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Attention: \_\_\_\_\_



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## COMMENTS OF THE SOCIETY OF ENVIRONMENTAL JOURNALISTS TO PROPOSED RULE ON CRITICAL INFRASTRUCTURE INFORMATION

**TO:**  
Associate General Counsel (General Law)  
Department of Homeland Security  
Washington, DC 20528

**FROM:**  
The Society of Environmental Journalists

**DATE:**  
June 16, 2003

### RE: PUBLIC ACCESS TO CRITICAL INFRASTRUCTURE INFORMATION

The Society of Environmental Journalists submits these views to the Department of Homeland Security in response to its Notice of Proposed Rulemaking [Federal Register: April 15, 2003 (Volume 68, Number 72), Pages 18523-18529], "Procedures for Handling Critical Infrastructure Information; Proposed Rule."

Our remarks concern the Department's proposed rule implementing Section 214 of the Homeland Security Act (PL 107-296) and broadening provisions of that law which would restrict public access not only to Critical Infrastructure Information (CII), but to other information needed by the public to protect their own health and safety.

The Society of Environmental Journalists (SEJ) is an organization of individual working journalists dedicated to improving the quality, accuracy and visibility of environmental reporting. Founded in 1990 and based in Jenkintown, Penn., SEJ consists of more than 1,200 journalists, educators and students. SEJ's programs include annual and regional conferences; a daily environmental news service; a quarterly magazine; a biweekly story tip sheet; an annual journalism contest; a comprehensive Web site, eight e-mail listserves, a diversity program and a mentoring program.

Working through its First Amendment Task Force, SEJ addresses freedom of information, right to know and other news gathering issues of concern to journalists reporting on environmental topics.

### Purpose of these comments

We are very concerned that the Department is proposing to broaden restrictions on public access to information beyond those intended or

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authorized in the law. We oppose the rule in its current form and urge the Department to draw it more narrowly, so as to prevent possible abuse of CII secrecy provisions.

We urge the Department to remember that several important public purposes are served by giving the public the broadest feasible access to information about hazards to environmental health and safety. While a new caution is certainly indicated in light of the September 11, 2001, attacks, that is not the only lesson to be remembered. The 1984 Bhopal tragedy showed that thousands of people were killed, not merely by industrial hazards, but actually by their unawareness of the threat the Bhopal plant presented to their lives and health. Many major environmental laws actually require disclosure of hazard information, and the important public policy reasons for this remain valid. Far more people in the United States have died from dam failures, fuel explosions, chemical accidents, pipeline failures, and other preventable hazards than from terrorism. But these deaths are only preventable if the public is aware of the hazards and urges companies and the government to provide real safety rather than hide the hazards.

The press plays a crucial role in alerting the public to the dangers they may face. We believe that, without openness, the press will be hampered in its vital purpose of giving citizens the environmental, health and safety information that individuals need to function effectively in a democracy and make good decisions about their lives, personal and civic.

We enumerate our concerns more fully in the specific comments below.

#### Specific Comments

1. The proposed rule clearly exceeds both legal authority and the intent of Congress by extending the CII program to include all federal agencies instead of just the Department of Homeland Security (DHS). An amendment proposing to do this was decisively defeated in a House roll-call vote. The CII program must be limited to information submitted directly to DHS.
2. The definition of "Critical Infrastructure Information" remains so vague as to invite abuse by submitters. The statement in the Background section that "the Department relies on the discretion of the submitter as to whether the volunteered information meets the definition" of CII suggests that the DHS intends to give submitters wide latitude and the difficulty of properly validating information. Submitters should not be permitted to determine whether the information they submit meets the definition.
  - a. The term "not customarily in the public domain" is insufficiently precise. It could be interpreted to mean information the public currently has a right to, but for some practical reason has not actually accessed. This interpretation could be ruled out by omitting the word "customarily."
  - b. The term "related to" is also troubling in its vagueness ["related to the security of critical infrastructure or protected systems"]. The rule should very clearly specify precisely what relation is meant to qualify.
  - c. Sec. 29.2 (b) (3), which refers to "any planned or past operational problem or solution regarding CII or protected systems, including repair, recovery, reconstruction, insurance, or continuity ..." is so broad as to seemingly forbid any government discussion of dam safety, pipeline safety, chemical plant safety, etc., or efforts to regulate or improve the safety of those facilities.
3. The meaning of "voluntary" or "voluntarily" submitted information remains confused despite efforts to define it. If such information excludes only information "submitted in the absence of DHS's exercise

of legal authority to compel" -- then it appears to include information which other agencies do have the authority to compel submission of in the course of regulating facilities under law for public health and safety. For example, it might allow removal of a chemical plant's five-year safety record, currently required to be disclosed by law, from the public record. This is a critical failing.

4. The program and procedures for reviewing and validating whether claims of CII protection are justified appears to be aimed primarily at protecting the interests of the submitters rather than protecting the interests of the public.

a. Submitted information is treated as protected unless and until determination is made otherwise. The burden of proof remains entirely on a single party (the Program Manager) to determine that information does not qualify for protection. Nothing in the regulation spells out criteria for determining whether the Program Manager has resources sufficient to accomplishing this vast job. The default of protection may be made inevitable by underfunding and understaffing the program. This must be changed.

b. There are no procedures for any outside parties to challenge the classification of claimed CII as protected. There should be.

c. There are no procedures clearly spelled out for any appeal of the Program Manager's decisions in validating claimed CII. There should be.

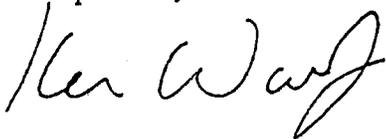
d. There are no deadlines for the Program Manager to make validation decisions. There should be.

e. Provisions must be made for additional review and challenge of information's protected status whenever a request is made for it through the Freedom of Information Act.

f. There must be procedures for allowing release of portions of a record in accordance with FOIA in cases where protection of those portions is not justified as CII.

We are grateful for the opportunity to comment on this proposed rule.

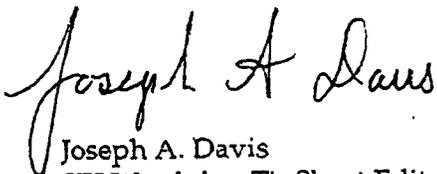
Respectfully submitted,



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