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Subject: NEPA Task Force Update

The period to submit comments to the NEPA Task Force has been extended until September 23, 2002. The attached notice is at the Federal Register for projected publication early this week.

We appreciate your continued support for the Task Force's efforts. Please direct any questions about the Task Force to me at 202-395-0827.

Regards,

Horst Greczmiel

Associate Director for NEPA Oversight

Council on Environmental Quality

(See attached file: Fed Reg NEPA TF extension of cmts.final.doc)

----- Forwarded by Horst Greczmiel/CEQ/EOP on 08/19/2002

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Horst Greczmiel

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Subject: NEPA Task Force Update

This updates you on the latest developments on the NEPA Task Force we discussed

at the March Liaison meeting hosted by Chairman Jim Connaughton.

The Task Force has begun contacting agency staff to discuss NEPA the focus areas

highlighted in the attached Federal Register notice that was published today.

The focus areas are: technology and information management; federal and intergovernmental collaboration; programmatic analysis and tiering; adaptive management/monitoring and evaluation; categorical exclusions; and environmental

assessment utility and structure.

We appreciate your continued support for the Task Force's efforts.

Please direct any questions about the Task Force to me at 202-395-0827.

Regards,

Horst Greczmiel

Associate Director for NEPA Oversight

Council on Environmental Quality



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INTRODUCTION

PROJECT: Environmental Impact Statement for the Integrated Deepwater Systems Replacement Project.

AGENCY: United States Coast Guard

PRACTICE: The review of the environmental impact statement (EIS) by the public and any other interested party/ies conflict with restrictions on the disclosure of certain procurement sensitive information and proprietary data. Based upon the United States Coast Guard (USCG) experience in the EIS for the Integrated Deepwater Systems Replacement Project, the USCG recommends future policy changes with regard to disclosing procurement sensitive information and proprietary data to the public and any other interested party/ies.

INVOLVED PARTIES: The National Environmental Policy Act of 1969 (NEPA) strongly favors public participation in the environmental review process, which needs to be weighed against other statutory and policy obligations when proprietary information is involved. The goals of NEPA include the careful consideration of the human and natural environments and providing an opportunity for public participation in a federal action having substantial environmental impact. NEPA requires that opportunities for public participation be provided at the important stages of the environmental review process. The only exception to this requirement is determining whether to prepare an EIS. The environmental assessment on which this determination is based is a public document. *40 C.F.R. §§ 1501.4, 1508.13 (1993)*. Beginning with the scoping process, the public is apprised that the EIS process has commenced through publication of notice in the Federal Register. *40 C.F.R. §§ 1501.7, 1508.13 (1993)*. The agency must then circulate copies of the draft EIS and obtain comments from appropriate federal, state and local agencies that have an interest in the project. It also has an obligation to solicit comments from those persons or organizations that may be interested or affected *40 C.F.R. § 1503.1(4)(1993)*. When the EIS is completed, the agency must again publish notice in the Federal Register, *40 C.F.R. § 1506.10(a) (1993)*.

Each federal agency undertaking an action requiring NEPA compliance is under a mandate to make diligent efforts to involve the public in preparing and implementing NEPA procedures, *40 C.F.R. § 1506.6(a) (1993)*. The agency must conduct public hearings for actions that are controversial and must provide public notice of such hearings or other related meetings. *40 C.F.R. § 1506.6(b), (c)(1) (1993)*. Where the action to be studied involves sensitive or privileged information, the public disclosure duties become much more difficult.

In the past, federal agencies have solicited bids on a narrowly defined statement of government need. Rather than asking for a system of systems that might include varying the number of airplanes, ships and spacecraft, the agencies would solicit a specific model of airplane. Proposals would vary only in price, warranty features, and other factors that have no significant environmental impact. In recent years, the trend has moved away from narrowly defined procurement towards the so-called "performance based"

CQ600

specifications. This issue will become more urgent as federal agencies attempt to adopt even more innovative procurement techniques.

The use of a System Integrator is now an accepted acquisition strategy throughout the federal government. The System Integrator concept is being used to acquire the IRS Tax Modernization Program and is the proposed concept for the planned National Missile Defense System. Below we will attempt to describe this context in greater detail and propose a solution for the apparent conflict.

AGENCY CONTACT: Francis H. Esposito, 202 267 0053,
fesposito@comdt.uscg.mil; US Coast Guard Chief Counsel Office of Environmental Law.

DATES: Began: 1/2000 Ended: 5/2002

CONTEXT/BACKGROUND:

THE INTEGRATED SYSTEM APPROACH

The issue of procurement sensitive data first arose when the United States Coast Guard (USCG) drafted an environmental impact statement (EIS) for the Integrated Deepwater System Program. The USCG's current "Deepwater" assets (those which operate more than 50 nm from shore) are aging and technologically obsolete. They lack essential speed, interoperability, sensor and communication capabilities, which in turn limits overall mission effectiveness and efficiency. To address these shortfalls, the USCG established the Integrated Deepwater System Program to replace and modernize its aging force of cutters and aircraft, and their supporting command-and-control and logistics systems. These new assets, which possess common systems and technologies, common operational concepts, and a common logistics base will give the USCG a significantly improved ability to detect and identify all activities in the maritime arena, a capability known as "maritime domain awareness," as well as the improved ability to intercept and engage those activities that pose a direct threat to U.S. sovereignty and security. The USCG rejected the traditional "one-for-one" asset replacement approach because it would introduce significant risk of timely asset delivery due to the need to establish individual asset acquisition new-starts, which would require the near simultaneous establishment of multiple program acquisition offices for which key management expertise is not available. Significant analysis and mandating of asset capabilities and interfaces would be required, thereby shifting all Deepwater system performance risk to the government. The USCG would lose the system synergy, component and infrastructure commonality, and system implementation control and flexibility that are seen as key benefits of the intended Integrated Deepwater System approach.

The Integrated Systems approach differs from the traditional approach in that the agency buys a system of systems rather than a very narrowly described item. For example, the traditional approach would have the USCG describe, with great precision, the size, speed and other characteristics of the specific ship to be replaced. Several entities would offer to sell the USCG a ship that meets the carefully drafted specifications. Rather than describing the specific proposals, the USCG would only need to describe the impacts created by the narrowly drawn specifications to meet NEPA's demands for alternative analysis. In other words, all proposals would have the same environmental impact. In the case of an integrated system, the USCG seeks a much broader category of proposals that might involve a differing number and type of ship, airplane and satellite all designed to meet its mission. Here, the separate proposals could clearly have very different environmental impacts and, it would appear, that the USCG would be forced to describe them. The description of a proposal during the competition stage of a government solicitation creates some very real conflicts between laws designed to ensure fair competition and protect business sensitive information that strongly encourages public disclosure. Clearly, NEPA (at 5 U.S.C. 552 and CEQ rules 1506.6(f)) does not establish any basis for belief in a **statutory conflict**. The agency proponent is free to withhold all information from NEPA public disclosure that it might withhold from a FOIA requestor. The problem the USCG experienced is in the uneven treatment of the subsequent disclosure.

NEPA demand for Evaluation of Alternatives Creates a Potential for Public Disclosure of Procurement Sensitive or Proprietary Information

As noted above, NEPA requires an EIS be prepared by federal agencies on "proposals for legislation and other major Federal actions significantly affecting the quality of the human environment."^{1[1]} Where the EIS evaluates the consideration of competing bids among contract offerors, the acquisition community becomes concerned that some of the information contained in the EIS is **procurement sensitive information** because the disclosure would enable other bidders to identify critical information about their competitor's bid. In addition to competition sensitive information, there is **proprietary information**, which the offeror will assert is critical to the offeror's company's future.

NEPA requires all Federal agencies to comply therewith to the fullest extent possible, 42 U.S.C. § 4332, unless existing law applicable to the agency's operations prohibits or makes compliance impossible, 40 C.F.R. 1500.4(a)(1).

We are directed by CFR 1506.6(f) to:

Make environmental impact statements, the comments received, and any underlying documents available to the public pursuant to the provisions of the Freedom of Information Act (FOIA)(5 U.S.C. 552), without regard to the exclusion for interagency memoranda where such memoranda transmit comments of Federal agencies on the environmental impact of the proposed action.

There are several categories of information that might generally be exempt from disclosure. The Council on Environmental Quality (CEQ) guidance urges a federal agency to refrain from claiming the interagency privilege with regard to comments by other agencies about the EIS. Where the information to be withheld is classified based upon national security demands, the path is clear. In *Catholic Action of Hawaii/Peace Education Project v. U.S.*, 468 F. Supp. 190, the plaintiff sought to enjoin the Navy from using certain newly constructed facilities at the West Loch Branch of its Pearl Harbor Naval Base in Honolulu, Hawaii because the Navy failed to issue a formal EIS before making a finding of no significant impact (FONSI). The court held that the submission of a public EIS would conflict with security data provisions of the Atomic Energy Act, 42 U.S.C. § 2014(y); with security classification guides prepared jointly by the Department of Defense (DOD) and the Department of Energy (DOE), CG-W-4, Joint ERDA/DOD Nuclear Weapons Classification Guide; and with United States Navy (USN) implementation of the joint guide, SWOP 55-1, Navy Security Classification Guide for Nuclear Weapons.

^{1[1]}42 U.S.C. 4332(2)(c).

Both FOIA and other laws protect certain information. The aforementioned national security data is one example. Another would be proprietary data. We note: CEQ Guidance **Section 1502.21 Incorporation by reference.**

Agencies shall incorporate material into an environmental impact statement by reference when the effect will be to cut down on bulk without impeding agency and public review of the action. The incorporated material shall be cited in the statement and its content briefly described. No material may be incorporated by reference unless it is reasonably available for inspection by potentially interested persons within the time allowed for comment. Material based on proprietary data, which is itself not available for review, and comment shall not be incorporated by reference.

In *Atchison v. Alexander*, 480 F. Supp. 980 (1979), proprietary data was held to have been correctly withheld from the defendant's final EIS. The issue involved the legality of the United States Army Corps of Engineers' (The Corps) efforts to add a new "step" in the series of dams and locks that descend from the headwaters of the Upper Mississippi River and which, together with dams and locks on the Illinois River, comprise the Upper Mississippi River Navigation System. The railroads and the environmental groups claimed that the United States Army Corps of Engineers acted arbitrarily and capriciously in preparing an EIS, in selecting a recommended plan, and in deciding to go forward with the proposal. The Corps used the data at issue to calculate the rate savings shippers would receive with the expansion of Locks 26's capacity. The Corps' positive findings on this point added to the projected benefits of the proposal. Therefore, the validity of the rate savings figures was a crucial matter to those in opposition to the construction. The Corps argued that this data was confidential proprietary information that could not be included in the final EIS.

Unfortunately, the case law does not begin to advise an agency on how to write an EIS that must include proprietary data. We speak here of the situations where an offeror provides certain information in response to a solicitation for bids, clearly labeling and asserting statutory privilege against disclosure. In the somewhat similar, but far easier situation where the agency discovers (by its own act) certain information that a landowner asserts to be proprietary, (NEPA call in) was somewhat uncertain.^{2[2]} We may safely presume, based upon CEQ guidance, that where there are statutory prohibitions against disclosure, one may safely withhold the data from a public EIS. Unfortunately, nothing precludes EPA from disregarding this limitation in reviewing the EIS. If the proprietary and procurement sensitive information may well be a critical

^{2[2]} Excerpt from "NEPA Call-In" web site: NEPA Call-In contacted GSA Commercial Broker, to determine if GSA had established policy or guidance on disclosure of contamination found during an EA or EIS. The Broker stated GSA has not developed a policy on this issue. We then recontacted the Environmental Attorney, who stated they were not aware of formal GSA guidance. The attorney further stated there is disagreement within GSA on disclosure of information, such as environmental contamination, that GSA learns of and that the property owner may consider proprietary information.

portion of the EIS, the United States Environmental Protection Agency (EPA) could well conclude that the statement is "inadequate."

3 (Inadequate) The draft EIS does not adequately assess the potentially significant environmental impacts of the proposal, or the reviewer has identified new, reasonably available, alternatives, that are outside of the spectrum of alternatives analyzed in the draft EIS, which should be analyzed in order to reduce the potentially significant environmental impacts. The identified additional information, data, analyses, or discussions are of such a magnitude that they should have full public review at a draft stage. This rating indicates EPA's belief that the draft EIS does not meet the purposes of NEPA and/or the Section 309 review, and thus should be formally revised and made available for public comment in a supplemental or revised draft EIS.

Under Section 309 of the Clean Air Act, EPA is required to review and publicly comment on the environmental impacts of major federal actions including actions that are the subject of EISs. If EPA determines that the action is environmentally unsatisfactory, it is required by Section 309 to refer the matter to CEQ. The EPA may assume, in the absence of better guidance, that it must evaluate only the EIS that is publicly released. The inevitable result would be that EPA will condemn the document as incomplete.

A far better result might be to ask EPA to act as an honest broker in the situations where protected material has been deleted. In doing so, it could reassure the public that a sufficient EIS has been completed and that the agency in question has disclosed all that they are legally permitted to disclose. The current situation leaves a federal agency in the position of going forward with a clear possibility that EPA will publicly condemn the EIS as inadequate because the proponent has withheld certain information and analysis which public law compels it to withhold. While this is not a clear "conflict of laws" since it is not a violation of law to issue an inadequate EIS, we suggest that clearer guidance might assist the EPA in its statutory duty to evaluate an EIS which contains proprietary or competition sensitive data.

Project Description: We suggest that federal agencies be encouraged to write an EIS that contains, where necessary, protected information. Protected information is any information that cannot be released to the public because of one or more lawful restrictions. The proposed practice would encourage federal agencies to examine all environmental impacts of a proposed action, not just those which can be described publicly. It would allow the general public to be reassured that a third party has reviewed the actual document and graded it accordingly. The alternative would be that practiced in the USCG IDSRP whereby the agency blurs the description of impacts to avoid details that cannot be disclosed. Either approach gives the public less than full disclosure of data and information. As compared to the USCG experience the proposed approach is much closer to the statutory intent of all other aspects of NEPA (consideration of all impacts, evaluation of alternatives, etc.) and at least as true in the area of public disclosure. We urge its adoption.

INTERNET SITE: N/A

VALUE AS A PRACTICE:

Results: Fortunately, the Integrated Deepwater Systems Replacement Project evaded the dilemma described above. When the objective measures of the three proposals were compared, they were similar. Thus, by happy coincidence, all three proposals were close enough in character to be described by a broad general range of environmental impacts. The EIS contained a very broad range of emissions and other objective criteria that encompassed each of the three proposals. In so doing, the CG was able to avoid describing the individual proposals. If the impacts associated with any one of the three proposals had been sufficiently outside the broad range of objective criteria, the laws (discussed above) that prohibit disclosure of one competitive proposal would have forced the CG to withhold the fruits of its environmental impact analysis from public review. Even though the USCG was able to create an EIS that covered the subject, one could certainly argue that the document we wrote is not as good, from a NEPA standpoint, as the one we might have written. Indeed, one could argue that rolling up the alternatives made for a more ambiguous document that did not discuss clearly and specifically some of the real differences in the alternatives. Moreover, the next group may not be lucky enough to find that all three systems have similar impacts. If the new trend in acquisition continues, the next major program may not be as fortunate.

Challenges overcome: *What impediments were overcome to make this more efficient or effective.* By pure coincidence, the CG was able to overcome the conflict between NEPA demands for disclosure of alternatives and statutory prohibitions against disclosure of proprietary and competition sensitive information. The next “out of the box” solicitation might not be as fortunate. We suggest that CEQ revisit its guidance with a view towards describing the level of public disclosure necessary in light of the above statutory prohibitions.

Challenges remaining: What areas of improvement still remain to be improved on, are these areas being explored? We believe the task force should answer these questions:

1. Given that certain information other than “Classified information” such as proprietary business information can lawfully be withheld from public disclosure under NEPA, should a public NEPA document be
 - a) A redacted version of the original: Namely, the agency will remove all proprietary, classified, or otherwise FOIA exempt material and release the document that remains. In other words, there would be an “internal” version of the document that contains the withheld data and a “public” version of the document. or
 - b) An ambiguous NEPA document: a NEPA document that must be altered to “hide proprietary data” by ambiguity, generalization or gross summarization. In this case there would be only the “external” document as this will be the one that the decision maker must consider. It may have a restricted annex containing certain privileged information.

2. If we agree that proprietary data can be lawfully withheld, should the US EPA be advised to evaluate the internal proprietary version (rather than the redacted public version) of the EIS in grading the document? If not, why not?

SOURCE OF INFORMATION/REFERENCES:

42 U.S.C. § 4332,

We generally rely on CEQ Guidelines, most specifically CFR 1502.21, 1506.6(f), as well as US EPA Guidance.

The protections for privileged data are contained in FOIA 5 USCS 552

The protections for competition sensitive information are contained at 41 U.S.C. 423

Our analysis cites the following cases:

Catholic Action of Hawaii/Peace Education Project v. U.S., 468 F. Supp. 190,

Atchison v. Alexander, 480 F. Supp. 980 (1979), S.

National Courier Association v. Board of Governors of the Federal Reserve System, 170 U.S.App.D.C. 301, 313-314,

For more information on the Integrated Deepwater see <http://www.uscg.mil/hq/g-a/deepwater/>

Validation: As stated above, the problem we cite was avoided by a fortuitous turn of events. We suggest, based on the near and present danger we experienced, that the conflict be addressed before another agency finds itself in a similar dilemma.

Recommendation as a best practice Our recommendation is that all federal agencies, be encouraged to treat statutorily protected material such as procurement sensitive information and proprietary data the same way as classified information. In other words, EPA and other reviewing agencies should be encouraged to review the internal EIS and refrain from commenting on the information that has been redacted from the public version (if any). They might even be encouraged to verify that the material which has been withheld would make the EIS full and complete, meriting a much higher grade.