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Mothers for Peace and the Need to Develop Classified NEPA Procedures

Joseph Farris[*]

"The resulting tension—between secrecy on one hand and open debate on the other—is best reconciled through rigorous oversight."

—Michael V. Hayden, Director of the Central Intelligence Agency, former Director of the National Security Agency (1999–2005).[1]

As national security issues have become increasingly more important and urgent in the United States, the imprint of national security has correspondingly grown more apparent on the landscape of environmental regulation. This Note examines how enforcement of the National Environmental Policy Act (NEPA) is at risk of being compromised by the encroachment of national security concerns. The Ninth Circuit's recent ruling in San Luis Obispo Mothers for Peace v. Nuclear Regulatory Commission *considered whether NEPA requires the Nuclear Regulatory Commission (NRC) to evaluate, in an Environmental Impact Statement (EIS), the potential of a terrorist attack on a proposed storage facility for nuclear material. The NRC claimed that it was not appropriate to address sensitive national security information in an EIS—a public document. The court, in keeping with Supreme Court precedent, ruled against the NRC and refused to waive NEPA's requirements even though the federal action dealt with classified subject matter.*

Nonetheless, the court did not provide clear guidelines on how NEPA should be applied in order to resolve the tension between security

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1. Michael V. Hayden, *Balancing Security and Liberty: The Challenge of Sharing Foreign Signals Intelligence*, 19 NOTRE DAME J.L. ETHICS & PUB. POL'Y 247, 251 (2005).

issues and NEPA's goal of public involvement in environmental decisionmaking. This Note considers that tension and attempts to provide a solution by advocating for the use of a special congressional oversight committee and in camera judicial review of classified NEPA proceedings. By establishing an official procedure for overseeing and reviewing classified NEPA proceedings, Congress can ensure that agencies will not be allowed to undermine NEPA's purposes in the name of national security.

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INTRODUCTION

As national security issues have become increasingly more important and urgent in the United States, the imprint of national security has correspondingly grown more apparent on the landscape of environmental regulation.[2] This Note examines how enforcement of the National Environmental Policy Act (NEPA) is at risk of being compromised by

2. *See* Ed Bethune, *Homeland Security and Environmental Law: Impacting and Influencing Each Other*, SPECIAL COMM. ON HOMELAND SEC. NEWSLETTER (A.B.A. Section of Env't, Energy, & Resources, Chicago, Ill.), Vol. 1, No. 1, July 2004, at 2–7, *available at* http://www.abanet.org/environ/committees/homelandsecurity/newsletter/archive/.

the encroachment of national security concerns. The Ninth Circuit's recent ruling in *San Luis Obispo Mothers for Peace v. Nuclear Regulatory Commission* considered whether NEPA requires the Nuclear Regulatory Commission (NRC) to evaluate, in an Environmental Impact Statement (EIS), the potential impact of a terrorist attack on a proposed storage facility for nuclear material.[3] The NRC claimed that it was not appropriate to address sensitive national security information in an EIS—a public document.[4] The court, in keeping with Supreme Court precedent, ruled against the NRC and refused to waive NEPA's requirements even though the federal action dealt with classified subject matter.[5] The court did not, however, specify exactly what action the NRC needed to take to remedy "the inadequacies of the agency's NEPA analysis."[6] The opinion simply makes the broad statement that "there remain open to the agency a wide variety of actions it may take on remand."[7] Nonetheless, prior Supreme Court jurisprudence has suggested that the NRC might be able to respond by producing a partially or completely classified EIS on the issue.[8]

By not proposing an alternative to the practice of creating classified EISs, *Mothers for Peace* directly undercuts the two primary goals of NEPA: (1) ensuring that agencies fully account for environmental impacts before proceeding with major federal actions, and (2) allowing meaningful public participation in the decisionmaking process.[9] Furthermore, allowing the Nuclear Regulatory Commission—a nonmilitary agency—to classify NEPA procedures in the name of national security concerns could lead to widespread use of this tactic by other nonmilitary agencies.

Part I of this Note discusses the *Mothers for Peace* holding and prior case law on the conflict between NEPA and national security concerns. Part II examines how the current judicial approach to this conflict encourages the development of a system that is at odds with the purposes of NEPA. In Part III, this Note explores solutions proposed by critics of the current classified NEPA procedural system. Finally, this Note advocates for the use of a special congressional oversight committee and in camera judicial review of classified NEPA proceedings in order to resolve the tension between national security issues and NEPA's goal of

3. San Luis Obispo Mothers for Peace v. Nuclear Regulatory Comm'n, 449 F.3d 1016 (9th Cir. 2006).

4. *Id.* at 1028.

5. *Id.* at 1034.

6. *Id.*

7. *Id.*

8. *See* Weinberger v. Catholic Action of Haw./Peace Educ. Project, 454 U.S. 139, 145 (1981).

9. San Luis Obispo Mothers for Peace v. Nuclear Regulatory Comm'n, 449 F.3d 1016, 1034 (9th Cir. 2006).

public involvement in environmental decisionmaking. By establishing an official procedure for overseeing and reviewing classified NEPA proceedings, Congress can ensure that agencies will not be allowed to undermine NEPA's purposes in the name of national security.

I. JUDICIAL SANCTION OF CLASSIFIED ENVIRONMENTAL IMPACT STATEMENTS: *WEINBERGER* AND *MOTHERS FOR PEACE*

A The Context of Mothers for Peace*: Recent Clashes Between Environmental Regulation and National Security*

Conflicts between environmental regulation and national security interests have traditionally centered on direct actions by the military that cause pollution or other detrimental environmental consequences.[10] Recently, however, the ballooning stature of national security in the political landscape of the United States has resulted in an increase in the number of fronts on which environmental policy and national security policy are clashing.[11] The result of this tension is the potential erosion of many environmental laws, as federal agencies and Congress have already shown a willingness to modify environmental regulations in order to accommodate national security.[12]

Since September 11, 2001, Congress has passed legislation granting the armed forces special exemptions from environmental laws in the name of increasing the effectiveness of military and counterterrorism efforts. For example, Congress added a broad exemption to the Marine Mammal Protection Act to allow the Navy to conduct sonar testing and use.[13] Also, the Department of Defense (DOD) has been actively pursuing its "Readiness and Range Preservation Initiative," which proposes to amend several major environmental statutes in order to grant exemptions to the armed forces.[14] Critics of the DOD proposal have called it "opportunistic, even exploitative, as it plays on the fears of

10. E.G. Willard, Tom Zimmerman & 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 (2004).

11. Bethune, *supra* note 2.

12. *See generally id.*

13. Marine Mammal Protection Act, 16 U.S.C. §§ 1362, 1371 (2006); 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).

14. The seven environmental statutes are: Clean Air Act, Clean Water Act, CERCLA, Endangered Species Act, Marine Mammal Protection Act, Migratory Bird Treaty Act, and Resource Conservation and Recovery Act. Stephen Dycus, *Osama's Submarine: National Security and Environmental Protection After 9/11*, 30 WM. & MARY ENVTL. L. & POL'Y REV. 1, 2–3 & n.2 (2005).

Americans in the wake of the terrorist attacks of September 11, 2001."[15] There are even proposals that seek to generally subordinate environmental regulation to homeland security by placing the Environmental Protection Agency under the auspices of the Department of Homeland Security, "an idea that has been frequently and seriously discussed in congressional circles."[16]

The *Mothers for Peace* litigation exposes another front in the battle between environmental and national security concerns: the tension between a mandate for public involvement and accountability in government environmental decisionmaking and the need to protect sensitive national security information.

B. The Relationship Between NEPA and FOIA and the Weinberger *Decision*

The Freedom of Information Act (FOIA) governs the disclosure of NEPA environmental review information to the public. NEPA provides that statements prepared as part of the environmental review process "shall be made available to the President, the Council on Environmental Quality and to the public as provided by [FOIA]."[17] Judicial interpretation of this section of NEPA has made clear that an agency preparing NEPA documents can withhold certain information from the public if it fits under one of the nine exemptions to FOIA disclosure.[18] If information does not fall under one of these exemptions, however, it must be made available to the public. One FOIA exemption allows agencies to withhold from the public information "specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy"—in other words, information classified for national security reasons.[19]

Even if an agency does not have to disclose certain information to the public, it is not relieved of its statutory duty to produce the document in which the secret information is contained.[20] The Supreme Court foreclosed the possibility of a wholesale national security exemption to NEPA review and reporting requirements in *Weinberger v. Catholic Action of Hawaii/Peace Education Project*.[21] In that case, the Navy had planned to move weapons and ammunition to a storage site in Oahu,

15. *Id.* at 53.
16. Bethune, *supra* note 2, at 4.
17. 42 U.S.C. § 4332(2)(C) (2006); *see also* Freedom of Information Act, 5 U.S.C. § 552 (2006).
18. Weinberger v. Catholic Action of Haw./Peace Educ. Project, 454 U.S. 139, 145 (1981).
19. 5 U.S.C. § 552(b)(1)(A).
20. *See Weinberger*, 454 U.S. at 146.
21. *Id.* at 146–47.

Hawaii.[22] The Navy admitted that the facility was capable of storing nuclear weapons, but would not state whether nuclear weapons would actually be stored there.[23] It prepared an Environmental Impact Assessment and a Candidate Environmental Impact Statement, in which it concluded that the environmental effects of the facility did not warrant a full-scale EIS.[24] When the plaintiffs brought suit alleging that the Navy had violated NEPA by failing to include an assessment of the risk of a nuclear accident, the Navy defended itself by citing its policy to neither confirm nor deny the presence of nuclear weapons in a location due to national security concerns.[25] According to the Navy's reasoning, the preparation of an EIS with information about the environment impact of nuclear weapon storage at the site would amount to such an admission.

The Court ruled that this policy on classified information did not excuse the Navy from its obligation to prepare an EIS under NEPA.[26] It was not required to release the document to the public, however, since it could be properly classified under the national security exemption to FOIA.[27] In other words, the Court approved of a classified EIS, which could be used by the government in its internal planning process, but not released to the public.[28] Justice Rehnquist, writing for the majority, focused his reasoning on the statutory language of section 102(2)(C) of NEPA, which requires federal agencies to follow NEPA's mandate "to the fullest extent possible."[29] The Court found that this broad language allowed an agency to modify the terms of NEPA so that it could balance the environmental mandate against the need for secrecy in matters of national security.[30] The Navy would not even be required to tell the public about the existence of the EIS, so long as the information was properly withheld under FOIA.[31] *Weinberger* further held that a properly classified EIS is "beyond judicial scrutiny" because a judicial inquiry would violate national policy against disclosing confidential government information in courtroom proceedings.[32]

Justice Blackmun, joined by Justice Brennan, concurred in the judgment, but wrote separately because he believed the majority had understated the Navy's obligation to release as much of the EIS to the

22. *Id.* at 141.
23. *Id.*
24. *Id.* at 141–42.
25. *Id.*
26. *Id.* at 146.
27. *Id.*
28. *Id.*
29. *Id.* at 139 (quoting 42 U.S.C. § 4332).
30. *See id.* at 143–46.
31. *Id.* at 146.
32. *Id.* at 146–47.

public as possible.[33] He proposed that an EIS should not be completely classified unless the entire document was subject to FOIA.[34] Rather than withholding the whole document, an agency could release a partially classified EIS with annexes to the classified portions.[35] Blackmun supported his position by pointing out that Department of Defense internal regulations already approved such a procedure.[36] Moreover, he read NEPA to require as much public involvement as possible. Quoting NEPA regulations, Blackmun stressed that "the public's inability to participate in military decisionmaking makes it particularly important that, in cases such as the one before us, the EIS 'serve practically as an important contribution to the decisionmaking process.'"[37]

The *Weinberger* majority and concurring opinions demonstrate the Justices' implicit conclusion that it is feasible to conduct a NEPA review involving classified information. The opinions also demonstrate an unresolved disagreement about how this should be done. In *Mothers for Peace*, the Ninth Circuit faced this issue directly: how does the NRC conduct a NEPA review on the risk of a terrorist attack on a nuclear facility? Unfortunately, the court's decision did little to clarify the vague *Weinberger* holding.

C. Diablo Canyon Power Plant and the Mothers for Peace *Holding*

The Diablo Canyon Nuclear Power Plant sits perched on a rugged and picturesque stretch of coastline in San Luis Obispo County, California. The plant has been in operation since 1985, and accounts for about 20 percent of Pacific Gas & Electric Company's (PG&E) total electricity output, providing power for over 1.6 million homes.[38] According to PG&E, the Diablo Canyon Power Plant is "a vital part of the electricity produced in and for California and an integral part of the Central coast's economy."[39]

The Nuclear Regulatory Commission has awarded the plant high ratings for safety and performance.[40] Part of keeping the plant safe involves protecting the plant from security breaches, especially in an era when terrorism is a primary concern. PG&E's website explains that,

> Diablo Canyon employs a large staff of highly trained and well-armed security officers. These company employees are aided in their efforts

33. *Id.* at 147 (Blackmun, J., concurring).
34. *Id.* at 149.
35. *Id.*
36. *Id.*
37. *Id.* at 148–49 (quoting 40 C.F.R. § 1502.5 (1981)).
38. Pacific Gas and Electric Company, Diablo Canyon Power Plant, http://www.pge.com/education_training/about_energy/diablo_canyon/ (last visited Sept. 6, 2007).
39. *Id.*
40. *Id.*

> by sophisticated electronic security and surveillance systems, as well as by defenses that are similar to "hardened" military facilities. Security is further enhanced by our remote location; miles from the nearest public road, with a buffer zone consisting of thousands of acres of land controlled by our paramilitary type security force.[41]

Despite its track record of safety and the prominent place it occupies in the state and local economies, the plant is not without opposition. The San Luis Obispo Mothers for Peace (Mothers for Peace), a local nonprofit organization, has actively opposed the Diablo Canyon Nuclear Power Plant since 1973.[42] In the past, Mothers for Peace has challenged the plant on such issues as its initial operating license, seismic safety, and the use of its waste storage pools.[43]

Over the next decade, PG&E plans to invest almost $1 billion in its facilities in order "to assure continued safe and efficient operations."[44] One of the planned major improvements includes the construction of a used fuel storage facility on the Diablo Canyon site, in order to address the space limitations in the current facility.[45] Spent fuel would be housed in this facility, in dry casks made of concrete and steel, sitting in the open on a hillside on the complex.[46] This new storage area would ensure that the plant could house all of its spent fuel through its current operating license, even if no national fuel repository becomes available.[47] In 2005, PG&E obtained final approval from the NRC to begin construction of the storage facility.[48]

In 2002, Mothers for Peace, along with the Santa Lucia Chapter of the Sierra Club and an individual, Peg Pinard ("the Petitioners"), filed a series of petitions in an administrative hearing before the NRC opposing the storage facility on several grounds, including "failure to address destructive acts of malice or insanity."[49] The NRC rejected all the petitions and declined to hold a public hearing on the issue of whether a terrorist attack on the storage facility was "reasonably foreseeable."[50] If

41. *Id.*

42. Mothers for Peace, http://mothersforpeace.org/AboutUs (last visited Sept. 6, 2007). The Plant is halfway through its forty-year NRC operating license, which expires in 2025. U.S. Nuclear Regulatory Commission, Diablo Canyon, http://www.nrc.gov/reactors/plant-specific-items/diablo-canyon-issues.html (last visited Sept. 6, 2007).

43. Mothers for Peace, *supra* note 42.

44. Pacific Gas and Electric Company, *supra* note 38.

45. Diablo Canyon Independent Safety Committee, 16th Annual Report, 4.19 Independent Spent Fuel Storage Installation (ISFSI), http://www.dcisc.org/annual_report_16_2005_2006/volume1/4_19_spent_fuel.html (last visited Sept. 6, 2007).

46. David Sneed, *PG&E to Appeal Diablo Ruling*, SAN LUIS OBISPO TRIB., Aug. 31, 2006.

47. *Id.*

48. Diablo Canyon Independent Safety Committee, *supra* note 45.

49. San Luis Obispo Mothers for Peace v. Nuclear Regulatory Comm'n, 449 F.3d 1016, 1022 (9th Cir. 2006).

50. *In re* Private Fuel Storage, L.L.C., 56 N.R.C. 340, 346 (2002).

the NRC had determined that a terrorist attack was reasonably foreseeable, it would have been required to produce an Environmental Impact Statement under NEPA.[51] The petitioners appealed to the U.S. Court of Appeals, which has jurisdiction to review final orders of the NRC.[52]

In an opinion written by Judge Thomas, the Ninth Circuit held for petitioners, finding first that whether or not NEPA mandates consideration of the environmental impacts of a terrorist attack is a legal issue; and second, that the NRC decision did not meet the standard of reasonableness in its "categorical refusal to consider the environmental effects of a terrorist attack."[53] The court based its decision "entirely on [its] understanding of NEPA and what means are best suited to dealing with terrorism."[54] It noted "the practical realities of spent fuel storage and the congressional policy to encourage utilities to provide for spent fuel storage at commercial reactor sites pending construction of a permanent repository."[55] In spite of these strong policy reasons supporting the NRC's order, however, the court found that NEPA could not be ignored.

The essence of the court's ruling is that the NRC erred by categorically refusing to evaluate the environmental impacts of a potential terrorist attack.[56] The NRC attempted to justify its refusal to examine the impacts by citing to its earlier decisions, in particular *In re Private Fuel Storage, L.L.C.*[57] In that case, the NRC provided four grounds to support its policy of not requiring an analysis of the environmental impacts of a terrorist attack:

(1) the possibility of a terrorist attack is too far removed from the natural or expected consequences of agency action to require study under NEPA;

(2) because the risk of a terrorist attack cannot be determined, the analysis is likely to be meaningless;

(3) NEPA does not require a "worst-case" analysis; and

51. *Id.* at 349.

52. *See* 42 U.S.C. § 2239 (2006). The court also has jurisdiction to review final orders of the NRC in licensing proceedings under 28 U.S.C. § 2342(4) (2006).

53. *Mothers*, 449 F.3d at 1028. PG&E appealed the case to the U.S. Supreme Court, but was denied review. 127 S. Ct. 1124 (2007). The NRC had declined to serve as a co-petitioner, but indicated that it might have filed an amicus brief in support of the company. Sneed, *supra* note 46. The NRC has said that it will respond to the ruling, but it also maintains that it believes that the ruling applies only in the districts of the Ninth Circuit. Robert Knox, *West Coast Nuclear Plant Case Could Have an Effect Here*, BOSTON GLOBE, Feb. 8, 2007, at 1.

54. *Mothers*, 449 F.3d at 1022.

55. *Id.* at 1023.

56. *See id.* at 1028.

57. *Id.* at 1022.

(4) NEPA's public process is not an appropriate forum for sensitive security issues.[58]

The NRC applied all four of these factors to justify the order before the court in *Mothers for Peace*.[59] The court reviewed each factor for reasonableness, found NRC's decision unsupportable, and therefore overturned the NRC decision.[60] This Note explores the implications of the Ninth Circuit decision with respect to the fourth factor in the holding—the court's assertion that the NEPA process remains viable and mandatory even when national security concerns are at stake.

D. The Fourth Factor of Mothers for Peace*: Applying NEPA and Protecting National Security*

Mothers for Peace holds that though NEPA may be modified, it is not trumped by national security concerns. This holding is consistent with previous case law regarding conflict between national security and NEPA.[61] According to the court, *Weinberger* "can support only the proposition that security considerations may permit or require modification of some of the NEPA procedures, not the Commission's argument that sensitive security issues result in some kind of NEPA waiver."[62] Furthermore, in a Ninth Circuit case between the Air Force and an activist group, *NO GWEN Alliance of Lane County v. Aldridge*,[63] the court flatly concluded that "[t]here is no 'national defense' exception to NEPA."[64]

In rejecting the NRC's contention that NEPA's public process is an inappropriate forum for the analysis of a potential terrorist attack, *Mothers for Peace* was a victory for those who defended the statute against such critiques. But NRC attorney Roland Frye, Jr., examining the *Mothers for Peace* case before it was decided,[65] argued against consideration of terrorism-related impacts in NEPA reviews, citing an increase in the potential for security breaches during the process. [66] He

58. *Id.*; *In re* Private Fuel Storage, L.L.C., 56 N.R.C. 340 (2002).

59. San Luis Obispo Mothers for Peace v. Nuclear Regulatory Comm'n, 449 F.3d 1016, 1028 (9th Cir. 2006).

60. *Id.*

61. *See, e.g.*, Weinberger v. Catholic Action of Haw./Peace Educ. Project, 454 U.S. 139 (1981); No GWEN Alliance of Lane County, Inc. v. Aldridge, 855 F.2d 1380 (9th Cir. 1988); Concerned About Trident v. Rumsfeld, 555 F. 2d 817 (D.C. Cir. 1977).

62. *Mothers*, 449 F.3d at 1034.

63. *No GWEN*, 855 F.2d at 1384.

64. *Id.*

65. The author's biographical information section notes that "[a]ll views expressed in this article are those of Mr. Frye and do not necessarily reflect those of the Commission [NRC]." Roland M. Frye, Jr., *The Nuclear Regulatory Commission Is Not Required By Statute to Release Terrorism-Related Portions of Environmental Impact Statements*, 55 ADMIN. L. REV. 643, 643 n.* (2003).

66. *Id.* at 675.

argued that "[t]o consider terrorism-related issues in NEPA reviews would entail complicated special procedures and arrangements to protect safeguards information, and possibly security clearance reviews if classified national security information is involved."[67] Frye also doubted that any procedure could adequately secure the information, arguing that "over time, the universe of persons with detailed knowledge of sensitive safeguards would spread so widely that security breaches would become all too likely."[68]

Mothers for Peace suggests that the value of carrying out the NEPA review process outweighs these potential drawbacks.[69] As Frye argued before the case was decided, however, this ruling may be merely a "Pyrrhic victory," since the NRC can still decline to release the relevant classified information under FOIA.[70] But if it does, what does the ensuing NEPA procedure require?

Although it leaves no doubt that NEPA must be applied, the *Mothers for Peace* opinion does not focus on *how* it should be applied. The court does not provide any explanation of how NEPA may be modified, except to note that "a *Weinberger*-style limited proceeding might be appropriate."[71] There are no statutory guidelines describing this type of "limited" proceeding in NEPA itself.[72] Additionally, the Council on Environmental Quality (CEQ), the agency that administers NEPA,[73] has not provided any definitive guidance for other agencies on how to conduct a limited NEPA proceeding in the years since *Weinberger*.[74] The only direction is the *Weinberger* court's own dicta, describing a fully classified EIS immune from judicial review.

The uncertainty surrounding the handling of classified and sensitive information under NEPA has not gone completely unnoticed. The CEQ recently implemented a task force that examined the "nuts and bolts" of the NEPA implementation process in an effort to modernize it.[75] In its report, the task force notes that many agencies "want more clarity about

67. *Id.* at 670. This result is no doubt true. Complicated security procedures will have to be developed. But the government deals with "complicated special procedures" such as this all the time.

68. *Id.* As later proposals in this paper recommend, if everyone involved in the review process has appropriate security clearance, the risk of a security lapse should be minimal.

69. Any detailed NEPA procedure for incorporating sensitive information, as explored *infra*, Parts III and IV, will again have to contend with these critiques.

70. Frye, *supra* note 65, at 650–51.

71. San Luis Obispo Mothers for Peace v. Nuclear Regulatory Comm'n, 449 F.3d 1016, 1034 (9th Cir. 2006).

72. *See* National Environmental Policy Act, 42 U.S.C. §§ 4321–4370f (2006).

73. *See id.* §§ 4342–4347 (2006).

74. *See* 40 C.F.R. §§ 1500.1–1508.28 (2006) (CEQ Regulations for Implementing NEPA).

75. NEPA TASK FORCE, COUNCIL ON ENVTL. QUALITY, REPORT TO THE COUNCIL ON ENVIRONMENTAL QUALITY 2 (Sept. 2003), *available at* http://ceq.eh.doe.gov/ntf/report/finalreport.pdf.

how to improve management of sensitive information during the NEPA process."[76] The Department of Defense, in particular, expressed its belief that material that does not qualify for FOIA's national security exemption might still not be appropriate for public disclosure via NEPA.[77] The task force also notes that "some comments expressed concern that potential terrorist attacks and other threats could be used as a pretext to bypass public involvement," a point that is neatly illustrated by the *Mothers for Peace* case.[78] Unfortunately, when CEQ issued the final result of the task force's efforts in the spring of 2007 as "The National Environmental Policy Act—Collaboration Handbook," it did not include a discussion of the problems that national security poses for collaboration.[79]

In the face of this uncertainty, *Mothers for Peace* only heightened the need for detailed classified NEPA procedures because it implicitly sanctioned the use of a classified EIS by a civilian agency. *Mothers for Peace* is significantly different from *NO GWEN* and *Weinberger* because it did not involve a maneuver by the Department of Defense to gain an exemption from NEPA, but rather an attempt by a civilian agency to avoid NEPA scrutiny by raising the shield of national security.[80] *Mothers for Peace* seems to endorse the practice of a civilian agency using a national security rationale to gain approval for a classified EIS. Therefore, this holding could have significant practical effects if a broad spectrum of federal agencies and civilian institutions begin to conduct classified NEPA proceedings.

The possible expansion of the use of limited NEPA procedures is particularly disquieting given the current ill-defined state of the law. This result is objectionable not only because it hides government decisionmaking from public view, but also because a classified EIS, free from judicial review, fails to meet the basic goals of NEPA. Any regulations or guidance documents regarding classified NEPA proceedings should strive to strike a better balance between the goals of NEPA and national security concerns.

76. *Id* at 17. The task force report is not legally binding and does not classify as formal CEQ regulations. *Id.* at i.

77. *Id.* at 17.

78. *Id.* Towards implementing the recommendations of the task force, the CEQ convened interagency "work groups" to formulate concrete proposals, with one group including representatives of the Department of Homeland Security. *See* NEPA Task Force, Implementing the Regulations, http://ceq.eh.doe.gov/ntf/implementation.html (last visited Sept. 6, 2007).

79. 72 C.F.R. §§ 7876–7877 (2007).

80. *See* Weinberger v. Catholic Action of Haw./Peace Educ. Project, 454 U.S. 139 (1981); San Luis Obispo Mothers for Peace v. Nuclear Regulatory Comm'n, 449 F.3d 1016 (9th Cir. 2006).

II. HOW A CLASSIFIED EIS FREE FROM JUDICIAL REVIEW FAILS TO MEET NEPA'S BASIC GOALS

The key to analyzing what constitutes a viable NEPA proceeding is to look to the goals underlying the statute. NEPA "makes it the policy of the federal government to use all practicable means to administer federal programs in the most environmentally sound fashion."[81] The *Mothers for Peace* court stated that the two purposes of NEPA are "first, ensuring that the agency will have and will consider detailed information concerning significant environmental impacts; and, second, ensuring that the public can both contribute to that body of information, and can access the information that is made public."[82] This formulation mirrors Justice Rehnquist's account of the "twin aims" of an EIS in *Weinberger*.[83] Furthermore, Congress ordered that NEPA be implemented "to the fullest extent possible."[84] Accordingly, the statute was intended to be applied in order to maximize the realization of these goals.

Weinberger's proposal for a classified EIS, free from judicial review, does not foster the realization of the first goal of NEPA—making agencies consider the environmental consequences of their actions. If the goal of NEPA is to *ensure* that agencies take a "hard look" at environmental consequences,[85] then there must be some oversight mechanism. For a public EIS, that oversight mechanism is the public's right to challenge an insufficient EIS in court.[86] But the *Weinberger* and *Mothers for Peace* courts fail to explain how effective oversight will be achieved with a classified EIS. *Weinberger* leaves the determination of the contents and the sufficiency of the classified EIS completely to the agency's good faith.

The second goal of NEPA, to include the public in the information gathering process, is obviously crippled by a classified EIS since the public cannot effectively comment on an EIS without reading it. The *Mothers for Peace* decision points to the fact that the public may contribute information and its perspective to the environmental review process in open hearings,[87] thus "fulfill[ing] both the information-gathering and the public participation functions of NEPA."[88] The court

81. ROGER W. FINDLEY & DANIEL A. FARBER, ENVIRONMENTAL LAW IN A NUTSHELL 21 (6th ed. 2004).

82. *Mothers*, 449 F.3d at 1034.

83. *Weinberger*, 454 U.S. at 143.

84. 42 U.S.C. § 4332 (2006).

85. Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 356 (1989).

86. While NEPA does not contain a citizen suit provision, citizens may bring actions under the Administrative Procedure Act to challenge agency actions that are "arbitrary and capricious" and which adversely affect them. 5 U.S.C. §§ 702, 706 (2006).

87. San Luis Obispo Mothers for Peace v. Nuclear Regulatory Comm'n, 449 F.3d 1016, 1034 (9th Cir. 2006).

88. *Id.*

concluded that there is no justification for preventing the public from presenting information to the NRC.[89] While this approach does allow the public to contribute to some extent, the court did not address the fact that the public would be unable to read the classified portions of the EIS and provide meaningful comments on those sections.

The classified EIS approach ignores the fact that a useful public contribution hinges upon the ability to have a real dialogue between an agency and the public. This policy goal is reflected in NEPA's procedural structure. Preparation of an EIS consists of several stages, including a "scoping" stage (to determine what issues will be addressed by the EIS in the first place), a draft EIS, a comment period, and a final version of the EIS.[90] Public involvement is a crucial component of the process:

> CEQ regulations call for extensive public involvement at each step of the review process, to improve the quality of decisions and to make public officials more accountable. For example, the agency must solicit and carefully consider comments from the public on the draft EIS, then include responses to those comments in the final EIS (FEIS).[91]

Because the NEPA process is a collaboration between the government and the public, it functions best when the public has access to meaningful information in order to properly contribute and comment. Indeed, critics have pointed out that with "loss of open discussion and expert public criticism, the quality of the agency's final decision may be seriously compromised."[92] By not ruling out a *Weinberger*-style limited proceeding, *Mothers for Peace* may follow the law of the land, but it fails to comply with NEPA's underlying goals. The decision provides an opportunity to consider alternative solutions for handling classified information while incorporating NEPA's goals.

III. THE CLASSIFIED EIS: PROPOSED SOLUTIONS

Several solutions have been proposed that seek to bridge the gap between NEPA's mandate for accountability and public involvement, and the need to keep information secure. They are all founded on the premise that it is possible to develop a procedure that will both respect the need to classify sensitive national security information and achieve NEPA's fundamental goals.

89. *Id.*
90. STEPHEN DYCUS, NATIONAL DEFENSE AND THE ENVIRONMENT 14 (1996).
91. *Id.* at 14.
92. *Id.* at 25.

A. In Camera Judicial Review

William Mendelsohn advocates for the use of in camera judicial review to address the problem of the lack of agency oversight over classified environmental impact statements.[93] With this method, agencies should have less fear of the disclosure of classified information in the judicial setting.[94] Mendelsohn illustrates his point by examining a case from the Second Circuit Court of Appeals, *Hudson River Sloop Clearwater, Inc. v. Department of Navy*.[95] In that case, the Navy produced an EIS for a proposed Staten Island port, but did not discuss whether ships in the port would carry nuclear weapons.[96] The plaintiffs asked the court to order the Navy to produce a classified EIS which would be reviewed for sufficiency by the court using in camera proceedings.[97] The district court denied the request, claiming that the result of the case itself could indirectly publicize whether or not nuclear weapons were present.[98] The case reached the Second Circuit Court of Appeals, but the court affirmed the holding on distinct grounds.[99] Mendelsohn argues that by failing to consider the feasibility of in camera judicial review "the Second Circuit abandoned its responsibility to ensure that the Navy had complied with NEPA."[100]

In camera review should be composed of a two-stage process: first, the court would review the validity of the withholding under FOIA; and second, the court would review the EIS to ensure that the agency complied with NEPA.[101] Mendelsohn posits that this would be an especially useful strategy in a NEPA proceeding because plaintiffs, which in these cases are usually public interest groups, cannot access the classified information necessary to state a claim and advocate their position.[102] Mendelsohn summarizes by recognizing that "this is an imperfect solution, lacking the benefits of a normal adversarial trial, but it at least imposes some form of outside review of an agency's compliance with NEPA."[103]

93. William Mendelsohn, Comment, *In Camera Review of Classified Environmental Impact Statements: A Threatened Opportunity?*, 23 B.C. ENVTL. AFF. L. REV. 679, 695 (1996).

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

95. Hudson River Sloop Clearwater, Inc. v. Dep't of Navy, 891 F.2d 414 (2d Cir. 1989).

96. *Id.* at 416.

97. Mendelsohn, *supra* note 93, at 694.

98. *Id.*

99. *Id.*

100. *Id.* at 695.

101. *Id.* at 696.

102. *See id.*

103. *Id.* at 697.

B. Partial Disclosure

Julie Yap has called for Congress to amend NEPA to "ensure public disclosure of a broader range of proposed and contemplated military actions."[104] Such an amendment would modify NEPA to require an agency to release a hypothetical EIS including the "effects" of all contemplated actions, but not project details unrelated to the environmental impacts.[105] According to Yap, "[t]his type of disclosure would also fully protect the public by examining the effects of all contemplated actions while protecting the security of confidentiality because it would be 'impossible to ascertain which of the known alternatives finally was selected.'"[106] In other words, the agency would inform the public of the consequences of possible actions, but would not reveal how the actions would be carried out or which contemplated action is ultimately selected. Yap further proposes an amendment to NEPA which requires classified information to be annexed to the otherwise publicly available EIS.[107]

This partial-disclosure approach presents some challenges, and it is difficult to imagine what a classified EIS under such a system would look like. If an agency contemplates only two actions, it would be obvious which alternative the agency chooses. For example, under the facts of *Mothers for Peace*, if the only options were (1) to build the storage facility, or (2) to not build the facility, it would be easy to visually determine which alternative was chosen. Also, classifying portions of the EIS that relate to "details" would still leave large and potentially significant sections of information unreviewable. The agencies would therefore still be operating on a good faith basis and making decisions without public participation.

C. Special Courts and/or Special Attorneys

Professor Stephen Dycus suggests the creation of classified proceedings as a solution to the classified EIS problem.[108] Under this proposal, Congress would develop a special court to hear classified information in NEPA compliance cases.[109] The court would have security procedures that ensure both competent hearings and the prevention of

104. Yap, *supra* note 13, at 1336.

105. *Id.*

106. *Id.* at 1337 (quoting Cary Ichter, Note, "*Beyond Judicial Scrutiny": Military Compliance with NEPA*, 18 GA. L. REV. 639, 689 (1984) (discussing the evolution of NEPA litigation involving the military)).

107. *Id.*

108. *See* Stephen Dycus, *NEPA Secrets*, 2 N.Y.U. ENVTL. L.J. 300, 309 (1993).

109. *Id.* at 310.

information leaks.[110] Dycus compares this hypothetical court to the Foreign Intelligence Surveillance Court (FISC) created by the Foreign Intelligence Surveillance Act of 1978 (FISA).[111] FISC is composed of eleven U.S. District Court judges who are appointed by the Chief Justice of the U.S. Supreme Court.[112] The court hearings are conducted in closed chambers and FISC maintains secret records.[113] The proceedings are nonadversarial and are based solely on the Department of Justice's (DOJ) presentations through its Office of Intelligence Policy and Review.[114]

Pursuant to FISA, the DOJ applies to the court for authorization of electronic surveillance in foreign intelligence matters.[115] The FISC earned a reputation as a "rubberstamp court" for the first twenty-three years of its existence, as it never turned down a single application by the DOJ.[116] However, the court recently sent a warning signal to the executive branch when it ruled against the DOJ in a 2002 opinion.[117] Although the Foreign Intelligence Surveillance Court of Review, the FISC's appellate body, subsequently overturned the decision, the message was clear—the court would not passively condone a violation of civil liberties in the "name of 'national security.'"[118]

There are several advantages to creating a special court for confidential environmental matters. An EIS would be reviewed for sufficiency, the public would be assured of agency oversight, and the special court would develop expertise in the subject matter area. As with other special courts, this expertise would result in consistent, informed jurisprudence that agencies could rely on. By conforming to a well-developed special court standard, agencies could easily minimize the likelihood of being ordered to produce a new EIS. The disadvantage of a special court would be the lack of a truly adversarial EIS proceeding since the public would be cut out of the process altogether. But there would at least be a measure of oversight.

As another alternative, Dycus proposes the creation of a "special environmental counsel" who can access classified information and

110. *Id.*

111. 50 U.S.C. §§ 1801–1871 (2006).

112. Id. § 1803(a).

113. Jessica M. Bungard, Comment, *The Fine Line Between Security and Liberty: The "Secret" Court Struggle to Determine the Path of Foreign Intelligence Surveillance in the Wake of September 11th*, 7:2 U. PITT. J. TECH. L. & POL'Y 1 (2004), *available at* http://tlp.law.pitt.edu/articles/Vol7Bungard.pdf.

114. Foreign Intelligence Surveillance Act, Frequently Asked Questions, http://www.eff.org/Censorship/Terrorism_militias/fisa_faq.html (last visited Sept. 6, 2007).

115. *Id.*

116. Bungard, *supra* note 113, at 2.

117. *Id.* at 3.

118. *In re* Sealed Case, 310 F.3d 717, 746 (FISA Ct. Rev. 2002).

prosecute NEPA cases before the judiciary in secure proceedings when he deems it necessary.[119] This position would be similar to the Independent Counsel that could formerly be appointed under the Ethics in Government Act.[120] Like the special court proposal, this option fulfills the important function of EIS review for sufficiency. However, it similarly falls short of fulfilling NEPA's goals by failing to include an active public comment process. A special attorney could advocate, and perhaps even use expert witnesses, but she would be a member of the executive branch and therefore would provide a check of dubious potency on executive agencies.

D. Oversight Committees

Professor Dycus suggests that, "even without judicial enforcement, Congress could monitor compliance with NEPA by requiring that each secret EIS or part thereof be reported to one or more congressional committees with oversight responsibility."[121] He illustrates how this system might function using the example of the Intelligence Oversight Committees of both houses, which receive reports of secret intelligence agency actions.[122] These committees do not have authority to overrule intelligence agency actions, but they authorize appropriations and have subpoena power, which gives them significant practical power.[123] The committees have created secure proceedings, which have been successful at preventing information leaks.[124] The hearings are open to the committee itself, testifying witnesses, and committee staff, but are closed to the public.[125]

The experience of the Intelligence Oversight Committees shows that designing a committee structure that maintains its independence and effectiveness is not simple. For example, in the past, the members of the House and Senate Intelligence Oversight Committees could not serve more than eight consecutive years.[126] That term limit was imposed because of fears of capture by the intelligence community.[127] But several outside reviewers, including the 9/11 Commission, recommended that

119. DYCUS, *supra* note 90, at 168.

120. Dycus, *supra* note 108, at 309; *see also* 28 U.S.C. § 595 (1982).

121. Dycus, *supra* note 108, at 310.

122. *Id.*

123. COMM'N ON THE ROLES & CAPABILITIES OF THE U.S. INTELLIGENCE COMMUNITY, PREPARING FOR THE 21ST CENTURY: AN APPRAISAL OF U.S. INTELLIGENCE 14-2 (Mar. 1, 1996), *available at* http://www.gpoaccess.gov/int/report.html.

124. *Id.*

125. U.S. House of Representatives, Permanent Select Committee on Intelligence, http://intelligence.house.gov/faqs.aspx (last visited Sept. 6, 2007).

126. COMM'N ON THE ROLES & CAPABILITIES OF THE U.S. INTELLIGENCE COMMUNITY, *supra* note 123, at 14-2.

127. *Id.*

these term limits be eliminated due to the length of time required to master the complex subject matter of national security.[128] According to one recommendation, the eight-year turnover caused an unfortunate "loss of expertise and continuity."[129] As a result, the Senate has done away with these term limits, but the House still maintains them.[130] A specialized congressional oversight committee to review classified environmental matters would similarly require a balance between the desire to avoid capture by government agencies and maintenance of committee expertise.

Nonetheless, even if a NEPA oversight committee is well designed, it is still possible to question what effect it would have—would it be enough to ensure that agencies take a "hard look" at their actions?

IV. A SOLUTION THAT PRESERVES THE GOALS OF NEPA–CONGRESSIONAL OVERSIGHT COMMITTEES AS A PROXY FOR THE PUBLIC AND IN CAMERA JUDICIAL REVIEW

This Note advocates for the use of both a congressional oversight committee and in camera judicial review to solve the tension between NEPA's goals and national security concerns. Providing meaningful review of classified executive actions in the environmental arena is no more difficult than providing such review for intelligence matters. According to the director of the CIA, "United States intelligence today is a highly regulated activity and properly so."[131] The oversight structure for intelligence "has ensured that the imperatives of national security are consistent with democratic values."[132]

Oversight of agency compliance is necessary to remain faithful to the first purpose of NEPA—ensuring that the agency factors environmental consequences into its decisionmaking calculus. This review should come in the form of in camera judicial proceedings. It is also important to seek a form of review that remains true to the second purpose of NEPA—ensuring that the public is allowed to be meaningfully involved in the process. In order for the agency to reap the benefits of an adversarial public comment process, the commenters must have access to detailed information on proposed actions. Merely knowing the "effects" of a hypothetical project plan is not enough. A congressional oversight

128. JUDY SCHNEIDER, SENATE SELECT COMMITTEE ON INTELLIGENCE: TERM LIMITS AND ASSIGNMENT LIMITATIONS (Aug. 12, 2004) (Library of Congress, CRS Report for Congress, Order Code RS21908), *available at* http://www.fas.org/irp/crs/RS21908.pdf.

129. COMM'N ON THE ROLES & CAPABILITIES OF THE U.S. INTELLIGENCE COMMUNITY, *supra* note 123, at 14-2.

130. Amy Zegart, *Outside View: Hill Intelligence Unreformed*, UNITED PRESS INT'L, Aug. 30, 2007, *available at* http://www.upi.com/International_Security/Emerging_Threats/Analysis/2007/08/30/ outside_view_hill_intelligence_unreformed/1255/.

131. Hayden, *supra* note 1, at 251.

132. *Id.*

committee, with elected representatives acting in the role of the critical public, would act as a public participation proxy and facilitate an informed comment process.

If the committee members have the requisite security clearance, secrecy is preserved. Of course, the committee would not be empowered to order the production of a new EIS if it found the first one insufficient. Such authority would run afoul of the prohibition against legislative vetoes of executive branch actions.[133] However, the committee could examine the full report and participate in an informed comment process regarding its contents, forcefully asking the agency to present reasoned responses to their criticism. This process would create a record of an adversarial exchange, used to facilitate subsequent judicial review in an in camera proceeding, much like review by the FISA court.

Dycus' congressional oversight proposal represents a better accountability mechanism than does his proposed "special environmental counsel," because the agency would have to face legislators who directly represent the public. With the public participation goal in mind, it would be best if the special committee could include legislators from the local district affected by the proposed project, appointed on a temporary basis, in addition to a permanent standing membership—provided they had appropriate security clearance. If a project is national in scope, the temporary committee membership could be composed of a random sampling of affected districts. The strength of a standing committee, modeled after the Congressional Intelligence Oversight Committees, is that it would have a degree of expertise and familiarity with the NEPA process and environmental subject matter.[134] But such a standing committee would lack local knowledge and would not have a direct stake in the project. By combining the strengths of the permanent and temporary members, the oversight committee would maintain a degree of expertise while including an interested faction of commenters.

The facts of *Mothers for Peace* can be used to illustrate how this proposal would work. The NRC would issue a draft EIS for the used fuel storage facility and then release it to the public through normal procedures with an annex to the portions that are classified according to the national security exemption of FOIA. Then the public would submit its comments on the public portions of the EIS for the NRC's review. If the public wished to challenge an informational withholding by the NRC, a court could review the propriety of the classification under standard

133. *See* Immigration & Naturalization Serv. v. Chadha, 462 U.S. 919 (1983) (holding that Congress cannot control agencies without respecting the Bicameralism and Presentment Clauses of the Constitution).

134. *See* COMM'N ON THE ROLES & CAPABILITIES OF THE U.S. INTELLIGENCE COMMUNITY, *supra* note 123, at 14-2.

review procedures for FOIA, ensuring that only properly classified material was withheld.

Concurrently with public release of the partially classified draft EIS, the NRC would submit the full draft EIS, including all classified information, to the congressional oversight committee. The committee would then comment on the classified portion. The committee would have discretion to comment in written form or to hold a secure hearing with the authority to issue subpoenas and use expert witnesses. The NRC would review and respond to comments by the committee, then complete the final EIS. Finally, a specialized court, in an in camera proceeding, would be empowered to review the record (both classified and unclassified portions) to ensure that the NRC took a hard look at the environmental consequences of the storage facility. The judicial review component would be mandatory in cases of classified EISs, much like Foreign Intelligence Surveillance Court review is mandatory prior to action under FISA. If the court approves, then the NEPA proceeding would be complete and the NRC would choose its course of action, fully informed of the environmental consequences. If the court rules that the EIS is not sufficient, it could enjoin the NRC to produce a sufficient EIS.

Critics of this proposal would probably echo concerns addressed previously in this Note—that these complicated procedures would weigh down the NEPA process with additional layers of costly bureaucracy and increase the likelihood of security leaks.[135] The cost of bureaucracy, however, must be weighed against the benefit of carrying out Congress' intent to ensure that federal agencies consider the environmental consequences of their decisions and involve the public in those decisions. Moreover, fears that security breaches would result from the review process are probably unfounded in light of the success of similar procedures already in use with the Foreign Intelligence Surveillance Court and the intelligence oversight committees in Congress.

Another potential concern with this proposal is that additional procedures would delay urgent federal actions. Judicial and congressional oversight would extend the decisionmaking process, compared to simply vesting responsibility with the agencies. In the case of Diablo Canyon Power Plant, the dry casks are intended to house dangerous fuel rods that might have no other safe repository when the existing wet storage is full. For now, PG&E has initiated a contingency plan to add temporary spent fuel storage racks in its spent fuel pools.[136] Still, one can envision the painful irony if the plant were to reach its storage limit, forcing it to handle the spent fuel rods in an environmentally dangerous manner due to a protracted administrative process.

135. *See* Frye, *supra* note 65.

136. Diablo Canyon Independent Safety Committee, *supra* note 45.

This concern may not be that significant, however. To begin with, if the committee establishes clear procedures for classified EISs, the review process would quickly become streamlined, especially as the committee develops expertise and the court develops a case law record, mitigating the resulting delay. More importantly, existing CEQ emergency procedures should allay concerns about emergency situations.[137] The relevant regulatory section provides:

> where emergency circumstances make it necessary to take an action with significant environmental impact without observing the provisions of [NEPA], the Federal agency taking the action should consult with the Council about alternative arrangements. Agencies and the Council will limit such arrangements to actions necessary to control the immediate impacts of the emergency. Other actions remain subject to NEPA review.[138]

Accordingly, when a situation becomes so urgent that an agency deems it an emergency, it can act outside the standard NEPA process. The CEQ regulation does not explicitly connect the emergency waiver with national security, but CEQ has demonstrated its willingness to apply it to military actions.[139] The NEPA emergency waiver has also been successfully invoked by the Department of Energy in its efforts to combat terrorism.[140] If Diablo Canyon Power Plant reaches a point where the unsafe storage of spent fuel rods is imminent, the exemption could be invoked. No one disagrees that there may be a time when national security calls for immediate action and NEPA cannot reasonably be applied, but it would be a mistake to allow this type of exemption to

137. Willard et al., *supra* note 10, at 80–81.

138. 40 C.F.R. § 1506.11 (2007).

139. DYCUS, *supra* note 90, at 149–51. CEQ granted the Department of Defense an emergency NEPA waiver during the Persian Gulf War. That waiver was invoked explicitly twice—once for fuel-bomb testing in Nevada during wartime and once to support the intensified use of an air base after the war.

140. Presidential Directed Mission Requiring Authorization of National Security Measures, 69 Fed. Reg. 10,313, 10,440–41 (Mar. 5, 2004), *available at* http://www.epa.gov/fedrgstr/EPA-IMPACT/ 2004/March/Day-05/i5017.htm. In 2004, the Department of Energy (DOE) issued a notice of emergency action in connection with a U.S. mission to extract nuclear materials from Libya and ship them to Tennessee. Under NEPA, the DOE typically would have to issue an Environmental Impact Assessment for this action. Nevertheless, "due to the urgent and classified nature of the actions required to perform this mission, DOE consulted with the Council on Environmental Quality about alternative arrangements with regard to NEPA compliance" under 40 C.F.R. § 1056.11. The National Nuclear Security Administration (NNSA), a quasi-autonomous agency within the DOE, produced a classified environmental review in an Appendix to a draft EIS, describing possible accident scenarios. CEQ reviewed the NNSA's assessment of the environmental impacts of transporting the materials, which included a pre-existing classified analysis of a similar scenario, and a proposal to conduct a post-mission briefing to CEQ, and determined that these "alternative arrangements" were sufficient under the emergency provision. *Id.*

extend into daily operations that implicate national security.[141] Not all security issues are emergencies.

Finally, one might ask if it is worth all the trouble to add more NEPA procedures when the congressional committee's power would be limited to comments, and courts could order only a more searching inquiry. But one must remember that in *Mothers for Peace*, the practical effect of the court's ruling is that the NRC must go back and produce an EIS addressing the possibility of a terrorist attack. The holding does not affect the agency's ultimate discretion to decide to build the facility, even if the environmental risks are revealed to be monumental. In the end, the agency makes the final decision, implementing its favored plan. With this Note's proposal, however, the agency would face an adversarial process and judicial oversight, ensuring that it really does evaluate the ramifications of its action. As with all applications of NEPA, the hope remains that by complying with the process, the agency's decisionmaking will be enlightened, and society will be the better for it.

CONCLUSION

By refusing to countenance a wholesale national security exemption to NEPA, the *Mothers for Peace* court seemed to hold the line on NEPA's validity within the national security landscape. But the court's decision also fails to answer many troubling questions about NEPA's application in the coming years. By referencing *Weinberger's* acceptance of a classified EIS immune from judicial review, *Mothers for Peace* runs counter to the goals of NEPA and extends the application of this immunity to civilian agencies. Commentators have pointed out that "in principle NEPA applies equally to all agencies and all activities of the federal government. In practice, it has often been applied less rigorously to America's defense establishment, especially when fear of foreign aggression has displaced worry about environmental consequences."[142] This case may herald an extension of this trend to agencies that are not traditionally associated with defense, as they may increasingly rely on it to use the national security exemption of FOIA in NEPA proceedings.

If national security concerns are invoked more frequently and by a broader range of agencies in the course of NEPA compliance, the courts must clarify the law. Vague gestures by the judiciary regarding the appropriate application of NEPA when national security is at issue further muddies already unclear waters. In addition, Congress should

141. In a case like *Mothers for Peace*, it seems doubtful that an agency could reasonably declare the need to act under the CEQ emergency exemptions. Unlike the extraction of nuclear material from Libya, the operation of the Diablo Canyon Power Plant is a continuous and longstanding activity. It would be a dubious extension of the emergency exemption to argue that the future lack of adequate storage space constitutes an emergency.

142. DYCUS, *supra* note 90, at 11.

reevaluate the interplay of NEPA and national security and chart a clear course to guide parties through these kinds of disputes while preserving the fundamental goals of NEPA—to ensure that agencies consider the environmental effects of federal actions and to allow the public to participate in the decisionmaking process. A congressional oversight committee would serve the role of the public in evaluating and challenging classified environmental data, and in camera judicial review would ensure that agencies comply with the mandates of NEPA.