Before
The Department of Homeland Security
Office of Safety and Environment
Management Directorate
Washington, D.C. 20528

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Proposed Environmental Planning Directive	)	

COMMENTS OF THE COALITION OF JOURNALISTS FOR OPEN GOVERNMENT*

August 16, 2004

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RE: Department of Homeland Security Environmental Planning Directive

The Coalition of Journalists for Open Government submits these comments to the Department of Homeland Security (DHS) in response to its "Environmental Planning Program -- Notice of Proposed Directive; request for comments," published in the

Federal Register on June 14, 2004 (69 FR pp. 33043-33066) -- as extended by DHS notice, "Reopening of comment period for Draft Environmental Directive," published in the *Federal Register* on July 16, 2004 (69 FR pp. 42760-42761).

The Coalition of Journalists for Open Government is an alliance of journalism-related organizations that came together because of a concern over the increasing secrecy at all levels of government. We believe the diminishing access to records and meetings, which prevents citizens from being fully informed, is detrimental to public policy and is a principal factor in the public's growing distrust of and disengagement from government.

The formulation of this directive is an unusually important one. While DHS has security as its primary mission, it has also become, coincidentally, one of the most important environmental agencies in the federal government. Its environmental protection responsibilities are vast, by virtue of the number of component agencies and programs it has taken under its roof. Many of these component programs were originally put in place to insure the public's environmental health and safety. The concerns of possible terrorist attack are a recent and, in many instances, a substantially less probable threat. Those programs include dam safety, pipeline safety, oil and chemical spills, chemical plant emergency prevention and preparedness, radiological release prevention and cleanup, and marine pollution, among others.

By taking over these environmental programs, DHS takes on the responsibility for effectively carrying out their environmental missions. It must not be assumed that a choice needs be made between the environment and security. Most often, there is no conflict between the two goals; they are at core the same. DHS has a responsibility, under the laws that originally mandated these environmental programs and are still on the books, to carry out their goals fully and effectively.

We commend DHS for seeking to ensure the integration of environmental considerations into Department of Homeland Security (DHS) mission planning and project decision making. We are heartened by DHS recognition that "environmental stewardship, homeland security, and economic prosperity are compatible and complementary," and we applaud the effort to establish "a framework for the balanced

and systematic consideration of these factors in the planning and execution of DHS activities."

Our comments focus primarily on information disclosure restrictions described under Section 6.2 of the proposed Environmental Planning Program directive ("Classified or Protected Information").

General Comments

The National Environmental Policy Act (NEPA) is a profoundly powerful and important environmental law. Enacted in the last days of 1969, at the dawn of the modern environmental protection era, it is both foundation stone and keystone in the structure of national environmental law. In essence, it requires that the federal government seriously consider the environmental consequences of major actions it undertakes, and that it balance its other goals against the need to protect the environment. It mandates that no federal agency, not even the Defense Department, operate in a policy vacuum. By requiring federal agencies to consult formally, it helps ensure that the goals of agencies working to protect the environment are balanced against the goals of agencies with very different primary missions. Over 3-1/2 decades, a broad fabric of statutory law, case law, regulatory and administrative law, and state law has accumulated and evolved to implement NEPA -- and this cannot be set aside with the pen stroke of a single agency.

Public disclosure of information is the heart and soul of the National Environmental Policy Act. This approach is based on fundamental statutory principles and a shared national philosophy about the role of government in a democracy. Not all Americans agree all of the time about whether prescriptive regulations are the best way for government to intervene for social good (specifically, environmental protection). But the approach to government that seeks to minimize regulatory intervention depends even more on openness. Government cannot act appropriately, tailoring its actions to suit specific problems, without the sunlight of public information, public accountability, and, sometimes, public pressure. NEPA is predicated on these serving as guides to and restraints on government action.

Regulatory and administrative provisions which in any way limit the disclosure of NEPA-related information must be given the narrowest possible construction and should

be no broader than necessary to achieve the security concerns involved A blank-check authority to declare information secret, with no appeal or oversight, with no necessity to make the case for withholding, with no requirement to even make the public aware that it has done so, would undermine NEPA and its bedrock principles. The DHS directive as proposed (along with the authorities it relies on), makes no provision for needed checks and balances on excessive secrecy. The directive should be reworked.

We urge the Department to remember that several important public policy goals are served by giving citizens the broadest possible access to information about hazards to environmental health and safety. While caution is certainly warranted in light of the September 11, 2001 attacks, that is not the only lesson to be remembered. The 1984 Bhopal tragedy reminds us that thousands of people were killed not merely by industrial hazards but by their unawareness of the threat the Bhopal plant presented to their lives and health. As a result, many major environmental laws now mandate disclosure of hazard information.

The threat of terrorism in no way mitigates the environmental threats that gave rise to these wise public disclosure provisions. Far more people in the United States have died from dam failures, fuel explosions, chemical accidents, pipeline failures, and other preventable hazards than from terrorist attack. Deaths such as these are preventable, but only if the public is aware of the hazards and government acts to provide more than an appearance of safety. Nondisclosure can kill just as surely as disclosure might.

Secrecy Means Liability: Critical Oversight Information

Much of the unclassified environmental information that DHS contemplates designating as Critical Infrastructure Information, Sensitive Security Information or Sensitive But Unclassified is currently in the public record in various federal agencies, the 50 states, and the thousands of municipalities affected. Those states and federal agencies have laws and policies that demand transparency. Those laws are in place because open records are essential to citizen oversight and to insuring accountability in government actions – including accountability in carrying out the duty of protecting the public.

If DHS withholds or withdraws some or all of these records from the public domain in the name of national security, it must recognize and take responsibility for the potential consequences of the diminished public oversight. In the act of taking these records from the public weal, DHS takes away one of the public's most valuable possessions, its "Critical Oversight Information." COI is information a citizen might use and must have to judge whether public servants are serving well. It is information that speaks to the quality and integrity of the performance of government policy-makers, managers, or employees. It indicates how well they are doing the job of managing government facilities and regulating private ones. It might be budget information and details on revenue and spending. It can be information about personnel and their qualifications, training, and performance. It may be business information about the multi-million or multi-billion-dollar contracts to build and maintain the nation's highways, bridges, dams, waterways, or government office buildings. It is the sort of information GAO pores over in its gimlet-eyed search for waste, fraud, and abuse. It is information about government contracts with carriers and suppliers and vendors and tenants. It is also information about public convenience and use of the public areas – and about personal safety. By definition, virtually all of the information normally contained in NEPA documents, such as an Environmental Impact Statement, is Critical Oversight Information.

Without restraints built into the information safeguarding rules, and without restraint exercised by those given the authority to mark information secret, much that is Critical Oversight Information will be withheld from public inspection. DHS should revise its proposed NEPA directive to provide restraint mechanisms that are now largely missing.

One such mechanism would be to build in a review of information gathered in the "protected" categories such as SSI or CII in order to identify and extract any Critical Oversight Information whose disclosure does not pose a clear and specific danger to homeland security.

Another would be for DHS, in a revised directive, to acknowledge that they are taking possession of what is, in effect, community property – publicly available information which has significant oversight value – and that in doing so, DHS accepts both moral and legal responsibility for ensuring that no collateral public harm results.

That could be harm to public health, or to an endangered species, or to public safety, or to property values. When an agency makes secret what is normally a public document that holds critical oversight information, the agency must ensure that nothing being kept secret reveals waste, fraud, abuse, violation of laws and regulations, actionable mismanagement, or of breaches of sound public policy. If the information being withheld from the public does suggest a need for remedial action, then the agency, as the record's guardian, must assume responsibility to see that appropriate action is taken.

That is an awesome additional responsibility – but the alternative is to leave a vacuum, something that should be as unacceptable in public policy as it is in the law. It is that potential vacuum that worries us. We urge that DHS, as it acts to insure the security of our homeland, recognize the potential collateral damage of its information-safeguarding actions.

There are many mechanisms commonly used in many parts of the government to restrain the overuse or misuse of secrecy. These include:

- Providing a sunset provision on secrecy rules and designations.
- Defining secrecy authorities narrowly rather than broadly.
- The use of detailed criteria.
- A requirement for written justification and a showing of public necessity.
- Procedures for independent review, for challenge, and for appeal of secrecy designations.
- Negotiated settlement of disputes.
- Oversight panels.

To our knowledge, few if any of these mechanisms are in use at DHS.

Legal Authority; Conflict Among Laws, Regulations, and Directives

We are particularly concerned that the sweeping language of Section 6.2.A. implies the Department of Homeland Security may restrict public access to information in a manner that exceeds any authorizing statute. The language creates fundamental conflicts between DHS and the National Environmental Policy Act and the Freedom of Information Act which must be addressed or resolved.

Only information that falls within a defined exemption to the Freedom of Information Act may legally be withheld from FOI requesters. The Department cannot by regulation or directive create new exemptions to the FOIA. The statutory mandate of CII is limited to that information which is voluntarily submitted by private industry. The authority of SSI is loosely derived from a 30-year-old law that was narrow in scope. Its expansion is the result of single word deletions buried deep in lengthy and complex legislation and has yet to be tested. SBU is not exempt from FOIA, as DHS acknowledges in its May 11 directive (MD Number: 11042) but fails to similarly note in the instant directive.

We urge DHS, in the body of the directive, make a strong statement on the presumption of openness in the environmental planning process. It is equally important that the directive provide specific criteria that must be met in those instances where secrecy must prevail over openness, as is explicitly required in 40 CFR 1507.3(c). We would also like to see specific procedures established to resolve conflicts and disputes between the two interests -- openness and secrecy. While the Council on Environmental Quality's role in this regard is an important one, its authority may not be sufficient to resolve all the issues that arise.

We understand that an agency directive has no legal force beyond the laws, regulations, and executive orders from which it is derived. It cannot create new authority for secrecy. But we also recognize that a directive's language does influence the behavior of those charged with implementing those laws, regulations and executive orders. In that regard, we fear that the directive's assertion of secrecy, however thin or lacking in legal predicate, could result in decisions to withhold information that are flatly contradictory to both the requirements and the spirit of NEPA and FOIA.

Public Participation, Adequacy of Notice and Comment Period

The environmental consequences of actions by the array of agencies under the administrative umbrella of DHS are vast, affecting millions of people and hundreds of stakeholder categories. The proposed environmental planning directive is a 60-page document dealing with a subject of considerable legal complexity (witness the breadth of programs involved in the Categorical Exclusions alone). The original 30-day comment

period was especially short. The 30-day extension was a recognition of that public hardship. However, the combined comment time still falls short of the public notice required in The Council on Environmental Quality's (CEQ) 1978 NEPA regulation (40 CFR 1506.6, "Public involvement"). It is also shorter than is practice common in federal rulemaking.

The CEQ regulation requires agencies to make "diligent efforts to involve the public in preparing and implementing their NEPA procedures." It defines a diligent effort coming "in the case of an action with effects of national concern" as including "notice by mail to national organizations reasonably expected to be interested." Since no such notices went out to journalism organizations or to many non-governmental advocacy groups working on environmental and open government issues, we suspect there are a substantial number of other interested national organizations who may not have received direct mail notice.

"Public involvement" is no longer an obscure concept in American government. Nor should the public's involvement be limited to a few opening remarks. Over the past 35 years, public involvement has come to be seen as an essential element of good government, a legal requirement, and a professional specialty. Indeed, one primer on public involvement -- the U.S. Environmental Protection Agency's "Introduction to Public Involvement" -- was written with environmental regulation in mind. Three and a half decades of government experience have taught that government decisions made without adequate public involvement risk catastrophic failure. Resistance from the public and stakeholders who feel blindsided or steamrolled has often made government programs difficult if not impossible to implement.

Rather than close the comment period and reconsider its directive based on the limited comments that have been received, we urge DHS to respond in a manner reflective of the public involvement goals of NEPA. DHS should undertake a full-scale public involvement program to make sure *all* the affected stakeholders fully understand the potential impact of this proposed NEPA directive and have an opportunity to be heard.

That would involve at a minimum much wider and active notification efforts, formal consultation on the record with other federal agencies, multiple public meetings or

forums, more factual and explanatory information materials for both specialized and general audiences, and, most importantly, a clearer indication of what kind of safeguarding DHS intends to impose in each program area. The public involvement programs mandated by the 1978 CEQ 1506.6 regulations for directives such as this one is broad, engaged, and active -- not merely passive publication in the *Federal Register*. Without such an exemplary public involvement effort, DHS's instructions on public involvement to its component agencies in section 2.1 of the proposed directive not only ring hollow but set an example-by-action that is directly contrary to the instructions being given.

For starters, we ask that DHS extend the comment period for at least 60 days, that it directly notify a wider range of national stakeholder groups, and that it then convene a public meeting in Washington, D.C. This would signal its support for the public involvement provisions of NEPA and its underlying support of FOIA which we believe are crucial to the ultimate success of its environmental planning efforts.

The 1978 CEQ NEPA regulations not only require DHS to draft and make available for public review the current proposed DHS-wide procedures, they also strongly "encourage" DHS to draw up specific procedures for each of its "major sub-units" (40 CFR 1507.3(a)), which will need to undergo public review and public involvement. This makes sense. A one-size-fits-all NEPA procedure seems unlikely to work equally well for all of the varied programs. To the extent that individual procedures are needed, the directive should provide specific instructions to the component agencies for drawing up their own NEPA procedures with a timetable and requirements for public involvement.

Finally, we are concerned about the near-total silence from other federal agencies about the proposed directive. NEPA mandates not only interagency consultation, but also public disclosure of the comments and responses of federal agencies to each other's proposals. While DHS's website laudably publishes comments received from the states, non-profit groups, and individuals, there are virtually no comments from the major federal agencies that will be affected by the DHS directive. The one exception is FERC, which submitted a letter saying it had "no comment" on the issue. We urge DHS to state publicly whether it has directly asked other agencies to comment and whether it has received responses, and to publish those responses it has or does receive. That would help

the public form some understanding of interagency issues and cooperation on in this critical area.

Public involvement in development of this NEPA directive is especially important because the net effect of the directive may be to deny any such involvement in future DHS environmental decisions. In opening the decision-making process to public discussion and input, DHS would be going a long way toward reassuring the American public that it recognizes the dangers inherent in preempting public oversight.

Specific Comments

Section 6.1 Emergencies

(G) Public Affairs Planning The section on public affairs planning for emergencies is an important one and DHS is to be commended for including it. We would, however, be interested in seeing more detail on the "open communication" measures, since advance preparation is a large part of the success of communication efforts in emergencies.

A single example, offered merely as illustration, is the availability of the names and direct phone numbers of DHS press officers. Other agencies make this information readily available and see many advantages in doing so. DHS does not. Nor does DHS offer electronic press-contact mailing lists. Yet that kind of basic person-to-person linkage between journalists and agencies is essential to building solid routine channels of communication that will function well under the stress and confusion of emergencies.

We worry that by quickly declaring a Categorical Exclusion in an emergency (Section 6.1.C), DHS may make critical safety information less available; telling the public less about the hazards than they need to know to protect property or health or save lives. One example: the particulate air pollution in lower Manhattan after the 9/11 attacks on the World Trade Center. The EPA's Inspector General reported just a year ago that the public may have suffered serious harms to their health because of a decision made at the time to withhold the hazard information.

Section 6.2 Classified or Protected Information

(A) Unnamed Legal Authorities The list of legal and regulatory authorities cited for asserting secrecy includes "other laws, regulations, or Executive Orders prohibiting or limiting the release of information." This is unacceptably vague. DHS should name and specify the legal authorities it is relying on. Unnamed authorities are no authorities at all.

(B and C) "Protected Information." The two sub-sections imply that "protected information" may be treated in the same manner under the CEQ NEPA regulations as classified information. That is incorrect and is a significant misreading of the CEQ regulations.

The CEQ regulations contain provisions that allow an agency the option to provide "limited exceptions to the provisions of these (CEQ) regulations for classified proposals. 40 CFR 1507.3(c). The CEQ regulations also state that "these documents (EISs and EAs) may be organized so that classified portions can be included as annexes, in order that the unclassified portions can be made available to the public."

The CEQ regulations make no provision for "protected information" or any category of information other than "classified proposals." Under NEPA, the content of "protected information" in the DHS directive cannot be excluded from public inspection. Further, the language of the directive could be used to exclude environmental impact assessments from public involvement in the NEPA process. To ensure compliance with the CEQ regulations in 40 CFR 1507.3(c) , the phrase "or protected information" must be deleted from DHS's language in 6.2B and C.

Criteria for Non-Disclosure. Even if we moot the question of whether DHS has authority to prevent disclosure of "protected" information in NEPA documents, and focus only on classified information, there remains unanswered the question: What are the criteria for determining which information should be withheld? The CEQ regulations (40 CFR 1507.3(c)) do not envision that any classified information remain automatically undisclosed in a NEPA document. Rather, the regulations speak of "limited exceptions" to full disclosure of classified information in NEPA documents. Those exceptions are allowed only if they fall within "specific criteria" spelled out in agency NEPA procedures.

Even less automatic, then, should be the assumption of non-disclosure of information in categories less stringent or less firmly grounded in law than "classified" -- the "protected" categories such as CII, CEII (Federal Energy Regulatory Commission), SSI, SHSI, SBU, and FOUO. Nowhere in the proposed directive does DHS offer the "specific criteria" for nondisclosure required by the CEQ regulations. This needs to be remedied in the final directive.

Concurrence in Nondisclosure by Other Agencies. Interagency consultation is one of the key mechanisms by which NEPA works. As currently written, Section 6.2 of the Proposed Directive leaves no room for input by other agencies into the question of whether environmental information should be undisclosed. DHS's desire to keep a piece of environmental information secret may conflict with the mandate of another agency, such as EPA, to warn the public of environmental hazards, threats or conditions. The proposed directive needs to spell out procedures through which such conflicts may be resolved -- whether by negotiation, by CEQ, or otherwise.

Segregation of Undisclosed Information. The directive should specify that, when it is necessary to segregate and not disclose particular information in a NEPA document, that the public document specifically mention and list in the table of contents the undisclosed annexes or appendices, and explain the general scope of information contained therein, itemize the documents withheld, and the general reasons why they need to remain undisclosed. This is the functional equivalent of what is known as a "Vaughn index" under FOIA.

"Appropriate Reviewers" of Undisclosed Information. The directive should clarify and specify the "appropriate reviewers and decision makers" authorized to review and mark NEPA documents for non-disclosure. This is not dealt with in the directive nor can it be extrapolated from the regulations on CII or SSI. Most important is the question of whether the reviewers will include officials from agencies outside of DHS -- as NEPA and its implementing regulations mandate. At issue is what happens if another agency disagrees with DHS on the need for secrecy, or recognizes the security concern but believes that the specific threat to health or safety outweighs it.

Section 6.3

"Procedures for Applicants" It may be implicit that applicants for "permits, grants, various certifications, awards, licenses, approvals, or other major federal actions" could not ask for protection of those documents as Critical Infrastructure Information (CII) because the information submitted would not be voluntary, CJOG would nonetheless be reassured if the directive stated that explicitly. This would not pre-empt the applicant from claiming protection for specific confidential or proprietary business information.

Categorical Exclusions

The concept of a Categorical Exclusion is not mentioned in the NEPA statute (42 USC. 4321-4347). In the governing CEQ regulations (40 CFR 1500-1508), it is mentioned only in the "Terminology" section (1508.4). CEs apply to actions "which do not individually or cumulatively have a significant effect on the human environment," as determined by proper procedures. The point of doing environmental assessments, as we read the law and regulations, is to make sure that the government addresses environmental issues of public concern, controversy, or consequence. They are a way of providing the public with the information needed to determine that the government is exercising its environmental stewardship responsibly.

Many of the items listed for Categorical Exclusion in Table 1.0 do not seem to fit these criteria. Since DHS published the "CE Administrative Record Summary" supporting the exclusions late in the review period, it has been difficult to fully examine their justification. That is, of course, still another reason why DHS should extend the review period. More importantly, the rationale for each of these Categorical Exclusions deserves detailed public explication and consideration. Once the CEs are in place, the public will routinely get less information, and will have a harder time getting information, about the activities they cover.

Without getting into details, it appears that in many cases DHS has used a relaxed threshold for what constitutes information that has "no significant effect on the human environment." and thus does not warrant public discussion or involvement. We offer a list of examples meant to be illustrative, rather than exhaustive.

There would seem to be potentially significant environmental impacts from activities involving:

- A7: "waste disposal"
- A7(e): "Chemicals and low level radio nuclides for analytical testing and research"
- A8(a): "Activities designed to support the improvement or upgrade management of natural resources ...."
- A8(c): "Site characterization studies and environmental monitoring...."
- A8(d): "Vulnerability, risk, and structural integrity assessments of infrastructure"
- B13, B14: "Tree removal" and logging activities
- D3: "Pest control activities"
- D5: "maintenance dredging and repair activities within waterways, floodplains, and wetlands"
- E5: "Natural resource management activities"
- E6, E7: Construction of roads and trails
- E8: "Construction of aquatic and riparian habitat"
- F1: Handling and disposal of hazardous materials and waste

Conclusion

We are grateful for the opportunity to comment on this proposed rule and urge that DHS reconsider and restate its directive to narrowly limit any closure of environmental information, to establish clear criteria for any such safeguarding of information, to provide for independent review of non-disclosure decisions, and to in every other way possible assure that the public is given full opportunity to be both informed and heard on matters of critical environmental planning, consistent with NEPA and CEQ regulations. In developing procedures and in then planning ways to protect our nation's environment, DHS must not treat the public's need to know and its right to know as categorical exclusions.

Respectfully submitted,

Society of Environmental Journalists
American Society of Newspaper Editors
Association of Alternative Newsweeklies
Associated Press Managing Editors
Committee of Concerned Journalists
Investigative Reporters and Editors
National Press Club
Newspaper Association of America
Radio-Television News Directors Association
Reporters Committee for Freedom of the Press
Society of Professional Journalists
U.Missouri Freedom of Information Center

Coalition Of Journalists For Open Government

By: Pete Weitzel

August 16, 2004

* These comments were prepared in substantial part by Joseph A. Davis on behalf of the Coalition of Journalists for Open Government and its respondent member organizations, including the Society of Environmental Journalists (SEJ) for which Mr. Davis prepared an earlier filing. As such, these incorporate and expand on the views expressed by SEJ in those previous comments.