* to eliminate the 30-day wait period between publication of the final EIS and the Record of Decision under the specified conditions, as well as the elimination of the wait period where there is an administrative appeal process (§1501.10(b)) such as those for some Bureau of Land Management and Forest Service actions. We oppose the elimination of the wait period when the preferred alternative was not identified in the draft EIS, and when the preferred alternative identified and analyzed in the final EIS differs from the preferred alternative analyzed in the draft EIS. In these cases, public and agency comments would not have focused on the ultimately selected alternative.

5. Should CEQ's NEPA regulations be revised to provide greater clarity to ensure NEPA documents better focus on significant issues that are relevant and useful to decisionmakers and the public, and if so, how?

The scoping process, as currently defined in §1500.4(g), §1500.5(d) and §1501.7, is adequate to define the relevant significant issues. In practice, however, many EISs and EAs fall short in using the results of scoping to guide the discussion of the various environmental resources in the existing environment and environmental consequences section. This is more a matter of education, experience, and guidance than regulation. §1501.7 should, however, be revised to apply the scoping process to EAs, where the early identification of relevant significant issues is equally important. The 2005 CEQ Memorandum for Federal NEPA Contacts on Emergency Actions and NEPA explains the use of scoping to produce concise, focused, and timely EAs; this information should be used in addressing scoping for EAs in the regulations.

6. Should the provisions in CEQ's NEPA regulations relating to public involvement be revised to be more inclusive and efficient, and if so, how?

Yes. Public involvement should play a central role in defining the alternatives and the issues to be analyzed. This is dependent on the lead and cooperating agencies actively involving and

informing the public. At present, the regulations require minimal public notice efforts, often resulting in minimal public participation. Regulations should be revised to recognize the new world of electronic communication and should authorize innovative public involvement using the new technologies and engagement strategies. Viewership of traditional NEPA communications, such as newspaper notices, is rapidly declining, reducing agency outreach to a diverse public unless agencies aggressively use additional media. New innovative efforts need to be made to notify all affected stakeholders, including low income, minority, and disabled individuals, and to receive useful feedback. The regulations should be revised to provide flexibility in public involvement and/or better define what is needed.

Many agencies make access to NEPA documents issued for public review difficult, with minimal public notice and requiring navigation of complex and sometimes non-intuitive dockets on websites. This could be addressed in the proposed revisions, as it is counter-productive to full and open public involvement.

Despite the definition of an EA in §1508.9 as a "concise public document" (emphasis added), a large proportion of EAs are completed and FONSIs issued with little or no prior public notice. This is contrary to the public involvement purpose of NEPA. Specific guidance on public involvement during the preparation of EAs is needed.

The 2010 CEQ guidance on categorical exclusions recommends that agencies post their categorical exclusion determinations online, particularly those for which there is a high level of public interest. To date, few agencies routinely do this; the exceptions include the Department of Energy which posts all categorical exclusion determinations online, and the Forest Service's Schedule of Proposed Action. Because many categorically excluded actions have readily identifiable environmental impacts (although not deemed "significant" impacts) and can affect hundreds to thousands of acres, agencies should be required to make public notice of actions proposed for categorical exclusions that have, or are likely to have, high public interest. "High public interest" can be defined in agency implementing procedures.

The regulations should direct every federal agency to maintain an electronic public record containing up-to-date information on each NEPA project (EIS, EA, categorical exclusion determination) for which it is responsible. This information should be presented in a standard format dictated by CEQ that is also compatible with efficient usage by modern information technology (i.e., "machine-readable") to allow for innovative platform to better inform and engage the public in the decisionmaking that affects their lives.

7. Should definitions of any key NEPA terms in CEQ's NEPA regulations, such as those listed below, be revised, and if so, how?

a. Major Federal Action

No.

b. Effects

No.

c. Cumulative Impact

The current structure of impact analyses in §1508.25 focuses on three types of impacts, direct, indirect, and cumulative. The NEPA analysis should describe all potential impacts related to the proposed action, and whether they are direct, indirect, cumulative, long-term, short-term, minor, or significant. These descriptions should be made clear from the context of the analysis. In practice, NEPA analysts often struggle with describing cumulative impacts despite there being numerous publications on the topic. Better training could help address this issue.

The different manner in which cumulative impacts are addressed under the various environmental statutes and regulations that are described in NEPA analyses may contribute to the difficulty in addressing cumulative impacts. Under NEPA, cumulative impacts are defined in §1508.75 to the impacts of other past, present, and reasonably foreseeable future actions regardless of who undertakes those actions. The regulations for consultation under Section 7 of the Endangered Species Act (50 CFR §402.02) excludes federal actions from the consideration of cumulative impacts. While the analysis in a NEPA document of potential impacts to species listed under the Endangered Species Act should include a description of outcome of any Section 7 consultation, it must also address any potential cumulative impacts on listed species that may result from reasonably foreseeable federal actions in order to comply with NEPA. Harmonizing the definition of cumulative impacts across the various environmental regulations would help address this problem.

d. Significantly

The current focus of the definition of "significantly" in §1508.27 is on context and intensity. In practice, these two concepts are closely intertwined, with context typically defining the setting, typically in terms of geographic areas, that can be unique for each of the 10 intensity factors. The 10 intensity factors are important and should be retained and potentially expanded. The definition of "significantly" should also emphasize quantifying potential impacts in terms of geographical boundaries, time, and other applicable metrics. In practice, some of the 10 factors could be more closely defined in accordance with their usage in other statues and regulations that address the same factors. An example is intensity factor (8) on adverse effects to historic properties, which could be more closely defined in accordance with its usage in Section 106 of the National Historic Preservation Act.

e. Scope

See the response to Question 5.

f. Other NEPA terms

Clearly define "extraordinary circumstance" as used in §1508.4.

8. Should any new definitions of key NEPA terms, such as those noted below, be added, and if so, which terms?

a. Alternatives

Clarify that the range of alternatives considered in an EA can often be narrow because the impacts are by definition insignificant. However, EAs addressing broad actions or with unresolved conflicts concerning alternative uses of physical, cultural, or natural resources should evaluate a larger range of action alternatives. The definition should also specify that all

alternatives analyzed in detail should be reasonable and implementable, and that the reasoning behind eliminating alternatives from detailed analysis must be explained.

b. Purpose and Need

The current usage of "purpose and need" at §1502.13 and elsewhere is confusing as it suggests EISs and EAs must provide a separate purpose statement and a separate need statement. In practice, these statement are difficult to distinguish and overlap; they should be considered a single concept, rather than two different things. Alternatively, replace it with a simpler, more self-explanatory phrase such as "need for action." Regardless of the term or phrase that is ultimately used, its purpose is to answer the question of why is the action being proposed.

Clarify that for an applicant-proposed action the purpose and need of the lead and cooperating agencies is not the same as the purpose and need of the applicant. The purpose and need of the applicant is frequently to increase shareholder value, return on investment, or some financial metric, while the purpose and need of lead and cooperating agencies is usually to process the application in accordance with applicable laws and regulations.

c. Reasonably Foreseeable

No.

d. Trivial Violation

No. This term only appears in §1500.3 and we have rarely encountered it in practice. We do not see a need for it to be further defined.

e. Other NEPA terms

Add a definition of Finding of No New Significant Impacts (FONNSI) and authorize agencies to issue a FONNSI under prescribed circumstances. Such a finding would be applicable when an agency has issued a programmatic EIS and then issues tiered EAs on subsequent individual actions to implement the action proposed in the programmatic EIS. Some of these actions addressed in the EAs could result in significant impacts which have been described in the programmatic EIS. However, to issue a FONSI for such action would be improper. A FONNSI would much more accurately describe the potential impacts while complying with established NEPA principles.

9. Should the provisions in CEQ's NEPA regulations relating to any of the types of documents listed below be revised, and if so, how?

a. Notice of Intent

No.

b. Categorical Exclusions Documentation

Clarify the documentation requirements for a categorical exclusion determination. Agencies should be required to define which of their categorical exclusions require documentation. For

those requiring documentation, the documentation should show that the agency has taken the necessary “hard look” defined in NEPA case law and is not making an arbitrary and capricious decision.

c. Environmental Assessments

When the CEQ NEPA regulations were first promulgated, it was expected that EAs would typically be prepared to determine whether an EIS should be prepared. In practice, EAs are very rarely prepared for this purpose as agencies frequently know fairly early in the planning stage whether an EIS will be required and use an EA to make verify this determination. The regulations should clarify that an EA is typically prepared for a proposed action that is unlikely to qualify for a categorical exclusion and its potential impacts, with mitigation, are unlikely to be significant.
This is being revised, focus on EA content and process

d. Findings of No Significant Impact

No.

e. Environmental Impact Statements

No.

f. Records of Decision

No.

g. Supplements

Consider adding specific, but flexible, requirements on supplementation of EISs and EAs in accordance with the well-developed caselaw.

10. Should the provisions in CEQ's NEPA regulations relating to the timing of agency action be revised, and if so, how?

The time limits imposed by EO 13807 and other measures have increased the focus on “pre-proposal NEPA,” i.e., agency NEPA-related work on a proposed action prior to the formal initiation of the NEPA process through the issuance of a Notice of Intent or other public notice. The regulations could more clearly define what acceptable decision-making is allowable at this time, such as the narrowing of potential alternatives, design of mitigation, and similar issues. Such actions typically occur through negotiations between an applicant and the lead agency, sometimes with cooperating agency involvement, and, depending on the nature of the proposed action (some transportation projects would be exceptions), often without public input.

11. Should the provisions in CEQ's NEPA regulations relating to agency responsibility and the preparation of NEPA documents by contractors and project applicants be revised, and if so, how?

NAEP endorses the preparation of NEPA documents by qualified environmental professionals working under contract and project applicants and the current provisions on this topic in §1506.5 are adequate. All NEPA documents should clearly identify the preparers and their affiliations. One of the main areas of concern over this topic is agencies increasingly do not have adequate internal, professional staff to provide the necessary guidance, oversight, and informed review of contractor-prepared NEPA documents. The peer review process provided by public and interagency review of draft NEPA documents can identify some of the resulting shortcomings from this lack of agency resources, but this can be an inefficient, after-the-fact process. An agency's priorities in allocating resources for NEPA compliance is not a problem that can be reasonably addressed by revising CEQ's NEPA regulations.

12. Should the provisions in CEQ's NEPA regulations relating to programmatic NEPA documents and tiering be revised, and if so, how?

See the response to Question 8(e) where we recommend the regulations be revised to define a Finding of No New Significant Impact for use in association with EAs that tier from programmatic EISs. For implementing actions which have little potential to individually result in adverse impacts, agencies should be encouraged to describe the potential impacts in Supplemental Analyses that document that the agency has taken the necessary hard look. See, for example, the Supplemental Analyses issued by Bonneville Power Administrations for transmission line vegetation management actions that tier from their Transmission System Vegetation Management Program Final EIS. The 2014 CEQ guidance on Effective Use of Programmatic NEPA Reviews contains several provisions that should be incorporated into the regulations.

13. Should the provisions in CEQ's NEPA regulations relating to the appropriate range of alternatives in NEPA reviews and which alternatives may be eliminated from detailed analysis be revised, and if so, how?

See the discussion of "Purpose and Need" under Question 8(b). Because the purpose and need sets the parameters for the alternatives, it must be clearly defined in the regulations and clearly explained in EISs and EAs.

Consider revising §1502.14 to better define "reasonable alternative." A reasonable alternative should achieve the purpose and need, be consistent with laws and regulations, be technically feasible, and be practicable, including economically practicable. For proposed actions that are the subject of EAs and therefore unlikely to result in significant impacts, multiple action alternatives are not always necessary. Alternatives developed during project planning as well as alternatives proposed by the public or others that are eliminated from detailed study should be briefly described in the EIS or EA and the reasons for their elimination carefully explained.

General

14. Are any provisions of the CEQ's NEPA regulations currently obsolete? If so, please provide specific recommendations on whether they should be modified, rescinded, or replaced.

The discussions in EISs of "the relationship between local short-term uses of man's

environment and the maintenance and enhancement of long-term productivity" and "irreversible and irretrievable commitments of resources" have, in practice, become rote and relatively uninformative. We acknowledge that these sections are required by Sec. 102(C) of NEPA. The regulations should better explain this requirement so that the discussions will be more informative. We question whether these need to be separate sections of the environmental consequences, as is usually the case, and whether they can instead be integrated into the overall description of the environmental consequences.

15. Which provisions of the CEQ's NEPA regulations can be updated to reflect new technologies that can be used to make the process more efficient?

See the response to Question 6. Agencies should be encouraged to use websites and social media to distribute NEPA documents and collect public and agency comments on NEPA documents. Because of the rapid changes in media, the regulations should be revised to promote the use of "media commonly used for mass communication" rather than specify any particular types of media. The regulations should also state that reviewing agencies only need to receive electronic, rather than printed, documents.

Since the CEQ regulations were written geospatial data and technologies have become ubiquitous and inexpensive. This technology can greatly improve the accuracy, efficiency, and value of analyses conducted as part of NEPA reviews. To date, almost all this information has largely been lost or difficult to use once the NEPA review is completed. We suggest CEQ require or encourage information developed for NEPA reviews be provided in geospatial form with appropriate metadata so it can be used more easily for permitting, mitigation monitoring, other NEPA reviews, or other studies. CEQ should consider revising §1502.24 to include geospatial technologies and provide similar guidance for environmental assessments and categorical exclusions.

16. Are there additional ways CEQ's NEPA regulations should be revised to promote coordination of environmental review and authorization decisions, such as combining NEPA analysis and other decision documents, and if so, how?

See the response to Question 4 on time limits regarding combining the FEIS and ROD. Due to the newness of the "one federal decision" approach to simultaneous decision-making under multiple laws, we are reluctant at this time to endorse the issuance of regulations mandating this approach until agencies have more experience in implementing it.

We also note that the NEPA reviews for many projects, particularly construction projects, are completed based on a design that is 10 to 30 percent complete. Some associated permitting decisions are typically based on more complete designs. Some agencies require that the NEPA review be completed before deciding to fund additional steps to develop the project, including the detailed design necessary to receive other project authorizations. It remains to be seen how this situation will be addressed through the "one federal decision" approach and other related initiatives.

17. Are there additional ways CEQ's NEPA regulations should be revised to improve the efficiency and effectiveness of the implementation of NEPA, and if so, how?

No.

18. Are there ways in which the role of tribal governments in the NEPA process should be clarified in CEQ's NEPA regulations, and if so, how?

Tribes have important roles in the NEPA process as proponents of actions subject to NEPA, cooperating “agencies,” and subject matter experts. They also have critical roles in the National Historic Preservation Act Section 106 compliance process which is typically carried out in concert with the NEPA compliance process. As with other cooperating agencies, their early and timely engagement is necessary. The regulations should emphasize this, as well as the government to government relationship between tribes and lead agencies. Executive Order 13175 – Consultation and Coordination with Indian Tribal Governments provides important guidance on this topic which should be incorporated into the regulations.

19. Are there additional ways CEQ's NEPA regulations should be revised to ensure that agencies apply NEPA in a manner that reduces unnecessary burdens and delays as much as possible, and if so, how?

No.

20. Are there additional ways CEQ's NEPA regulations related to mitigation should be revised, and if so, how?

The 2011 CEQ guidance on the appropriate use of mitigation and monitoring provides useful direction to agencies on the implementation, monitoring, and reporting of mitigating actions. Few agencies, however, routinely monitor their mitigation actions or report on this monitoring. The only revisions to regulations related to mitigation should be to require that the mitigating actions that an agency intends to implement should be clearly described in the decision document (i.e., the FONSI, FONNSI, ROD) and that these are binding on the agency unless the agency later decides in a subsequent, publicly available document, that it does not intend to implement one of more of the mitigating actions. The decision documents should also describe the associated mitigation monitoring and reporting requirements.