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

Via fax to (202) 772-9749, five pages

To Whom It May Concern:

Nuclear Watch New Mexico is a nonprofit organization that monitors the activities of the U.S. Department of Energy (DOE), including the biological research activities of the Department of Homeland Security (DHS) within the DOE complex at the Los Alamos National Laboratory and other facilities.

We respectfully 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). 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.

However, we note the definition the DHS gave to NEPA in its Appendix A of the proposed directive:

National Environmental Policy Act (NEPA): Public Law 91-190 declares a national policy which will encourage productive and enjoyable harmony between man and his environment; establishes a Council on Environmental Quality in the Executive Office of the President; and requires that every recommendation or report on proposals for legislation and other major federal actions significantly affecting the quality of the human environment, a detailed statement (EIS) by the responsible official. [Sic]

What is striking to us is omission of the fact that the responsible federal agency is also required to solicit and consider public comment for environmental impact statements, as per CEQ regulations §§1503.1 through 1503.4. Whereas we trust this omission is not deliberate, nevertheless an effort to constrict public review and comment seems to pervade throughout this proposed directive.

Under Public Involvement the directive claims that

The DHS believes that public involvement early in the NEPA analysis process will help produce better decisions. The DHS also believes that the public and NGOs play an important role in the protection of resources. The DHS will encourage early and open public involvement in proposals. Open communication with the American public, consistent with other federal requirements, is the DHS policy.

However, the proposed directive limits public participation in two critical ways. First, it proposes to remove completely from all public review – as “categorical exclusions” – many activities that have the potential to harm significantly the environment and neighboring 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. It imposes extraordinary barriers to access to environmental information about proposals that could significantly impact our nation’s air, water and soil. Specifically we are referring to two provisions: Section 6.2 which could result in many NEPA review documents being withheld from public review and comment, or even perhaps public knowledge of the existence of those reviews, and section 3.0 that will create new Categorical Exclusions from NEPA review.

Section 6.2 Secrecy Provisions

DHS is proposing to restrict the information that will be released to the public in its NEPA reviews by choosing not to disclose information that is exempted by the Freedom of Information Act, Critical Infrastructure Information, Sensitive Security Information, DHS management Directives or information that is protected by other laws, regulations, or Executive Orders prohibiting or limiting the release of information. 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.

This grab bag of justifications indicates that DHS will err on the side of preemptively withholding environmental review information rather than carefully considering whether disclosure would harm the national interests. We argue that for the public and decision-makers to participate in government decisions likely to have a significant effect on the environment, the risks and plans must be publicly explained and the public must be provided the opportunity to comment. At the heart of NEPA is public's right for informed review and comment. NEPA was designed to facilitate an interactive process whereby citizens can comment by providing insights and criticisms to the officials about their proposals and genuinely influence the outcome of the proposal.

FOIA Exempted Information 5 U.S.C. 552

NEPA is designed to complement FOIA and the text of NEPA specifically includes provisions that encourage reviewers to utilize FOIA to enable them to comment intelligently on NEPA documents: Agencies shall "Make environmental impact statements, the comments received, and any underlying documents available to the public pursuant to the provisions of [FOIA]." 40 CFR 1506.6(f). FOIA is designed to provide documents in an expedited fashion. Of course agencies are not required to release documents that fall within the exceptions enumerated by FOIA. DHS should make a commitment within its rules to expedite FOIA requests that concern matters that should be addressed during the public comment period so that commenting agencies and the public can have the information they need to provide meaningful comments.

Sensitive Security Information (For Official Use Only) as defined by DHS Management Directive 460.1, 49 CFR Part 1520, and E.O. 12958 and the DHS Management Directive 11042

The sensitive but unclassified information (such as For Official Use Only), as defined by DHS directives, is defined too broadly to meaningfully protect the public from excessive withholding of information. Any DHS employee or contractor can designate documents as FOUO if it is regarded to be in one of eleven broad categories. There is no oversight body empowered to review or challenge the legitimacy of these sensitive designations, once bestowed.

We find FOUO and other "sensitive but unclassified" categories to be an irresponsible system for protecting important information that cuts too deeply into the rights of individuals who will be directly impacted by environmental harms. Moreover, under the proposed rule, there is no oversight mechanism to ensure that DHS does not abuse citizens' rights.

We believe the DHS directive should be rewritten to remove section 6.2 on Classified or Protected Information (1507.3(c)). We feel that this section dilutes NEPA and fails to prevent abuse of FOUO and other sensitive information designations. DHS should clarify its procedures to limit what is withheld from NEPA documents to information that has previously been generated as sensitive security information (SSI). No basis exists for labeling information generated as part of the NEPA process as SSI.

Th proposed rule states that "[I]f 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...." This would seem to create ripe conditions for agency abuse. It also begs the question of whether the public would ever have knowledge of these NEPA reviews to begin with. At the bare minimum there should clearly be a requirement that DHS must make public notice of all NEPA reviews, regardless of its potentially classified nature. From there, ample mechanisms for classified appendices already exist. We find it difficult to believe that the segregation of sensitive material would be impossible, or would leave the review so completely meaningless as to be of no value whatsoever, unless it were the intent of DHS to do so in

advance. Additionally, as another bare minimum, there should be a requirement to at least release a declassified summary of the review.

For years, federal government agencies have had the ability to fence sensitive information from public review, given that the information went through the appropriate classification procedures. Classified appendices have been issued in the past by federal agencies when the agency believed it was warranted. For example, DOE used classified appendices in the environmental impact statement for the Los Alamos National Laboratory's Dual Axis Radiographic Hydrodynamic Testing Facility. DOE also used them in the Stockpile Stewardship and Management PEIS. While classified appendices may be warranted on occasion, a blanket exemption would likely lead to abuse and suppress vast amounts of environmental information. There is no external monitoring entity that would ensure this rule is not abused. Moreover, this exception should not apply to the reference documents underlying the DHS' conclusions – those should remain available to the public so that it can evaluate the underlying information and assumptions upon which the project is based and approved.

Further, the DHS should consider the very real perception problem of conducting a major component of its work, that is biological select agent research, in a less than reasonably transparent manner. Select agent research is inherently dual use, that is I can be both offensive and defensive depending on intent. We must avoid raising suspicions and setting bad international precedent.

Section 3.0 Categorical Exclusions

The following proposed Categorical Exclusions (CEs) should be removed from the list altogether.

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.

E2: We find this to be perhaps the most egregious categorical exclusion that is being proposed, one that could produce giant loopholes. It is proposed to exclude new construction from review if the structure and planned use are compatible with local codes, is in an already developed area, not substantially increase vehicular traffic, are consistent with nearby buildings, and not exceed existing infrastructure capacities. There

could be an infinite amount of new construction that could be tailored to meet, or reputedly meet, those criteria. In our view, this categorical exclusion should be rejected. Instead, all new construction should stand or fall on its own merits, according to its appropriate level of NEPA review.

F1: F1 excludes routine uses of hazardous waste from NEPA review. However, no standard exists by which to measure "routine." Absent a deeper explanation of the activities being excluded, this categorical exclusion could easily become a rubber stamp to nearly all agency activities with hazardous waste. Additionally, the categorical exclusion of these activities would mask the cumulative effects of routine hazardous waste use at agency facilities. This would contradict the CEQ NEPA guidelines. 40 C.F.R. § 1508.7, 1508.8. It is striking that DHS has determined that the routine uses of hazardous waste "inherently [has] no potential for significant environmental impacts." Categorical Exclusions (CE) Administrative Record Summary. At the very least, such activities deserve a REC, as well as further elaboration within the text of the categorical exclusion.

F2: F2 would allow use of hazardous and radiological devices without NEPA review. While not every device needs an EA or EIS, the categorical exclusion is too broad since it does not provide an exception for devices with a significant amount of hazardous or radiological risk and/or waste. It also sets no limit on the cumulative use of such devices.

G1: G1 would allow training exercises using live chemical, biological, and radiological agents only at locations designed and constructed for such training. While the limitation to such facilities is better than allowing training at any facility, it does not go far enough. What is to guarantee that those facilities receive the appropriate level of NEPA review to begin with (e.g., see comment on E2)? Regardless of the facility, the use of live agents cannot be said to "inherently have no potential for significant environmental impacts." Categorical Exclusions (CE) Administrative Record Summary. At a minimum, such activities should require elevated REC review.

Finally, due to the dramatic impact this rule will have on DHS implementation of NEPA, **we urge you to hold public hearings on this rulemaking around the country and extend the public comment period by ninety days.** We were notified by a colleague organization about this proposed rule change ten working days ago and believe that many groups who may be affected by this rule are similarly situated.

Conclusion

The proposed exclusions from NEPA review and the prohibitions on disclosure of information go well beyond what is necessary to protect security and could create giant loopholes that could encourage agency abuse. 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.

Respectfully submitted,
Jay Coghlan, Director