



*The Voice of Cross-Border Business
in the Pacific Corridor Since 1989*

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March 25, 2005

US-VISIT Program
(Land) – Comments
ATTN: Facilities Director
P.O. Box 587
Arlington, VA 22216-05897

Dear Facilities Director:

The Pacific Corridor Enterprise Counsel (PACE) and the American Immigration Lawyers Association (AILA) jointly file this letter as comments to the Draft Environmental Assessment for US-VISIT Increment 2C: Proof of Concept at Select Land Ports of Entry (hereafter “Draft EA”).

Federal agencies are required to take a “hard look” at the possible environmental consequences of a proposed action in the environmental assessment process. In their review, agencies must also take into consideration the possible socioeconomic effects of the action, including the direct, indirect, cumulative, and reasonably foreseeable effects. An Environmental Assessment (“EA”) should briefly determine whether to prepare an environmental impact statement (“EIS”) or a finding of no significant impact (“FONSI”), aid an agency’s compliance when no EIS is necessary, and to facilitate the preparation of a statement when one is necessary. 40 C.F.R. §1508.9.

Implementing a national entry/exit monitoring system, even in increments, is a “significant” federal action, with the potential to affect the human environment of border communities and the United States in general. As such, a full environmental impact statement should be prepared, so that interested communities, citizens, and government agencies can be satisfied that DHS has sufficiently considered all reasonably foreseeable effects that will flow from the entry/exit tracking monitoring methods which are chosen. At a minimum, sufficient advance fact-finding and analysis is necessary (and compelled by law) to adequately address the full spectrum of possible socioeconomic and environmental impacts the Increment 2C and the subsequent phases of US VISIT implementation may have.



PACE

Formed with the inception of the 1989 US-Canada Free Trade Agreement, PACE is a non-profit, bi-national private-sector organization that promotes and advances interests in free trade and border-crossing matters by advocating the removal of barriers that impede the legitimate flow of people, goods and services across the Canada/USA border. Its membership consists of business owners, managers, entrepreneurs, professionals, association managers and government officials who share a common interest in an efficient and secure border that facilitates legitimate trade and travel.

PACE recognizes that it is vitally important to enhance our nation's security, and that we must do so in a way that balances our need for enhanced security with the cross-border flow of people and goods that are the foundation of the economic security that pays for our national security. Among its many accomplishments PACE worked with legacy INS regarding NEXUS implementation and enrollment issues at the Peace Arch Crossing located at Blaine, Washington.

PACE has consistently supported legislation to expand staffing for our nations Ports of Entry and to ensure that they are otherwise well-equipped. For example, PACE strongly supported the Enhanced Border Security Act. The goal of this law is to make our borders the last line of defense. To that end, it includes the following provisions: authorizes increased funding for immigration and border functions, requires federal agencies to coordinate and share information needed to identify and intercept terrorists; encourages the use of new technologies by authorizing funds to improve technology and infrastructure for immigration functions, targeting much of this effort at strengthening our nation's borders; mandates the transmittal of advance passenger lists; and mandates a study to determine the feasibility of a North American Perimeter Safety Zone. (This study would include a review of the feasibility of expanding and developing pre-clearance and pre-inspections programs).

AILA

AILA is a voluntary bar association of approximately 9,000 attorneys and law professors practicing and teaching in the field of immigration and nationality law. AILA takes a very broad view on immigration matters because our member attorneys represent thousands of U.S. businesses and industries that sponsor highly skilled foreign professionals seeking to enter the United States on a temporary basis or, having proved the unavailability of U.S. workers, on a permanent basis. AILA members deal extensively with the various offices of DHS, including ports of entry, and with the State Department's consular posts.



National Environmental Policy Act

The National Environmental Policy Act of 1969 (“NEPA”) requires that federal agencies give adequate consideration to the *social* impacts of proposed projects as well as the *natural* impacts. According to 40 C.F.R. §1508.14, the “human environment is to be interpreted *comprehensively* to include the natural and physical environment *and the relationship of the people with that environment.*” Further, the United States Supreme Court established in Robertson v. Methow Valley, 490 U.S. 332 (1989), that agencies must take a “*hard look*” at the environmental consequences prior to taking a major action. We are concerned that the Draft EA, and in particular §3.4 (“Socioeconomics”), fails to take a “hard look” at the full spectrum of possible social and environmental effects, both locally and nationally, that may flow from this project.

Specifically, the Council on Environmental Quality’s regulations require DHS to consider both the direct and indirect effects of Increment 2C. 40 C.F.R. §1508.8. Also, the environmental assessment process requires that several social impacts, such as economics, population density and growth rates, patterns of land use, cultural, and health impacts be considered both individually and cumulatively. 40 C.F.R. §1508.8(b) also requires DHS to consider reasonably foreseeable indirect effects that are caused by actions that are later in time or farther removed in distance.

Further, to properly determine whether an action is “significant,” the agencies must evaluate both the context and intensity of their proposed action. 40 C.F.R. §1508.27. The regulations say several “contexts” must be adequately considered, such as society as a whole (human, national), the affected region and interests, and the locality. As an example, the regulation states that in a site-specific action, significance would usually depend upon the effects in the locale rather than in the world as a whole. Short and long term effects are also relevant.

Concerning intensity, 40 C.F.R. §1508.27(7) also specifically states that agencies need to consider whether an action is individually insignificant but is related to other actions that are cumulatively significant impacts. In determining significance, the regulation also states that agencies must consider whether the effects on the quality of human environment are likely to be highly controversial, whether the effects present highly unknown risks, and whether the action establishes a precedent for future actions or a decision in principle about a future consideration.



US VISIT: A Tool to Enhance Our Security without Harming our Economy?

We are concerned that the Draft EA fails to take the “hard look” required regarding US VISIT implementation. Specifically, it appears from the Draft EA that the DHS considers the concept to be tested to concern issues as to the functioning of specific technology only, and not a full testing and review of an entry/exit system that captures both entry and exit information using technologies such as radio frequency technology that is compatible with DHS’ statutory mandate and its stated goals for US VISIT, and the fragile ecology of human environment at the border. A poorly conceived and improperly implemented system could have disastrous consequences for legitimate cross-border trade and travel.

Will US VISIT help to enhance our security? While the jury is still out, serious questions need to be addressed as to the achievable mission of US VISIT. A June 1998 Senate Judiciary Committee Report (Senate Judiciary Report 105-197 on S. 1360, Border Improvement and Immigration Act of 1998, June 1, 1998) makes the following apt comment:

*The Committee is keenly aware that implementing an automated entry/exit control system **has absolutely nothing to do** with countering drug trafficking, and halting the entry of terrorists into the United States, or with any other illegal activity near the borders. An automated entry/exit control system will at best provide information only on those who have overstayed their visas. Even if a vast database of millions of visa overstayers could be developed, this database will in no way provide information as to which individuals might be engaging in other unlawful activity. It will accordingly provide **no assistance in identifying terrorists, drug traffickers, or other criminals.** (emphasis added).*

With regard to tracking visa overstayers, the report further states:

Even if a list of names and passport numbers of visa overstayers would be available, there would be no information as to where the individuals could be located. Even if there was information at the time of entry as to where an alien was expecting to go in the United States, it cannot be expected that 6 or more months later the alien would be at the same location. Particularly, if an alien were intending to overstay, it is likely that the alien would have provided only a temporary or false location as to where the alien was intending to go.



While the Draft EA contains conclusory language to the effect that US VISIT will greatly enhance the nation's capacity to prevent terrorism, it does not address the above concerns in any meaningful way. Moreover recent government reports reveal that there is a high risk that US VISIT will not meet its stated goals. A summary of these reports follows:

- In March of 2004, the U.S. General Accounting Office (GAO) conducted a study of US-VISIT and found that it is "inherently risky" because of the demanding and challenging implementation schedule, enormous potential cost, uncalculated and underestimated costs, and problematic program management. A link to the study follows:
<http://www.gao.gov/highlights/d04569thigh.pdf>
- In a December 2004 report, the U.S. Department of Justice's Office of the Inspector General (OIG) found that the Department of Justice, Department of Homeland Security and the Department of State "have not agreed on a uniform fingerprint Technology Standard nor agreed how to develop a fully interoperable system that provides law enforcement agencies with 'readily and easily accessible' access to IDENT and US-VISIT immigration records as directed by Congress." A link to the report follows:
<http://www.usdoj.gov/oig/inspection/plus/0501/final.pdf>
- In its most recent study on US VISIT released in February 2005, the U.S. Government Accountability Office (GAO) found that a high risk remains that US VISIT will fail to meet its stated goals. Among other findings, the study found that DHS has failed to identify non-governmental costs such as social costs associated with adverse potential economic impact at the border that may be attributable to US VISIT implementation. A link to the study follows:
<http://www.gao.gov/new.items/d05202.pdf>.

The Department of Homeland Security was established by The Homeland Security Act of 2002.¹ Section 101(b)(1) of the Homeland Security Act of 2002 sets out the seven components that comprise the primary mission of DHS. Subparagraph (F) affirmatively establishes that an integral part of DHS' primary mission is to "ensure that the overall economic security of the United States is not diminished by efforts, activities, and programs aimed at securing the homeland..." Moreover, DHS has indicated that one of its goals for US VISIT is for the system to facilitate legitimate trade and travel.

¹ Pub. L. No. 107-296. 116 Stat. 2135 (Nov. 25, 2002).



31 USC §9701, 8 CFR §235.7(a)(5)(iii), OMB Circular A-25 and other provisions of law, mandate that user fees sufficient to cover the costs of such technology and its administration are to be charged to the users of government programs. Given its statutory mandate, DHS should not be designing US VISIT without concern as to the amount of the user fee to be imposed to make the program self-sustaining when finalized, and the effect of said user fee on legitimate cross-border trade and travel.

Moreover, on the northern border, other than U.S. citizens, Canadian citizens form the largest number of border crossers. At present, for technical reasons established in the Data Integrity and Management Act, most Canadian citizens are exempt from US VISIT's requirements and not subject to payment of a fee when crossing the border. However, at a US VISIT stakeholders meeting held in Bellingham WA on January 25, 2005, DHS announced that it is exploring enrolling Canadian citizens into US VISIT in 2008 when a provision of The Intelligence Reform and Terrorism Prevention Act of 2004 takes effect that will require Canadian citizens to use passports containing certain biometric information when entering the U.S. A recent report by DHS' Inspector General also calls for subjecting Canadian citizen visitors to US VISIT. The Draft EA fails to address the effect on cross-border legitimate trade and travel of requiring Canadian citizens to enroll in US VISIT.

Based on the above discussion, and to facilitate DHS' ability to implement feasible security objectives without seriously harming the cross-border flow of legitimate trade and travel, we submit that at minimum the following should occur:

1. DHS Should Determine the Limits of US VISIT: DHS must step back and determine the program's true capabilities and assess the feasibility of every stage of the program while US VISIT is still in its infancy. The 1998 Senate report on the entry/exit program challenges the notion that an entry/exit system can be used as a tool to prevent terrorism. If that is true, its full scope of effectiveness must be determined now rather than after billions of US tax dollars have been spent. If the primary mission of US VISIT is instead to merely catch visa overstayers, the mission should be clarified. On the issue of national security, a false sense of security is a failure.
2. DHS Should Address the Issues Raised by the Government Reports Cited Herein. The December 2004 report clearly states that Department of Justice, the Department of State, and the Department of Homeland Security are not in agreement on basic US VISIT technology. The February 2005 GAO report states directly that DHS has failed to identify socioeconomic costs this program may



have on border communities. NEPA's basic policy is to assure that all branches of government give proper consideration to the human environment prior to undertaking any major federal action. The Draft EA is deficient in these respects, and the failure to adequately address these issues constitutes an arbitrary and capricious analysis.

3. DHS Should Examine the Potential Impact of Foreseeable Consequences of US VISIT. Government policy calls for user fees to defer the cost of programs such as US VISIT. It is foreseeable that an increase in the cost of cross-border travel in the form of an increased user fee will lead to a significant decrease in international trade and commerce. DHS has failed to take a hard look at this issue in the Draft EA, and a study on the long term costs of Increment 2C technology if implemented nationwide as well as the effect of increased user fees on those visiting the U.S. should be included as part of an EIS regarding Increment 2C testing and implementation.
4. DHS Should Hold Additional Stakeholder Meetings for Local Communities And Extend the Period for Comment. Border communities are dependent on steady flows of cross-border visitors, and accordingly they have a significant stake in US VISIT. These communities experienced a dramatic downturn in cross-border visitors after September 11th, a decrease which corresponds directly to increased security measures at the nation's borders. On the northern border, the number of cross-border visitors continues to be down, even with the rising value of the Canadian dollar.² Stakeholders need to be adequately on notice and able to provide comment on the program.
5. Develop a More Comprehensive Plan for US VISIT Prior to Proofing Concepts: DHS should use the above assessments to develop a comprehensive plan for US VISIT that takes into account the achievable goals of the program, necessary funding levels, infrastructure needs, and appropriate deadlines. For example, any comprehensive plan needs to take user fees into account as part of the broad vision concerns set out above. The Draft EA fails to address user fees assessed to visitors to the US if the Increment 2C technology proves to be workable from a

² A Western Washington University Center for Economic and Business Research (CEBR) study of numbers of visitors to the U.S. using southbound border crossings in Whatcom County, Washington reveal that prior to September 11, 2001 there was a direct link between the Canadian dollar exchange rate and the number of persons entering the U.S. In the months following September 11, the number of border-crossers dropped dramatically, and has failed to show a substantial increase despite a dramatic increase of the value of the Canadian dollar vis-à-vis its U.S. counterpart. A link to a CEBR chart illustrating the above follows: <http://www.cbe.wvu.edu/cebr/border%20crossings.htm>.



technical standpoint, and is incorporated into US VISIT nationwide. To conduct Increment 2C testing for incorporation into US VISIT without concern as to the long-term user fees charged to international travelers, if Increment 2C technology is adapted for final use, ignores DHS' statutory mandate as well as an articulated goal for US VISIT.

6. Determine the Effect to Cross-Border Trade and Commerce if Canadian Citizens Are Required to Participate in US VISIT: At the present time most Canadian citizens are exempt from US VISIT. Given staffing and infrastructure constraints at Land Ports of Entry on the Northern Border it is difficult to conceive of enrolling Canadian citizens into US VISIT without causing hours long waits at the border. The Draft EA does not address the ability of US VISIT to process Canadian visitors in a fashion that does not cause substantial disruptions to legitimate trade and travel despite the fact that DHS is actively exploring requiring Canadians to participate in US VISIT.

Conclusion

Based on the foregoing, it is abundantly clear that DHS Increment 2C testing carries the potential for significant impact which must be explored (and disclosed) through preparation of an EIS.

Sincerely,

PACIFIC CORRIDOR ENTERPRISE COUNCIL

Greg Boos, Vice President³

³ The original of this letter was filed electronically with DHS and signed by both PACE and AILA.