



NATURAL RESOURCES DEFENSE COUNCIL

July 14, 2004

Environmental Planning
Office of Safety and Environment
Management Directorate
Department of Homeland Security
Washington, DC 20528

Re: Proposed Management Directive 5100.1, Environmental Planning Program
69 Fed. Reg. 33044 (June 14, 2004)

To Whom It May Concern:

On behalf of the millions of members and supporters of the Natural Resources Defense Council (NRDC) across the country, we submit the following comments on the Department of Homeland Security's (DHS's) proposed Management Directive 5100.1, procedures to implement the National Environmental Policy Act (NEPA). NRDC is national, non-profit membership organization seeking to safeguard the Earth – its people, plants and animals, and the natural systems on which all life depends. NRDC has been an active participant in the NEPA process, commenting on numerous proposed government decisions from a revised management plan to manage crowds in Yosemite, to restoring the Everglades.

We applaud DHS's recognition that "[s]tewardship of the air, land, water, and cultural resources is compatible with and complementary to the planning and execution of the DHS missions." 69 Fed. Reg. 33048. The environmental review and public participation provided by NEPA are critical to well-informed and well-accepted government decisions.

The proposed directive, however, limits public participation in two critical ways. First, the directive removes completely from all public review – as "categorical exclusions" – many activities that have the potential to harm significantly the environment and communities. Second, the proposed directive dramatically curtails information now available to the public about activities that may affect citizens' health and safety, as well as their quality of life.

Incorporating the Coast Guard, Border Patrol, the Federal Emergency Management Agency (FEMA), the National Communication System, and over a dozen of other elements, DHS has the potential to dramatically affect the environment and peoples' lives in numerous ways. DHS jurisdiction includes areas such as oil spills, border security, flood plain designation, and chemical plant security. Given the sweeping scope of DHS's jurisdiction and the breath of the exemptions from review and disclosure the proposed directive contains, we appreciate the Department's extension of the comment deadline to enhance public awareness of what has been proposed and provide a meaningful opportunity for input. Regulations by the Council on Environmental Quality (CEQ) place an affirmative duty on DHS to "make diligent efforts to

involve the public in preparing and implementing their NEPA procedures.” 40 C.F.R. § 1506.6(a). To further efforts to involve the public, we request that DHS hold one or more public meetings regarding the proposed directive prior to finalizing it.

While reserving the right to supplement our comments, we offer the following suggestions now to help DHS fulfill its mission of protecting the nation’s security, while protecting the environment and preserving public participation at the same time.

3.3 List of Categorical Excludable Actions

DHS has inappropriately proposed to categorically exclude from NEPA review many types of activities that could have significant adverse effects on the environment and communities. We are not advocating making DHS’s job more difficult or more time-consuming when review is unnecessary. Yet, several of the categorical exclusions (CEs) proposed go beyond what the CEQ regulations authorize. See 40 C.F.R. § 1508.4. As DHS acknowledges, agencies must justify a CE “based on experience” that establishes that a type of activity “do[es] not individually or cumulatively have a significant impact on the human environment and, therefore do[es] not require an Environmental Assessment (EA) or Environmental Impact Statement (EIS).” 69 Fed. Reg. 33055. Contrary to DHS’s suggestion, the Department has not simply incorporated CEs that were already in place when the DHS elements existed as separate agencies. Some of the proposed CEs, such as for waste disposal activities (A7), are completely new and are the type of activities that by their nature could have significant impacts on the environment. They should be deleted from the list. Others may be appropriate under limited circumstances, but are described too broadly and need to be narrowed in scope.

Proposed CEs that Should be Deleted

A7 All references to waste disposal should be deleted. The record does not provide anything to support the inclusion of waste disposal in this CE. CEs previously used by the Federal Emergency Management Agency (FEMA) and the Coast Guard were limited to the procurement and storage of non-hazardous goods, not their disposal. Waste disposal can affect water quality, air quality, drinking water supplies, land uses and property values, among other things. The fact that waste disposal may be limited to “permitted landfills or other authorized facilities,” does not resolve these concerns. Many sites may have been permitted many years ago and new analysis of the addition of new waste may be necessary. Furthermore, the permit process does not consider many of the factors integral to the NEPA process such as disproportionate impacts on minority communities, socio-economic concerns, and cumulative impacts.

B9 Reference to remote video surveillance systems should be deleted. Some types of remote video surveillance systems could cause significant surface disturbance. While the Navy has an existing CE covering routine protection of Navy owned or controlled properties, this does not justify approving a broad CE covering all remote video surveillance systems that might be used by any of DHS’s elements. Rather than using such a broad CE, DHS could consider using a programmatic environmental analysis addressing a particular type of surveillance. This could limit the site-specific analysis that would have to be done if the surveillance was applied in

numerous places. In addition, programmatic analysis would provide the opportunity to identify ways to mitigate potential adverse effects.

B10 The proposed CE for all “existing aircraft operations conducted in accordance with normal flight patterns and elevations” should be deleted. Aircraft overflights, especially at low elevations, can have dramatic adverse environmental impacts including noise and air pollution. While some kind of programmatic analysis might be appropriate for aircraft operations, removing them completely from environmental and public review is inappropriate and inconsistent with CEQ’s regulations. The existing CEs related to aircraft operations are much narrower than the CE DHS has proposed. For example, the Army only covers flights that were addressed in a master plan that underwent NEPA review. Significantly, the two elements that would primarily use the CE – the Coast Guard and Border and Transportation Security – do not have existing CEs to cover this type of activity.

B13 & B14 Logging, whether of live or dead trees, by its very nature can adversely affect the environment. Depending on its location, logging can be highly controversial both among the scientific community and the public. While logging of a limited number of acres at the Federal Law Enforcement Training Center in Georgia might not adversely affect the environment or be controversial, this in no way justifies the blanket exemption from environmental review and public participation DHS has proposed. Eliminating the CE does not mean that a lengthy process or document is necessary, but some kind of review is appropriate and required under CEQ’s regulations.¹

D3 The reference to “pest control activities” should be deleted. Widespread use of pesticides can have significant adverse effects on the environment and public health. The existing Coast Guard CE does not justify the proposed CE to cover all “buildings, roads, airfields, grounds, equipment, and other facilities” under DHS jurisdiction.

D5 This exclusion for “maintenance dredging and repair activities within waterways, floodplains, and wetlands” should be deleted. The Coast Guard already has a CE for maintenance dredging. No basis exists in the record for extending this CE to Customs and Border Protection and other agencies. While it is unclear how much dredging Customs and Border Protection would engage in, the record provides no evidence that this DHS element can conduct dredging in a manner that does not impact the environment. The record contains no Findings of No Significant Impact (FONSIs) from the Border Patrol for dredging activities. Until Customs and Border Patrol establish a record of minimal environmental impact for dredging in their particular circumstances, any CE for maintenance dredging should continue to be limited to the Coast Guard.

¹ We acknowledge the additional requirement of a Record of Environmental Consideration (REC) to justify the use of the logging CEs, as well as a few of the other CEs. This REC, however, cannot justify the use of a CE. As DHS acknowledges, the activities requiring a REC “involve greater potential for environmental effect.” 69 Fed. Reg. 33057. Because of this potential for harm, these activities should not even be considered for CEs in the first place. Furthermore, no opportunity exists for the public to comment on or challenge the REC. In fact, there is no provision for the public to even be provided notice of the REC.

F1 References to the disposal of hazardous material/ waste should be deleted. Neither the Coast Guard's nor the Department of Energy's existing CEs related to hazardous material covers its disposal. Questions of hazardous waste disposal, especially of large quantities, deserve a public process to resolve.

G2 References to "conducting" national, state, local, or international exercises should be deleted. While the design and development or readiness exercises may not significantly impact the environment, actually conducting these activities could. The existing FAA CE allowing for planning grants does not justify an exemption for conducting readiness activities. Likewise, the Army's existing CE for allowing emergency or disaster assistance does not justify the sweeping exemption proposed by DHS. CEQ regulations already provide for emergency action. The proposed exemption does not deal with actual emergency response, but instead conducting exercises "to test the readiness" of a response. Perhaps, DHS intent was not to cover the actual exercises themselves, but simply the documents providing for them. This is not what the language provides, however. The reference to "projects" or "activities . . . to . . . conduct" could certainly be interpreted to include conducting the exercises.

Proposed CEs that Should be Narrowed

B4 Reference to training on "specialized equipment" should be narrowed to limit the CE to types of equipment that do not disturb the surface in any way and have no potential to disturb the environment in any other way. While the preparation of "plans, studies, or evaluations" is unlikely to impact the environment, training on equipment may. The four pre-existing CEs (from the Department of Labor, the National Park Service, the Federal Highway Administration, and the Agency for International Development) that DHS relies on in support of this new proposed CE do not on their face incorporate training on equipment that may adversely affect the environment. While computer training probably would not affect the environment, an off-road vehicle used to take air samples certainly could.

B9 The reference to "temporary use of barriers, fences, and jersey walls" should be narrowed. Various kinds of barriers can have significant impacts on wildlife, including endangered species. While some locations may not present any potential adverse environmental impacts, DHS cannot justify a complete exclusion from review and public participation of all "temporary use of barriers, fences, and jersey walls." First, temporary is not defined. A barrier that exists for a week might not have an adverse environmental effect, but a barrier in place for a month or year might. Second, the exclusion for barriers, fences, and jersey walls should be limited to locations that do not have the potential to adversely affect the environment, such as inside a building.

E6 The reference to "previously disturbed areas" should be clarified. Road construction can have significant impact on the environment by increasing erosion, contaminated runoff, and fragmenting wildlife habitat. The proposal should be clarified to limit the CE to roads that would not cause new surface disturbance. In addition, it is impossible to tell the exact DHS facilities that will be covered and where they are located. While some sites will likely be in areas where new road construction is not controversial, others may be located where it is controversial. The Border Patrol's one Finding of No Significant Impact (FONSI) for the

expansion of a road at a border checkpoint, as well as the limited existing Coast Guard and FAA CEs for road construction, do not justify the sweeping exemption for all review that DHS has proposed.

6.2 Classified or Protected Information

DHS's proposal to withhold large, undefined categories of information precludes meaningful public participation in the NEPA process. What DHS has proposed goes well beyond what is provided for in CEQ's regulations. CEQ regulations limit what may be withheld to classified information. 40 C.F.R. § 1507.3(c). In addition to classified information, the directive prohibits the disclosure of "critical infrastructure information" and "sensitive security information." 69 Fed. Reg. 33063. Information routinely provided now in environmental documents, such as EISs or EAs, could be withheld. For example, information about a gas pipeline's potential to leak or explode could be considered critical infrastructure information. This exactly the kind of information that communities rely on in evaluating the potential impacts of a proposed pipeline, as well as the information communities need to protect themselves. Yet, the DHS proposal prohibits its disclosure.

DHS lacks the statutory authority to withhold all the information it has proposed. None of the authorities that DHS cites to in its directive provides authority to withhold unclassified information. See 69 Fed. Reg. 33045. Furthermore, the protections provided for critical infrastructure information (CII) by the Homeland Security Act of 2002 do not authorize withholding information from environmental documents used to justify government decisions. The statute defines "critical infrastructure information" as "information not customarily in the public domain." 6 U.S.C. § 131(3). Information now routinely available in NEPA documents may certainly be related to critical infrastructure, such as gas pipelines or nuclear power plants. Other than classified information, however, this information is "customarily in the public domain." Consequently, DHS cannot use the critical infrastructure provisions in the Homeland Security Act to withhold anything other than classified information from NEPA documents.

Furthermore, not all critical infrastructure information, as defined by 6 U.S.C. § 131(3), qualifies for protection under the statute. The Homeland Security Act protects CII from disclosure if: (1) it is voluntarily submitted by a private party, i.e. not required by law to be submitted² and (2) it has not been "independently obtained" by anyone through lawful means. 6 U.S.C. § 133(a) & (c). The legislative history of the Homeland Security Act confirms the limited circumstances under which CII is protected. In its report accompanying the bill containing the provisions ultimately enacted as the CII provisions of the Homeland Security Act, the House Select Committee on Homeland Security stated: "The Select Committee intends that [the CIIA] only protects private, security-related information that is voluntarily shared with the government in order to assist in increasing homeland security. *This subtitle does not protect information required under any health, safety, or environmental law.*" H. Rep. No. 107-609, at 116 (emphasis added). The Homeland Security Act's definition of "voluntarily" also limits when CII is protected. Congress specifically provided that a party cannot "voluntarily" submit (and thus

² This approach is consistent with the 1992 decision in *Critical Mass Energy Project v. Nuclear Regulatory Comm'n*, 975 F.2d 871, in which the D.C. Circuit Court of Appeals held that voluntarily submitted information is exempt from the Freedom of Information Act only if the government could *not* obtain it through other legal means.

cannot receive CII protection for) "information or statements submitted or relied upon as a basis for making licensing or permitting determinations, or during regulatory proceedings." 6 U.S.C. § 131(7)(B)(ii). Despite these limitations on the protection of CII, DHS's unlawfully proposes to withhold all critical infrastructure information from NEPA documents. See 69 Fed. Reg. 33063 ("DHS will not disclose . . . critical infrastructure information as defined in 6 U.S.C. § 131(3)"). Perhaps, DHS's intention is not as sweeping as we suggest. If this is the case, we urge the Department to clarify the directive's language to remove any possible ambiguity.

DHS's authority to withhold sensitive security information (SSI) from NEPA documents is more ambiguous. The Aviation and Transportation Security Act, as amended by the Homeland Security Act, gives the Administrator of the Transportation Security Administration (TSA) the authority to withhold information determined to be "detrimental to the security of transportation." 49 U.S.C. § 114(s)(1)(C). Previously SSI was limited to information related to air transportation and involved types of records, such as airport and air carrier security programs, that had little relevance to environmental analysis. SSI now applies to all modes of transportation, including non-passenger modes such as air and maritime cargo, trucking and freight transport, and pipelines. DOT/ DHS, Protection of Sensitive Information, 69 Fed. Reg. 28066, 28068 (May 18, 2004).

SSI could potentially include information critical to NEPA analysis and the public's ability to protect itself, such as chemical toxicity studies, spill response preparedness information, or vulnerability assessments. DHS should clarify its procedures to limit what is withheld from NEPA documents to information that has *previously been generated as SSI*, such as the security plans that vessel and maritime facility operators must submit for Coast Guard approval. See 68 Fed. Reg. 60448 (October 22, 2003). No basis exists for labeling information generated as part of the NEPA process as SSI. Furthermore, DHS should provide other agencies (like the Environmental Protection Agency or the U.S. Fish and Wildlife Service), as well as the public, the right to petition CEQ to review a decision by DHS to withhold information from NEPA analysis as sensitive security information.

In addition, it is critical that the process for identifying information that may be kept secret is an open and rigorous one. There is no reason why the process for identifying unclassified material that is to be withheld should be any less rigorous than the one for identifying classified information. Secrecy has severe consequences in a democracy. It is information about what their government is up to that gives citizens reason to trust it. Information is what holds public officials accountable to the public they serve.

The current processes for defining what qualifies as protected information are vague and leave too much discretion to industry and DHS. DHS has developed many of its procedures related to withholding information in secret, generating distrust and skepticism in the public the agency is supposed to be serving. Many of the policies have not even been made public once they are finalized. For example, despite FOIA's mandate to make agency policies readily available on the internet, neither of the two management directives referred to in Section 6.2 of the Federal Register notice (DHS Management Directive 0460.1, "Freedom of Information Act Compliance" and DHS Management Directive 11042, "Safeguarding Sensitive But Unclassified (For Official Use Only) Information") appear to be available on DHS's web site. If DHS wants

to withhold information from the public beyond classified information, we urge the Department to narrowly define the information through an open and public process and provide some mechanism for independent or judicial oversight.

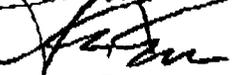
DHS has not even proposed procedures to govern some of the most sweeping categories of information it could withhold under the NEPA directive. For example, the Homeland Security Act, contains a sweeping mandate that the President "shall prescribe and implement procedures under which relevant Federal agencies . . . identify and safeguard homeland security information that is sensitive but unclassified." 6 U.S.C. § 482(a)(1)(B). Apparently, DHS will initiate some kind of public process to address this category of information. DHS should develop explicit criteria, with full public input, to ensure that these procedures provide ways of sharing important security information among federal, state and local protection entities as they were intended, rather than becoming a shield to withhold information from the public to which it has previously had access.

Finally, we commend DHS's proposal to require that agency officials segregate classified and protected information, allowing public review of the remainder of the NEPA analysis. This is consistent with agencies' obligations under FOIA to disclose portions of records that are non-exempt. 5 U.S.C. § 552(b). The proposal, however, lacks a mechanism to ensure that the DHS element in charge of the NEPA process does not withhold entire documents when it is unnecessary. The directive should provide other agencies (like the Environmental Protection Agency or the U.S. Fish and Wildlife Service), as well as the public, the right to petition CEQ to review DHS's failure to segregate and release portions of a document. Alternatively, the directive should explicitly provide that DHS's decision not to segregate and release portions of NEPA analysis is a final agency action subject to judicial review under the Administrative Procedures Act.

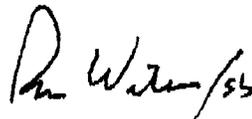
Conclusion

While DHS's national security mission is essential, it must be accomplished in a way that does not compromise the very democracy that the Department was created to protect. The proposed exclusions from NEPA review and the prohibitions on disclosure of information go well beyond what is necessary to protect security. The proposal could result in a dramatic curtailment of information that is now readily available to the public through the NEPA process. While some DHS activities will not affect the environment at all, some have tremendous potential to affect both the environment and communities. We urge the Department to adopt the changes suggested herein to narrowly limit and clearly define exclusions from environmental review and prohibitions on disclosure of information.

Sincerely,



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