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THE UNITED STATES SUPREME COURT DEALS A SEVERE BLOW TO NEPA

ENVIRONMENTAL LAW—NEPA: The United States Supreme Court holds that the Navy need not prepare an environmental impact statement for federal action protected from disclosure under the Freedom of Information Act. *Weinberger v. Catholic Action of Hawaii/Peace Education Project*, 102 S.Ct. 197 (1981).

INTRODUCTION

Congress enacted the National Environmental Policy Act (NEPA)¹ in 1970. The basic purpose of NEPA is to implement the stated environmental policy of the federal government, which is to “use all practicable means and measures . . . to create and maintain conditions under which man and nature can exist in productive harmony.”² NEPA furthers this policy by ensuring that federal agencies consider the environmental impacts of potential actions and incorporate those environmental considerations into their decision-making processes.³ In addition, NEPA requires that the public be made aware of those environmental factors.⁴ Thus, it has been termed an environmental full disclosure law.⁵

Courts are generally reluctant to disapprove agency actions on substantive grounds, but they enforce the procedural provisions of NEPA “with a vengeance.”⁶ Accordingly, the heart of NEPA is §4332(2)(C), which requires that a detailed environmental impact statement (EIS) be prepared for any proposed major federal action “significantly affecting the quality of the human environment.”⁷ Courts have struggled to determine under what circumstances and at what point in the decision-making process an EIS must be prepared.

If the nature of a proposed action is such that the necessity of an EIS is not obvious, the agency making the proposal must prepare an envi-

1. 42 U.S.C. §§ 4321–4361 (1976).

2. *Id.* § 4331(a).

3. *Id.* § 4332(2)(B).

4. *Id.* § 4332(2)(C).

5. *Environmental Defense Fund, Inc. v. Corps of Engineers*, 325 F. Supp. 749, 759 (E.D. Ark. 1971).

6. W. RODGERS, *HANDBOOK ON ENVIRONMENTAL LAW* 717 (1977).

7. 42 U.S.C. § 4332(2)(C) (1976). An EIS must provide information regarding the environmental impact of the proposed action, any adverse environmental effects which cannot be avoided should the proposal be implemented, alternatives to the proposed action, the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and any irreversible commitments of resources which would be involved in the proposed action should it be implemented.

ronmental assessment (EA).⁸ The EA is basically a shorter version of the EIS. It discusses briefly the particular proposal involved, potential environmental impacts, alternatives, and the agencies and persons consulted during its preparation.⁹ The EA serves as an aid in determining whether NEPA requires an EIS.¹⁰ The agency must use the findings stated in the EA to ascertain whether the proposed action has sufficient potential environmental impact to trigger the need for preparation of an EIS.¹¹

The United States Supreme Court in *Weinberger v. Catholic Action of Hawaii/Peace Education Project*¹² dealt with the issue of under what circumstances and at what point in the decision-making process an EIS is required. The facts of that case are unique, yet they present an example of how an agency goes through preliminary steps to determine the necessity of an EIS. In *Catholic Action of Hawaii*, the Navy decided that an EIS was not necessary, and the Supreme Court agreed. The Court held that when a federal action is protected from disclosure under the Freedom of Information Act (FOIA),¹³ NEPA does not require the preparation of an EIS. Thus, the Court's opinion gives guidance to agencies for making future determinations.

STATEMENT OF THE CASE

The United States Navy operates the West Loch facility, located on the island of Oahu, Hawaii. Since 1959, the Navy has used West Loch to handle and store ammunition. The facility is situated near a major private airport as well as two military airports. West Loch is also near the Oki-okirolepe Fishpond, a refuge listed on the National Register of Historic Places.¹⁴

The Navy decided to transfer some weapons to West Loch from another facility in 1975. Pursuant to Department of Defense regulations¹⁵ the Navy prepared an EA and determined that the transfer and requisite construction of additional storage space would not have any environmental impact.¹⁶ The EA did not consider the possibility of nuclear weapons

8. Council on Environmental Quality, 40 C.F.R. § 1508.9 (1981).

9. *Id.*

10. *Id.* § 1501.4.

11. *Id.*

The environmental assessment is a concise public document to determine whether to prepare an environmental impact statement or whether to prepare a finding of no significant impact, to aid in compliance with NEPA when no environmental impact statement is necessary, and to facilitate preparation of a statement when one is necessary.

12. 102 S.Ct. 197 (1981).

13. 5 U.S.C. § 551-557 (1976).

14. *Catholic Action of Hawaii/Peace Educ. Project v. Brown*, 643 F.2d 569, 570 (9th Cir. 1980).

15. Office of the Secretary of Defense, 32 C.F.R. § 214.6 (1981).

16. *Weinberger v. Catholic Action of Hawaii/Peace Educ. Project*, 102 S.Ct. 197, 200 (1981).

storage, even though the new building would produce a facility capable of maintaining and storing nuclear weapons.¹⁷ The EA concluded that an EIS need not be prepared and construction began. In 1978, the Navy prepared a candidate EIS,¹⁸ although its reasons for doing so were not stated in the Supreme Court's opinion.¹⁹ The candidate EIS discussed nuclear weapons storage in general, but was not site-specific, and concluded that "[t]he handling, storage, and transportation of nuclear weapons present no hazards to the environment."²⁰ This general conclusion did not relate specifically to the West Loch facility, but rather to the handling of nuclear weapons in general.

The plaintiffs in *Catholic Action of Hawaii*, several environmental groups and individuals, sued in March of 1978 to enjoin the construction of the new West Loch facility and to compel the preparation of an EIS. They alleged that the Navy should have considered in detail, through the mechanism of an EIS, the risk that the storage of nuclear weapons at West Loch would present to the nearby airports and the people of Hawaii. Both Navy regulations²¹ and the FOIA prohibit the Navy from either admitting or denying that the West Loch facility is or will be used to store nuclear weapons. Therefore, the United States District Court determined that any further compliance with NEPA, in the form of an EIS, was impossible. The court denied the request for a preliminary injunction and held that the Navy had complied with NEPA to the fullest extent possible.

The Ninth Circuit court of appeals reversed,²² holding that the Navy must prepare an EIS. The court determined that an EIS could hypothesize, without admitting or denying, that West Loch would be used to store nuclear weapons, since the facility's capability to do so had been conceded by the Navy. Thus, the court invented what it termed a hypothetical EIS which would discuss the environmental effects of the project if nuclear weapons were to be stored at the facility. In this way, the Navy would

17. *Catholic Action of Hawaii/Peace Educ. Project v. Brown*, 643 F.2d 569, 570 (9th Cir. 1980).

18. Navy regulations establish a series of steps to be followed in determining whether an EIS should be filed. A brief Environmental Impact Assessment must be prepared for any action that may have environmental effects. If it appears from this assessment that the action may have significant environmental impact a Candidate Environmental Impact Statement must be prepared, following the same format and covering the same issues as a formal EIS. The candidate EIS is reviewed by a Review Panel in the Office of Chief of Naval Operations, which decides whether an EIS is required.

City and County of San Francisco v. United States, 615 F.2d 498, 500 (9th Cir. 1980).

19. One can infer from the opinion that the Candidate EIS was prepared as a final effort to pacify the plaintiffs in this case. Obviously the effort was unsuccessful since the lawsuit remained unsettled.

20. *Catholic Action of Hawaii/Peace Educ. Project v. Brown*, 643 F.2d 569, 570 (9th Cir. 1980).

21. *Id.*

22. *Id.* at 572.

not violate any security requirements and would satisfactorily fulfill the provisions of the FOIA. The court reasoned that the public is entitled to knowledge regarding the possible consequences of governmental action so that the political process can operate to weed out unpopular government officials. Here, the preparation of the hypothetical EIS would provide assurance to the public that the Navy had considered the environmental effects of nuclear weapons storage and handling in the event that the Navy decided to use West Loch for that purpose. If the public was not satisfied with the conclusions reached in the EIS, the voters could use their influence to obtain new government leadership.

The United States Supreme Court reversed the Ninth Circuit. The Court held that the hypothetical EIS was "a creature of judicial cloth, not legislative cloth"²³ and not mandated by NEPA. Thus, according to the Supreme Court, the court of appeals did not have the authority to impose the requirement of a hypothetical EIS on the Navy, since such a requirement "departed from the express intent of Congress manifested by the explicit language in § 102(2)(C)."²⁴

The Supreme Court used two basic lines of reasoning in determining that the Navy was not required to prepare an EIS. The first involved a recognition of the two basic goals of NEPA.²⁵ One is the decision-making goal—to ensure that the agency considers environmental impacts when engaging in its decision-making processes. The other is a public disclosure goal—to ensure accountability to the public. Through disclosure of the EIS, the public is assured that the agency has considered environmental factors in reaching its decision. This public disclosure is controlled by the FOIA, which balances "the public's need for access to official information with the government's need for confidentiality."²⁶ The FOIA lists nine exemptions to its provisions,²⁷ the first of which the Supreme Court found applicable here. Exemption one provides that matters which must be kept secret in the interest of national defense need not be disclosed, as long as certain other requirements are also met.²⁸ The location of nuclear weapons falls within the category of matters related to the national defense.

23. *Weinberger v. Catholic Action of Hawaii*, 102 S.Ct. 197, 200 (1981).

24. *Id.* at 202. § 102(2)(C) and § 4332(2)(C) are substantively the same. They merely represent a different codification of the same statute.

25. 42 U.S.C. § 4332(2)(C) (1976).

26. *Weinberger v. Catholic Action of Hawaii/Peace Educ. Project*, 102 S.Ct. 197, 202 (1981).

27. 5 U.S.C. § 552(b) (1976).

28. *Id.* § 552(b)(1). "This section does not apply to matters that are specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and are in fact properly classified pursuant to such Executive order." *Id.* In *Catholic Action of Hawaii*, Exec. Order 12,065, 43 Fed. Reg. 28,949 (1978), provided the authority for classification.

The second line of reasoning that the Court used involved the "proposed action" requirement of NEPA. NEPA requires the preparation of an EIS only for proposed federal actions, and not for actions which are merely contemplated.²⁹ The Court found that a hypothetical EIS would deal merely with a contemplated agency action—a very vague possibility for the future. The Court in *Catholic Action of Hawaii* held that this was insufficient to trigger the need for an EIS and therefore did not require its preparation.

ANALYSIS

The first line of reasoning in *Catholic Action of Hawaii*, involving the two basic goals of NEPA, is unnecessary to the opinion. The two goals, public disclosure and decision-making, are not necessarily coextensive. The opinion recognizes this by stating that "§ 102(2)(C) contemplates that in a given situation a federal agency might have to include environmental considerations in its decision-making process, yet withhold public disclosure of any NEPA documents, in whole or in part, under the authority of a FOIA exemption."³⁰ NEPA's goal of public disclosure could not possibly have been met in this case because to do so would violate the provisions of the FOIA. The goal of decision-making, however, could have been met by requiring the preparation of an EIS for internal use only. The agency can consider the environmental impacts and alternatives provided in such an EIS during the decision-making process without revealing its contents to the public. The Supreme Court in *Catholic Action of Hawaii* thus could have required the preparation of an EIS for internal use by the Department of the Navy in its decision-making processes regarding the West Loch facility without requiring public access to that EIS. In view of the result and holding of this case, the Court obviously did not rely on its discussion of the NEPA goals to justify its decision.³¹

The second line of reasoning in the opinion seems to provide the basis for the Court's decision. One of the biggest problems confronted in interpreting NEPA is the determination of when an EIS is required.³² The statute itself provides that an EIS must be prepared for "every recommendation or report on proposals for legislation and other major Federal

29. *Kleppe v. Sierra Club*, 427 U.S. 390 (1976).

30. *Weinberger v. Catholic Action of Hawaii/Peace Educ. Project*, 102 S.Ct. 197, 201 (1981). The Department also recognizes the possibility of preparing an EIS for internal use only. Office of the Secretary of Defense, 32 C.F.R. § 214.6(D)(10) (1981).

31. *Weinberger v. Catholic Action of Hawaii/Peace Educ. Project*, 102 S.Ct. 197, 203 (1981). "The Navy must consider environmental consequences in its decisionmaking process, even if it is unable to meet NEPA's public disclosure goals by virtue of FOIA Exemption 1. It does not follow, however, that the Navy is required to prepare an EIS in this case."

32. W. RODGERS, HANDBOOK ON ENVIRONMENTAL LAW 767-777 (1977).

actions significantly affecting the quality of the human environment."³³ Courts have focused on the word "proposal" and established that an EIS must be prepared when federal action is actually proposed,³⁴ rather than simply contemplated. Mere contemplation of action is not enough to trigger this requirement. The rationale behind this proposal/contemplation distinction is that contemplated actions often do not result in actual proposals. Therefore, requiring an EIS for every contemplated action would lead to many unnecessary EIS's and impose too great a burden on agencies.³⁵

The Supreme Court in *Catholic Action of Hawaii* determined that the hypothetical EIS envisioned by the court of appeals necessitated the assumption that nuclear weapons might at some time be stored at the West Loch facility. The storage must be viewed as a contemplated action, according to the Court, because the Navy cannot admit or deny the storage of such weapons. Consequently, the Court held that the Navy need not prepare an EIS.³⁶

This rationale and holding result in a unique dilemma. The Navy's action could never be viewed as a proposal because the Navy need not ever admit the actual storage of nuclear weapons at the site. Therefore, the Navy would never be required to prepare an EIS, even if nuclear weapons were stored at West Loch in the future. The basic premise and safeguard of the contemplation/proposal distinction, however, is that an EIS can be required at such time as a proposal is actually made. Under the facts and rationale of this case, the Navy could actually store nuclear weapons at the West Loch facility without ever having to prepare an EIS. The effective holding of *Catholic Action of Hawaii* is that where the FOIA permits the nature of an agency action to be kept secret, NEPA does not require an EIS, even for internal agency use. The action can occur without disclosure or consideration of environmental factors.

A basic purpose of NEPA is to "require consideration of environmental factors before project momentum is irresistible, before options are closed, and before agency commitments are set in concrete."³⁷ Late EIS's present

33. 42 U.S.C. § 4332(2)(C) (1976).

34. A proposal is "a tentative plan or course of action offered for consideration." W. RODGERS, HANDBOOK ON ENVIRONMENTAL LAW 767 (1977). The CEQ regulations provide that a proposal "exists at that stage in the development of an action when an agency subject to the Act has a goal and is actively preparing to make a decision on one or more alternative means of accomplishing that goal and the effects can be meaningfully evaluated." Council on Environmental Quality, 40 C.F.R. § 1508.23 (1981).

35. *Kleppe v. Sierra Club*, 427 U.S. 390, 406 (1976).

36. *Weinberger v. Catholic Action of Hawaii/Peace Educ. Project*, 102 S.Ct. 197, 203 (1981). "The Navy is not required to prepare an EIS regarding the hazards of storing nuclear weapons at West Loch . . . simply because a project is *contemplated*, but only when the project is *proposed*." (Emphasis in original.) *Id.*

37. W. RODGERS, HANDBOOK ON ENVIRONMENTAL LAW 767 (1977).

a real problem in enforcement of NEPA. The EIS is of little value unless the agency considers the contents in determining whether to act.³⁸ A premature EIS, however, does no harm. It does not impede the agency's decision-making process³⁹ and can be amended or supplemented if facts and circumstances so warrant.⁴⁰ In *Catholic Action of Hawaii*, the Navy had completed the construction of the addition to the West Loch facility at the time of the lawsuit. Therefore, any EIS requirement imposed by the Court would have been ineffectual regarding the decision whether to build the addition. An EIS could only affect a decision regarding whether to store nuclear weapons at West Loch.

The court of appeals' opinion stated that an EIS should deal not only with the environmental impact of the original construction of the facility, but also with the impact of its operation.⁴¹ The Supreme Court did not discuss this idea. The Court arguably may have been influenced by the fact that the Navy had already completed construction, although the opinion does not explicitly state that this affected the holding. If the Court did rely on this fact, then in effect the Court was implying that it would not enforce the EIS requirement once a project was completed. The opinion's impact as precedent for future litigation could thus result in frustration of the purposes and policies of NEPA. Agencies would have free rein to delay the preparation of an EIS until enforcement becomes infeasible.

CONCLUSION

Weinberger v. Catholic Action of Hawaii/Peace Education Project should be analyzed in terms of what message the United States Supreme Court is sending to federal agencies regarding the preparation of EIS's. Here, the message is clear and unfortunate. If an agency is considering action that falls within an FOIA exception and can therefore be withheld from public disclosure, the agency can proceed with its action without having to prepare an EIS. In theory, the agency is still required by NEPA to consider environmental factors. As a practical matter, no mechanism exists for enforcing that requirement.

The court of appeals provided the Supreme Court with the opportunity to hold that an EIS is not required in this factual situation. Perhaps if the court of appeals had confined its holding to the statutory provisions, the Supreme Court would have affirmed the opinion. For example, instead of inventing a hypothetical EIS, the court could have required an EIS for

38. *Id.*

39. *Id.* at 773.

40. Council on Environmental Quality, 40 C.F.R. § 1502.9 (1981).

41. *Catholic Action of Hawaii/Peace Educ. Project v. Brown*, 643 F.2d 569, 571 (9th Cir. 1980).

internal use. In this case, however, the court of appeals unnecessarily expanded the provisions of NEPA. This Supreme Court decision is a severe blow to NEPA and provides agencies with an opportunity to circumvent NEPA's purposes and policies with judicial sanction.

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