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COMMENT

AMBER WAVES OF GRAIN: ARE NATIONAL SECURITY INTERESTS DESTROYING THE LAND THEY FIGHT TO PRESERVE?

T. Jaren Stanton*

The National Environmental Policy Act of 1969 (NEPA) requires government agencies to consider the potential environmental impact of significant actions prior to their undertaking and to publically disclose the results of those deliberations. In contrast to other environmental legislation, Congress did not include a national security exemption in NEPA that would allow agencies engaged in national security efforts to bypass the consideration and disclosure requirements. Since NEPA's passage, courts have struggled to balance the requirements of NEPA with the need to protect national security secrets. In NEPA compliance cases, a number of courts have sided with the government although the agencies failed to adhere to the procedures mandated by NEPA. As a result, scholars have claimed the courts have created a national security exemption that the legislature never intended. This concern heightened when the government increased national security efforts after the terrorist attacks on September 11, 2001.

Various proposals have been suggested to correct this perceived threat to NEPA. These include in-camera review of government

*Antonin Scalia Law School, George Mason University, J.D. Candidate, May 2017; University of Utah, B.S., 2013. A special thanks to my wonderful mother for all the time she spent editing this Comment and my supportive wife.

environmental documents, the creation of specialized courts to hear security sensitive NEPA compliance challenges, and limitations on the public disclosure requirement. However, such changes are unnecessary. A sampling of recent NEPA compliance cases involving national security illustrates that while courts work to protect the disclosure of national security secrets, no real threat to the purpose of NEPA exists.

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INTRODUCTION

In the ten years following the September 11, 2001 terrorist attacks (“9/11”), the United States spent nearly \$8 trillion on national security, almost double the amount spent for the same purpose in the preceding decade.¹ The cost of the Iraq and Afghanistan conflicts totaled \$1.36 trillion,² the newly created Department of Homeland Security received \$791 billion,³ and billions more were spent on government facilities dedicated to keeping America safe,⁴ including the “Country’s Biggest Spy Center,” a newly built National Security Agency (“NSA”) data center in the heart of Utah’s Wasatch Front Region.⁵ The \$2 billion data center, completed in 2013, has the capacity to pump 1.7 million gallons of water per day to cool massive data servers.⁶ Although this type of water usage is common for data storage facilities,⁷ it is no small matter for Utah, a desert state where residents are extremely cognizant of water usage.⁸ When Salt Lake

¹ Chris Hellman, *Has the Pentagon’s Post-9/11 Spending Spree Made Us Safer?*, THE NATION (Aug. 16, 2011), <http://www.thenation.com/article/has-pentagons-post-911-spending-spree-made-us-safer>.

² *Id.*

³ Ned Resnikoff, ‘Homeland Security’ has received \$791 billion since 9/11, MSNBC (Sept. 13, 2013, 8:47 AM), <http://www.msnbc.com/the-ed-show/homeland-security-has-received-791-billion>.

⁴ James Bamford, *The NSA Is Building the Country’s Biggest Spy Center (Watch What You Say)*, WIRED MAG. (Mar. 15, 2012, 7:24 PM), https://www.wired.com/2012/03/ff_nsadatacenter (explaining the setup of the NSA’s data network and the money that has been spent on new or renovated buildings to complete the network).

⁵ *Id.*

⁶ *Id.*

⁷ Drew FitzGerald, *Data Centers and Hidden Water Use*, WALL ST. J. (June 24, 2015, 3:20 PM), <http://www.wsj.com/articles/SB10007111583511843695404581067903126039290> (explaining how water is used to cool large data centers and the growing problem for centers in California and other western states because of water shortage due to drought).

⁸ Amy Joi O’Donoghue, *Water world: Can a solution to Utah’s thirst be found?*, THE DESERET NEWS (Dec. 15, 2014, 3:45 PM), <http://www.deseretnews.com/article>

Tribune reporter Nate Carlisle filed a request for local records relating to the data center, he was surprised that the NSA had redacted data about water usage at the facility.⁹ The NSA claimed that the redactions were for national security purposes because, “[a]rmed with [the information regarding the facility’s water usage], one could then deduce how much intelligence NSA is collecting and maintaining.”¹⁰ However, after an appeal, the Utah State Records Committee ruled that the NSA’s data center water usage should not be classified, even post-9/11, and ordered the records released.¹¹

For years, government agencies like the NSA have sought to withhold information from the public about government facilities and actions in the name of national security.¹² Nevertheless, the National Environmental Policy Act (“NEPA”), among other laws and regulations, requires disclosures before the government takes significant action.¹³ While there have been obvious changes to the

/865617766/Water-world-Can-a-solution-to-Utahs-thirst-be-found.html?pg=all (explaining how questions about the uncertain future of water in Utah have driven numerous groups, including the state, to seek for solutions to the coming problems).

⁹ Robert McMillan, *Why Does the NSA Want to Keep Its Water Usage A Secret?*, WIRED MAG. (Mar. 19, 2014, 6:30 AM), <http://www.wired.com/2014/03/nsa-water>.

¹⁰ Letter from David Sherman, Associate Director for Policy and Records, National Security Administration, to Bluffdale City, Utah (undated) (on file with the author).

¹¹ McMillan, *supra* note 9.

¹² See, e.g., *Weinberger v. Catholic Action of Haw./Peace Educ. Project*, 454 U.S. 139 (1981).

¹³ 42 U.S.C. § 102(2)(C) (2012). Significantly [or significant] as used in NEPA requires considerations of both context and intensity:

(a) Context. This means that the significance of an action must be analyzed in several contexts such as society as a whole (human, national), the affected region, the affected interests, and the locality. Significance varies with the setting of the proposed action. For instance, in the case of a site-specific action, significance would usually depend upon the effects in the locale rather than in the world as a whole. Both short- and long-term effects are relevant.

(b) Intensity. This refers to the severity of impact. Responsible officials must bear in mind that more than one agency may make decisions about partial aspects of a major action. The following should be considered in evaluating intensity:

American way of life in the aftermath of 9/11, including a limitation on freedoms in furtherance of security,¹⁴ authors of recent scholarly

1. Impacts that may be both beneficial and adverse. A significant effect may exist even if the federal agency believes that on balance the effect will be beneficial.
2. The degree to which the proposed action affects public health or safety.
3. Unique characteristics of the geographic area such as proximity to historic or cultural resources, park lands, prime farmlands, wetlands, wild and scenic rivers, or ecologically critical areas.
4. The degree to which the effects on the quality of the human environment are likely to be highly controversial.
5. The degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks.
6. The degree to which the action may establish a precedent for future actions with significant effects or represents a decision in principle about a future consideration.
7. Whether the action is related to other actions with individually insignificant but cumulatively significant impacts. Significance exists if it is reasonable to anticipate a cumulatively significant impact on the environment. Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts.
8. The degree to which the action may adversely affect districts, sites, highways, structures, or objects listed in or eligible for listing in the National Register of Historic Places or may cause loss or destruction of significant scientific, cultural, or historical resources.
9. The degree to which the action may adversely affect an endangered or threatened species or its habitat that has been determined to be critical under the Endangered Species Act of 1973.
10. Whether the action threatens a violation of Federal, State, or local law or requirements imposed for the protection of the environment.

40 C.F.R. § 1508.27 (2012).

¹⁴ See, e.g., The Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 ("USA PATRIOT Act"), Pub. L. No. 107-56, 115 Stat. 272 (2001).

articles contend that not only individual freedoms, but also the natural environment, are being compromised.¹⁵ These authors believe that courts have erred by allowing agencies to limit the availability of documents required under NEPA in the name of national security.¹⁶ While some of these documents and the actions they contemplate have negligible impact, such as those detailing actual water usage of a data storage facility, other environmental documents required under NEPA contain much more serious information relating to proposals for weapon storage, including nuclear weapons, which could have significant impacts on the public and the environment.¹⁷ Each of these scholarly authors proposes ways to simultaneously protect both public interest and national security.¹⁸ However, a study of recent cases involving alleged violations of NEPA in the interest of national security show that the judiciary has not merely deferred to agencies' assertions of compliance with NEPA regulations, but has instead subjected the decisions to thorough judicial review while still protecting the interests of national security.¹⁹ Accordingly, this Comment argues that the judiciary has already ensured that the goals of NEPA are accomplished, and that protection of the natural

¹⁵ E.g., Major Charles J. Gartland, *At War and Peace with the National Environmental Policy Act: When Political Questions and the Environment Collide*, 68 A.F. L. REV. 27 (2012).

¹⁶ William Mendelsohn, Comment, *In Camera Review of Classified Environmental Impact Statements: A Threatened Opportunity?*, 23 B.C. ENVTL. AFF. L. REV. 679 (1996); Stephen Dycus, *NEPA Secrets*, 2 N.Y.U. ENVTL. L.J. 300 (1993).

¹⁷ See, e.g., *Catholic Action*, 454 U.S. at 141; *Ground Zero Ctr. for Nonviolent Action v. U.S. Dep't of the Navy*, No. 12-cv-5537, 2014 U.S. Dist. LEXIS 2752, at *4-5 (W.D. Wash. 2014).

¹⁸ Amanda Mott, Comment, *Should the Threat of a Terrorist Attack on a Nuclear Power Plant Be Considered Under NEPA Review?*, 12 UCLA J. INT'L L. & FOREIGN AFF. 333, 356-57 (2007); Mendelsohn, *supra* note 16, at 695; Dycus, *supra* note 16, at 310.

¹⁹ *Ground Zero*, 2014 U.S. Dist. LEXIS 2752, at *29-37 (examining the Navy's unredacted NEPA documents in-camera to ensure compliance).

environment does not require the changes to NEPA proposed by recent scholarly articles.

Part I of this Comment contains a brief history of NEPA and explains the requirements that the Act imposes on government agencies. Part II examines national security exemptions to other environmental laws and how courts have applied the national security exemption in the Freedom of Information Act (“FOIA”) to NEPA challenges. Part III examines the proposals various authors have made to combat a perceived threat to NEPA. Finally, Part IV contends that no threat to NEPA exists and that courts are already employing the proposed changes to NEPA without congressional intervention. This Comment further acknowledges that the cases cited are possibly the best examples of agencies working with the courts to reach a viable solution to alleged NEPA violations. Although such coordination is not always present and sensitive national security issues are at stake, it is within the existing power of the judicial branch to require agencies to conform with NEPA regulations.

I. THE NATIONAL ENVIRONMENTAL POLICY ACT

On January 28, 1969, more than three million gallons of crude oil spilled into the Santa Barbara Channel off the coast of Southern California.²⁰ The devastation of “oil-soaked birds” and “beaches coated with thick sludge”²¹ captured national attention and became a catalyst for the passage of the National Environmental Policy Act of 1969.²² Congress intended the Act “to foster and promote the general welfare, to create and maintain conditions under which man and

²⁰ Miles Corwin, *The Oil Spill Heard ‘Round the Country*, L. A. TIMES (Jan. 28, 1989), http://articles.latimes.com/1989-01-28/news/mn-1162_1_oil-spill.

²¹ *Id.*

²² National Environmental Policy Act of 1969, 42 U.S.C. § 4321 (2012); *see also* Corwin, *supra* note 20 (explaining that the oil spill created ‘the spark’ that led to the passage of NEPA in addition to similar state legislation in California and doubts about the safety of oil drilling on the environment).

nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.”²³ To accomplish this goal, section 102(2)(C)²⁴ of NEPA requires that agencies perform a series of procedural steps to ensure that they take a “hard look” at the environmental impact of their

²³ National Environmental Policy Act of 1969 § 101(a), 42 U.S.C. § 4321 (2012).

²⁴ 42 U.S.C. § 4332 (2012).

All agencies of the Federal Government shall --

(A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decision making which may have an impact on man's environment;

(B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by title II of this Act, which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decision making along with economic and technical considerations;

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on --

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided

should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented. Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of title 5, United States Code, and shall accompany the proposal through the existing agency review processes;

proposed action.²⁵ NEPA covers a broad range of agency actions that significantly affect the quality of the human environment, including constructing roads and publicly-owned facilities.²⁶ Regardless of the specific action, agencies must document their considerations by preparing a detailed statement of the impacts of their proposed action before commencing the action.²⁷ The Supreme Court has stated that this documentation requirement is “the heart of NEPA.”²⁸

There are varying levels of environmental review, and the extent of review and documentation required is contingent on the perceived level of impact.²⁹ The Council on Environmental Quality (“CEQ”) offers guidance on the selection of the applicable level of analysis.³⁰ First, an agency prepares a Categorical Exclusion (“CATEX”) if they believe that the proposed action will not “individually or cumulatively have a significant effect on the human environment.”³¹ For instance, a CATEX may be sufficient for a federally funded project to repave an existing road, because the proposed action will not have any significant new effect on the environment. In most cases, however, an agency will complete an Environmental Assessment (“EA”) to determine the environmental impact of their proposed action.³² The EA may either result in a Finding of No Significant Impact (“FONSI”), allowing the project to

²⁵ *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989).

²⁶ *What is the National Environmental Policy Act?*, U.S. ENVTL. PROT. AGENCY, <https://www.epa.gov/nepa/what-national-environmental-policy-act> (last visited Aug. 14, 2016).

²⁷ *Id.*

²⁸ *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 757 (2004).

²⁹ *See National Environmental Policy Act Review Process*, U.S. ENVTL. PROT. AGENCY, <http://www2.epa.gov/nepa/national-environmental-policy-act-review-process> (last visited Oct. 16, 2016).

³⁰ COUNCIL ON ENVTL. QUALITY NEPA RULES, 40 C.F.R. § 1501.4 (2014) (explaining the criteria for determining which level of analysis and documentation is required).

³¹ 40 C.F.R. 1508.4; *see also* 40 C.F.R. § 1508.27 (defining significant as it relates to NEPA).

³² *National Environmental Policy Act Review Process*, *supra* note 29.

proceed without further analysis, or a determination that an Environmental Impact Statement (“EIS”) is required.³³ Courts

examine the EA with two purposes in mind: to determine whether it has adequately considered and elaborated the possible consequences of the proposed agency action when concluding that it will have no significant impact on the environment, and whether its determination that no EIS is required is a reasonable conclusion.³⁴

In an EIS, agencies consider the adverse effects of the project, ways to mitigate possible damage, possible alternatives, and even the implications of taking no action.³⁵ There are two purposes behind the EIS requirement: first, to “provide decision makers with an environmental disclosure sufficiently detailed to aid in the substantive decision whether to proceed with a project in light of its environmental consequences,”³⁶ and second, to inform the public that the agency has considered the environmental impacts associated with the project.³⁷ Government agencies often accomplish these goals by working with stakeholders throughout the NEPA process, and agencies are required to publish a draft EIS for a 45-day comment period.³⁸ At the conclusion of the comment period, agencies release a final EIS, and NEPA requires that it “shall be made available to the

³³ *Id.*

³⁴ *Ctr. for Biological Diversity v. NHTSA*, 538 F.3d 1172, 1215 (9th Cir. 2008).

³⁵ *See* 40 C.F.R. § 1502.14 (2014).

³⁶ *Trout Unlimited v. Morton*, 509 F.2d 1276, 1283 (9th Cir. 1974); *see also* *Weinberger v. Catholic Action of Haw./Peace Educ. Project*, 454 U.S. 139, 143 (1981).

³⁷ *Catholic Action*, 454 U.S. at 143; *see also*, *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989) (stating that NEPA “ensures that the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts; it also guarantees that the relevant information will be made available to the larger audience that may also play a role in both the decision-making process and the implementation of that decision”).

³⁸ 40 C.F.R. § 1506.10 (2016); 40 C.F.R. § 1503.1(a)(4) (2016).

President, the Council on Environmental Quality and to the public.”³⁹ A final EIS is used to show that the decision makers have considered the implications of their proposed actions,⁴⁰ including responding to concerns raised by stakeholders during the comment period for the draft EIS.⁴¹ Nevertheless, an agency may proceed with environmentally harmful actions and still comply with NEPA, because NEPA does not mandate particular results; it “merely prohibits uninformed – rather than unwise – agency action.”⁴²

Both an agency’s decision about the required level of analysis and the results of the analysis are reviewable.⁴³ The Supreme Court has held that the section of NEPA that dictates the steps agencies must take in forming decisions is procedural,⁴⁴ and although Congress has granted agencies a wide breadth of discretion,⁴⁵ an agency’s decision making process is subject to judicial review under the Administrative Procedure Act.⁴⁶ Therefore, citizens with standing who feel that the NEPA process was not properly followed can sue the applicable

³⁹ 42 U.S.C. §4332 (2016).

⁴⁰ *Silva v. Lynn*, 482 F.2d 1282, 1284-85 (1st Cir. 1973). *See also Johnston v. Davis*, 698 F.2d 1088, 1091 (10th Cir. 1983); *Sierra Club v. U.S. Army Corps of Eng’rs*, 701 F.2d 1011, 1029 (2d Cir. 1983).

⁴¹ 40 C.F.R. § 1503.4(a) (2016).

⁴² *Robertson*, 490 U.S. at 350-51.

⁴³ *See e.g.*, *Sierra Club v. Van Antwerp*, 661 F.3d 1147, 1153-54 (D.C. Cir. 2011).

⁴⁴ *See Marsh v. Oregon Nat. Res. Council*, 109 S. Ct. 1851 (1989); *Strycker’s Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223 (1980); *Vermont Yankee Nuclear Power Corp. v. Nat. Res. Def. Council*, 435 U.S. 519, 558 (1978).

⁴⁵ *See Susannah T. French, Judicial Review of the Administrative Record in NEPA Litigation*, 81 CAL. L. REV. 929, 930 (1993) (explaining how “administrative agencies are presumed [by Congress] to have special knowledge in the fields that they regulate” and are generally given “significant authority and discretion to use their expertise to serve the broader public good”).

⁴⁶ 5 U.S.C. § 702 (2012).

agency,⁴⁷ and reviewing courts can enjoin a project if they concur with the plaintiffs.⁴⁸

Courts, however, have traditionally struggled when determining the proper scope of their judicial review and have been highly deferential to agency decisions. In general, courts must grant substantial deference to agency expertise and will defer to an agency's "reasoned decision based on the evaluation of the evidence."⁴⁹ Accordingly, when an agency conducts an environmental process and makes a determination based on their analysis of the facts, a reviewing court should only determine whether the decision was "arbitrary or capricious."⁵⁰ The Supreme Court explained this standard, stating that the reviewing court "must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error in judgment."⁵¹ Courts employ this level of deference by reviewing only the materials considered by the agency at the time the final decision was made.⁵²

While courts should not substitute their own judgment for that of the agency,⁵³ they must effectuate a balance that allows for

⁴⁷ *Id.* (stating "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof").

⁴⁸ See *Karlen*, 444 U.S. at 227-28 (quoting *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21 (1976)) ("Once an agency has made a decision subject to NEPA's procedural requirements, the only role for a court is to insure that the agency has considered the environmental consequences; it cannot interject itself within the area of discretion of the executive as to the choice of the action to be taken.") (internal quotation marks omitted).

⁴⁹ *Earth Island Inst. v. U.S. Forest Serv.*, 351 F.3d 1291, 1301 (9th Cir. 2003).

⁵⁰ 5 U.S.C. § 706(2)(A).

⁵¹ *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971).

⁵² See *French*, *supra* note 45, at 931 (explaining that courts have adopted the "Record Rule" which only allows for review of documents considered by the agency at the time of their final decision).

⁵³ *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

deference to agency expertise but ensures that the law is followed. Interested parties usually allege that the agency has not properly analyzed all relevant information or did not prepare a NEPA document.⁵⁴ Consequently, when an agency does not publish an environmental document, or restricts access to portions of that document for national security purposes, challengers are left in the dark, and must argue that they do not have enough information to understand the potential impacts of the agency's actions.⁵⁵ The problem intensifies when courts are likewise unable to determine whether an agency has followed the requirements of NEPA because they lack the clearance to be briefed regarding the full scope of the agency's actions or are not privy to classified portions of the agency's environmental documents.⁵⁶

II. EXEMPTIONS FOR NATIONAL SECURITY AND PAST LITIGATION

Although NEPA is not the only law enacted for the purpose of protecting the environment, it is the most well-known, and is commonly referred to as the Magna Carta of environmental laws.⁵⁷ Despite NEPA's importance in environmental law, since its passage more than thirty years ago, Congress has not enacted any significant changes to it, and it remains the only environmental Act without a

⁵⁴ See e.g., *Winter v. NRDC, Inc.* 555 U.S. 7, 16-17 (2008) (examining the plaintiff's contention that the Navy's actions violated NEPA).

⁵⁵ See e.g., *Ground Zero Ctr. for Nonviolent Action v. U.S. Dep't of the Navy*, No. 12-cv-5537, 2014 U.S. Dist. LEXIS 2752, at *10 (W.D. Wash. Jan. 8, 2014).

⁵⁶ See e.g., *Weinberger v. Catholic Action of Haw./Peace Educ. Project*, 454 U.S. 139, 146 (1981) (explaining why the Court would not require the Navy to prepare an EIS which considered the impact of nuclear weapons because the Navy was restricted by statute from disclosing to the Court if the site would be used for nuclear storage).

⁵⁷ Amanda Jahshan, *NEPA: The Magna Carta of Environmental Law*, SWITCHBOARD NAT'L RESOURCE DEF. COUNCIL STAFF BLOG: AMANDA JAHSHAN'S BLOG (July 26, 2013), http://switchboard.nrdc.org/blogs/ajahshan/nepa_the_magna_carta_of_enviro_1.html.

national security exception.⁵⁸ Consequently, in the wake of the 9/11 attacks, the Pentagon announced an initiative that included proposed amendments to several environmental statutes to allow for “proper training of American military forces and the development of new weapons” for national security purposes,⁵⁹ but did not request amendments to NEPA. Instead, the Pentagon sought to enact the desired changes while adhering to the current NEPA framework.⁶⁰

A. *National Security Exemptions in Environmental Regulations*

A number of environmental statutes do contain the written national security exception that NEPA lacks. First, the Endangered Species Act (“ESA”), passed in 1973, seeks to prevent the extinction of at-risk animals and plant species by protecting not only the animals and plants but also critical habitats.⁶¹ The U.S. Fish and Wildlife Service is charged with enforcing ESA and is given wide reach and power because of the geographical size of critical habitat in need of protection.⁶² The ESA requires federal agencies to ensure that their actions are not “likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or

⁵⁸ See e.g., 16 U.S.C. § 1536(j) (2012) (allowing the Secretary of Defense to grant an exception to Endangered Species Act for national security purposes).

⁵⁹ See Stephen Dycus, *Osama's Submarine: National Security and Environmental Protection After 9/11*, 30 WM. & MARY ENVTL. L. & POL'Y REV. 1, 2 (2005) (explaining that the DoD sought amendments to the “Clean Air Act, the Resource Conservation and Recovery Act, the Endangered Species Act, the Marine Mammal Protection Act, the Migratory Bird Treaty Act, the Superfund law, and perhaps even the Clean Water Act.”).

⁶⁰ See Migratory Bird Permits; Take of Migratory Birds by the Department of Defense, 69 Fed. Reg. 31,074, 31,079, 31,083-84 (Jun. 2, 2004) (stating “Department of Defense will use the NEPA process to determine whether any ongoing or proposed military readiness activity is likely to result in a significant adverse effect on the population of a migratory bird species of concern,” and also that the Interior Department determined that the proposed regulations would be “categorically excluded” from the extensive NEPA analysis).

⁶¹ The Endangered Species Act, 16 U.S.C. §§ 1531-1544 (2012).

⁶² *Id.*

adverse modification” of critical habitat.⁶³ However, ESA does allow the Secretary of Defense to grant an exemption to this requirement to any agency for the purpose of national security.⁶⁴ Such an exemption was granted in 1979 for the Grey Rocks Dam Project in Wyoming after the project had stalled due to the potential threat to whooping cranes.⁶⁵ Additionally, the National Defense Authorization Act for Fiscal Year 2004 amended ESA to limit the designation of military lands as critical habitat,⁶⁶ in an attempt to make it easier for the Department of Defense (“DoD”) to comply with environmental statutes.⁶⁷

Next, the Clean Air Act (“CAA”) regulates air emissions from stationary sources, such as factories, and mobile sources, like cars,⁶⁸ in order “to protect and enhance the quality of the Nation’s air . . . so as to promote public health and welfare.”⁶⁹ The CAA requires that federal agencies comply with federal, state, and local regulations regarding air quality.⁷⁰ Yet these regulations do not apply to “military

⁶³ 16 U.S.C. § 1536(a)(2) (1988).

⁶⁴ 16 U.S.C. § 1536(j) (1988) (“Exemption for national security reasons. Notwithstanding any other provision of this Act, the Committee shall grant an exemption for any agency action if the Secretary of Defense finds that such exemption is necessary for reasons of national security.”). The provision grants the Secretary an unqualified privilege.

⁶⁵ Col. E. G. Willard, Lt. Col. Tom Zimmerman & Lt. Col. Eric Bee, *Environmental Law and National Security: Can Existing Exemptions in Environmental Laws Preserve DoD Training and Operational Prerogatives without New Legislation?*, 54 A.F. L. REV. 65, 75 (2004) (explaining that after the national security exception was added, several projects were considered for exemption from the ESA while an exception was granted for the Grey Rocks Dam Project).

⁶⁶ National Defense Authorization Act for Fiscal Year 2004, Pub. L. No. 108-136, § 318, 117 Stat. 1392, 1433 (2003).

⁶⁷ Dycus, *supra* note 59 (“The [Act] amends six federal environmental statutes to make it easier for DoD to comply with the statutes”).

⁶⁸ The Clean Air Act, 42 U.S.C. § 7401 et seq. (2012).

⁶⁹ 42 U.S.C. § 7401(b)(1).

⁷⁰ 42 U.S.C. § 7418(a).

tactical vehicles,”⁷¹ primarily because the DoD was concerned about the compliance cost of the regulations when they were enacted.⁷² Further, the President may exempt any stationary source for national security purposes for a period of two years.⁷³

Finally, the Marine Mammal Protection Act (“MMPA”), enacted on October 21, 1972 to protect all marine mammals,⁷⁴ was amended by the 108th Congress to add a broad national defense exemption.⁷⁵ Specifically, the amendment changed the definition of “harassment” of marine mammals, as applied to military readiness activities, to allow the Navy to conduct sonar testing.⁷⁶ This exemption was the subject of the 2008 Supreme Court case *Winter v. National Resources Defense Council*, where the Court overturned an injunction against the Navy’s use of sonar off the coast of Southern California.⁷⁷

⁷¹ 42 U.S.C. § 7418(c). Although tactical vehicles are not defined in the statute, the DoD has defined non-tactical vehicles as “any commercial motor vehicle, trailer, material handling or engineering equipment that carries passengers or cargo acquired for administrative, direct mission, or operational support of military functions.” All DoD sedans, station wagons, carryalls, vans, and buses are considered “non-tactical.” U.S. DEP’T OF DEF., INSTR. 4500.36, ACQUISITION, MANAGEMENT, AND USE OF NON-TACTICAL VEHICLES (NTVs) glossary, part 2 (11 Dec. 2012).

⁷² 20 Env’t Rep. (BNA) 1932 (Apr. 6, 1990).

⁷³ 42 U.S.C. § 7412(i)(4) (“The President may exempt any stationary source from compliance with any standard or limitation under this section for a period of not more than 2 years if the President determines that the technology to implement such standard is not available and that it is in the national security interests of the United States to do so”).

⁷⁴ Marine Mammal Protection Act, 16 U.S.C. § 1361 et seq. (2012).

⁷⁵ 16 U.S.C. §§ 1362, 1371 (2012); National Defense Authorization Act for Fiscal Year 2004, Pub. L. No. 108-136, 117 Stat. 1392, 1433-35 (2003); see also Julie G. Yap, Note, *Just Keep Swimming- Guiding Environmental Stewardship Out of the Riptide of National Security*, 73 FORDHAM L. REV. 1289, 1292-93 (2004).

⁷⁶ 16 U.S.C. § 1362 (2012).

⁷⁷ *Winter v. NRDC, Inc.*, 555 U.S. 7, 42-43 (2008).

B. *National Security and NEPA*

Rather than make an exemption for national security when enacting NEPA,⁷⁸ Congress provided that all documents must be released unless exempted by FOIA.⁷⁹ Congress passed FOIA in 1976, granting the public a legal right to access federal government records from any agency.⁸⁰ Nevertheless, if the documents sought by the public (including an EIS) contain classified information, FOIA allows the agency to withhold the information in the interest of national security.⁸¹ Exemption 1, the primary FOIA exemption for national security, allows an agency to withhold documents only when specifically authorized by an executive order in the interest of national defense.⁸² Exemption 3, which allows agencies to withhold documents “specifically exempted from disclosure by statute,” can also apply to national security matters.⁸³ Therefore, it has been left to the courts to decide whether one of the FOIA exemptions is applicable when an agency argues against disclosure of an EIS to the public based on its classified nature.

⁷⁸ There is no explicit national security exemption in NEPA, but in *Winter v. NRDC, Inc.*, Justice Roberts held “any such injury is outweighed by the public interest and the Navy’s interest in effective, realistic training of its sailors.” 555 U.S. 7 at 23 (2008). Additionally, the Council on Environmental Quality has authority to issue exemptions in emergency situations. See 40 C.F.R. § 1506.11 (2013).

⁷⁹ See 42 U.S.C. § 4332(2)(C) (2012), which explains that an agency should make an EIS available to the public except as “as provided by [FOIA].”

⁸⁰ *What is FOIA?*, U.S. DEP’T OF JUSTICE, <http://www.foia.gov/about.html> (last visited Nov. 8, 2016).

⁸¹ 5 U.S.C. § 552(b) (2012). Although there are nine exemptions to disclosure under FOIA, the following specifically relate to national security.

⁸² 5 U.S.C. § 552(b)(1) (2012).

⁸³ See *Weinberger v. Catholic Action of Haw./Peace Educ. Project*, 454 U.S. 139, 141 (1981), (explaining that Exemption 3 might apply in the case because distributing an EIS would conflict with the Atomic Energy Act, 42 U.S.C. § 2014(y), but conducting the analysis was not needed because of the application of Exemption 1).

C. *NEPA Litigation*

Immediately after the passage of NEPA, courts began to consider the conflict between NEPA and national security.⁸⁴ However, the Supreme Court did not decide the most significant case on the issue, *Weinberger v. Catholic Action of Hawaii/Peace Education Project*, until 14 years after the enactment of NEPA in 1981, when it considered the application of a FOIA exemption to NEPA in the context of building a naval weapons storage facility.⁸⁵ Prior to the construction of a facility for the storage of ammunition and weapons, the Navy conducted an environmental impact assessment (“EIA”),⁸⁶ similar to an EA, and concluded that there would be no significant environmental impact, so an EIS was not prepared.⁸⁷ Although the missile magazines constructed at the facility were capable of storing nuclear weapons, their potential environmental impacts were not covered in the EIA, and for “national security reasons, the Navy’s regulations forbid it either to admit or to deny that nuclear weapons [were] actually stored at [the facility].”⁸⁸

The *Weinberger* plaintiff argued that, in the EIA, the Navy had ignored the increased risk of a nuclear accident should a plane from one of the nearby airports crash into the site.⁸⁹ Even though the district

⁸⁴ See e.g., *McQueary v. Laird*, 449 F.2d 608, 612 (10th Cir. 1971). Here, the court acknowledged that federal agencies are not exempt from the disclosure requirements of NEPA, but stated that “[p]ublic disclosure relating to military-defense facilities creates serious problems involving national security.” *Id.* Thus, the court implied that due to national security concerns, agencies may be exempt from the requirements of NEPA and would not enjoin the military’s action. *Id.*

⁸⁵ *Catholic Action*, 454 U.S. at 139.

⁸⁶ A preliminary document used to “[b]riefly provide sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact.” Council on Environmental Quality Terminology and Index, 40 C.F.R. § 1508.9 (2012).

⁸⁷ *Catholic Action*, 454 U.S. at 141.

⁸⁸ *Id.* at 146.

⁸⁹ *Id.* at 142.

court agreed with the plaintiffs that the Navy had taken a significant action within the meaning of NEPA,⁹⁰ the court found that an EIS would conflict with a number of national security provisions.⁹¹ The court of appeals subsequently reversed the district court's holding, finding that, without revealing exact details, the Navy could provide a hypothetical EIS that would generally assess the impact of nuclear storage at the facility without conceding whether or not such items were stored there.⁹²

On appeal, the Supreme Court, however, did not feel that Congress intended the creation of a hypothetical EIS when it enacted NEPA.⁹³ Rather, the Court found that section 102(2)(C) only required that federal agencies complete the NEPA process and prepare the applicable documentation "to the fullest extent possible."⁹⁴ Referencing the text of NEPA, which states that a document resulting from the NEPA process "shall be made available to the President, the Council on Environmental Quality and to the public, *as provided by [FOIA]*,"⁹⁵ the Court found that the Navy was potentially protected from disclosing the requested information by two FOIA exemptions.⁹⁶

⁹⁰ Although not directly stated by the court, it can be inferred that they were not satisfied with the Navy's preparation of an EIA and would have required an EIS if not for their later finding. See *Catholic Action of Haw./Peace Educ. Project v. Brown*, 468 F. Supp. 190, 193 (D. Haw. 1979). See also *Catholic Action of Haw./Peace Educ. Project v. Brown*, 643 F.2d 569, 572 (9th Cir. 1980) (holding that NEPA required the preparation of an EIS in the case).

⁹¹ *Catholic Action*, 468 F. Supp. at 193 (stating that preparing an EIS would "conflict with security data provisions of the Atomic Energy Act, 42 U.S.C. § 2014(y); with security classification guides prepared jointly by the DoD and the Department of Energy, CG-W-4, JOINT ERDA/DOD NUCLEAR WEAPONS CLASSIFICATION GUIDE; and with United States Navy implementation of the joint guide, SWOP 55-1, NAVY SECURITY CLASSIFICATION GUIDE FOR NUCLEAR WEAPONS").

⁹² *Catholic Action*, 643 F.2d at 572.

⁹³ *Catholic Action*, 454 U.S. at 142.

⁹⁴ *Id.*; 42 U.S.C. § 4332(2)(C) (2012).

⁹⁵ 42 U.S.C. § 4332(2)(C) (2012)(emphasis added).

⁹⁶ *Catholic Action*, 454 U.S. at 144.

The Court found that Exemption 3,⁹⁷ which authorizes the government to withhold documents specifically exempted from disclosure by statute, could apply because of the Atomic Energy Act,⁹⁸ but declined to fully consider the question because of the apparent applicability of Exemption 1 to the case.⁹⁹ Exemption 1 prohibits disclosure of documents that are “(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order.”¹⁰⁰ The Court held that Exemption 1 applied and that the Navy was free from the obligation to disclose an EIS because “[v]irtually all information relating to the storage of nuclear weapons is classified.”¹⁰¹

Ultimately, the Court determined that the Navy did not necessarily need to prepare such an internal EIS in this case, because NEPA only requires an EIS for proposed actions, not those that are merely contemplated.¹⁰² While the Court stated that, if the Navy proposed to store nuclear weapons at the facility, it should prepare an internal EIS that would not be released to the public but would fulfill the Navy’s NEPA obligation to consider the environmental impacts,¹⁰³ such action was not needed at the time. Because “it ha[d] not been and *cannot be established* that the Navy has proposed [storing nuclear weapons at the site],” the Court concluded that an EIS was not required.¹⁰⁴ The Court finished by declaring, “[W]hether or not the Navy has complied with NEPA . . . is beyond judicial scrutiny in this case,” because public policy would not allow a trial “which would inevitably lead to the disclosure of matters which the law itself regards

⁹⁷ 5 U.S.C. § 552(b)(3) (2012).

⁹⁸ 42 U.S.C. § 2011 (2012).

⁹⁹ *Catholic Action*, 454 U.S. at 144.

¹⁰⁰ 5 U.S.C. § 552(b)(1) (2012).

¹⁰¹ *Catholic Action*, 454 U.S. at 144-45.

¹⁰² *Id.*

¹⁰³ *Id.* at 146.

¹⁰⁴ *Id.* (emphasis added).

as confidential.”¹⁰⁵ By its ruling, the Court acknowledged that there is potential for government agencies to avoid the requirements of NEPA, since agencies would be able to avoid disclosure through an adversarial trial if there was any link to national security.¹⁰⁶

Justice Blackmun’s concurring opinion acknowledged the potential loophole that the Court created.¹⁰⁷ While he agreed that confidential information may be withheld from the public, he noted that one of the goals of NEPA was to inform the public of agencies’ actions.¹⁰⁸ To resolve this problem, he argued that agencies should organize the EIS in such a way that the classified portions could be protected through redaction or removal under FOIA, while the unclassified portions could be disseminated to the applicable parties, including the public at large.¹⁰⁹

III. THE RESULTING ALARM

In the years following the Court’s decision in *Catholic Action*, a number of authors have written about the harm that would result if agencies were able to avoid public disclosure of an EIS.¹¹⁰ One author, Amy Sauber, argued that an even greater harm would occur when agencies failed to even prepare an EIS because *Catholic Action* deemed such challenges beyond judicial review.¹¹¹ Sauber maintained that this predicted harm was realized soon after *Catholic Action*, when the court in *Laine v. Weinberger* deemed the Navy’s decision to not prepare an EIS beyond judicial review because it could not be

¹⁰⁵ *Id.* (quoting *Totten v. United States*, 92 U.S. 105, 107 (1876)).

¹⁰⁶ *Catholic Action*, 454 U.S. at 146-47.

¹⁰⁷ *Id.* at 147-48.

¹⁰⁸ *Id.* at 145 (citing 42 U.S.C. § 4332(2)(C) (2012)).

¹⁰⁹ *Catholic Action*, 454 U.S. at 149.

¹¹⁰ See, e.g., Joseph Farris, *Mothers for Peace and the Need to Develop Classified NEPA Procedures*, 34 *ECOLOGY L.Q.* 955, 968 (2007)

¹¹¹ Amy Sauber, *The Application of NEPA To Nuclear Weapons Production, Storage, and Testing: Weinberger v. Catholic Action of Haw./Peace Education Project*, 11 *B.C. ENVTL. AFF. L. REV.* 805, 832 (1983-1984).

established whether the Navy proposed to store nuclear weapons at the site under review.¹¹² This general alarm regarding the judiciary's application of a non-congressionally authorized exception to NEPA has grown in the years following the 9/11 attacks and the judiciary's increased deference to agency action regarding national security.¹¹³ Therefore, several authors of scholarly articles have proposed a number of different ways to "bridge the gap between NEPA's mandate for accountability and public involvement, and the need to keep information secure."¹¹⁴

A. *EIS Released with Portions Withheld*

The first approach considered here was first posed by Justice Blackmun in his *Catholic Action* concurrence. Justice Blackmun argued that agencies should organize the EIS document in such a way that the classified portions could be protected under FOIA while unclassified portions could be disseminated to the applicable parties, including the public at large.¹¹⁵ Amanda Mott also considered this approach:

Information pertinent to national security may be set out in a classified annex to the EIS, rather than in the EIS itself. Including classified information in an annex would allow for information to

¹¹² *Laine v. Weinberger*, 541 F. Supp. 599, 604 (C.D. Cal. 1982) (stating that application of the ruling in *Catholic Action* would not allow the court to consider the challenge because District Courts are not the proper forum for resolving such sensitive issues).

¹¹³ Thirty-one of the forty articles found by this author relating to the subject were published after 9/11. See, e.g., PATRIOT Act, Pub. L. No. 107-56, 115 Stat. 272 (codified as amended in 8-50 U.S.C.) (limiting specific rights/freedoms in an effort to ensure public safety and security).

¹¹⁴ See, e.g., Joseph Farris, *Mothers for Peace and the Need to Develop Classified NEPA Procedures*, 34 *ECOLOGY L.Q.* 955, 968 (2007).

¹¹⁵ *Weinberger v. Catholic Action of Haw./Peace Educ. Project*, 454 U.S. 139, 149 (1981).

be read by a government official who would require clarification on anything that might be of public concern.¹¹⁶

The CEQ adopted this approach in its NEPA regulations, stating that the NEPA document “may be organized so that classified portions can be included as annexes, in order that the unclassified portions can be made available to the public.”¹¹⁷

However, author Joseph Farris criticized this approach, questioning whether a classified EIS could accomplish NEPA’s goal of requiring agencies to take a hard look at the environmental consequences.¹¹⁸ Farris argued that allowing agencies to classify portions of their EIS would leave the determination of whether the requirements of NEPA had been accomplished to the agency.¹¹⁹ Furthermore, Farris pointed out that a goal of NEPA is to allow the stakeholders, including the public, to participate in the planning process.¹²⁰ While an agency conducting a normal environmental review would release a draft EIS, which allows for a discussion between the public and the agency regarding the information contained within, Farris argued that such a result could not be accomplished under the classified EIS approach.¹²¹ Farris contended that “useful public contribution hinges upon the ability to have a real dialogue between the agency and the public,” and that this method would not allow the public to comment on classified portions of the document.¹²²

B. *In Camera* Review

In the second approach considered here, authors have advocated for the use of *in camera* judicial review of classified EIS

¹¹⁶ Mott, *supra* note 18, at 356-57.

¹¹⁷ 40 C.F.R. § 1507.3(c) (2016).

¹¹⁸ Farris, *supra* note 111, at 970.

¹¹⁹ *Id.* at 968.

¹²⁰ *Id.* at 967-68.

¹²¹ *Id.* at 968.

¹²² *Id.*

documents.¹²³ This approach would help to fulfill both goals of NEPA while keeping classified information from the eyes of the public. William Mendelsohn advocated for this approach while considering *Hudson River Sloop Clearwater v. Department of Navy*.¹²⁴ In *Hudson River*, the plaintiffs filed suit against the Navy after it announced plans to build a port in New York Harbor.¹²⁵ The plaintiffs alleged that the Navy violated NEPA by not producing an internal EIS to consider the implications of storing nuclear weapons at the port, and they petitioned the court to perform an *in camera* review for sufficiency of any documents produced during the NEPA process.¹²⁶ The district court denied the plaintiff's request, stating that even if the court kept the material confidential, the result of the case could indirectly confirm whether nuclear weapons were stored at the site.¹²⁷ Although on appeal the circuit court affirmed the case on different grounds, Mendelsohn argued that the court "abdicated its duty to ensure that the Navy had complied with NEPA" because it did not conduct an *in camera* review.¹²⁸

Mendelsohn asserted that *in camera* review should be comprised of two tests.¹²⁹ The court would first review whether the agency qualified for an exemption under FOIA, and then whether the agency's EIS was sufficient to meet the requirements of NEPA.¹³⁰ Mendelsohn believed that "[c]ourts have granted such a review in those instances in which both parties already are familiar with the classified information."¹³¹ Mendelsohn acknowledged that this is not a

¹²³ See e.g., Mendelsohn, *supra* note 16, at 695.

¹²⁴ *Id.*

¹²⁵ *Hudson River Sloop Clearwater, Inc. v. U.S. Dep't of Navy*, 891 F.2d 414, 416-17 (2d Cir. 1989).

¹²⁶ *Id.*

¹²⁷ *Id.* at 417.

¹²⁸ Mendelsohn, *supra* note 16, at 695.

¹²⁹ *Id.* at 696.

¹³⁰ *Id.*

¹³¹ *Id.*

perfect solution to the *Hudson River* problem because it “lack[s] the benefits of a normal adversarial trial, but it at least imposes some form of outside review of an agency’s compliance with NEPA.”¹³²

C. *Congressionally Created Court*

The final method considered here was suggested by Vermont Law School professor Stephen Dycus, who argued for Congress to create a special court that would hear classified information in cases in which NEPA compliance was challenged.¹³³ This specialized court would adhere to the security concerns of the proposing agencies while developing expertise in the application of NEPA to such projects.¹³⁴ Professor Dycus envisioned a court similar to the Foreign Intelligence Surveillance Court (“FISC”) created by the Foreign Intelligence Surveillance Act of 1978 (“FISA”).¹³⁵ The FISC is composed of eleven district court judges who are appointed by the Chief Justice of the Supreme Court; the hearings are conducted in closed chambers and the FISC maintains secret records.¹³⁶

Professor Dycus also proposed, as an alternative to a special court, that Congress create a “special independent environmental attorney.”¹³⁷ This attorney would have a security clearance and the ability to prosecute cases for plaintiff groups.¹³⁸ However, Professor Dycus failed to detail specifically how the process would work, leaving many unanswered questions that would need to be resolved before this approach could be fully considered. For instance, a venue would need to be selected where the special attorney would bring cases, and that

¹³² *Id.* at 697.

¹³³ Dycus, *supra* note 16, at 310.

¹³⁴ *Id.*

¹³⁵ Foreign Intelligence Surveillance Act of 1978, 50 U.S.C. §§ 1801-1811 (2016).

¹³⁶ 50 U.S.C. § 1803 (2015).

¹³⁷ Dycus, *supra* note 16, at 310.

¹³⁸ *Id.*

court would also have to be given security clearance so that they could hear the cases.

IV. THE JUDICIARY'S BALANCED APPROACH

This Comment acknowledges that while the current system is not a perfect solution to the oft-opposing demands of NEPA and national security, the revisions suggested by the authors cited above are not possible due to the current polarized political climate in Congress. Furthermore, such actions are not necessary because courts have taken sufficient individual action, without congressional direction, to satisfy the demands of NEPA while protecting national security interests. A study of recent court decisions shows that, even post-9/11, courts have not allowed national security concerns to cripple the application of NEPA.¹³⁹

Although *Catholic Action* was decided more than thirty years ago, many of the scholarly articles demanding changes to the NEPA process continue to address the case.¹⁴⁰ However, recent decisions relying on *Catholic Action* have been able to satisfy both the national security and NEPA concerns without the congressional action that the previously cited proposals would require.

For instance, in *San Luis Obispo Mothers for Peace v. Nuclear Regulatory Commission*, the court relied on *Catholic Action* when considering the plaintiff's claim under NEPA that the U.S. Nuclear Regulatory Commission's EIS must consider the potential of terrorist attacks.¹⁴¹ The court rejected the assertion that agencies were exempt from NEPA requirements because of national security concerns, and

¹³⁹ See, e.g., *Ground Zero Ctr. for Nonviolent Action v. U.S. Dep't of the Navy*, No. 12-cv-5537, 2014 U.S. Dist. LEXIS 2752, at *6-8 (W.D. Wash. Jan. 8, 2014).

¹⁴⁰ See, e.g., Farris, *supra* note 111, at 959-60 (considering the relationship between NEPA, FOIA, and the decision in *Catholic Action*).

¹⁴¹ *San Luis Obispo Mothers for Peace v. Nuclear Regulatory Comm'n*, 635 F.3d 1109, 1112, 1116 (9th Cir. 2011).

stated that while situations involving national security could require certain changes to regular NEPA procedures, the agency's "inability to comply with some of NEPA's purposes did not absolve it of its duty to fulfill others."¹⁴² Furthermore, the court cited *Catholic Action* for the proposition that agencies are "required [under NEPA] to perform a NEPA review and to factor its results into [their] decision making even where the sensitivity of the information involved [means] that the NEPA results [can]not be publicized."¹⁴³ Nevertheless, while the *Catholic Action* Court determined that whether the agency had complied with this requirement and prepared an internal EIS was not justiciable in national security cases,¹⁴⁴ the *Mothers for Peace* Court cited their ruling as a requirement that agencies prepare a NEPA document that is reviewable by the court.¹⁴⁵ Thus, a recent ruling has reinterpreted the holding in *Catholic Action* to close the national security loophole that the authors cited above contended was eroding the NEPA requirements.

Additionally, in *Ground Zero Center for Nonviolent Action v. United States Department of the Navy*, the court's application of *Catholic Action* was even more restrictive. In *Ground Zero*, the Navy proposed to build a second explosive-handling wharf to handle the excessive demand on the existing wharf.¹⁴⁶ In accordance with NEPA, the Navy conducted the appropriate environmental reviews and published a final EIS that extensively covered the potential impacts.¹⁴⁷

¹⁴² *Id.* at 1112.

¹⁴³ *Id.* at 1116 (citing *San Luis Obispo Mothers for Peace v. Nuclear Regulatory Comm'n*, 449 F.3d 1016, 1034 (9th Cir. 2007) (internal quotation marks omitted)).

¹⁴⁴ *Weinberger v. Catholic Action of Haw./Peace Educ. Project*, 454 U.S. 139, 146 (1981).

¹⁴⁵ *Mothers for Peace*, 635 F.3d at 116.

¹⁴⁶ *Ground Zero Ctr. for Nonviolent Action v. U.S. Dep't of the Navy*, No. 12-cv-5537, 2014 U.S. Dist. LEXIS 2752, at *4-5 (W.D. Wash. Jan. 8, 2014).

¹⁴⁷ *Id.* at *6-8 (stating the following:)

The EIS disclosed that underwater construction noise may cause levels of sound injurious to fish. The Navy also considered mitigation measures to reduce potential damage caused by construction, including: (1) efforts to

Even though the EIS contained numerous documents disclosed to the public, the plaintiffs argued that the Navy withheld information critical to their review process and required under NEPA.¹⁴⁸ During litigation, the Navy released redacted copies of the five documents previously withheld and allowed the court to review unredacted copies *in camera*.¹⁴⁹ However, the Navy's eventual disclosure of these redacted copies during litigation led the plaintiffs to argue that the Navy should have released them during the public comment period.¹⁵⁰ Nevertheless, by reviewing the documents *in camera*, the court

protect marine water quality and seafloor during construction; (2) a limited in-water work window; (3) efforts to protect upland water quality during construction; (4) efforts to protect water quality during operation; (5) noise attenuation techniques during construction; (6) monitoring noise impacts; and (7) mitigation measures for biological, cultural, and other resources. Additional mitigation measures include limiting the use of impact hammering, which creates higher levels of injurious sound, and a "soft-start approach" for pile driving to provide a warning to fish prior to the drivers operating at full capacity.

Additionally, the Navy considered five alternative forms for the new wharf: (1) a combined trestle with large pile wharf (the preferred alternative); (2) a combined trestle with conventional pile wharf; (3) separate trestles with large pile wharf; (4) separate trestles with conventional pile wharf; and (5) a combined trestle with floating wharf.

The Navy identified these alternatives based upon (1) their capability of meeting Trident mission requirements; (2) the ability to avoid or minimize environmental consequences; (3) siting requirements, including proximity to existing infrastructure; (4) the availability of waterfront property; (5) the ability to construct essential project features; and (6) master planning issues, such as explosive safety restrictions. The Navy also considered a "no-action alternative," but as outlined above, the Navy argued that the need for increased operational days mandates action.

¹⁴⁸ *Id.* at *10.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at *16.

concluded that the purposes of NEPA had been fulfilled and that the public had not missed a significant opportunity to comment.¹⁵¹

This ruling demonstrates that the purposes of NEPA can be fulfilled within the current judicial system without legislative action. And by its inaction, Congress has shown its implied support for the recent course of NEPA litigation.¹⁵² Although the Navy did not release every document to the public that could have potentially been considered, NEPA only demands that agencies comply “to the fullest extent possible.”¹⁵³

A. *Limited Disclosure Does Not Close Dialogue or Release Agency Obligation*

Without congressional action, the court in *Ground Zero* successfully implemented the approach suggested by Justice Blackmun in *Catholic Action*.¹⁵⁴ The Navy released both a draft and final EIS to the public that contained extensive information regarding their proposed plan, but withheld sensitive portions of the EIS from disclosure.¹⁵⁵ One of the chief concerns Farris voiced against this method is that the public would not be able to have an informed dialogue with the proposing agency regarding the action because they would lack vital information.¹⁵⁶ Nevertheless, after reviewing all of the Navy’s NEPA documents *in camera*, the court determined that the documents released to the public provided enough information for the

¹⁵¹ *Id.* at *24-25.

¹⁵² See generally, Sharon Buccino, *Colloquium Article: NEPA Under Assault: Congressional And Administrative Proposals Would Weaken Environmental Review And Public Participation*, 12 N.Y.U. ENVTL. L.J. 50, 50-51 (2003) (stating that Congress has not made any significant changes to NEPA since it was first passed in 1969).

¹⁵³ 42 U.S.C. § 4332(2)(C) (2016).

¹⁵⁴ *Weinberger v. Catholic Action of Haw./Peace Educ. Project*, 454 U.S. 139, 149 (1981).

¹⁵⁵ *Ground Zero*, 2014 U.S. Dist. LEXIS 2752 at *10-11.

¹⁵⁶ Farris, *supra* note 111, at 967.

public to make informed choices,¹⁵⁷ effectively stating that the required dialogue between the public and the Navy had taken place. While the Navy might have released redacted copies of the documents withheld in the EIS to the public at the time of the final EIS, rather than doing so at trial, they were released to the public nonetheless.¹⁵⁸

Additionally, the courts' process in *Ground Zero* and holding in *Mothers for Peace* illustrate that the judiciary has not allowed agencies to subvert the goals of NEPA, but that courts have required agencies to fully consider the impact of their actions.¹⁵⁹ Furthermore, the agencies are not seeking to limit their obligation under NEPA. The Navy's own NEPA regulations state, "The fact that a proposed action is of a classified nature does not relieve the proponent of the action from complying with NEPA and the CEQ regulations."¹⁶⁰ However, the Navy's regulation does allow for sensitive information to be safeguarded.¹⁶¹ Thus, as suggested by some commentators, the Navy "set out [information] in a classified annex to the EIS, rather than in the EIS itself."¹⁶² This action fulfilled the requirements of NEPA because it showed that environmental concerns had been integrated into the decision making process and it was an "outward sign that environmental values and consequences [had] been considered during the planning stage of agency actions."¹⁶³

B. *The Occurrence of In Camera Review*

While the *Hudson River* court would not conduct an *in camera* review of classified materials, the court in *Ground Zero*

¹⁵⁷ *Ground Zero*, 2014 U.S. Dist. LEXIS 2752 at *20-21.

¹⁵⁸ *Id.* at *10.

¹⁵⁹ *San Luis Obispo Mothers for Peace v. Nuclear Regulatory Comm'n*, 635 F.3d 1109, 1116 (9th Cir. 2011); *Ground Zero*, 2014 U.S. Dist. LEXIS 2752 at *37.

¹⁶⁰ Classified Actions, 32 C.F.R. § 775.5(a) (2016).

¹⁶¹ *Id.*

¹⁶² Mott, *supra* note 18, at 356.

¹⁶³ *Andrus v. Sierra Club*, 442 U.S. 347, 350 (1979).

successfully conducted *in camera* review of all the NEPA documents prepared by the Navy and was able to establish that the requirements of NEPA had been met.¹⁶⁴ *In camera* review is contingent upon the cooperation of the agency with the court. However, the Navy's own regulations state that the classified portions of an EIS serve the same purpose as the unclassified, and should be reviewed by the decision maker in the case.¹⁶⁵ Similarly, the CEQ regulations state:

The primary purpose of an environmental impact statement is to serve as an action-forcing device to insure that the policies and goals defined in [NEPA] are infused into the ongoing programs and actions of the Federal Government. . . . An environmental impact statement is more than a disclosure document. It shall be used by Federal officials in conjunction with other relevant material to plan actions and make decisions.¹⁶⁶

By providing the court with unredacted copies of the documents held back from public disclosure, the Navy gave the court an opportunity to judge whether it had fully complied with NEPA. Thus, the Navy was able to prove that it had complied with the CEQ regulations.

Although some may be correct that this practice “lack[s] the benefits of a normal adversarial trial,”¹⁶⁷ it provides at least one check against the potential for agencies to subvert the law. The Constitution, in establishing the judicial branch as a check on the legislative and executive branches, trusted judges to ensure that federal agencies comply with the law, which is possible through *in camera* review.¹⁶⁸

¹⁶⁴ *Ground Zero*, 2014 U.S. Dist. LEXIS 2752 at *29-37.

¹⁶⁵ 32 C.F.R. § 775.5(a) (2016).

¹⁶⁶ 40 C.F.R. § 1502.1 (2016).

¹⁶⁷ Mendelsohn, *supra* note 16, at 697.

¹⁶⁸ U.S. CONST. art. III, § 2.

C. *Congessionally Created Courts are Unlikely and Unneeded*

A congressionally created court would provide many advantages, as outlined by Professor Dycus.¹⁶⁹ First and foremost, such a court would have the clearance to be briefed regarding the full extent of the agency's actions and ensure that they had considered the effects of those actions on the environment by completing an EIS. The court would also be well versed in handling the concerns of both NEPA and national security. Because of the court's high security clearance, it would have the ability to make an informed decision based on all the facts. However, in the current political climate, where Congress struggles to pass even the most fundamental legislation,¹⁷⁰ the creation of such a court is unlikely. Although similar courts have been created in the past,¹⁷¹ no significant changes to NEPA have been made in over thirty years.¹⁷² Lack of congressional action regarding NEPA not only foreshadows that significant new action is unlikely, but also that Congress is satisfied with the way courts are currently dealing with challenges to NEPA.

Furthermore, the outcome of *Ground Zero* showed that congressional action is not required to achieve the desired results. In that case, the Navy produced unredacted copies of the documents withheld for national security to the court, which was able to review them and make a decision based on all the facts.¹⁷³ When district court judges can fulfill this rule, with cooperation from the applicable

¹⁶⁹ Dycus, *supra* note 16, at 310.

¹⁷⁰ See e.g., Tom Cohen, *U.S. government shuts down as Congress can't agree on spending bill*, CNN (Oct. 1, 2013, 12:43 AM), <http://www.cnn.com/2013/09/30/politics/shutdown-showdown> (explaining the inability of Congress to agree on a spending bill that would allow the government to remain open).

¹⁷¹ Foreign Intelligence Surveillance Act of 1978, 50 U.S.C. §§ 1802-1805 (2016).

¹⁷² See generally Buccino, *supra* note 154, at 50-51.

¹⁷³ *Ground Zero Ctr. for Nonviolent Action v. U.S. Dep't of the Navy*, No. 12-cv-5537, 2014 U.S. Dist. LEXIS 2752, at *10 (W.D. Wash. Jan. 8, 2014).

agency, there is no need to add additional levels of bureaucracy and create more judicial bodies.

D. The Balance of Powers

While *Mothers for Peace* and *Ground Zero* provide useful examples of legal challenges that allowed both the goals of NEPA and the interests of national security to be satisfied, the possibility remains that agencies will refuse to submit classified documents prepared during the NEPA process for judicial review. If judicial review of agency decisions is to be successful, courts must balance security and disclosure while also allowing an agency to have adequate discretion to perform its duties.¹⁷⁴ Courts should not undermine an agency's expertise with the courts' own less experienced opinions; rather, the court should only determine whether the decision is supported by substantial evidence in the record.¹⁷⁵ Nevertheless, successful judicial review requires that courts have a full record to review, including potentially classified information.

The Court in *Catholic Action* failed to employ the required level of judicial review to make the NEPA process effective while still protecting national security concerns. The Court stated that if the Navy proposed to store nuclear weapons at the facility, it should prepare an internal EIS.¹⁷⁶ The Court would not require that the Navy release the EIS to the public, but would fulfill the Navy's NEPA obligation to consider the environmental impacts.¹⁷⁷ However, the Court did not require such an EIS to even be completed or reviewed by a court.¹⁷⁸ Rather, the Court determined that the Navy was free from the requirements of NEPA because it could not be established

¹⁷⁴ See Bernard Schwartz, ADMINISTRATIVE LAW § 10.1, at 624–25 (3d ed. 1991).

¹⁷⁵ Scope of Review, 5 U.S.C. § 706(2)(E) (2016).

¹⁷⁶ Weinberger v. Catholic Action of Haw./Peace Educ. Project, 454 U.S. 139, 146 (1981).

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

whether the Navy was storing nuclear weapons at the site.¹⁷⁹ The Court allowed the Navy an exception to the requirements of NEPA based on the Navy's own assertion that they could not acknowledge or deny the presence of nuclear weapons at the facility.¹⁸⁰ The Court further stated that the matter was beyond judicial review.¹⁸¹ Conversely, thirty years later, the *Mothers for Peace* and *Ground Zero* courts each considered similar situations and found that their respective cases were not beyond judicial review, with the court in *Ground Zero* requiring the review of the full record *in camera* before ruling on the asserted NEPA violations.¹⁸²

Thus, the fault of the *Catholic Action* Court was the failure to consider whether the agency had complied with the requirements of NEPA by requiring that a classified EIS be completed which considered the full extent of the agency's actions. In contrast, following the methodology of *Ground Zero*, future courts will be able to preserve the applicable balance of power while ensuring compliance with NEPA and protecting the interests of national security.

CONCLUSION

The security of the nation and protection of the natural resources within its borders are both important objectives, but one should not prevail at the expense of the other. The NSA's Utah data center, designed to support the Intelligence Community's efforts to monitor, strengthen, and protect the nation,¹⁸³ would ultimately be unsuccessful at achieving its stated purpose if the massive amounts of

¹⁷⁹ *Id.* (emphasis added).

¹⁸⁰ *Id.* at 146-47.

¹⁸¹ *Id.* at 146.

¹⁸² *Ground Zero Ctr. for Nonviolent Action v. U.S. Dep't of the Navy*, No. 12-cv-5537, 2014 U.S. Dist. LEXIS 2752 (W.D. Wash. Jan. 8, 2014).

¹⁸³ Press Release, U.S. NAT'L SEC. ADMIN., Groundbreaking Ceremony Held for \$1.2 Billion Utah Data Center (Jan. 6, 2011), <https://www.nsa.gov/news-features/press-room/press-releases/2011/utah-groundbreaking-ceremony.shtml>.

water used to keep it running had a detrimental effect on the local environment.

Nevertheless, the anxiety that is caused by the idea that national security interests are undermining environmental protections is unnecessary. By performing a number of the functions suggested by the various authors cited above, without congressional action, the courts in *Mothers for Peace* and *Ground Zero* show that NEPA protections will not necessarily succumb to the interest of national security in the current judicial system. These courts prove that even post-9/11, the judicial branch has ensured that agencies conduct a full NEPA review to certify that they are accurately considering the implications of their actions. Finally, the court's rulings prove that there is no need to enact extensive procedural changes to NEPA because the judiciary can perform these suggested actions without direction from Congress. Therefore, the public should be assured that both "man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans."¹⁸⁴



¹⁸⁴ 42 U.S.C. § 4331(a) (2016).