



July 14, 2004

Department of Homeland Security
Management Directorate
Environmental Planning, Office of Safety and Environment
Washington, D.C. 20528
ATTN: Mr. David Reese

Sent via facsimile to (202) 772-9749

RE: Notice of Proposed Directive Implementing the National
Environmental Policy Act

Dear Mr. Reese:

The following comments on the Department of Homeland Security's ("DHS") proposed directive containing policy and procedures for implementing the National Environmental Policy Act of 1969 ("NEPA") are submitted by Defenders of Wildlife on behalf of ourselves, the Ocean Conservancy, and the National Audubon Society (collectively "Defenders"), and the millions of members our organizations represent.

Defenders believes that several aspects of the proposed rule are contrary to the letter and spirit of NEPA, its implementing regulations as promulgated by the Council on Environmental Quality (CEQ), and judicial interpretations of both. We are particularly concerned with the proposed directive's extremely broad and liberal use of Categorical Exclusions. Moreover, the proposed directive contains troubling and ill-defined provisions allowing for the withholding of entire NEPA documents as classified or protected information, an unprecedented measure which runs counter to fundamental democratic values of open, transparent, and accountable government. While we recognize the fact that some actions taken, and information held, by DHS may accurately be described as classified or protected, and thus for purposes of national security should be shielded from public view, the proposed directive lacks any meaningful attempt to carefully define the circumstances or situations in which these exemptions may be invoked. Finally, the directive misapplies existing law in its provisions relating to both environmental assessments and environmental impact statements.

Establishing carefully considered and painstakingly crafted NEPA procedures is especially important for an agency such as DHS which includes under its umbrella a large number of components responsible for regulating a staggering array of activities and operations, as well as ensuring the safety of the nation's citizens. Encompassing agencies as

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diverse in mission and culture as the Federal Emergency Management Agency, U.S. Border Patrol, U.S. Secret Service, Coast Guard, Nuclear Incident Response Team, and the Transportation Security Administration, the manner in which DHS undertakes its environmental responsibilities has tremendous ramifications for citizens as well as the environment. We hope our comments will aid DHS in fulfilling its critical mission while preserving both the environment and avenues of public participation and government transparency that are among the hallmarks of our democracy.

With these comments, Defenders therefore suggests that broad revisions be made to the proposed directive in order to bring it into conformance with existing law under NEPA and other federal statutes. A detailed discussion of our specific comments follows.

I. Background on Use of Categorical Exclusions Under NEPA.

The Council on Environmental Quality's ("CEQ") NEPA implementing regulations define three levels of NEPA analysis: Environmental Impact Statements ("EIS"), Environmental Assessments ("EA"), and Categorical Exclusions ("CE"). According to the CEQ, categorical exclusions are clearly defined categories of actions that do not under any circumstances produce significant environmental effects. 40 C.F.R. §§ 1500.4, 1508.4. Importantly, the regulations specify that these categories may not either individually or cumulatively have the potential for adverse environmental effects. As cumulative effects are defined as an "impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions," some agency actions which have a relatively minor impact on their own are nonetheless improper for inclusion as a categorical exclusion because of their synergistic or additive effects in conjunction with other actions. This requirement is especially important for actions which are proposed in particularly sensitive areas, such as habitat for threatened or endangered species, wetlands or other aquatic resources, and other fragile or environmentally valuable lands.

The CE provisions were designed to allow routine agency administrative and maintenance needs to be met with minimal NEPA documentation. As noted by one commentator, "the CEQ intended categorical exclusion to function as a structured procedure for avoiding NEPA documentation of no practical value while insuring that a adequate analysis occurs whenever a proposed action or surrounding circumstance may produce environmental impacts." Myron L. Scott, "Defining NEPA Out of Existence: Reflections on the Forest Service's Experiment with 'Case-by Case' Categorical Exclusion," 21 Environmental Law 807, 813 (1991)(emphasis added), citing CEQ Guidance at 48 Fed. Reg. 34,264-65 (1983). Categorical exclusions are thus intended to reduce NEPA inflexibility in carefully considered and limited categories of agency actions. Thus, agency efforts to create categorical exclusions which apply to numerous and diverse facets of agency activities and operations are likely overstepping the bounds of lawful CE definition.

Unfortunately, the Bush administration has undertaken a broad and systematic effort to rewrite and subvert many federal environmental laws, including NEPA. One of the administration's central vehicles for this effort has been the "NEPA Task Force," a collection of 11 federal agency employees convened to "create suggestions for modernizing the implementation" of the law. Patrick A. Bousquet, "Recent Environmental Law News: NEPA Task Force Recommends More Categorical Exclusions," 11 Mo. Env'tl. L. & Pol'y Rev. 115 (2003). In September, 2003 the Task Force released a report outlining recommendations for such "modernization" in six broad areas, calling the overhauling of the process for identifying categorical exclusions as the "top priority" among the recommendations. To this end, the report encourages the CEQ to push for "increased use" of CEs—which in the environmental doublespeak of the Bush administration translates to the expansion of NEPA exemptions to as many agency actions as possible.

II. Many Categorical Exclusions Under the Proposed Directive Would Illegally Encompass Activities With Adverse Environmental Effects.

Mirroring the recommendations from the NEPA Task Force, DHS's draft Directive proposes broad and extensive use of categorical exclusions. In the proposed rule's background section, it states that "an area of emphasis included the development of appropriate categorical exclusions" and that the "resulting list of proposed categorical exclusions . . . includes a large number that are applicable to all component elements of the DHS." 69 Fed. Reg. 33044 (June 14, 2004). In general, many of the proposed categories of exclusions are overly broad and vague, and are thus of highly questionable legality under both NEPA and its implementing regulations. Additionally, Defenders has specific concerns with individual proposed exclusions, particularly those relating to Customs and Border Protection, and the U.S. Border Patrol.

While federal agencies are afforded deference in their promulgation of NEPA regulations, they must provide evidence and justification supporting their findings that categories of actions will not individually or cumulatively have a significant effect on the environment. See Heartwood v. Dombek, 73 F. Supp. 2d 962 (S.D. Ill. 1999)(holding that agency's expertise and experience not sufficient to justify proposed categorical exclusion where no rationales, documentation, or evidence provided in support of those categories). Additionally, an inherent limitation on the promulgation of categorical exclusions is that they be very specific and limited in their definitions, and that they only be applicable to those routine administrative or managerial actions that are certain to produce no adverse environmental impacts.

Contrary to these requirements, many of the categorical exclusions proposed by DHS are overly broad and unduly vague. This failure to narrowly and specifically tailor the proposed CEs is compounded by DHS's neglecting to provide public access to the administrative record supporting their promulgation. Heartwood at 975 ("the Forest Service does not provide any documentation nor evidence regarding the details of these prior harvests nor the FS's analysis of their environmental effects upon which they based

their opinion.”). Moreover, many of the proposed categories would permit activities that, far from being of negligible effect on the environment, would potentially have significant effects, including effects on highly imperiled wildlife species listed under the Endangered Species Act. While CEs are an important and useful tool, and needless analysis should not be conducted for truly minimal actions, neither should CE provisions be applied to actions which will create adverse environmental effects.

For example, proposed CE # B2 would pertain to “transportation of personnel, detainees, equipment, and evidentiary materials in wheeled vehicles over existing roads or established jeep trails, including access to permanent and temporary observation posts.” For at least one agency under DHS, the Border Patrol, the establishment of, and access to, such observation posts poses great risks to the environment, and directly threatens one of the most imperiled land mammals on the continent, Sonoran pronghorn. A well established record overwhelmingly demonstrates that construction, use of, and access to, such observation posts is clearly not appropriate for categorical exclusion.

To illustrate, the Tucson and Yuma sectors of the Border Patrol recently proposed to expand “Operation Desert Grip,” an effort to secure the Arizona border which involves deployment of more agents, increased construction of roads and walls, installation of surveillance infrastructure, addition of helicopter overflights, and establishment of observation posts and camps. The majority of this activity would take place on federal lands, including National Wildlife Refuges, National Monuments, National Forests, and designated wilderness areas. In response to this proposal, the manager of the Cabeza Prieta National Wildlife Refuge expressed strong reservations about several aspects of the proposal, including the construction of “temporary posts.” (February 11, 2004 letter to Mr. Mark Doles, U.S. Army Corps of Engineers, Fort Worth District). The manager wrote that construction of such posts, or “camps,” would occur within pronghorn habitat, “and that both the noise and visual impact of the camp sites on the pronghorn could be considerable.” Importantly, the manager went on to “strongly suggest” that an environmental impact statement be prepared. With respect to the issue of “access”—which would be permitted under the proposed exclusion—the manager noted that “observations by refuge staff indicate that a large amount of degradation is the result of the high speeds at which [Border Patrol] agents regularly traverse these roads,” and that many of the roads considered to be “established” by the Border Patrol include “illegally created roads in Wilderness;” of which “refuge staff have reported several accounts” of Border Patrol agents using. The fact that such activities would be authorized under the proposed categorical exclusion is but one illustration of the clear misinterpretations of NEPA requirements contained in the proposed directive.

Many of these concerns would also apply to CE #B12, which authorizes “routine monitoring and surveillance activities that support law enforcement or homeland security and defense operations, such as patrols, investigations, and intelligence gathering . . .”. Clearly, “routine” monitoring such as “patrols” can have widely varying intensities of effects on the environment, depending on the numbers of patrolling personnel and the manner of their monitoring and surveillance. As the trend for Border Patrol operations

increasingly places large numbers of agents in highly sensitive areas, such operations move further and further away from the negligible environmental effects that may be lawfully authorized under categorical exclusions. The recently announced Arizona Border Control Initiative, for example, proposes to deploy hundreds of new agents, along with new off-road and all-terrain vehicles, within the Tucson and Yuma sectors. Many of these agents' activities would take place within wilderness areas, National Wildlife Refuges, and other sensitive areas.

The proposed categorical exclusion K1, a CE unique to Customs and Border Patrol, and which applies to "road dragging of existing roads and trails to maintain a clearly delineated right-of-way," raises similar issues. Additionally, this CE is on its face nonsensical by permitting "road dragging" of tires behind vehicles on "trails," which by definition are limited to foot, rather than vehicular, traffic. Moreover, limited monitoring conducted by wildlife and land management agencies has detected systematic and ongoing environmental abuses and degradation caused by Border Patrol road dragging. As stated by one federal employee, "It starts out as a one lane road and expands to a three lane road with off road driving on the shoulders to read foot prints in the sand." Much of this dragging is conducted within important habitat for several threatened and endangered species, including Sonoran pronghorn, cactus ferruginous pygmy-owl, and flat-tailed horned lizard.

Proposed categorical exclusion #B10, which authorizes "existing aircraft operations conducted in accordance with normal flight patterns and elevations," also would allow activities that create significant environmental effects. Many "existing aircraft operations" adversely affect a wide variety of wildlife, especially low level flights such as those conducted on a daily basis by the Border Patrol and other agencies such as Drug Enforcement Administration. Again, Border Patrol operations in Arizona involving such flights are believed to be a particular danger to the highly imperiled Sonoran pronghorn, especially when cumulative impacts are considered. Previous failures by the Border Patrol and other agencies to adequately analyze such impacts under NEPA have been previously struck down by federal courts. See Defenders of Wildlife v. Babbitt, 130 F. Supp. 2d 121 (D. D.C. 2001). It is ironic and clearly unlawful that DHS now proposes to exempt this category of actions from NEPA.

Importantly, the potential cumulative effects associated with proposed categorical exclusions must be considered during the promulgation of those categories, rather than after the fact during their implementation. See Heartwood at 976 ("The extraordinary circumstances provision is designed to be applied to already-existing categorical exclusions, which by definition must have already been found to not generally have 'cumulative effects.' The [federal agency] is mandated to consider these cumulative effects prior to the implementation of a CE, not afterward.") (emphasis in original). Thus, subsequent reliance on exemptions for "extraordinary circumstances" cannot remedy facially illegal CEs. For some components of DHS, such as the Border Patrol, the large majority of their activities are conducted within habitat critical to wildlife and imperiled species, and are thus inappropriate for any CEs. As illustrated above, DHS has proposed

categories of exclusions which clearly will permit activities with adverse and significant environmental effects, far beyond the pale of the negligible or nonexistent effects that are allowed under legitimate CEs.¹

III. The Proposed Exemption for Classified and Protected Information Is Unduly Broad and Unjustifiably Vague.

NEPA is widely recognized as serving two core, fundamental purposes: (1) providing decisionmakers with an environmental disclosure sufficiently detailed to aid in the substantive decision whether to proceed with the project in light of its environmental consequences, and (2) providing the public with information and an opportunity to participate in gathering information. 40 C.F.R. § 1500.1(b); see also Baltimore Gas & Electric Co. v. NRDC, 462 U.S. 87, 97-100 (1978). CEQ's implementing regulations are replete with specific provisions emphasizing the central role public participation and oversight plays in proper NEPA analysis under both the letter and the spirit of the law. See e.g. 40 C.F.R. § 1500.1(b) ("Purpose of NEPA" section of regulations) ("NEPA procedures must insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken . . . Accurate scientific analysis, expert agency comments, and public scrutiny are essential to implementing NEPA."); § 1506.6 (a) ("Agencies shall make diligent efforts to involve the public in preparing and implementing their NEPA procedures."); § 1506.6(b) ("Agencies shall provide 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.").

NEPA does not exempt any federal agency from its provisions, and thus compliance is required of all agencies unless there is a "clear conflict" of statutory authority. Calvert Cliffs Coordinating Committee v. Atomic Energy Comm'n, 449 F.2d 1109 (D.C. Cir. 1971). The federal government has nonetheless claimed for itself an implied exemption for secret actions intended to further national security, under the rationale that such information is exempted from release under FOIA and thus cannot be made available to the public under NEPA. The Supreme Court has given qualified acceptance to this principle, allowing a secrecy claim made by the Navy under FOIA to exempt NEPA compliance for the potential proposed storage of nuclear weapons. Weinberger v. Catholic Action of Hawai'i/Peace Education Project, 454 U.S. 139 (1981). Subsequent cases, however, have refused to extend this principle and made clear that the doctrine of secrecy contained in Weinberger is limited to extremely limited and discrete activities. See Romer v. Carlucci, 847 F. 2d 445 (8th Cir. 1988) (finding that review of NEPA analysis of proposed MX missile deployment to be a justiciable issue).

Section 6.2 of the proposed directive permits DHS to exempt from disclosure "classified, protected, proprietary, or other information" exempted under FOIA. The

¹ In addition to the proposed CEs discussed at length in this letter, we also have concerns with other CE's, which include but are not limited to: A7, D3, F1, G2, B4, B9, and E6.

directive goes on to state that "to the fullest extent possible, the DHS will segregate" such information but that "if exempted material cannot be segregated, or if segregation would leave essentially meaningless material, the DHS elements will withhold the entire NEPA analysis from the public." Defenders strongly believes that the extremely broad and sweeping exemption which would be codified by the proposed rule to be unwarranted and impermissibly vague. This is especially so given the fact that the directive makes no attempt to define terms, provide examples of situations or proposed actions which may fall within the rubric of the exemption, or otherwise provide any limit or parameters to its application. Given the proclivity of many components of DHS to already unduly restrict meaningful public input into their decision-making processes, in matters that quite clearly do not implicate matters of national security or involve classified information, but which do cause or have the potential to cause significant environmental effects, the draft directive must be revised to provide much greater specificity regarding this extremely important provision.

IV. The Proposed Direction Misstates or Misinterprets Several Other Important NEPA Provisions.

In addition to these fundamental issues, the directive also contains several subtler but important misstatements of NEPA law. Each of these is discussed briefly below.

A. Environmental impact statements must be prepared for actions which raise substantial questions concerning significant environmental effects.

Figure 1 of the proposed rule misleadingly states that an EIS will be prepared for proposals for which significant environmental effects will occur. However, a line long of judicial interpretations of the law make clear that EISs are in fact required for actions which raise substantial questions concerning the significance of effects. Save the Yaak Committee v. Block, 840 F.2d 714 (9th Cir. 1988), Blue Mountains Biodiversity Project v. Blackwood, 161 F.3d 1208 (9th Cir. 1998), cert. denied 119 S. Ct. 2337 (1999). Judge Friendly, in his noted dissent in the case Hanly v. Kleindienst, 471 F.2d 823 (2d Cir. 1972), argued that EISs should be prepared when actions would "arguably" have adverse environmental impacts. By attempting to interject a principle of certainty into the consideration of significance in threshold questions of preparing EISs under NEPA, DHS's directive clearly misstates governing NEPA law.

B. DHS must provide for public involvement for Environmental Assessments.

The proposed directive at section 2.6 states that "while the proponent is encouraged to provide public involvement in EAs, the proponent has discretion regarding the type and level of public involvement in EAs." (emphasis added). NEPA, however, does not recognize such discretion. As stated in one recent case, "[i]t is evident . . . that a complete failure to involve or even inform the public about an agency's preparation of an

EA and a FONSI . . . violates these regulations.” Citizens for Better Forestry v. U.S. Department of Agriculture, 341 F3d 961, 970 (9th Cir. 2003); see also Montana Wilderness Association v. Fry, 310 F. Supp. 2d 1127, 1146 (D. Mont. 2004)(“While the public notice requirements for an EA are not as stringent as those for an EIS, it would certainly thwart one of the cornerstones of NEPA to allow an EIS to ‘tier’ to an EA that was never circulated for public comment.”). In sum, while the standards governing public participation of EISs does differ from those governing the preparation of EAs, providing for a base level of public participation in EAs is a mandatory rather than discretionary task. By allowing its components to provide for discretionary public participation rather than mandating such participation, the directive violates NEPA.

C. The proposed standard for applying “Extraordinary Circumstances” is unduly restrictive.

CEQ’s implementing regulations specify that otherwise valid categorical exclusions cannot be invoked when there are “extraordinary circumstances” present. § 1508.4. As noted above, EISs are required when there are substantial questions relating to the significance of effects and EAs must be prepared when there is a possibility that the proposed action may have a significant effect on the environment; thus, the threshold of environmental effects allowed under a CE must be lower than a potential of significance. As CEs are intended for routine administrative actions, Defenders believes this threshold is crossed by any action which has the potential for any adverse environmental effect—which is commonly the situation when “extraordinary circumstances” are present.

Nonetheless, section 3.1(C) of the proposed directive conflates the standard for extraordinary circumstances with those for an environmental impact statement. The general provision of the rule states that a prerequisite to using a categorical exclusion is that “no extraordinary circumstances with potentially significant impacts relating to the proposed action exist.” As discussed above, however, potentially significant impacts trigger the need to prepare an EIS, a much different and more rigorous standard compared to the simple adverse environmental impact which would preclude the use of a CE. The environmental assessment, in fact, is specifically intended for situations in which the degree of potentially significant impacts is unknown—hence the required “finding of no significant impact” that follows preparation of most EAs. In contrast, the mere presence of extraordinary circumstances, such as endangered species, historical places, unknown effects on public health or safety, or the existence of controversy, usually indicates the presence of negative environmental effects mandating, at the least, the preparation of an environmental assessment. Thus, the extraordinary circumstances provision should be revised and clarified to read that when there is the presence of such circumstances, use of CEs is inappropriate.

Conclusion

Defenders of Wildlife, Ocean Conservancy, and the National Audubon Society respect the critical, difficult and complex mission with which Department of Homeland

Security is entrusted. However, for the reasons addressed by this letter, we are strongly opposed to several provisions of the draft directive for implementation of the National Environmental Policy Act. Defenders is particularly concerned with the directive's overly broad and impermissibly liberal use of categorical exclusions, as well as the extremely vague provision relating to exemption of documents from NEPA procedures under the national security and classified exemptions. We strongly urge DHS to remedy these shortcomings and the other issues addressed in this letter in the final draft of this directive.

Sincerely,

A handwritten signature in black ink, appearing to read 'B. Segee', with a stylized flourish at the end.

Brian Segee
Associate Counsel