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Message: Please accept these comments on the Proposed Mgt Directive 5100.1



August 4, 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:**

These comments are submitted on behalf of the Sierra Club, 85 Second Street, Second Floor, San Francisco, CA 94105. The nation's oldest grass-roots environmental organization, Sierra Club was founded in 1892. Sierra Club's purpose is "to explore, enjoy and protect the wild places of the earth; to practice and promote the responsible use of the earth's ecosystems and resources; to educate and enlist humanity to protect and restore the quality of the natural and human environments." As concerned citizens, the Sierra Club's 750,000 members are committed to securing policies that protect, preserve and restore environmental quality. Recognizing the need to balance sound environmental policy with national security concerns, Sierra Club offers the following comments on the Department of Homeland Security's (DHS's) proposed Management Directive to implement the National Environmental Policy Act (NEPA).

Sierra Club believes that, if enacted, the directive would undermine NEPA's purpose and effectiveness. More specifically, the DHS plan limits public participation in two critical ways. One limitation results from DHS's designation of categorical exclusions to an expansive list of actions, effectively abolishing any public review of activities that may cause harm to the environment and communities. Another curb to citizen involvement is that DHS is given broad authority to restrict access to environmental studies, even if the activities show there is potential harm to citizens' safety and health, by labeling the documents as classified information.

While the proposed directive applies only to DHS actions, a broad array of topics and governmental agencies fall under this banner. For example, DHS jurisdiction encompasses the Coast Guard, Border Patrol, the Federal Emergency Management Agency (FEMA), the National Communication System, and over a dozen of other entities. These agencies oversee oil spill response, border security, flood plain designation, chemical plant security, and the clean up of hazardous accidents. Therefore, DHS determinations are likely to affect the environment and peoples' lives in numerous ways.

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Because DHS's directive can have a sweeping impact on our nation's environmental well-being as well as the health and safety of countless adults and children, we ask DHS to hold public meetings where other citizens can voice their perspective. Securing additional public input is consistent with the Council on Environmental Quality (CEQ) regulations that place an affirmative responsibility on DHS to "make diligent efforts to involve the public in preparing and implementing their NEPA procedures." 40 C.F.R. § 1506.6(a).

### **Categorical Exclusions**

In the past, categorical exclusions (CE) were granted to expedite routine administrative measures, not create a loophole for avoiding scientific review and public input. Yet, this may be the consequence of DHS' proposed CE listing. As proposed, the DHS categories of exclusion are broad and vague. Equally problematic is that many of these activities could significantly and adversely effect the environment, communities, and wildlife habitat, which means these proposed categorical exclusions (CEs) fail to meet CEQ's implementing regulations and definitions. See 40 C.F.R. § 1508.4.

Further, current regulations state that when an Environmental Assessment (EA) or Environmental Impact Statement (EIS) is not conducted, the action can neither individually nor cumulatively have potentially adverse environmental effects. 69 Fed. Reg. 33055. Also, when given categorical exclusions are limited to specific actions; they are not granted for expansive or extensive use.

There does not appear to be any limitation on how often the CE could be used, consequently many individually insignificant (small) projects could be right next to each other without their total effect ever being taken into account. Individual projects that would be covered by the CE could have "significant" individual and cumulative environmental effects.

A meaningful analysis of cumulative impacts must identify: (1) the area in which effects of the proposed project will be felt; (2) the impacts that are expected in that area from the proposed project; (3) other actions – past, proposed, and reasonably foreseeable – that have had or are expected to have impact in the same area; (4) the impacts or expected impacts from these other actions; and (5) the overall impact that can be expected if the individual impacts are allowed to accumulate.

Therefore, Sierra Club asks that the list of activities identified for categorical exclusion from NEPA review be revised and limited in scope. Our recommendations for changes to the categorical exclusion section are:

- Delete all references to waste disposal. Putting waste disposal in permitted landfills or other authorized facilities does not resolve environmental concerns. Many sites may have been permitted years ago and additional analysis of new waste may be necessary. Furthermore, the permit process does not consider such factors as disproportionate impacts on minority communities, socio-economic concerns, and cumulative impacts. This proposed CE may allow significant degradation of communities already suffering from poor environmental conditions. According to the 1987 Commission for Racial Justice's *Toxic Waste and Race Study*, three of

the five largest commercial hazardous waste landfills are located in predominately African-American or Latino communities and account for 40% of the nation's total estimated landfill capacity in 1986.<sup>1</sup> Failing to give full consideration to waste disposal issues could result in incomplete application of Executive Order 12898, "Federal Action to Address Environmental Justice in Minority Populations and Low-Income Populations." (A7)

- Narrow the reference to training on specialized equipment to limit the CE to types of equipment that minimize surface disturbances. While the preparation of activities or evaluations is unlikely to impact the environment, training on equipment, an off-road vehicle might. (B4)
- Narrow the reference to temporary use of barriers, fences, and jersey walls. Also define the term temporary. While a barrier put up for a week might not have an adverse environmental effect, a barrier in place for a month or year might have significant impacts on wildlife, including endangered species. (B9)
- Delete the CE for all existing aircraft operations conducted in accordance with normal flight patterns and elevations. Due to noise and air pollution, over flights, especially at low elevations, can be inappropriate over environmentally sensitive lands, such wildlife refuges, and areas of cultural and spiritual value. Therefore, evaluations of over flight impacts to avoid adverse impacts should be conducted and the finding provided to the public. (B10)
- Delete the logging exemption. Logging can adversely affect the environment and any logging proposal should be subject to environmental review and public participation. There is no indication of how many projects the CE may cover, nor is there an indication of how many acres will be affected, how many board feet of timber it expects to remove from the forests, or what types of trees will be removed. With a CE the public will not know what types of trees will be logged or their age, nor of the effects to the wildlife, soil or watersheds from these projects. (B13 & B14)
- Delete the reference to "pest control activities". Use of pesticides and other pest control activities can have significant adverse effects on the environment and public health. As Congress recognized in 1996 when it passed the Food Quality Protection Act, infants and children may be particularly sensitive to pesticides. Their internal organs are still developing, and they may engage in certain behaviors that increase their exposure to pesticides. In addition, recent research has shown that some chemicals, including many pesticides, block or otherwise interfere with naturally produced hormones, potentially disrupting normal development in humans and other animals. Scientists are just beginning to understand many health effects of exposure to hormone-disrupting pesticides and

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<sup>1</sup> Bullard, Robert D. "In our Back Yards." *EPA Journal*. March/April 1992. page 12.

other chemicals. Therefore, issuing a CE for all "pest control activities" could have significant effects on human health and other species. (D3)

- Delete the exclusion for maintenance dredging and repair activities within waterways, floodplains, and wetlands. The record provides no evidence that this DHS element can conduct dredging in a manner that does not impact the environment. (D5)
- Clarify the reference to previously disturbed areas. Road construction can spread native and exotic pests, increase erosion, contaminate runoff, pollute clean drinking water, and fragment wildlife habitat. The proposal should be clarified to limit the CE to roads that would not cause new surface disturbance. (E6)
- Delete references to the disposal of hazardous material/ waste. Questions of hazardous waste disposal, especially of large quantities, deserve a public process to resolve. (F1)
- Delete references to "conducting" national, state, local, or international exercises. While the design and development or readiness exercises may not significantly impact the environment, actually conducting these activities could. (G2)

#### **Classified or Protected Information**

The DHS proposal would restrict access to large undefined categories of information. This restriction eviscerates NEPA and its intent to provide for meaningful public participation in a project's planning process. No federal agency is exempt from NEPA provisions. In the past, governmental requests for exemptions were based on the notion that the data would be exempted from release under the Freedom of Information Act. While the Supreme Court agreed in a limited ruling regarding nuclear weapons storage, subsequent cases clarified this acceptance is not the norm and secrecy must be limited.

DHS' proposal far exceeds CEQ's regulations, which limits what information may be withheld as classified information. 40 C.F.R. § 1507.3(c). In addition, the directive would also prohibit the disclosure of "critical infrastructure information" and "sensitive security information." 69 Fed. Reg. 33063. This type of information is routinely provided now in Environmental Impact Statements or Environmental Assessments.

There is no statutory authority to withhold all the information DHS proposes. 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). NEPA documents currently provide information that may certainly be related to critical infrastructure, such as gas pipelines or nuclear power plants. This information is provided on a routine basis, and is "customarily in the public domain." Consequently, use of the critical infrastructure provisions in the Homeland Security Act to withhold any information other than classified data from NEPA documents should be deleted from the final proposal.

Moreover, under the Homeland Security Act, Congress specifically provided that a party cannot "voluntarily" submit (and thus 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). The draft DHS proposal would allow the withholding of all critical infrastructure information from NEPA documents, despite Congressional limitations on the protection of CII.

Similarly, DHS's authority to withhold sensitive security information (SSI) from NEPA documents is ambiguous. SSI applies to all modes of transportation, including non-passenger modes such as air and maritime cargo, trucking and freight transport, and pipelines. 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 must clarify its procedures to limit what is withheld from NEPA documents to information that has previously been generated as SSI. 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, we urge DHS to establish an open process for identifying what information to keep secret. Public access to information helps ensure accountability of our government's actions.

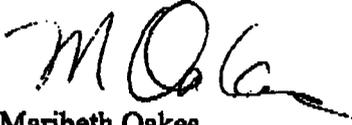
Finally, requiring agency officials to segregate classified and protected information will give the public the ability to review what remains of the NEPA analysis, therefore this disclosure is consistent with DHS's obligations under the Freedom of Information Act. 5 U.S.C. § 552(b). The proposal, however, fails to ensure that the DHS personnel will not unnecessarily withhold entire documents. Other agencies (like the Environmental Protection Agency or the U.S. Fish and Wildlife Service), as well as the public, should be identified in the proposal as having the right to petition CEQ to review DHS's failure to segregate and release portions of a document. Further, the directive should clarify that DHS's decision not to segregate and release portions of NEPA analysis is an agency action subject to judicial review under the Administrative Procedures Act.

### **Conclusion**

Sierra Club opposes numerous provisions set forth in the draft directive for implementation of the National Environmental Policy Act. In particular, the Club opposes the overly broad use of categorical exclusions and the classified information exemptions that could be applied to NEPA documents. In fact, Sierra Club contends that by failing to conduct an environmental assessment or environmental impact statement on the rulemaking itself, the proposed CE violates the regulations of the Council on Environmental Quality ("CEQ"), 40 C.F.R. § 1500 *et seq.*, and the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 *et seq.* Because the types of activities proposed for categorical exclusion are highly controversial and often result in significant environmental impacts as well as cumulative effects, an EA or EIS should have been prepared.

While Sierra Club recognizes the importance of establishing national security regulations, we urge the DHS to maintain a strong and meaningful NEPA process by modifying the draft directives and adopting the recommendations list above. Please feel free to contact us with addition comments or questions.

Sincerely,



Maribeth Oakes  
Director, Lands Protection Team