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**FILED BY ELECTRONIC MAIL**

mail to: [ADMIN-S&E@hq.dhs.gov](mailto:ADMIN-S&E@hq.dhs.gov)

**Re: Department of Homeland Security's Proposed Management Directive 5100.1, Environmental Planning Program – published in 69 Fed. Reg. 33,043 (June 14, 2004).**

Dear Sir/Madam:

The Center for Progressive Regulation submits the following comments concerning the Department of Homeland Security's (DHS) Proposed Management Directive 5100.1 for the Environmental Planning Program (Proposed Directive).<sup>1</sup> The Proposed Directive asserts sweeping and unprecedented power to keep secret potentially vast amounts of information on the environmental impact of federal actions despite the clear and unequivocal disclosure requirements of the National Environmental Policy Act (NEPA or Act).<sup>2</sup> CPR believes that most of the secrecy provisions of the Proposed Directive violate NEPA and, unless they are revised, will lead to a successful challenge to the Directive in court. We urge DHS to revise the Directive to comply with the law by limiting its non-disclosure provisions to information that unambiguously qualifies for withholding under one of the exemptions provided in the Freedom of Information Act (FOIA).<sup>3</sup>

The Center for Progressive Regulation (CPR) is an organization of academics specializing in the legal, economic, and scientific issues that surround federal regulation. CPR is committed to informing the public about scholarship that envisions government as an arena where members of society choose and preserve their collective values. CPR

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<sup>1</sup> 69 Fed. Reg. 33,043-66 (June 14, 2004).

<sup>2</sup> National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-70 (2000).

<sup>3</sup> Freedom of Information Act of 1966, 5 U.S.C. § 552(b) (2000).

rejects the idea that government's only function is to increase the economic efficiency of private markets.

## OVERVIEW AND SUMMARY

According to DHS, the purpose of the Proposed Directive is to “establish procedures that DHS will use to comply with”<sup>4</sup> its obligations under NEPA and the Council on Environmental Quality’s Regulations for Implementing NEPA (CEQ Regulations).<sup>5</sup> As DHS points out, “NEPA provides a tool for carrying out federal environmental policy.”<sup>6</sup> More specifically, the Act requires federal agencies to factor environmental considerations into the decision-making process by undertaking a public evaluation of the environmental consequences of any proposed “major Federal action[] significantly affecting . . . the . . . environment.”<sup>7</sup>

The public nature of this NEPA “tool” is essential to its efficacy: Recognizing the public’s right to a clean environment and concomitant duty to protect the environment,<sup>8</sup> NEPA and the CEQ Regulations require agencies to involve the public in the drafting of Environmental Impact Statements (EIS) and to incorporate the public’s comments into final EISs.<sup>9</sup> CPR is concerned that, contrary to DHS’s stated intention, the Proposed Directive’s instructions require officials to shield from public review large, ill-defined

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<sup>4</sup> 69 Fed. Reg. at 33,045, § 1.B.

<sup>5</sup> CEQ Regulations for Implementing NEPA, 40 C.F.R. §§ 1500-08 (1978).

<sup>6</sup> 69 Fed. Reg. at 33,045, § 1.B.

<sup>7</sup> 42 U.S.C. § 4332(C).

<sup>8</sup> *See id.* § 4331(c) (“The Congress recognizes that each person should enjoy a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment.”).

<sup>9</sup> *See* 42 U.S.C. § 4332(C) (“Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to . . . the public as provided by section 552 of Title 5, and shall accompany the proposal through the existing agency review processes.”); 40 C.F.R. § 1506.6(b) (requiring agencies to “[p]rovide public notice of NEPA-related hearings, public meetings, and the availability of environmental documents so as to inform those persons and agencies who may be interested or affected”); *id.* § 1503.1(a)(4) (mandating that agencies “[r]equest comments from the public [on draft EISs], affirmatively soliciting comments from those persons or organizations who may be interested or affected”); *id.* § 1503.4(a) (instructing agencies “to assess and consider comments both individually and collectively” and to respond to comments in the final EIS); *see also Dep’t of Transp. v. Public Citizen*, 124 S. Ct. 2204, 2216 (2004) (“The informational role of an EIS is to give the public the assurance that the agency has indeed considered environmental concerns in its decisionmaking process, and, perhaps more significantly, provide a springboard for public comment in the agency decisionmaking process itself.”) (quoting *Baltimore Gas & Elec. Co. v. Natural Res. Def. Council*, 462 U.S. 87, 97 (1983)) (internal quotations, citations, and alterations omitted).

categories of information contained in environmental-study documents.<sup>10</sup> As a result, use of the NEPA tool by DHS will become the exception, rather than the rule, in direct violation of the statute.

Although CPR appreciates that there may be limited circumstances in which some information contained in an EIS or related documentation is properly withheld from the public, the blanket nature of the Proposed Directive's non-disclosure provisions undermines both NEPA and, ironically, DHS's security mission. The foundational premise underlying NEPA—and, indeed, the legitimacy of the U.S. government—is that government accountability is a necessary condition of public security. The public's ability to hold its government accountable is directly dependent on the availability of information on governmental decisions and actions. For the reasons explained more fully below, CPR urges DHS to eliminate provisions in the Proposed Directive that illegally extend such exemptions to the grossly over-broad categories of "critical infrastructure information" and "sensitive security information."<sup>11</sup>

### **CATEGORIES OF INFORMATION THAT "DHS WILL NOT DISCLOSE"**

Subsection 6.2(A) of the Proposed Directive provides that "[n]otwithstanding other sections of this chapter, DHS will not disclose":

- (1) "classified, protected, proprietary, or other information that is exempted from disclosure by the Freedom of Information Act (FOIA), (5 U.S.C. 552),"
- (2) "critical infrastructure information as defined in 6 U.S.C. 131(3),"
- (3) "sensitive security information as defined in 49 CFR Part 1520, E.O. 12958, the DHS Management Directive 0460.1, 'Freedom of Information Act Compliance', and the DHS Management Directive 11402, 'Safeguarding Sensitive But Unclassified (For Official Use Only) Information', or other laws, regulations, or Executive Orders prohibiting or limiting the release of information."<sup>12</sup>

Presumably, by including exempted information under FOIA, DHS intended simply to reiterate NEPA's designation of FOIA as governing disclosure of environmental-study documentation pursuant to NEPA.<sup>13</sup> Much less clear, however, is

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<sup>10</sup> See 69 Fed. Reg. at 33,063, § 6.2.

<sup>11</sup> Although the focus of CPR's comments is the non-disclosure provisions of the Proposed Directive, CPR notes its agreement with other organizations whose comments are already on file with DHS that the Proposed Directive's automatic exclusion from NEPA's requirements of a number of broadly-defined categories of agency action undoubtedly undermines, and in all likelihood violates, NEPA and the CEQ Regulations. See, for example, the discussion of 69 Fed. Reg. at 33055, § 3.0, in the comments filed by the Sierra Club, Aug. 4, 2004, at 2-4; the Alliance for Nuclear Accountability, July 15, 2004, at 4-8, and the Natural Resources Defense Council, July 14, 2004, at 2-5.

<sup>12</sup> 69 Fed. Reg. at 33,063, § 6.2(A).

<sup>13</sup> See 42 U.S.C. § 4332(C) (quoted *supra*, note 9).

what DHS intends to withhold pursuant to the other two categories of information and, relatedly, the authority on which DHS bases such withholding.

### **Critical Infrastructure Information**

DHS should delete the provision requiring DHS officials to withhold from the public “critical infrastructure information” (CII) contained in NEPA documents. In this provision, DHS asserts authority to withhold CII “as defined in 6 U.S.C. 131(3)” of the Critical Infrastructure Information Act (CII Act).<sup>14</sup> But subsection 131(3) does merely that—i.e., defines CII. DHS has no authority to exempt itself from NEPA’s disclosure requirements simply by extracting the definition of a category of information without regard to the definition’s statutory context. Subsection 131(3) of the CII Act defines CII as “information not customarily in the public domain and related to the security of critical infrastructure or protected systems.”<sup>15</sup> In a subsequent section, Congress created a statutory exemption to FOIA for CII thus defined *only if two further conditions are met*, namely, if the CII (1) “is voluntarily submitted to a covered Federal agency,”<sup>16</sup> and (2) is not independently obtained by “a State, local, or Federal Government entity, agency, or authority, or any third party.”<sup>17</sup> Thus, the subset of CII that may be legally withheld is already covered by the Proposed Directive’s recognition that information in NEPA documents is subject to non-disclosure pursuant to these FOIA exemptions.<sup>18</sup>

By the terms of NEPA, information contained in environmental-study documentation is customarily in the public domain as long as that information does not fall within one of the narrow exemptions under FOIA. Giving effect to the conjunctive nature of DHS’s non-disclosure list requires reading the separate enumeration of FOIA-exempted information *and* CII to mean that DHS believes there could be CII that can be withheld even though the information must be disclosed under FOIA. A mere statutory definition of CII does not provide DHS with the authority to withhold such information. Congress did not exempt CII from disclosure, but rather the much more narrowly-defined category of information deemed *protected* CII.<sup>19</sup> Thus, the Proposed Directive’s provision for non-disclosure of CII is unlawful and must be removed from the final version.

### **Sensitive Security Information**

Consistent with its overreaching and illegal treatment of CII, DHS asserts authority to withhold “sensitive security information” (SSI) based on mere definitions. DHS plans to withhold from the public NEPA information that constitutes SSI “as defined in 49 CFR Part 1520, E.O. 12958, the DHS Management Directive 0460.1,

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<sup>14</sup> Homeland Security Act of 2002, 6 U.S.C. § 131(3) (Supp. 2003) (cited by DHS in the Proposed Directive, 69 Fed. Reg. at 33,063, § 6.2(A)).

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* § 133(a).

<sup>17</sup> *Id.* § 133(c).

<sup>18</sup> *See supra* text accompanying note 13.

<sup>19</sup> *See* 6 U.S.C. §§ 133(a)(1), (c).

‘Freedom of Information Act Compliance’, and the DHS Management Directive 11402, ‘Safeguarding Sensitive But Unclassified (For Official Use Only) Information.’ ”<sup>20</sup> The DHS’s recitation of sources for the definition of SSI appears to be, at best, inadvertent sloppiness, or, at worst, an attempt to assert sweeping power to withhold information by relying on copious and vague language, some of which is only marginally related to the purpose for which it is invoked.

Only one of the sources cited for the definition of SSI actually provides such a definition; namely, 49 C.F.R. Part 1520 (Part 1520). DHS Management Directive 11402 incorporates by reference the definition in Part 1520,<sup>21</sup> and, puzzlingly, the other two sources—DHS Management Directive 0460.1 and Executive Order 12,958—do not mention SSI at all. In fact, Executive Order 12,958 governs the handling of classified national security information,<sup>22</sup> which Part 1520 explicitly excludes from the definition of SSI contained therein.<sup>23</sup> Even further obscurity is infused into the “definition” of SSI by what is apparently a “savings clause” reserving vast, and arguably illegitimate, power to withhold information: in addition to the named executive order, regulation, and management directives, DHS ambiguously references “other laws, regulations, or Executive Orders prohibiting or limiting the release of information.”<sup>24</sup> Thus defined, SSI potentially encompasses an immense amount of the sort of information normally included in NEPA documents.

In light of the potential for abuse created by this confusing amalgam of sources for the definition of SSI, CPR urges DHS to delete the provision for non-disclosure of SSI. Even if all the sources were removed except Part 1520, which does actually contain a definition of SSI, the problem remains that DHS is basing its non-disclosure authority on a definition, and not on a congressional mandate deeming such non-disclosure proper. There is such a mandate in the NEPA provision that incorporates FOIA by reference. It is unnecessary—and, indeed, illegal—for DHS to assume the power to withhold outside the bounds of that mandate.

***RECOMMENDATION: Because definitions of CII and SSI in statutory and other sources do not provide DHS with the authority to withhold such information from the public, DHS should remove the provisions for non-disclosure of CII and SII from the final version of the Directive. DHS should instead confine non-disclosure of NEPA documents to the limits imposed on agencies in FOIA.***

### **“Essentially Meaningless” Material**

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<sup>20</sup> 69 Fed. Reg. at 33,063, § 6.2(A).

<sup>21</sup> DHS Management Directive 11402, *Safeguarding Sensitive But Unclassified (For Official Use Only) Information*, May 11, 2004, at 2, § 4, available at <http://www.gas.org/sgp/othergov/dhs-sbu.html>.

<sup>22</sup> Exec. Order No. 12,958, 60 Fed. Reg. 19,825 (Apr. 17, 1995).

<sup>23</sup> Transportation Security Administration, DHS, Protection of Sensitive Security Information, 49 C.F.R. § 1520.1(a) (2004).

<sup>24</sup> 69 Fed. Reg. at 33,063, § 6.2(A).

The Proposed Directive illegally requires DHS officials to withhold another “category” of information by providing, in a separate section that purports to address the procedures for withholding categories of information already defined, that “if segregation (of classified or protected information) would leave essentially meaningless material, the DHS elements will withhold the *entire* NEPA analysis from the public.”<sup>25</sup> However, NEPA places such tremendous emphasis on the public’s right and responsibility to participate in governmental decision-making because Congress understood that in many circumstances, the people who live in a given area—who breathe the air and drink the water—have a much better understanding than government officials of what information is meaningful when it comes to determining whether to undertake an action that will significantly impact their home.

***RECOMMENDATION: DHS should delete the provision requiring officials to withhold “essentially meaningless” information not otherwise subject to exemption from disclosure so the public can determine whether such information is meaningful, as intended by Congress.***

### **PROCEDURES GOVERNING DHS’S DETERMINATION TO WITHHOLD INFORMATION FROM THE PUBLIC**

CPR commends DHS’s effort to comply with the public-disclosure requirements of NEPA and the CEQ Regulations by providing that “[t]o the fullest extent possible, DHS will segregate any such classified or protected information into an appendix sent to appropriate reviewers and decision makers, and allow public review of the remainder of the NEPA analysis.”<sup>26</sup> In addition to providing the public with vital information about the impact of a given federal action on their environment, public dissemination of such “segregated” information may give the public some indication whether the remaining portions of the NEPA analysis were properly withheld. However, the Proposed Directive fails to include any provision for the public to challenge DHS’s decision to withhold information contained in NEPA documents. In light of the crucial role of the public in implementing federal environmental policy under NEPA, this omission is simply untenable.

***RECOMMENDATIONS: The final version of the Directive should provide that federal, state, and local agencies and any third party may appeal a decision to withhold information contained in NEPA documents and that DHS will consider such appeals in a timely and attentive manner.***

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Respectfully Submitted,

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<sup>25</sup> 69 Fed. Reg. at 33,063, § 6.2(C) (emphasis added).

<sup>26</sup> *Id.*

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