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THE APPLICATION OF NEPA TO NUCLEAR
WEAPONS PRODUCTION, STORAGE, AND TESTING:
*Weinberger v. Catholic Action of Hawaii/Peace Education
Project.*

Amy J. Sauber*

I. INTRODUCTION

Military technology has brought us to an age of both nuclear and chemical weapons. The production, testing, and storage of such weapons by the military has resulted in significant harm to the environment and to public health.¹ Nuclear weapons testing has exposed countless people to the harmful effects of radiation.² The wastes from chemical weapons production have contaminated ground water and destroyed crops.³ Air, water, and food in the areas where many of these activities are conducted are no longer safe. Many of the consequences of these activities may still be unknown.

The National Environmental Policy Act of 1969⁴ (NEPA) established a national policy that requires all federal agencies, including military agencies, to give full consideration to environmental effects in planning their programs. To ensure that agencies implement this policy, NEPA directs that all agencies disclose the environmental impact of proposed projects to the public in the form of an Environmental Impact Statement (EIS)⁵. An EIS is a document which describes the environmental effects of a proposed project or action, and must be prepared in connection with

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1. See *infra* text at notes 10-51.

2. See *infra* text at notes 14-31.

3. See *infra* text at notes 39-42.

4. 42 U.S.C. §§ 4321-4361 (1976 & Supp.V 1981).

5. 42 U.S.C. § 4332 (1976 & Supp.V 1981).

all major federal actions significantly affecting the environment.⁶

NEPA's disclosure mandate, however, conflicts with the needs of the military to prevent disclosure of military activities that involve the national security. The Freedom of Information Act⁷ (FOIA), which NEPA incorporates by reference, protects military secrets by exempting properly classified national security matters from disclosure.⁸ Courts have struggled to resolve the conflict between the environmental goals of NEPA and the need to protect military secrets in attempting to determine the extent to which NEPA applies to military actions that involve issues of national security. In 1981, the Supreme Court addressed this conflict in *Weinberger v. Catholic Action of Hawaii/Peace Education Project*,⁹ which involved a challenge to the Navy's storage of nuclear weapons on the island of Oahu, Hawaii. The Court decided that in this particular instance, the military was exempt from the mandates of NEPA.

In analyzing the conflicting goals of NEPA and military secrecy, this article will first discuss the environmental effects of military activities that involve issues of national security. Second, this article will examine both NEPA and FOIA as disclosure statutes. An examination of the relevant case law involving NEPA's application to the military will follow. Next, the article will examine the Supreme Court's decision in *Catholic Action* and discuss the issues it leaves unresolved. The article will conclude with an examination of the impact of the *Catholic Action* decision, and a proposal for alternatives to achieve NEPA's goals while adequately protecting military secrets.

II. ENVIRONMENTAL EFFECTS OF MILITARY ACTIONS

The importance of the question of NEPA's application to military activities is illustrated by looking at the long history of grave environmental consequences associated with certain military actions. Both nuclear and chemical weapons are now widespread. While, fortunately, these weapons have not been used in warfare within the United States, their production, testing, and storage¹⁰

6. *Id.*

7. 5 U.S.C. § 552 (1982).

8. 5 U.S.C. § 552 (b)(1) (1982).

9. 454 U.S. 139 (1981).

10. Environmental problems also arise from the transportation of hazardous materials. See Hellier, *Transportation of Dangerous Substances*, 31 U. NEW BRUNSWICK L. J.

have resulted in serious environmental and health hazards for countless victims.¹¹ A survey of military activities which have caused such injuries will illustrate the extent of these environmental and health hazards.

The development of nuclear weapons testing began in the 1940's with atomic tests in Nevada.¹² Between 1945 and 1962, the United States government exploded over 180 nuclear devices in the open air at its Nevada Test site.¹³ This testing exposed over 400,000 military and Atomic Energy Commission personnel, along with an undetermined number of civilians, to radiation.¹⁴ Hundreds of residents of Utah, Nevada, and Arizona communities downwind from the test detonation site have contracted cancer,¹⁵ allegedly as a result of their exposure to radiation¹⁶.

Between 1948 and 1958, twenty-three nuclear test blasts were detonated on the Bikini Atoll, part of a Pacific island chain administered by the United States after it was captured from the Japanese in World War II.¹⁷ Before the blasts, the Bikini residents were moved to other islands in the chain.¹⁸ The natives were not allowed to return home until 1977 when the island was declared to be ostensibly safe.¹⁹ They were hastily evacuated, however, when it was discovered that the island was still dangerously radioactive.²⁰

Enewetak, another island in the chain, was the scene of forty-

135-60 (1982); and Marten, *Regulation of the Transportation of Hazardous Materials: A Critique and Proposal*, 5 HARVARD ENVTL. L. REV. 345-76 (1981).

11. See M. UHL & I. ENSIGN, G.I. GUINEA PIGS, HOW THE PENTAGON EXPOSED OUR TROOPS TO DANGERS MORE DEADLY THAN WAR: AGENT ORANGE AND ATOMIC RADIATION (1980); H. ROSENBERG, ATOMIC SOLDIERS: AMERICAN VICTIMS OF NUCLEAR EXPERIMENTS (1980); R. LAPP, MUST WE HIDE (1949); S. SEAGRAVE, YELLOW RAIN: A JOURNEY THROUGH THE TERROR OF CHEMICAL WARFARE (1981); P. Huyghe & D. Konigsberg, *Grim Legacy of Nuclear Testing*, N.Y. Times, Apr. 22, 1979 (Magazine) at 35.

12. P. Huyghe & D. Konigsberg, *supra* note 11, at 70.

13. *Id.*

14. *Id.*

15. For a discussion of the medical effects of nuclear testing, see Subcomm. on Oversight and Investigations of the House Comm. on Interstate and Foreign Commerce, 96TH CONG., 2D SESS., THE FORGOTTEN GUINEA PIGS, A REPORT ON THE HEALTH EFFECTS OF LOW LEVEL RADIATION SUSTAINED AS A RESULT OF THE NUCLEAR WEAPONS TESTING PROGRAMS CONDUCTED BY THE UNITED STATES GOVERNMENT 13 (Comm. Print. 1980).

16. Hundreds of cancer victims or their survivors have since filed suit, charging that nuclear fallout led to their diseases and deaths. H. ROSENBERG, *supra* note 11, at 175.

17. M. UHL & I. ENSIGN, *supra* note 11, at 35.

18. *Id.*

19. H. ROSENBERG, *supra* note 11, at 168.

20. M. UHL & I. ENSIGN, *supra* note 11, at 35.

three nuclear detonations,²¹ including, in 1952, the world's first explosion of a hydrogen bomb.²² In 1947, the United States moved residents of Enewetak to another island atoll so that the island could be used as a nuclear test site.²³ The island is presently undergoing a \$100 million clean up.²⁴ One island in the chain will never again be habitable since it is being used as a dump site for plutonium collected from the other islands.²⁵

In 1963 nuclear testing moved underground.²⁶ Since then more than 300 shaft and tunnel detonations have been conducted in Nevada.²⁷ In fifteen of them, a "venting" released radioactivity off the site, allegedly causing radiation injuries to nearby residents.²⁸ A 1972 action against the United States by some Utah residents to prevent further nuclear testing in Nevada was unsuccessful.²⁹

Thus, nuclear weapons testing has exposed countless individuals to radiation. Some have been exposed to levels of radiation thought to be dangerous. Some areas exposed to radiation remain contaminated. Many types of cancer are known to result from radiation exposure.³⁰ Radiation released from nuclear testing can be inhaled or ingested through contaminated food consumption.³¹ Nuclear weapons testing thus has potentially severe environmental and health effects.

Weapons technology has produced not only nuclear weapons, but also chemical and biological weapons whose production and storage pose serious environmental and health hazards.³² For

21. H. ROSENBERG, *supra* note 11, at 131.

22. *Id.* In *People of Enewetak v. Laird*, 353 F. Supp. 811, 813 (D. Hawaii 1973), the people of Enewetak, who at the time of the action were unable to return to their homes, were granted, under NEPA, an injunction with respect to further nuclear testing on their island. See *infra* text at notes 122-26.

23. H. ROSENBERG, *supra* note 11, at 131.

24. P. HUYGHE & D. KONIGSBERG, *supra* note 11, at 79.

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. An action was brought in 1972 to prevent further nuclear testing by the AEC at its Nevada Test Site on the grounds that the testing contravened the policies and purposes of NEPA. The court entered summary judgment for the AEC, ruling that the decision to conduct tests was not reviewable by a federal court since it involved delicate questions of national security. *Nielson v. Seaborg*, 348 F.Supp. 1369 (D. Utah 1972). See *infra* text at notes 135-39.

30. See SUBCOMM. ON OVERSIGHT AND INVESTIGATION OF THE HOUSE COMM. ON INTERSTATE AND FOREIGN COMMERCE, *supra* note 15.

31. M. UHL & I. ENSIGN, *supra* note 11, at 230.

32. For an excellent overview of the environmental threat posed by chemical and biological weapons, see S. SEAGRAVE, *supra* note 11.

example, the Rocky Mountain Arsenal, located on the edge of Denver's International Airport, stores 4.2 million pounds of deadly saren-GB nerve gas, as well as bombs filled with an even more potent nerve agent called VX.³³ These VX-filled bombs by themselves are enough to kill all the residents of Colorado and neighboring states, along with most of the residents of nearby parts of Canada and Mexico.³⁴ The proximity of the Rocky Mountain Arsenal to the Denver airport increases the chances of an accident occurring.³⁵ Vast amounts of nerve gas could escape if an aircraft were to crash into the contents of one of the arsenal's warehouses.³⁶ A severe storm or earthquake could cause the same result.³⁷ If inhaled, a small droplet of nerve gas would be enough to kill a person within minutes.³⁸

Not only does chemical weapons storage pose health hazards of an immediate, catastrophic nature, it also can have long term consequences such as ground water contamination. In Denver, for example, the Army pumped the wastes from nerve gas production at the Rocky Mountain Arsenal into ponds to evaporate. It found, however, that this practice severely contaminated the ground water in the area, causing the pollution of the Denver aquifer and the destruction of crops and livestock.³⁹ Early in 1962, in an effort to rectify the situation, the Army dug a 12,000-foot well to dispose of the wastes.⁴⁰ The pumping of wastes into this

33. S. SEAGRAVE, *supra* note 11, at 3.

34. *Id.*

35. *Id.* at 4. In 1971, a class action suit was brought by residents of the Rocky Mountain area and nearby areas to enjoin the storage of chemical and biological warfare agents at the arsenal. The court held that, in view of the needs of national security, NEPA did not create substantive rights in the residents to raise an environmental challenge with respect to the arsenal. *McQueary v. Laird*, 449 F.2d 608 (10th Cir. 1971). *See infra* text at note 134.

36. *Id.* This is the same sort of accident the plaintiffs in *Catholic Action* feared would occur since the storage site was so close to Honolulu International Airport. *See infra* text at notes 156-58. For a compilation and brief narrative of instances in which aircraft have crashed into nuclear weapons storage sites, see Center for Defense Information, *Some Minor Mishaps with Atomic Bombs*, 42 BUS. & SOC'Y. REV. (1982). *See also* Brief for Appellant at 14, *Weinberger v. Catholic Action of Hawaii/Peace Education Project*, 454 U.S. 139 (1981).

37. *See* S. SEAGRAVE, *supra* note 11, at 4. An occurrence on Johnston Island, south of Hawaii, in August of 1972, indicates that the stockpiles of war poisons at Denver may at times be less than secure. There, the United States Air Force hastily evacuated all personnel from the chemical warfare depot because the depot was in the path of a hurricane. S. SEAGRAVE, *supra* note 11, at 4.

38. *Id.* at 3.

39. *Id.* at 23.

40. *Id.*

well, however, triggered a series of earthquakes, some reaching a magnitude of 4.0 on the Richter scale.⁴¹ The ground water contamination problem remains unresolved.⁴² Despite the potential immediate and long term problems, the military continues to store chemical weapons at the Rocky Mountain Arsenal on 250 acres only ten miles from downtown Denver.⁴³

The production and testing of chemical weapons also caused environmental harm in 1968 at the Dugway Proving Ground near Salt Lake City, Utah. There, during the spraying of VX nerve agent as part of ongoing tests and demonstrations, an aircraft valve failed to close and dropped a cloud of VX droplets.⁴⁴ Sixty-three hundred sheep in the aircraft's path died, "digging spastically at the frozen ground."⁴⁵ The Pentagon denied responsibility for more than a year.⁴⁶

At Fort Greely, Alaska, in 1966, 200 canisters of nerve gas stacked on the surface of a frozen lake sank through the ice.⁴⁷ Six years later, fifty-three nearby caribou mysteriously died.⁴⁸ Wildlife experts ruled out natural causes.⁴⁹ The Army refused to investigate, and denied that chemical agents might have been responsible.⁵⁰

The list of production, testing, and storage sites of chemical and nuclear weapons with their accompanying environmental hazards goes on.⁵¹ The details of these activities are generally unavailable because, for reasons of national security, they are kept secret. Because of the serious environmental and health hazards of these activities, however, public interest in them has steadily increased. Certain federal statutes require government agencies to disclose the environmental impacts of their actions. It is unclear, however, whether these statutes apply to the military activities just described, or whether the potential for environmen-

41. *Id.*

42. *Id.* at 109.

43. *Id.* at 280.

44. *Id.* at 4.

45. *Id.*

46. *Id.* at 109. During a House subcommittee hearing on open-air testing of gas, the Army admitted that its nerve gas at Dugway killed the sheep. *Id.* at 264.

47. *Id.* at 4.

48. *Id.*

49. *Id.*

50. *Id.* at 5.

51. *Id.* at 276.

tal damage from future, similar military activities must be disclosed.

III. FEDERAL DISCLOSURE STATUTES

In its mandate to federal agencies to disclose the environmental impacts of their actions, NEPA requires that such effects be disclosed "as provided by the FOIA."⁵² By this wholesale inclusion of FOIA, NEPA has also apparently adopted FOIA's exemption for matters properly classified as secret in the interest of national security.⁵³ Therefore, the military can avoid disclosure if its proposed action fits under this exemption. Thus, there is a conflict between NEPA's policy of disclosure of potential environmental threats, and FOIA Exemption 1, which prevents required disclosure of certain military activities. In order to better understand this conflict, this section will discuss these two statutes and the classification procedure embodied in FOIA Exemption 1.

A. *The National Environmental Policy Act*

The National Environmental Policy Act (NEPA)⁵⁴ was Congress' first major attempt to establish a national policy to protect the quality and condition of the environment.⁵⁵ The Act, which is composed of two titles,⁵⁶ seeks to alter the attitude and posture of federal agencies toward environmental preservation in an effort to eliminate actions that would cause irreparable harm to the air, land, and water resources of the nation.⁵⁷ Its overall environmental policy goal is to "use all practicable means and measures . . . to

52. 42 U.S.C. § 4332(2)(C)(V) (1976 & Supp. V 1981).

53. 5 U.S.C. § 552(b)(1) (1976 & Supp. V 1981). The exemption for properly classified national security matters is Exemption 1 of FOIA.

54. 42 U.S.C. §§ 4331-4335, 4341-4347 (1976 & Supp. V 1981). The effective date of NEPA was January 1, 1970. For a discussion of the legislative history of NEPA see Yarrington, *The National Environmental Policy Act*, 4 ENV'T REP. (BNA) No. 17, at 4-6 (1974).

55. Previous efforts to establish a national environmental program resembling NEPA were unsuccessful. Prior to NEPA, several bills addressing environmental concerns were introduced. Among these were the Resources & Conservation Act, S. 2549, 86th Cong. 1st Sess. (1969); and the Ecological Research & Surveys Act, S. 2282, 89th Cong., 1st Sess. (1975).

56. Title I: "Declaration of National Environmental Policy," 42 U.S.C. § 4321 (1976 & Supp. V 1981) and Title II: "Council on Environmental Policy," 42 U.S.C. § 4341 (1976 & Supp. V 1981).

57. 115 CONG. REC. 40,416 (1969) (statement of Sen. Jackson).

create and maintain conditions under which man and nature can exist in productive harmony."⁵⁸

In order to implement this policy, Title I imposes specific obligations on all federal agencies.⁵⁹ NEPA requires federal agencies to consider the environmental impacts of their proposed actions, account for these impacts in their decision making processes, prepare detailed Environmental Impact Statements describing these impacts,⁶⁰ and make these statements available to the President, the Council on Environmental Quality,⁶¹ and the public.⁶² These statements must be prepared in connection with all major federal actions "significantly affecting the environment."⁶³ These specific procedural requirements are designed to implement the broad, substantive policy goals of NEPA.⁶⁴

58. 42 U.S.C. § 4331(a) (1976 & Supp. V 1981).

59. 42 U.S.C. § 4332 (1976 & Supp. V 1981).

60. An EIS is a document which describes the environmental implications of a proposed project. EIS's are prepared by federal agencies in connection with "all major federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C) (1976 & Supp. V 1981). The EIS must include: (1) a description of the proposed action; (2) the relationship of the proposed action to land use plans, policies, and controls for the affected area; (3) the probable impact of the proposed action on the environment; and (4) any probable adverse environmental effects which cannot be avoided. 42 U.S.C. § 4332(2)(C)(i)-(v) (1976 & Supp. V 1981).

61. See *infra* text at notes 65-69.

62. 42 U.S.C. § 4332(C)(V) (1976 & Supp. V 1981).

63. 42 U.S.C. § 4332 (1976 & Supp. V 1981).

64. It is well established that courts can enforce NEPA's procedural requirements, *Calvert Cliffs' Coordinating Committee, Inc. v. United States Atomic Energy Commission*, 449 F.2d 1109, 1112 (D.C. Cir. 1971) (courts have the power to require agencies to comply with the procedural directions of NEPA which "establish a strict standard of compliance"). See also *Concerned About Trident v. Rumsfeld*, 555 F.2d 817 (D.C. Cir. 1977) (the Navy is bound to comply with NEPA requirements with respect to its decision to build a support facility for the Trident submarine program). Judicial enforcement of the broad, substantive environmental policy of NEPA is not so clear, however. In terms of the practical effectiveness of an environmental impact statement, the distinction between procedural and substantive review is extremely important. The courts have not definitively established the scope of judicial review of agency decisions on environmental issues; neither the Act nor its legislative history mentions judicial review. I. ANDERSON, *NEPA IN THE COURTS* 16 (1973).

Once NEPA's procedural requirements have been met, some cases have denied the right of courts to review the substance of the ultimate agency decision. *Environmental Defense Fund v. Armstrong*, 487 F.2d 814 (9th Cir. 1973); *National Helium Corp. v. Morton*, 455 F.2d 650 (10th Cir. 1971); *Pizitz v. Volpe*, 467 F.2d 208 (5th Cir. 1972); *Ethyl Corp. v. Environmental Protection Agency*, 541 F.2d 66 (D.C. Cir. 1976), *cert. denied*, 426 U.S. 941 (1976); *Vermont Yankee Nuclear Power Corporation v. Natural Resources Defense Council Inc.*, 435 U.S. 519 (1978).

Another series of cases has rejected the argument that NEPA is limited to its procedural mandates and recognizes limited substantive rights created by NEPA. *Calvert*

Title II created the Council on Environmental Quality (CEQ).⁶⁵ The role of the CEQ is to provide general advice and assistance to the President on the preparation of an annual Environmental Quality Report, to research conditions and trends in the quality of the environment, and to evaluate the various programs and activities of the federal agencies for consistency with NEPA policy.⁶⁶ The CEQ is also responsible for developing and promulgating regulations to implement the procedural provisions of NEPA.⁶⁷ CEQ regulations have been revised several times.⁶⁸ The most recent regulations were promulgated in 1977 pursuant to a directive from President Carter.⁶⁹

Section 102(2)(C) of NEPA,⁷⁰ which requires the preparation and disclosure of an EIS, has emerged as the most important provision of the Act because an EIS serves as the principal mechanism for insuring that federal agencies comply with the underlying policy of the Act. Section 102(2)(C) serves two functions: first, to inject environmental considerations into an agency's decision making; and second, to inform the public of the potential environmental effects of federal activities by requiring disclosure of the EIS. To give effect to the second function, NEPA relies on the Freedom of Information Act (FOIA),⁷¹ a statute generally requiring each federal agency to make its documents available to the

Cliffs' Coordinating Committee v. Atomic Energy Commission, 449 F.2d 1109 (D.C. Cir. 1971); Environmental Defense Fund v. Corps of Engineers, 470 F.2d 289 (8th Cir. 1972), cert. denied, 412 U.S. 908 (1973); Environmental Defense Fund v. Froelke, 473 F.2d 346 (8th Cir. 1972).

For a discussion of the disagreement among courts see Leed, *NEPA of 1969: Is the Fact of Compliance a Procedural or Substantive Question?*, 15 SANTA CLARA L. REV. 303 (1975); Kelly, *Judicial Review of Agency Decisions under the NEPA of 1969—Strycker's Bay Neighborhood Council Inc. v. Karlen*, 10 B.C. ENVTL AFF. L. REV. 79 (1982). In light of the disagreement among courts as to whether the substance of the EIS is reviewable, the question whether a publicly disclosed EIS effectively fulfills the substantive goals of NEPA remains unresolved.

65. 42 U.S.C. § 4342 (1976 & Supp. V 1981).

66. *Id.*

67. *Id.*

68. The CEQ published Interim Guidelines in 1970, 35 Fed. Reg. 7390 (1970), Revised Guidelines in 1971, CEQ 1971 Guidelines, 36 Fed. Reg. 7724 (1971), Revised Guidelines in 1973, CEQ 1973 Guidelines, 38 Fed. Reg. 20549 (1973).

69. Council on Environmental Quality: Final Regulations Implementing the Procedural Provisions of NEPA, 43 Fed. Reg. 55,978 (1978) (codified in 40 C.F.R. § § 1500-1508 (1978)). See McDermott, *Improving NEPA: New Regulations of the CEQ*, 8 B.C. ENVTL AFF. L. REV. 89 (1979); Lesser, *Putting Bite in NEPA's Bark: New CEQ Regulations for the Preparation of Environmental Impact Statements*, 13 J. L. REFORM 367 (1980).

70. 42 U.S.C. § 4332(2)(C) (1976 & Supp. V 1981).

71. 5 U.S.C. § 552 (1982).

public. Specifically, NEPA requires that an EIS be made available to the public "as provided by the FOIA."⁷² Before discussing what is meant by this requirement, an examination of FOIA is necessary.

B. The Freedom of Information Act

1. Purpose and Policy

Prior to the passage of FOIA in 1967, neither the press nor the public had any legal right to demand access to the files of the United States government.⁷³ Government agencies routinely rejected citizen requests for information.⁷⁴ The overall policy of FOIA is one of full disclosure of government documents.⁷⁵ It was intended to clarify and protect the public's right to information.⁷⁶ The Act provides procedures whereby citizens may directly request a document from a federal agency.⁷⁷ If denied access to the item sought, the citizen may resort to the courts.⁷⁸

FOIA can be used by federal agencies, however, to prevent disclosure by relying on certain statutory exemptions. Agencies can refuse to release information if such information fits into one of nine specified exemptions.⁷⁹ Exemption 1,⁸⁰ which exempts

72. 42 U.S.C. § 4332(2)(C)(V) (1976 & Supp. V 1981).

73. M. HALPERIN, TOP SECRET, NATIONAL SECURITY AND THE RIGHT TO KNOW, 47 (1977).

74. *Id.*

75. FOIA seeks to provide access to official information and to secure a judicially enforceable public right to secure such information. *EPA v. Mink*, 410 U.S. 73, 80 (1973).

76. 112 CONG. REC. 13,641 (1966) (statement of Cong. Moss).

77. H. RELYEA, THE PRESIDENCY AND INFORMATION POLICY 29 (1978).

78. *Id.*

79. 5 U.S.C. § 552(b)(1)-(9) (1982). These nine exemptions include: (1) matters that are specifically authorized under criteria established by an Executive Order to be kept secret in the interest of national defense or foreign policy, and are in fact properly classified pursuant to such Executive Order; (2) information related solely to the internal personnel rules and practices of an agency; (3) information specifically exempted from disclosure by statute; (4) trade secrets and commercial or financial information obtained from a person that are privileged or confidential; (5) inter-agency or intra-agency memoranda or letters which would not be available by law to a party other than an agency in litigation with the agency; (6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy; (7) investigatory records compiled for law enforcement purposes; (8) information contained in or related to examination, operating, or condition reports by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or (9) geological and geophysical information and data, including maps, concerning wells.

80. 5 U.S.C. § 552(b)(1) (1982).

national security matters from disclosure, is the most important exemption for the purposes of this article and will be discussed in detail.

2. FOIA Exemption 1: The National Security Exemption

In enacting FOIA, Congress gave little consideration to Exemption 1 for foreign policy and national defense information,⁸¹ believing simply that there must be disclosure restrictions on information which the President has determined must be kept secret to protect the national defense or to advance foreign policy.⁸² Congress linked access to information by the public under FOIA to the Executive branch classification system,⁸³ established under a succession of Presidential orders.⁸⁴

An agency's ability to prevent disclosure under Exemption 1 has not gone unchallenged. As early as 1971, several members of Congress made a determined effort to secure classified information relating to the environmental impact of a scheduled underground nuclear test in Alaska.⁸⁵ President Nixon denied a request from Congresswoman Mink to release reports on the proposed test.⁸⁶ When the request was denied, Mink and thirty-two of her colleagues in the House brought an action under FOIA to obtain the requested information.⁸⁷

In interpreting the meaning of Exemption 1, the Supreme Court in *Environmental Protection Agency v. Mink* held that FOIA Exemption 1 meant whatever the Executive branch said it meant in any given case.⁸⁸ The Court declared that Congress had not intended that courts review the propriety of particular classifications.⁸⁹ The Court concluded by stating that even where an Executive decision to classify a document as secret appears to be "cynical, myopic, or even corrupt" the courts must respect it

81. See M. HALPERIN, *supra* note 73, at 47.

82. HOUSE COMM. ON GOVERNMENT OPERATIONS, CLARIFYING AND PROTECTING THE RIGHT OF THE PUBLIC TO INFORMATION, H.R. Rep. No. 1497, 89th Cong., 2d Sess. 9-10 (1966).

83. See H. RELYEA, *supra* note 77, at 67.

84. *Id.*

85. EPA v. Mink, 410 U.S. 73, 75 (1972).

86. *Id.*

87. *Id.*

88. 410 U.S. 73 (1973).

89. 410 U.S. at 84.

and exempt the document from disclosure under FOIA Exemption 1.⁹⁰

In the wake of the *Mink* decision and the release of the Pentagon Papers in June, 1972,⁹¹ serious Congressional concern arose over the abuses of Exemption 1.⁹² Congress therefore amended FOIA in the fall of 1974.⁹³ The amendments sought, in part, to stop these abuses.⁹⁴ Congress explicitly authorized judicial inspection of all classified documents to provide review of the propriety of decisions to withhold documents from disclosure.⁹⁵ Subsequent cases have confirmed a court's right to make secret inspections of documents, and to make their own private determinations of whether information is properly classified as secret and non-disclosable.⁹⁶

Although courts may now inspect withheld documents, the amended FOIA still grants the Executive branch broad discretion in classifying documents.⁹⁷ Exemption 1, as amended, exempts matters that are specifically authorized under criteria established by an Executive Order to be kept secret in the interest of national defense or foreign policy, and are in fact properly classified pursuant to such Executive Order.⁹⁸ An examination of the classification procedure is necessary to understand how material may be withheld under Exemption 1.

a. Classification

In order for material to be exempt from disclosure under FOIA Exemption 1, it must be properly classified pursuant to a Presi-

90. 410 U.S. at 95.

91. The Pentagon Papers controversy involved a secret study of the Vietnam War. Its subsequent publication revealed the persistent deception by the Administration of both Congress and the public. For a discussion of the Pentagon Papers, see M. HALPERIN, *supra* note 73, at 5-40.

92. See M. HALPERIN, *supra* note 73, at 48.

93. The amendments received a temporary setback when President Ford vetoed them, alleging that review of classification decisions by the courts to determine if those decisions were properly made was unconstitutional. His veto was overridden and the amendments were passed. See H. RELYEA, *supra* note 77, at 68.

94. Tuoni, *NEPA and the Freedom of Information Act: A Prospect for Disclosure*, 4 B.C. ENVTL AFF. L. REV. 179, 184 (1975).

95. 5 U.S.C. § 552 (1982).

96. *Ray v. Turner*, 587 F.2d 1187 (D.C. Cir. 1978). See also *Halperin v. Dept. of State*, 565 F.2d 699 (D.C. Cir. 1977); *Phillippi v. C.I.A.*, 546 F.2d 1009 (D.C. Cir. 1976).

97. Tuoni, *supra* note 94, at 184-85.

98. 5 U.S.C. § 552 (1982).

dent's Executive Order.⁹⁹ Executive Order No. 12356,¹⁰⁰ entitled "National Security Information," provides, with one exception,¹⁰¹ the only basis for classifying material as secret. The Order prescribes a uniform system for classifying and safeguarding national security information. It confers upon specified officials within a federal agency the power to classify information as secret if its disclosure "could reasonably be expected to cause damage to the national security."¹⁰²

Information to be considered for classification under this order includes: (1) military plans, weapons, or operations; (2) the vulnerabilities or capabilities of systems, installations, projects or plans relating to the national security; and (3) United States government programs for safeguarding nuclear materials or facilities.¹⁰³ Additionally, it authorizes that information may be classified even *after* an agency has received a request for disclosure of the information under FOIA.¹⁰⁴ Thus, an agency has broad discretion in determining how and when information is to be classified.

Moreover, in response to a request under FOIA, the agency may neither confirm nor deny the existence of the information if

99. For a discussion of the history of the classification system, see Note, *The National Security Interest and Civil Liberties*, 85 HARV. L. REV. 1130 (1972).

100. Issued on April 2, 1982. Exec. Order No. 12356, revoked Exec. Order No. 12065, which superseded Exec. Order No. 11652, 37 Fed. Reg. 5209 (1972), which in turn superseded Exec. Order No. 10501, 18 Fed. Reg. 7049 (1953).

101. Exec. Order No. 12356 states that nothing in that order supercedes any requirement made by or under the Atomic Energy Act of 1954, as amended. Exec. Order No. 47 Fed. Reg. 14,874 (1982). Therefore, the only other way for material to be properly classified, and thus fit under FOIA Exemption 1, is if it is classified pursuant to the regulations of the Atomic Energy Act. The Atomic Energy Act, 42 U.S.C. § 2011 (1976), declares that all data concerning the design, manufacture, or use of atomic weapons is "Restricted Data" and orders the Nuclear Regulatory Commission (NRC) (formerly the Atomic Energy Commission) to control its dissemination to assure the common defense and security. 42 U.S.C. § 2014(y), § 2161 (1976). Thus, any information regarding the environmental effects of the manufacturing, testing, or storage of nuclear weapons can lawfully be withheld by the military from the public under Exemption 1 if the NRC has properly classified such information pursuant to the provisions of the Atomic Energy Act.

Furthermore, as stated in the Supreme Court's decision in *Weinberger v. Catholic Action*, 454 U.S. 139, 144 (1981), FOIA Exemption 3, which authorizes the withholding of documents specifically exempted from disclosure by statute, arguably exempts the disclosure of an EIS under the Atomic Energy Act. The Court, however, found that since Exemption 1 was applicable, it was unnecessary to discuss the applicability of Exemption 3.

102. Exec. Order No. 12356, 47 Fed. Reg. 14,874 (1982).

103. *Id.*

104. *Id.*

such confirmation or denial is itself classified.¹⁰⁵ Therefore, an agency cannot only refuse to give details of requested information, but it can also refuse to say whether such information even exists.

Executive discretion under the classification procedure is so broad, in part, because Congress has not set any standards of "proper" classifications under Exemption 1. Therefore, while the judiciary may review whether particular documents meet classification standards, agencies still have broad discretion in determining the classification standards themselves. Pursuant to Executive Order No. 12356, an agency is free to develop and implement its own classification guides to determine what information is to be classified as secret.¹⁰⁶

b. Classification Guides

Executive Order No. 12356 authorizes agencies whose officials have original classification authority¹⁰⁷ to determine what information is to be classified as secret by preparing their own classification guides.¹⁰⁸ The potential shielding effect of Executive Order No. 12356 is thus implemented through these guides. A brief examination of the guides prepared by military agencies will illustrate what information may be classified as secret.

The Department of Defense (DOD) issued a Nuclear Weapons Classification Guide¹⁰⁹ which provides that the following types of information merit secret classification: (1) planning or construction information revealing the installation of a nuclear weapons storage site; (2) information revealing installation of a storage site for nuclear weapons, whether or not presence of weapons can be determined; (3) the quantity of nuclear weapons actually at a site; (4) storage site vulnerability studies; (5) that a particular Nuclear-Capable Unit actually has nuclear weapons; and (6) the number of nuclear weapons in storage or within a Nuclear or

105. *Id.*

106. Exec. Order No. 12356, 47 Fed. Reg. 14,874 (1982).

107. Original classification authority may be exercised only by the President, agency heads and other officials designated by the President in the Federal Register, and officials delegated this authority pursuant to Exec. Order No. 12356, 47 Fed. Reg. 14,874 (1982).

108. Exec. Order No. 12356, 47 Fed. Reg. 14,874 (1982).

109. Brief for Appellant at Appendix H, *Weinberger v. Catholic Action of Hawaii/Peace Education Project*, 454 U.S. 139 (1981).

Nuclear-Capable Unit.¹¹⁰ This classification guide indicates that virtually all information having anything to do with nuclear weapons is classified.

The Department of the Navy adopted this same classification scheme in its 1975 manual entitled "Navy Security Classification Guide for Nuclear Weapons."¹¹¹ The Navy also issued a regulation that forbids members of the Navy to reveal any information with respect to the presence or absence of nuclear weapons or components on board any ship, station or aircraft,¹¹² The only response that Navy personnel may give to a request for such information is, "it is the policy of the United States government neither to confirm nor deny the presence or absence of nuclear weapons or components on board any ship, station or aircraft."¹¹³

Through these classification guides, federal agencies have broad power to classify information as secret. Therefore, they can, in effect, determine what information will be exempt from FOIA disclosure requirements. The same power serves to exempt information from NEPA's disclosure requirement since NEPA incorporates FOIA.¹¹⁴ Since many military actions do pose severe environmental impacts,¹¹⁵ whether or not they are subject to the NEPA reporting requirements is significant. The conflicting need to preserve military secrets, however, is also important. The appropriate balance between the two policies is a critical issue. The Supreme Court addressed this issue in *Weinberger v. Catholic Action*.¹¹⁶ In order to understand the *Catholic Action* decision, it is necessary to first examine the state of the law at the time the case arose.

IV. APPLICATION OF NEPA TO MILITARY ACTIONS BEFORE *Weinberger v. Catholic Action*

Before the *Catholic Action* controversy arose in 1975, courts had struggled with the issue of to what extent NEPA's mandates applied to military activities that involved issues of national secu-

110. *Id.*

111. Brief for Appellant at Appendix I, *Weinberger v. Catholic Action of Hawaii/Peace Education Project*, 454 U.S. 139 (1981).

112. Brief for Appellant at Appendix J, *Weinberger v. Catholic Action of Hawaii/Peace Education Project*, 454 U.S. 139 (1981).

113. *Id.*

114. 42 U.S.C. § 4332(C)(V) (1976 & Supp. V 1981).

115. See *supra* text at notes 10-51.

116. 454 U.S. 139 (1981).

rity.¹¹⁷ Although courts have been reluctant to require the military to disclose information about nuclear and chemical weapons,¹¹⁸ they have nevertheless generally agreed that there is no blanket, overall military exemption from NEPA.¹¹⁹

For example, in *Concerned About Trident v. Rumsfeld*,¹²⁰ which involved a challenge to the adequacy of the EIS prepared by the Navy for a Trident nuclear submarine system, the District of Columbia Court of Appeals firmly rejected the application of a military exemption from NEPA even though the program had serious national security implications.¹²¹ The court vehemently condemned the Navy's argument that NEPA could not possibly apply to military actions as a "flagrant attempt" to exempt from NEPA all military actions under the "overused rubric of national defense."¹²² The court found that this effort to carve out a general national defense exemption from NEPA was strongly opposed by the clear language of the statute,¹²³ Department of Defense and Navy regulations,¹²⁴ CEQ guidelines¹²⁵ and case law.¹²⁶ The court

117. To put this problem in perspective, it should be noted that the military engages in countless projects that either have no significant environmental impacts, such as the construction of Army base housing, or have significant environmental impacts but do not qualify for FOIA Exemption 1, such as the dam construction projects of the Army Corps of Engineers. Nuclear and chemical weapons production, testing, and storage, however, are major military activities which undoubtedly "significantly affect the quality of the human environment." They also involve issues of national security. It is these activities which present the conflict between NEPA disclosure and FOIA Exemption 1.

118. *McQueary v. Laird*, 449 F.2d 608 (10th Cir. 1971); *Nielson v. Seaborg*, 348 F. Supp. 1369 (D. Utah 1972); *Citizens for Reid State Park v. Laird*, 356 F. Supp. 783 (D. Me. 1972).

119. *Calvert Cliffs' Coordinating Comm. v. AEC*, 449 F.2d 1109, 1111 (D.C. Cir. 1971); *McQueary v. Laird*, 449 F.2d 608, 612 (10th Cir. 1971); *Greene County Planning Bd. v. Federal Power Commission*, 455 F.2d 412, 418 (2d Cir. 1972); *Env't Defense Fund v. United States Army Corps of Engineers*, 470 F.2d 289, 294 (8th Cir. 1972); *Env't Defense Fund v. Tennessee Valley Auth.*, 468 F.2d 1164, 1173 (6th Cir. 1972); *Bradford Township v. Illinois State Toll Auth.*, 463 F.2d 537, 539 (7th Cir. 1972); *Zabb v. Tabb*, 430 F.2d 199, 211 (5th Cir. 1970); *Citizens for Reid State Park v. Laird*, 336 F. Supp. 783, 786 (D. Me. 1972); *Concerned About Trident v. Rumsfeld*, 555 F. 2d 817, 823 (D.C. Cir. 1977).

120. *Concerned About Trident v. Rumsfeld*, 555 F. 2d 817 (D.C. Cir. 1977).

121. *Id.* at 823.

122. *Id.*

123. The court referred to § 102 of NEPA that instructs *all* federal agencies to comply with NEPA's requirements. *Id.* at 823.

124. The court pointed to Department of Defense regulations 32 C.F.R. § 214.1-2 (1983): "This part 214 reiterates and amplifies DOD policy, responsibilities, and procedures for assessing the environmental impact of Defense actions . . . as required by NEPA . . . The provisions of this Part 214 apply to . . . the Military Departments . . . and Defense Agencies." 555 F.2d at 823.

125. Referring to 40 C.F.R. § 1500.4(a) (1975), the court found that: "The phrase 'to the fullest extent possible' in Section 102 is meant to make clear that each agency of the

ordered the Navy to correct the deficiencies in its EIS.¹²⁷

Similarly, in *People of Enewetak v. Laird*,¹²⁸ the District Court of Hawaii held that the section 102(2)(C) EIS requirement applied to the atomic tests conducted on Enewetak, a Pacific island used extensively in the past for test detonations.¹²⁹ The DOD argued that the core drilling, which the plaintiffs sought to enjoin, had no appreciable effect on the environment, and that an EIS, therefore, was unnecessary.¹³⁰ The court, however, reasoned that such drilling was only a segment of the entire project of testing nuclear weapons.¹³¹ It therefore concluded that since the primary purpose of the drilling was to further the project, which itself had potentially significant environmental consequences, the drilling too was subject to NEPA.¹³²

On the other hand, some courts, in holding that NEPA does not apply to a challenged military activity, despite significant environmental consequences, have granted such activities broad protection from disclosure.¹³³ *McQueary v. Laird*¹³⁴ involved a challenge to the storage of chemical warfare agents at the Rocky Mountain Arsenal. In holding that preparation of an EIS was not required since public disclosure would create serious problems of national security, the Tenth Circuit Court found that the federal government possesses "unfettered" control over federal military establishments.¹³⁵

Similarly, in *Nielson v. Seaborg*,¹³⁶ which involved the Atomic Energy Commission's (AEC's)¹³⁷ Nevada nuclear tests, plaintiffs

Federal Government shall comply with that section unless existing law applicable to the agency's operations expressly prohibits or makes compliance impossible." 555 F.2d at 823.

126. The court cited the following cases: *Natural Resources Defense Council v. Morton*, 458 F.2d 827, 836 (D.C. Cir. 1972); *Comm. for Nuclear Responsibility, Inc. v. Seaborg*, 463 F.2d 796, 799 (D.C. Cir. 1971); *People of Enewetak v. Laird*, 353 F. Supp. 811 (D. Hawaii 1973).

127. 555 F.2d at 830.

128. *People of Enewetak v. Laird*, 353 F. Supp. 811 (D. Hawaii 1973).

129. *Id.* at 821.

130. *Id.* at 820.

131. *Id.*

132. *Id.* at 821.

133. *See supra* note 118.

134. *McQueary v. Laird*, 449 F.2d 608 (10th Cir. 1971).

135. *Id.*

136. *Nielson v. Seaborg*, 348 F. Supp. 1369 (D. Utah 1972). *See supra* text at notes 26-29.

137. Under the provisions of the Energy Reorganization Act of 1974, 42 U.S.C. § 5801 (1976 & Supp. V 1981), the Nuclear Regulatory Commission (NRC) replaced the AEC as the licensing and regulatory authority for the AEA.

sought to enjoin the tests on the ground that the tests contravened the policies and purposes of NEPA.¹³⁸ The Utah District Court held that the tests were totally within agency discretionary weighing of other essential considerations of national policy.¹³⁹

The District of Columbia took a middle ground on the question of NEPA's application to national security matters in *Calvert Cliffs' Coordinating Commission v. United States Atomic Energy Commission*.¹⁴⁰ The case involved a challenge to the Atomic Energy Commission rule that environmental factors need not be considered unless affirmatively raised by outside parties or staff members. Plaintiffs claimed that such a rule did not comply with NEPA. The court agreed, holding that section 102 duties must be complied with "to the fullest extent possible" unless there is a clear conflict of statutory authority.¹⁴¹

The most protracted litigation on NEPA's application to national security matters concerned "Project Cannikin," the 1971 underground test detonation of a five-megaton nuclear warhead beneath Amchitka, an island off the coast of Alaska.¹⁴² The AEC, assuming that NEPA applied to the test, prepared both a draft and a final EIS for the testing. The Committee for Nuclear Responsibility, Inc., a committee of eight environmental and conservation groups, challenged the adequacy of the statement, primarily based on a series of secret studies prepared by the government and not included in the NEPA review process. The circuit court ordered some of the studies to be made public late in the litigation. These studies indicated that a more severe environmental threat existed than the Commission's EIS indicated.

Committee for Nuclear Responsibility v. Seaborg, the challenge to "Project Cannikin," came before the district and circuit courts

138. 348 F. Supp. at 1372.

139. *Id.*

140. 449 F.2d 1109 (D.C. Cir. 1971).

141. *Id.* at 1115. By adding the phrase "to the fullest extent possible" to § 102, the joint House-Senate Conference Committee to the NEPA bill addressed the issue of particular agency exemptions: "The purpose of the new language is to make it clear that each agency of the Federal Government shall comply with the directives set out in such sub-paragraphs A through H unless the existing law applicable to such agency's operations expressly prohibits or makes full compliance with one of the directives impossible . . . No agency shall utilize an excessively narrow construction of existing statutory authorizations to avoid compliance." H.R. REP. No.765, 91ST CONG., 1ST SESS. 9-10 (1969).

142. See Comment, *Project Cannikin and the NEPA*, ENVTL. L. REP. ENVTL. L. INST. 10,161, 10,162 (1971). See also *supra* text at notes 84-90 for a discussion of *EPA v. Mink*, 410 U.S. 73 (1973), a case which also grew out of the Project Cannikin controversy.

three times¹⁴³ before an appeal requesting an injunction was denied by the Supreme Court.¹⁴⁴ Although the District of Columbia Circuit Court denied injunctive relief because of the potential harm to national security that a delay would cause, it rejected the AEC's claim that NEPA did not apply in this situation.¹⁴⁵ The court made it clear that the plaintiffs could still pursue and might yet prevail on their claim that the AEC had failed to comply with NEPA.¹⁴⁶

The Supreme Court affirmed the circuit court's denial of injunctive relief without providing a written opinion to explain its reasons.¹⁴⁷ Consequently, the litigation did not resolve questions about NEPA's application to national security matters.¹⁴⁸ It is interesting to note, however, that the Court agreed to hear the case under extraordinary time demands and somewhat excep-

143. *Comm. for Nuclear Responsibility v. Seaborg*, 463 F.2d 783; 463 F.2d 788; 463 F.2d 796 (D.C. Cir. 1971). The district court decisions were not reported.

144. *Comm. for Nuclear Responsibility v. Schlesinger*, 404 U.S. 917 (1971).

145. 463 F.2d at 791.

146. *Id.* at 798.

147. 404 U.S. 917 (1971).

148. An additional issue left unresolved by the *Comm. for Nuclear Responsibility* cases is the practical effectiveness of an EIS in terms of judicial relief. If a court were to review an agency's decision and find an EIS to be inadequate or defective, it is unclear what judicial relief is available. In *Comm. for Nuclear Responsibility*, the District of Columbia Court of Appeals denied a request to temporarily enjoin an underground nuclear test blast even though, as the court conceded, substantial doubt existed as to the adequacy of the EIS prepared by the AEC for this test blast. *Comm. for Nuclear Resp. v. Seaborg*, 463 F.2d 796, 798 (D.C. Cir. 1971). According to the circuit court, the potential harm to national security and foreign policy that might result from postponement of the test outweighed the existing evidence of possible environmental harm. 463 F.2d at 798. The Supreme Court summarily affirmed the circuit court's denial of injunctive relief. *Comm. for Nuclear Resp. v. Schlesinger*, 404 U.S. 917 (1971).

Justice Douglas, in a written opinion, dissented from the Supreme Court's decision denying the injunction. As authority for judicial review of impact statements, he relied on *Calvert Cliffs' v. AEC*, 449 F. 2d 1109 (D.C. Cir. 1971), which held that: "if the decision under NEPA was reached by AEC procedurally without individualized consideration and balancing of environmental factors—conducted fully and in good faith—it is the responsibility of the courts to reverse." *Id.* at 1115. Justice Douglas went on to conclude that once noncompliance with NEPA is shown, the federal courts have uniformly held that injunctive relief is appropriate. 404 U.S. at 921. Courts have consistently held, he found, that a defect in the EIS presents a justiciable question and provides a basis for equitable relief. *Id.* citing *West Virginia Highlands Conservancy v. Island Creek Coal Co.*, 441 F.2d 232 (4th Cir. 1971); *Envtl. Defense Fund v. Corps of Eng. of U.S. Army*, 325 F. Supp. 749, 759 (E.D. Ark. 1971); *Wilderness Society v. Hickel*, 325 F. Supp. 422 (D.D.C. 1970).

The majority, however, disagreed, and despite the circuit court's finding that the AEC's EIS presented a substantial question as to the legality of the proposed test under NEPA, denied injunctive relief, and the test was conducted on schedule on Saturday, November 6, 1971. See also *supra* note 54 for a discussion of the related problem of procedural versus substantive agency compliance with NEPA.

tional circumstances.¹⁴⁹ By having done this, the Court seemed to indicate that any attempts to circumscribe the NEPA requirements raises significant legal and policy issues. This was the rather confusing state of the case law involving NEPA and national security matters when the case of *Weinberger v. Catholic Action of Hawaii/Peace Education Project*¹⁵⁰ reached the Supreme Court in 1981.

V. *Weinberger v. Catholic Action of Hawaii/Peace Education Project*

A. *The Controversy*

In 1975, the Navy decided to transfer weapons stored at various locations on the island of Oahu, Hawaii to the West Loch branch of the Lualualei Naval Magazine. The transfer required construction of additional facilities at the weapons storage site. Pursuant to CEQ guidelines¹⁵¹ and DOD regulations,¹⁵² the Navy prepared an Environmental Impact Assessment (EIA). An EIA is a preliminary screening device used to determine whether or not a full scale EIS is necessary.¹⁵³ The Navy's EIA made no mention at all of nuclear weapons storage and only discussed the construction aspect of the project. It concluded that the necessary construction

149. The plaintiff groups were permitted to appear before a special Saturday session of the Court at 9:30 A.M., November 6, 1971, requested by the Chief Justice just hours before the scheduled test blast. They challenged a major nuclear test of allegedly vital national security importance which Congress had debated and President Nixon had personally ordered to go ahead. Comment, *Project Cannikin and the NEPA*, *supra* note 142, at 100, 162.

150. 454 U.S. 139 (1981).

151. § 1501.4 CEQ guidelines provide that when it is difficult for an agency to determine the extent of the environmental impact of its proposal, the agency shall prepare an environmental impact assessment (EIA). Based on the EIA, the agency shall make its determination whether the environmental impact is or is not significant. If it is concluded that significant environmental impact will result from a proposed action, a draft EIS must be prepared. In those projects which normally would require an EIS, if an EIA concludes that the environmental impact is not significant, then a finding of no significant impact (FONSI) must be prepared and made available to the public. If the proposed action does not normally require an EIS and the EIA concludes that no significant impact will result, the agency need not prepare a FONSI, but must just file and make public the EIA. For a discussion of the EIA, EIS, and FONSI, see R. JAIN, *ENVIRONMENTAL IMPACT ANALYSIS* 24-26 (1981).

152. 32 C.F.R. § 2.14.6 (1981). This section requires an assessment of environmental consequences. Only if it is determined that the proposal will significantly affect the environment is an EIS required. The EIS must then be submitted with the proposal.

153. 40 C.F.R. § 1508.9 (1981). *See supra* note 152.

of additional facilities at a site where conventional weapons had been stored for twenty years would have no significant environmental impact. The EIA, therefore, concluded that an EIS need not be prepared, and construction subsequently began.

In 1978, the Navy prepared a separate "candidate" EIS, a statement that the Navy regulations require prior to a formal EIS.¹⁵⁴ The candidate EIS, entitled "Nuclear Aspects of Naval Systems Storage," discussed, without reference to any specific storage site, the hazards connected with the storage of nuclear warheads. The report concluded that "the handling, storage, and transportation of nuclear weapons present no hazards to the environment."¹⁵⁵ This candidate EIS neither made reference to any specific storage site, nor discussed the potential dangers involved.

B. Lower Court Decisions

In 1979, several Hawaii based environmental groups and individuals brought an action in federal district court against the Secretary of Defense, the Secretary of the Navy, the Chief of Naval Operations, the Commandant of the 14th Naval District,

154. Navy regulations establish a series of steps to be followed in determining whether an EIS should be filed. A brief EIA must be prepared for any action that may have environmental effects. If it appears from this assessment that the action may have a significant environmental impact, a Candidate EIS must be prepared, following the same format and covering the same issues as a formal EIS. The Candidate EIS is reviewed by a panel in the Office of Chief of Naval Operations, which decides whether an EIS is required. *City and County of San Francisco v. United States*, 615 F.2d 498, 500 (9th Cir. 1980). Since the Navy had concluded in its EIA of 1975 that the new Lualualei Naval Magazine facility would have no significant impact on the environment and therefore concluded that there was no need to prepare an EIS, it is unclear why they prepared their Candidate EIS in 1978. Its reasons for doing so were not discussed in any of the decisions, but at least one commentator has surmised that it was prepared as a final effort to pacify the plaintiffs in the case. DeBois, *The Supreme Court Deals a Severe Blow to NEPA*, 22 NAT. RESOURCES J. 699, 701 n.19 (1982).

155. Brief for Appellant at Appendix G, *Weinberger v. Catholic Action of Hawaii/Peace Education Project*, 454 U.S. 139 (1981). The candidate EIS, in its conclusion, further stated that "low level radioactive emissions from nuclear warheads are sufficiently low to pose no threat to the environment or to personnel health and safety, and therefore, the nuclear aspects of weapons storage do not constitute an 'environmental factor' per se, and can be excluded from any assessment prepared under the NEPA that addresses the conventional or construction aspects of storage handling facilities." Its final conclusion simply stated: "Probable Adverse Environmental Effects Which Cannot be Avoided: None." *Id.*

and the Commander-in-Chief of the Pacific Fleet.¹⁵⁶ The plaintiffs sought to enjoin the construction at West Loch until the Navy prepared an EIS.¹⁵⁷ In support of their demand, the plaintiffs alleged that the Navy's EIA and candidate EIS ignored both the risk of a nuclear detonation caused by an aircraft crash into the storage facility and the potential environmental effects of such an accident.¹⁵⁸ The plaintiffs further alleged that the Navy had failed to consider the effects of the continued release of low level radiation from the storage of nuclear weapons near populated areas.¹⁵⁹

Even though the Navy had stipulated that the West Loch facility was capable of storing nuclear weapons,¹⁶⁰ they contended that Navy regulations prohibited it from either admitting or denying that plans existed to store nuclear weapons at West Loch.¹⁶¹ The Navy claimed that it therefore was precluded from the preparation of an EIS with respect to the storage of nuclear weapons at West Loch.

The district court agreed that the construction and use of the storage facilities at West Loch constituted a major federal action and therefore was subject to NEPA requirements.¹⁶² The court

156. *Catholic Action of Hawaii/Peace Education Project v. Brown*, 468 F. Supp. 190 (D. Hawaii 1979).

157. The plaintiffs contended that the candidate EIS did not satisfy the requirements of NEPA since it ignored four environmental factors: (1) the risk of nuclear accidents; (2) the enhancement of that risk by the physical proximity of airports; (3) the effects of any nuclear accident upon the surrounding population and environment of Hawaii; and (4) the effects of continual low level radiation from the storage of the weapons near populated areas. They contended that since the candidate EIS was not site-specific, it could not supply information about any of these factors. *Catholic Action*, 643 F.2d at 571.

158. Plaintiffs offered and defendants stipulated to several examples of aircraft mishaps and other accidents involving nuclear weapons. On January 17, 1966, an American B-52 bomber collided with a KC-135 refueling tanker causing the deaths of crewmen and the loss of unarmed nuclear weapons. On March 11, 1958, a B-47 bomber accidentally dropped an unarmed nuclear weapon in the megaton range over South Carolina. An explosion of conventional explosives occurred. On June 7, 1960, at McGuire Air Force Base, a fire occurred at a launch shelter of a Bomarc Missile. One missile exploded. Some radiation was scattered. On January 21, 1968, a B-52 attempting an emergency landing at a United States Air Force Base in Greenland, crashed, breaking or destroying nuclear weapons. A radioactive contaminated area resulted.

159. *See supra* text at note 3.

160. Stipulation of March 4, 1979. Brief for Appellant, *Weinberger v. Catholic Action of Hawaii/Peace Education Project*, 454 U.S. 139 (1981).

161. *See supra* text at note 113.

162. *Catholic Action v. Brown*, 468 F. Supp. at 192-93. Section 102(2)(C) of NEPA requires that agencies prepare an EIS for all "major federal actions significantly affecting the environment." This phrase suggests that actions first have to be found to be "major" and then, must also be found to have potentially "significant" environmental effects. Anderson, *supra* note 64, at 89.

concluded, however, that the Navy had complied with NEPA "to the fullest extent possible" and therefore had discharged its statutory duty.¹⁶³ Complete compliance with NEPA, according to the court, was not possible where an EIS would necessarily involve a discussion of the presence, number, and location of atomic weapons, as well as the design and capabilities of such weapons and related security measures.¹⁶⁴ To discuss this information would conflict with the restrictions of the security regulations of the Nuclear Regulatory Commission (NRC) and the classification guides of the DOD and the Navy.¹⁶⁵ The district court, therefore, denied the plaintiffs' request for an injunction.¹⁶⁶

The Ninth Circuit Court of Appeals reversed the lower court decision.¹⁶⁷ While accepting the Navy's argument that it could not possibly *disclose* information regarding the presence or absence of nuclear weapons at West Loch without violating the security regulations of the NRC, the court did not agree that EIS *preparation* was precluded, and ordered the Navy to prepare one.¹⁶⁸ The court reasoned that an EIS could hypothesize, without conceding, that the facilities would store nuclear weapons and that the EIS need not imply that a decision to store had been made or reveal to the public specific information regarding nuclear weapons.¹⁶⁹

Relying on the District of Columbia Circuit Court's decision in *Concerned about Trident v. Rumsfeld*,¹⁷⁰ the court found that in order for an EIS to be sufficient, it must discuss the environmental consequences of both the construction of a project and the operation of the facility.¹⁷¹ The Court also found that since the Navy had already conceded that the facility was nuclear capable, an EIS that discussed the consequences of storing nuclear weapons would not violate any national security policies or regulations, and would fulfill NEPA requirements.¹⁷² The court reasoned further that the preparation of a hypothetical EIS would provide assurance to the public that the Navy had considered the environmental effects of nuclear weapons storage and handling

163. 468 F. Supp. at 192.

164. *Id.* at 193.

165. *Id.* See *supra* text at notes 107-16.

166. 468 F. Supp. at 193.

167. *Catholic Action*, 643 F.2d 569 (9th Cir. 1980).

168. *Id.* at 572.

169. *Id.* at 571.

170. See *supra* text and note 120.

171. 643 F.2d 569.

172. *Id.* at 572.

should the Navy decide in the future to use West Loch for that purpose.¹⁷³

C. Supreme Court Decision

The Supreme Court granted certiorari in April, 1981 to settle the important issue of the relationship between national security and NEPA. In a unanimous decision,¹⁷⁴ the Supreme Court rejected the Ninth Circuit's reasoning and conclusion, and reversed the decision of the Circuit Court. In his opinion, Justice Rehnquist relied on two factors to find that the Navy was not required to prepare or disclose an EIA: first, FOIA Exemption 1 exempts the Navy from NEPA requirements in this instance;¹⁷⁵ and, second, an EIS is not required when an action is merely *contemplated*, only when an action is *proposed*.¹⁷⁶

As to the first factor, the Court initially noted that the public disclosure function of the EIS requirement is expressly constrained by FOIA.¹⁷⁷ Finding that "virtually all information relating to the storage of nuclear weapons is classified,"¹⁷⁸ the Court concluded that whether or not nuclear weapons are to be stored at West Loch is a question exempt from disclosure under FOIA Exemption 1, which exempts all properly classified information. Therefore, Justice Rehnquist concluded, even if an EIS had been prepared in this case, there would have been no requirement of disclosure.¹⁷⁹

The second factor relied on by the Court led to the finding that the Navy need not even prepare an EIS.¹⁸⁰ Relying on *Kleppe v.*

173. *Id.* Neither the district court nor the circuit court explicitly referred to FOIA in its decisions. They referred to it only indirectly by addressing the conflict between NEPA's preparation and disclosure mandates, and the security provisions of the AEA and security classification guides. These security provisions, however, are a basis for nondisclosure only within the context of FOIA Exemption 1. It is unclear why neither lower court made any reference to FOIA Exemption 1; presumably they simply neglected to track the process through which nondisclosure is effectuated.

174. Justice Rehnquist delivered the opinion of the Court in which Justices Burger, White, Marshall, Powell, Stevens, and O'Connor joined. 454 U.S. at 140. Justice Blackmun filed a concurring opinion in which Justice Brennan joined. 454 U.S. at 147 (Blackmun J., concurring).

175. 454 U.S. at 146.

176. *Id.*

177. 454 U.S. at 143.

178. *Id.* at 144.

179. *Id.* at 146.

180. The DOD's regulations, however, do not excuse the agency from NEPA's requirement of EIS *preparation*. They say that "the fact that a proposed action is of a

Sierra Club,¹⁸¹ which held that an EIS need only be prepared when a project is proposed, but not when a project is merely contemplated,¹⁸² the Court concluded that the Navy is not required to prepare an EIS simply because a facility is "nuclear capable."¹⁸³ A statement that the facility is 'nuclear capable' indicates only that the Navy has *contemplated* the possibility that nuclear weapons may, at some time, be stored there. Only a *proposal* to store nuclear weapons at West Loch would trigger the EIS preparation requirement.¹⁸⁴ Since the Navy is forbidden by Navy regulations¹⁸⁵ from either admitting or denying that it proposes to store nuclear weapons at West Loch, the Court held that "it has not been and cannot be established that"¹⁸⁶ the Navy has made a proposal. Therefore, even the preparation of an EIS is not required by NEPA. Interestingly, the court then concluded that "ultimately whether or not the Navy has complied with NEPA . . . is beyond judicial scrutiny in this case."¹⁸⁷

In his concurring opinion, Justice Blackmun, joined by Justice Brennan, found that the applicable law was "relatively simple and straightforward."¹⁸⁸ He found that it was unnecessary to rule that the Navy's compliance with NEPA was beyond judicial scrutiny, or to address the applicability of FOIA case law.¹⁸⁹ Justice Blackmun agreed with the majority that the Navy need not *publish* an EIS if disclosing its contents or even its existence

classified nature does not relieve the proponent of the action from complying with NEPA," but in such circumstances, the EIS "shall be prepared, safeguarded and disseminated in accordance with the requirements applicable to classified information."

181. 427 U.S. 390, 405-06 (1976).

182. The rationale behind this distinction is that contemplated actions often do not result in actual proposals. Therefore, to require an EIS for every contemplated action would lead to many unnecessary EIS's and impose an unnecessary burden on agencies. *Kleppe v. Sierra Club*, 427 U.S. 390, 406 (1976).

183. 454 U.S. at 146.

184. *Id.*

185. *See supra* text at notes 111-12.

186. 454 U.S. at 146.

187. *Id.* Justice Rehnquist relied on *Totten v. United States*, 92 U.S. 105, 107 (1875), and *United States v. Reynolds*, 345 U.S. 1 (1953) to reach this conclusion. These cases held that public policy forbids the maintenance of a suit whose trial would lead to the disclosure of matters that the law regards as confidential.

188. 454 U.S. at 147.

189. *Id.* at 149. Justice Blackmun was referring to Rehnquist's reliance on *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 161-62 (1975); *Forsham v. Harris*, 445 U.S. 169, 185-86 (1980); and *Kissinger v. Reporters Comm.*, 445 U.S. 136, 152 (1980), which Justice Rehnquist used to support the Court's holding that FOIA governs NEPA's disclosure requirements.

would reveal properly classified materials.¹⁹⁰ He reasoned, however, that even though DOD and CEQ regulations provide that classified information may be restricted from public *disclosure*, they do not suggest that classified proposals are exempt from EIS *preparation*.¹⁹¹ He found that the Navy must prepare an EIS on all proposals for major federal actions significantly affecting the environment, and that NEPA does not provide an exception for classified proposals.¹⁹² Nevertheless, he concurred in the Court's result because the plaintiffs had failed to establish the existence of a proposal, and thus the need for an EIS.¹⁹³

The Supreme Court in *Catholic Action* held that when military activities involve properly classified national security information, such information need not be revealed. Further, the Court ruled, where an agency cannot, due to national security reasons, admit or deny the existence of a proposal, the agency need not prepare an EIS because the very existence of the action triggering the need for the EIS is "beyond judicial scrutiny." For the first time, the Court considered the relationship between military secrecy, the FOIA, and NEPA. The decision will have a significant impact on the law in this area, but it still leaves some issues relating to NEPA's application to military actions unresolved.

D. Analysis

To understand the impact of the Court's decision in *Catholic Action*, it is necessary to analyze the decision in terms of when EIS preparation is required, when EIS disclosure is required, and when both or neither are required. In the *Catholic Action* situation, the Court held that military agencies are exempt from both EIS preparation and disclosure. The threshold question in a *Catholic Action* type of situation is whether the mere existence of the proposal can be admitted or denied without revealing properly classified information. If it cannot, then the question of NEPA compliance is "beyond judicial scrutiny."¹⁹⁴ No EIS need be prepared, and any lawsuits brought to force preparation of an EIS will be dismissed.

The number of actual *Catholic Action* situations—where even

190. 454 U.S. at 148.

191. *Id.*

192. *Id.*

193. *Id.* at 150.

194. *Id.* at 146.

the existence of a project or activity cannot be disclosed—may not be very significant. In order to be so protected, the project must be one which is both secret and hidden from public view. Otherwise, the DOD could not claim that its existence could not be admitted or denied. Situations where the mere existence of a proposal is unknown are likely to be very rare.¹⁹⁵ In most major military endeavors, at least those likely to result in significant environmental effects, the action simply cannot be hidden from public view.¹⁹⁶ The proposal will either be disclosed in defense appropriations, will be the subject of public controversy, or will be so physically obvious that the DOD could not reasonably claim an inability to admit or deny its existence.¹⁹⁷ In these cases, NEPA requires that an EIS be *prepared* even though it touches on military secrets. When nonclassified information is segregable from classified materials, it must be disclosed.¹⁹⁸

In those rare cases in which an agency's compliance with NEPA is "beyond judicial scrutiny," the *Catholic Action* decision does not clearly indicate when an "internal EIS," one prepared but not disclosed,¹⁹⁹ is required. As the concurrence in *Catholic Action* noted, Justice Rehnquist "rather obliquely" stated that if the Navy *proposes* to store nuclear weapons, both DOD regulations and NEPA require the preparation of an "internal EIS."²⁰⁰ Where even the existence of a project or activity is secret, it will be deemed to be "contemplated," not "proposed," and even an internal EIS need not be prepared. As a practical matter, of

195. Comment, *Nuclear Weapons and Secret Impact Statements*, 12 ENVTL. L. REP. (ENVTL. L. INST.) 10,007, 10,011 (1982).

196. *Id.*

197. *Id.*

198. 40 C.F.R. § 1507.3(c) (1981). This CEQ regulation provides that EIS's be organized so that unclassified portions can be made available to the public.

199. The Court may not have ordered the preparation of an internal EIS in this case because of the nature of the circuit court's holding. Perhaps if the Ninth Circuit had not invented a *hypothetical* EIS, and had instead confined its holding to the statutory provisions of NEPA, the Supreme Court would have ruled differently. Justice Rehnquist concluded that the hypothetical EIS was "a creature of judicial cloth, not legislative cloth," 454 U.S. at 141, and not mandated by NEPA since such a requirement "departed from the express intent of Congress manifested by the explicit language in Section 102(2)(C)." 454 U.S. at 144. If the Ninth Circuit had required the preparation of an EIS for internal use only, the Supreme Court might have affirmed the decision. This decision would still have failed to provide for any mechanism for enforcing the requirement of EIS preparation or for ensuring that the Navy had in fact considered environmental factors in its decisionmaking. It would, however, have prevented a total circumvention of NEPA requirements in this case.

200. 454 U.S. at 147.

course, an "internal EIS" screens out the public from the NEPA process altogether. Further, lawsuits alleging the failure to prepare an EIS would apparently be dismissed as "beyond judicial scrutiny." The utility of an internal EIS requirement, therefore, is quite limited.

Even though *Catholic Action* does not necessarily sanction a broad, national security exemption from NEPA,²⁰¹ the decision creates a unique dilemma. In *Catholic Action*, the Navy's action can never be viewed as a "proposal" and thus trigger the need for an EIS because the Navy need not ever admit the actual storage of nuclear weapons at the West Loch site. Therefore, the Navy would never be required to prepare an EIS, even if nuclear weapons were stored there in the future. The basic premise of the contemplation/proposal distinction, however, is that an EIS will be required when a proposal is actually made.²⁰² Under the *Catholic Action* decision, however, the Navy could actually store nuclear weapons at West Loch without ever having to prepare an EIS, because the action would never even rise to the level of a proposal. Justice Rehnquist applied the contemplation/proposal distinction in a context quite different from the types of situations to which the distinction had previously been applied.²⁰³ The distinction was created to address the situation in which contemplated actions do not result in actual proposals.²⁰⁴ To require an EIS for every contemplated action would lead to unnecessary EIS's and impose an undue burden on federal agencies.²⁰⁵ Justice Rehnquist seized on this distinction and stretched it in order to apply it to the *Catholic Action* situation, even though it was clear

201. A district court in California, however, relying exclusively on the *Catholic Action* decision, recently refused to order the Navy to prepare an EIS for a nuclear capable weapons storage facility in Southern California. In *Laine v. Weinberger*, 541 F. Supp. 599 (C.D. Cal. 1982), the court found *Catholic Action* to be absolutely controlling with respect to nuclear weapons. In that case, as in *Catholic Action*, a group of neighborhood citizens concerned about the possible presence of nuclear weapons at Seal Beach Weapons Station sought an injunction to stop the storage of nuclear weapons there. The plaintiffs, however, were unable to establish that the Navy had proposed to store nuclear weapons there, and thus, the court found, the EIS preparation requirement was not triggered.

202. Justice Rehnquist had found that "if the Navy proposes to store nuclear weapons at West Loch, the DOD's regulations can fairly be read to require that an EIS be prepared solely for internal purposes." 454 U.S. at 146. Justice Blackmun, in his concurrence, echoed this finding, stating that, "in fact, the DOD regulations explicitly declare that the fact that a proposed action is of a classified nature does not relieve the proponent of the action from complying with NEPA." 454 U.S. at 147.

203. *See supra* note 182.

204. *Id.*

205. *Id.*

that the Navy, by actually building nuclear weapon storage facilities on its site, had gone well beyond the contemplation stage of its decision. The distinction was originally intended to prevent unnecessary EIS's; it was not intended to be used as a shield to prevent preparation and disclosure.

The effective holding of *Catholic Action* is that, where FOIA permits the existence of an agency's actions or even an entire project to be kept secret, an EIS is not required, even for internal agency use. The action can occur without consideration or disclosure of environmental factors. Given the potential hazards of storage and handling of nuclear weapons described above,²⁰⁶ allowing an agency to take such action without even prior consideration of its potential environmental consequences may seriously undermine the goals of NEPA. This may, in fact, be the result desired by Congress when it enacted NEPA. In striking a balance between environmental disclosure and military secrecy in favor of secrecy and nondisclosure, however, the Court in *Catholic Action* stretched the contemplated/proposed judicially created exemption to a point that the distinction is now without meaning. Activities and projects remain "contemplated" for however long the military decides to keep their existence secret—even though it had been conceded by the military that such activities might be carried out.

Further, exactly what Congress did intend when it enacted NEPA is unclear, and the Court may have granted more deference to the military than intended by Congress. The Supreme Court relied on FOIA Exemption 1 in holding that the Navy need not prepare an EIS, noting that NEPA's public disclosure requirements are expressly governed by FOIA.²⁰⁷ Therefore, the Court reasoned, Congress intended that the public's interest in ensuring that federal agencies comply with NEPA must give way to the government's need to preserve military secrets.²⁰⁸ It is unclear, however, whether NEPA's reference to FOIA was meant to inhibit disclosure in Exemption 1 situations or was intended primarily to reinforce NEPA's mandate of public disclosure.

The CEQ, the agency created by NEPA to set out guidelines and regulations for agency compliance with NEPA, promulgated a regulation in 1978 which suggests that FOIA inhibits the disclo-

206. See *supra* text at notes 10-31.

207. 454 U.S. at 145.

208. *Id.*

sure requirement of NEPA. The regulation permits agencies to safeguard, and restrict from public dissemination, proposals in accordance with the agencies' own regulations pertaining to classified information.²⁰⁹ The regulation allows such documents to be organized in such a manner as to prevent disclosure of classified portions, but make unclassified portions available to the public.²¹⁰ Therefore, CEQ regulations uphold an agency's freedom to set out its own criteria regarding classification and disclosure, and essentially promulgate its own exceptions to the disclosure requirement of NEPA. Thus, the CEQ recognizes that FOIA Exemption 1 operates to inhibit the disclosure requirement of NEPA in certain situations.

It could be persuasively argued, however, that NEPA's reference to FOIA was intended primarily to reinforce NEPA's public disclosure mandate.²¹¹ Proponents of this argument could point out that the purpose of FOIA is to clarify and protect the right of the public to information.²¹² It could be argued that the use of the phrase "as provided by" indicates that Congress intended that FOIA buttress NEPA's disclosure mandate. The Supreme Court in *Catholic Action*, however, noted that NEPA's public disclosure requirement is "governed by"²¹³ and "subject to"²¹⁴ the provisions of FOIA, implying that Congress intended the FOIA to be an affirmative basis for *nondisclosure*.

When a federal agency proposes an action that, in the words of NEPA, "significantly affects the quality of the human environment,"²¹⁵ but is arguably exempt from NEPA's requirements by virtue of FOIA Exemption 1, the goal of NEPA to ensure that environmental impacts are an integral part of agency decision making might be seriously undermined. In attempting to resolve the conflict between NEPA disclosure and military secrets, the Court in *Catholic Action* struck a balance that apparently favors the military. In light of the language of NEPA and FOIA Exemption 1, and the discretion granted to agencies in classifying information, perhaps the Court was bound to decide the issue in this

209. 40 U.S.C. § 1507.4(c).

210. *Id.*

211. Tuoni, *supra* note 94. The author evaluates both NEPA and FOIA as disclosure statutes.

212. 112 CONG. REC. 13,641 (1966) (statement of Cong. Moss).

213. 454 U.S. at 145.

214. *Id.* at 143.

215. 42 U.S.C. § 4332(2)(C) (1976 & Supp. V 1981).

way. Nevertheless, under the current system, the military will be able to avoid disclosing information about many proposals that pose threats to surrounding land and people. Allowing the military such unfettered discretion in the past has resulted in abuses of its power to keep secrets from the public.²¹⁶ Such abuse was evident with the publication of the Pentagon Papers in 1972.²¹⁷ Further, under the *Catholic Action* decision, this discretion has been broadened significantly. Because an EIS need not even be prepared if the military decides that it wishes to never confirm the existence of a project, the military, in essence, has complete control over whether the potential environmental consequences of its activities will be subject to public scrutiny. While the need to protect military secrets such as the placement of nuclear missiles can not be disputed, where the military has acknowledged that certain activities might be taking place—such as when it states publicly that a weapons storage site under construction is “nuclear capable”²¹⁸—the threat to national security from public examination of the potential environmental threat which would arise *if* nuclear weapons were stored at that site is not apparent. The Supreme Court rejected the circuit court’s holding that such a “hypothetical EIS” was required not because it contravened the military’s statutory authority under NEPA to protect military secrets, however, but because the hypothetical EIS was “a creature of judicial cloth, not legislative cloth.”²¹⁹

Rather than settling the conflict between environmental disclosure and military secrecy, the *Catholic Action* decision served to highlight the problems which arose from Congress’s wholesale inclusion of FOIA within NEPA, without deliberate consideration of when the military should have unfettered discretion over environmental disclosure decisions. Given the military’s broad discretion over environmental disclosure, the potential for abuse of this discretion, and the severe environmental harm which, in all likelihood, will continue to arise from military activities, revision of the current system of environmental disclosure of military activities may be warranted.

216. Morton Halperin cites the Pentagon Papers, the secret bombing of Cambodia in 1969-70 and the secret American intervention in Angola in 1975 as examples of this abuse. See M. HALPERIN, *supra* note 73, at 5-24 for a discussion of these episodes.

217. See M. HALPERIN, *supra* note 73, at 5-14.

218. 454 U.S. at 141.

219. *Id.*

E. Proposals to Resolve the Conflict Between Environmental Disclosure and Military Secrecy

NEPA's goal of public disclosure could not be satisfied in *Catholic Action* because to do so would have violated the provisions of FOIA. Therefore, changes may be needed in order to achieve the basic policy behind NEPA that all federal agencies incorporate environmental factors into their decision making, to prevent abuse of executive discretion, and to ensure adequate disclosure while still protecting military secrets.

Under the present classification system, the right to classify information has been delegated to a very large number of officials in all federal agencies.²²⁰ This system has permitted and encouraged the withholding of vast amounts of information from the public.²²¹ The threat to national security posed by the release of some of this information is questionable, at best. Executive Order No. 12356 contains no clear mandate for disclosure of any specific kind of information. Rather, the order grants almost complete discretion to the military in establishing classification guidelines. Congress should consider enacting standards for these guidelines. As part of this system, Congress should require the preparation of an EIS where the military has conceded the possibility that environmentally hazardous activities will be undertaken. In addition, where a legitimate threat to national security would not be posed, the disclosure of an EIS should be required. This would provide maximum disclosure of potential environmental threats while still protecting national security secrets, and would limit the use of the contemplated/proposed distinction to situations where the distinction can reasonably be made. The system should be established by legislation, thereby subject to legislative debate, rather than by executive order, so that clear, specific, and balanced criteria for disclosure and secrecy are enacted.²²²

In addition, where no environmental disclosure is required for reasons of national security, Congress should consider amending NEPA to require that an EIS still be *prepared*. This would insure that at least one goal of NEPA—to inject environmental considerations into agency decision making—will be satisfied. Addition-

220. M. HALPERIN, *supra* note 73, at 215. Original classification authority may be exercised by the President; agency heads and officials designated by the President in the Federal Register, and officials delegated this authority pursuant to Exec. Order No. 12356, 47 Fed. Reg. 14,874 (1982).

221. M. HALPERIN, *supra* note 73, at 215.

222. M. HALPERIN, *supra* note 73, at 57. *See id.* at 55-85 for a detailed discussion of proposals for a more open classification system.

ally, some type of internal review mechanism, perhaps by the CEQ, to enjoin military activities until both NEPA's procedural and substantive requirements have been met, would ensure that military agencies consider the environmental impact of their actions when such actions are not publicly disclosable. Through its EIS preparation and disclosure requirements, NEPA provides for outside review of the actions of federal agencies. Where public involvement is not possible in the EIS review process, an internal review could insure that the EIS adequately evaluates the environmental threat posed by the military activities in question.

The above reforms—the enactment of statutory standards for classification; requiring a “hypothetical EIS” where appropriate; requiring an internal EIS where public disclosure is prohibited; and providing for an internal, objective review of the internal EIS—are offered as examples of ways in which NEPA's dual policies of promoting agency consideration of environmental hazards and providing for public consideration of those hazards can be advanced without needlessly sacrificing necessary protection of military secrets. The examination contained herein reveals that there are no easy answers to resolving the conflict between military secrecy and environmental disclosure. Rather, *Catholic Action* indicates that Congress should now undertake a thorough analysis of the policy issues raised by the application of NEPA to military activities.

V. Conclusion

The Supreme Court's decision in *Catholic Action* is the Court's most recent attempt to resolve the conflict between NEPA's disclosure mandate and military secrecy. In holding that in constructing weapons storage sites the military was exempt from NEPA requirements, the Court relied on two factors: the distinction between a project which is “contemplated” and one which is “proposed”; and FOIA Exemption 1, which provides an exemption under which the military may completely avoid environmental disclosure under NEPA. FOIA Exemption for national security is undoubtedly necessary to protect the military's need for secrecy in many instances. The classification scheme embodied in the exemption, however, allows the military such unfettered discretion with respect to what information may be classified as secret, that the unwarranted frustration of NEPA's goals may result. As suggested, a new classification system and review mechanism may be needed to curb military abuse in this area and to close this loophole.