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National Security and the National Environmental Policy Act

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NATIONAL SECURITY AND THE NATIONAL ENVIRONMENTAL POLICY ACT

EPA AND THE EXTREMELY LOW FREQUENCY ELECTROMAGNETIC RADIATION SUBMARINE COMMUNICATION (ELF) SYSTEM. The United States District Court for the Western District of Wisconsin and the United States Court of Appeals for the Seventh Circuit expounded three theories of the authority of a federal court to balance national security concerns against environmental considerations given a NEPA violation by a federal agency. No one theory has yet achieved precedence in any jurisdiction. *Wisconsin v. Weinberger,* 745 F.2d 412 (7th Cir. 1984).

FACTS

Since 1958, the Navy has been studying and developing the use of "extremely low frequency" electromagnetic radiation submarine communication (ELF) systems.[1] In 1968, the Navy decided to construct an ELF communication test facility in northern Wisconsin.[2] The facility became operational in 1969 and achieved full capacity in 1970.[3] Acknowledging the public's interest in the subject of biological impacts, the Navy studied the environmental effects of potential ELF system designs from 1969 to 1972.[4] No environmental impact statement was filed because the National Environmental Policy Act (NEPA)[5] did not become effective until January 1, 1970. In 1972, the Navy proposed Project Sanguine, a three-phase plan for research and development at the Wisconsin test facility.[6] In April 1972, the Navy filed an environmental impact

1. Extremely low frequency electromagnetic radiation refers to nonionizing electrical waves in the frequency range from 30 to 300 Hz with wavelengths from 620 to 6200 miles long. These very long wavelengths can penetrate seawater to depths of 300 to 400 feet. Existing communication systems can only operate at depths of 30 to 40 feet, forcing submarines either to operate at shallow depths or to send up buoyed antennas. In both cases, the submarine becomes more vulnerable to detection. Wisconsin v. Weinberger, 578 F. Supp. 1327, 1334 (W.D. Wis. 1984) [hereinafter cited as *Wisconsin I*].

2. *Id.*

3. *Id.* at 1335.

4. From the beginning, environmental research has concentrated on the effects of continuously exposing humans, animals, and plants to extremely low frequency electromagnetic radiation. Emphasis has been placed upon the potential effects of (1) the frequencies to be used by the Navy, (2) the power intensity of the electric fields produced by the operation of the ELF antennae, and (3) the intensity of the magnetic fields generated by the electric current passing through the antennae. *Id.* at 1335-36.

5. 42 U.S.C. §§ 4321-4347, 4361-4370 (1982).

6. *Wisconsin I,* 578 F. Supp. at 1335.

statement in compliance with NEPA.[7] In 1975, the Navy filed a supplemental environmental impact statement as required by NEPA.[8]

Rather than proceeding to the full-scale developmental phase of Project Sanguine, the Navy proposed Project Seafarer in 1977.[9] Project Seafarer was an experimental ELF system to be located at both the site in northern Wisconsin and an additional site in the upper peninsula of Michigan.[10] Seafarer was considered superior to Sanguine because it reduced the size of the fully operational system, cut project costs, and, by placing the system at two sites, made it possible to commence synchronous operations, increasing the strength of the signal.[11] The Navy issued an environmental impact statement for Project Seafarer in 1977.[12]

In 1978, President Carter decided to terminate Project Seafarer.[13] Congress followed the president's lead and decided not to fund the program, leaving the project dormant from April 1979 to March 1981.[14]

In October 1981, President Reagan approved the reactivation of an upgraded ELF system.[15] On June 7, 1983 the Navy issued, but did not circulate to the public or to interested federal agencies, an environmental assessment of the upgraded project. In this assessment, the Navy relied upon the 1977 environmental impact statement for Project Seafarer.[16] The assessment concluded that the ELF system would have neither permanent

7. The Navy concluded there would be no significant adverse effects from either the three developmental phases of the project or from the construction and development of a fully-operational system in late 1976. *Id.* at 1336.

8. The Navy decided to supplement its 1972 environmental impact statement before proceeding with the validation phase of Project Sanguine. The supplement concluded that two additional years of study revealed that the environmental risk of the system continued to be small. *Id.* at 1337.

9. *Id.* at 1335.

10. When fully operational, Seafarer would have five surface transmitter stations and 2400 miles of buried antenna cables dispersed in a 4000 square mile area. *Id.*

11. *Id.*

12. The statement concluded that no adverse biological effect had been completely substantiated or seemed highly probable from a Seafarer-like operation. *Id.* at 1338. Because NEPA merely required the Navy to consider environmental effects in its decisionmaking, the Navy's decision that no adverse effects had been substantiated revealed Navy consideration of environmental issues and thus compliance with the statute. A new environmental impact statement (EIS) rather than a supplemental environmental impact statement (SEIS) was filed due to the differences between Sanguine and Seafarer. *See id.*

13. *Id.* at 1335. Project termination was justified by reports that the ELF system represented only a marginal enhancement of breakthroughs that would impair submarine survivability in this century. *See* Wisconsin v. Weinberger, 582 F. Supp. 1489, 1493 (W.D. Wis. 1984) [hereinafter cited as *Wisconsin II*].

14. *Wisconsin I*, 578 F. Supp. at 1335. *Wisconsin II*, 582 F. Supp. at 1493.

15. The actual reasons for the reactivation of the ELF project are probably contained in an August 1981 recommendation from Defense Secretary Weinberger to President Reagan. The document itself was not part of the record before the district court. *Wisconsin I*, 578 F. Supp. at 1340, 1340 n. 7.

16. The Navy explained that the new ELF program would not increase electromagnetic field intensities above 1977 levels, and, upon reviewing new scientific information, concluded that there was no credible evidence of adverse effects to human health or the environment. *Id.* at 1341, 1341 n. 8.

nor temporary significant environmental impact.[17] Based on advice from Navy legal counsel, the Navy did not file a supplemental environmental impact statement,[18] asserting that a statement was unnecessary because all relevant information was included in the 1977 document.[19]

The state of Wisconsin subsequently filed a civil action seeking a preliminary and a permanent injunction of any additional work on the ELF project pending the preparation of a supplemental environmental impact statement as required by NEPA.[20] At the end of the trial, but before the issuance of a final decision, Chief District Judge Crabb denied the state's request for a preliminary injunction.[21] Finding the balance of harms to be approximately even, she decided that the public interest would not be served by an injunction at that time.[22]

On the merits, Judge Crabb later held, first, that new scientific information on the biological effects of extremely low frequency electromagnetic radiation since the time of the 1977 environmental impact statement was sufficient to impose upon the Navy the duties of evaluation and explanation.[23] The court also held that the Navy abused its discretion by proceeding with the project without filing a supplement to the 1977 environmental impact statement.[24] Finally, the court ruled that injunctive relief was the appropriate remedy.[25] The court enjoined the Navy from further work on the ELF system sites in northern Wisconsin or upper Michigan and from supplying submarines with ELF receivers until a supplemental environmental impact statement was filed.[26]

HOLDING

The Navy immediately filed a motion in district court for reconsideration of the permanent injunction on the ground that national security would be impaired by the delay in the ELF program pending the completion of a supplemental environmental impact statement.[27] Chief District Judge Crabb declined to impose a balancing test, holding that once NEPA had been found to have been violated, the presumption favoring the imposition of a permanent injunction could not be overcome unless injunctive relief could be shown not to promote the goal of the act—the

17. *Id.* at 1341.
18. *Id.* at 1351.
19. *Id.*
20. *Id.* at 1327.
21. *Id.* at 1333.
22. *Id.*
23. *Id.* at 1327.
24. *Id.*
25. *Id.*
26. *Id.* at 1365.
27. *Wisconsin II*, 582 F. Supp. at 1491.

integration of environmental concerns into agency decisionmaking.[28] National security concerns alone could not overcome the presumption.[29] The Navy's motion for a stay of the injunction pending appeal was also denied, while Wisconsin's motion for clarification was granted.[30]

On appeal, the Seventh Circuit Court of Appeals reversed the district court and vacated the permanent injunction in an order entered two days after oral arguments and prior to publication of final opinions.[31] All three members of the panel agreed to lift the injunction immediately due to a lack of justification for further delaying a national defense project authorized by Congress and directed by the president.[32]

In opinions entered on August 10, 1984, Circuit Judge Wood, joined by Chief Circuit Judge Cummings, decided that the Navy had not acted arbitrarily or capriciously in deciding not to file a supplemental environmental impact statement.[33] Circuit Judge Cudahy, dissenting in part, found that the Navy had failed to seriously consider new information, and Judge Cudahy would have affirmed the district court on that basis.[34]

The panel was unanimous in concluding that the district court should be reversed on its ruling that NEPA prohibits the consideration of competing agencies. Judge Wood and Judge Cummings denied the existence of a presumption in favor of injunctive relief under NEPA, and found that a delay in the ELF project would significantly impair the Navy's ability to protect national security.[35] Because the majority had already decided there was no violation of NEPA, this portion of the opinion is dictum. Judge Cudahy, concurring in part, agreed with the majority that NEPA does not prohibit a court from undertaking a traditional balancing of equities in deciding to issue an injunction.[36] He thus agreed with the majority's decision to lift the injunction.[37] As with the corresponding portion of the majority opinion, Judge Cudahy's concurrence is dictum.

This casenote will focus on contrasting views of a court's authority to balance national security and environmental concerns in the event of a NEPA violation. Chief District Judge Crabb held that the presumption

28. *Id.* at 1496.

29. *Id.*

30. On the motion for clarification, the court amended its injunction to permit the Navy to operate the already existing ELF system because Wisconsin was unable to demonstrate any significant danger from the system already in operation. *Id.* at 1496-97.

31. Wisconsin v. Weinberger, 736 F.2d 438 (7th Cir. 1984) (argued June 11, 1984; decided June 13, 1984) [hereinafter cited as *Wisconsin III*].

32. *Id.*

33. Wisconsin v. Weinberger, 745 F.2d 412, 424 (7th Cir. 1984) [hereinafter cited as *Wisconsin IV*].

34. *Id.* at 432.

35. *Id.* at 428.

36. *Id.* at 432.

37. *Id.*

for injunctive relief under NEPA cannot be overcome by national security concerns. In overturning Judge Crabb's decision, Circuit Judge Wood, joined by Chief Circuit Judge Cummings, advised that there is no presumption for injunctive relief under NEPA, and that, in this case, national security would prevail in a balancing test over environmental considerations. Finally, Circuit Judge Cudahy, concurring in part, conceded that there could be cases where national security would have to prevail over environmental concerns, even given a NEPA violation. Judge Cudahy, however, doubted that the courts are qualified to access national security needs.

Not one of these three views has the weight of *stare decisis* in any jurisdiction. Any one theory may be persuasive, however, in an area of law that has yet to be settled.

LEGAL BACKGROUND

The purpose of the National Environmental Policy Act is to impose a decisionmaking process upon all federal agencies.[38] Section 102(2)(C) of NEPA provides that "to the fullest extent possible," all federal agencies shall "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" assessing the environmental impact of the proposed action and possible alternatives.[39] "The thrust of § 102(2)(C) is . . . that environmental concerns be integrated into the very process of agency decisionmaking. The 'detailed statement' (environmental impact statement) NEPA requires is the outward sign that environmental values and consequences have been considered during the planning stage of agency actions."[40] The act does not prescribe the outcome of substantive decisions; it merely requires those decisions to be made in light of environmental concerns.[41] The preparation of an environmental impact statement ensures that the agency has made environmental considerations a part of the decisionmaking process.[42]

Domestic military activities are not exempt from the NEPA. As the court pointed out in *Concerned About Trident v. Rumsfeld*,[43] "The Navy, just like any federal agency, must carry out its NEPA mandate 'to the fullest extent possible' and this mandate includes weighing the environ-

38. Weinberger v. Catholic Action of Hawaii/Peace Education Project, 454 U.S. 139, 142-43 (1981).
39. *Id.*
40. Andrus v. Sierra Club, 442 U.S. 347, 350 (1979).
41. Kleppe v. Sierra Club, 427 U.S. 390, 410 n. 21 (1976).
42. *Catholic Action*, 454 U.S. at 143.
43. 555 F.2d 817, 823 (D.C. Cir. 1977).

mental costs of the Trident Program even though the project has serious national security implications."[44]

While the military is not exempt from NEPA, courts may balance environmental considerations against national security concerns when deciding whether to grant a preliminary injunction.[45] In *Committee for Nuclear Responsibility Inc. v. Seaborg,* the District of Columbia Circuit Court refused to overturn the district court's denial of a preliminary injunction against underground nuclear testing.[46] Because no NEPA violation had yet been established, the court found that it was proper to deny preliminary injunctive relief due to national security considerations.[47]

The District of Columbia Circuit has recognized a presumption favoring the imposition of an injunction once a NEPA violation has been discovered. In *Realty Income Trust v. Eckerd,*[48] the court unanimously held that, "(o)rdinarily when an action is being undertaken in violation of NEPA, there is a presumption that injunctive relief should be granted against continuation of the action until the agency brings itself into compliance." In *Eckerd,* the presumption was overcome when the court decided that an injunction against further completion of a federal office building would not promote further agency consideration of environmental concerns.[49] The problem in *Eckerd* was merely one of timing—the EIS was filed late—rather than one of an agency's lack of consideration of environmental concerns.[50] The court also noted, however, that when there were exceptional countervailing equities, as where "further delay might injure our nation's defense posture,"[51] the action could be allowed to proceed free of an injunction despite a NEPA violation.[52] The agency's obligation to comply with the act, however, would not be diminished; it would still be bound to "rethink" its decision based on environmental considerations.[53] As the same circuit noted in *Alaska v. Andrus,*[54] while there is a

44. *Id.* at 823.

45. *See* Massachusetts v. Watt, 716 F.2d 946 (1st Cir. 1983); Committee for Nuclear Responsibility v. Seaborg, 463 F.2d 796 (D.C. Cir. 1971) *aff'd* 404 U.S. 917 (1971); Committee for Responsible Area Growth v. Adams, 477 F. Supp. 994 (D.N.H. 1979), *vacated in part and remanded on other grounds,* 680 F.2d 835 (1st Cir. 1982); Conservation Law Found. v. General Services Admin., 427 F. Supp. 1369 (D.R.I. 1977); Atchison, Topeka & Santa Fe Ry. Co. v. Callaway, 382 F. Supp. 610 (D.D.C. 1974).

46. 463 F.2d at 797.

47. *Id.* at 798.

48. 564 F.2d 447, 456 (D.C. Cir. 1977).

49. *Id.* at 457.

50. *Id.*

51. *Id. citing* Judge Leventhal's concurrence in Concerned About Trident v. Rumsfeld, 555 F.2d at 457 (D.C. Cir. 1977).

52. Realty Income Trust v. Eckerd, 564 F.2d at 457 (D.C. Cir. 1977).

53. *Id.*

54. 580 F.2d 465 (D.C. Cir. 1978), *vacated in part on other grounds,* 439 U.S. 922 (1978).

presumption in favor of injunctive relief, such relief is not automatic. Countervailing considerations of public interest may outweigh factors favoring an injunction.[55]

ADDRESSING THE PROBLEM

While the District of Columbia Circuit has suggested that a presumption favoring injunctive relief under NEPA can be overcome by national security considerations, neither that circuit nor any other circuit has been compelled to decide a controversy by resolving this question. *Wisconsin v. Weinberger* presents three interpretations of the existence of a presumption for injunctive relief under NEPA and the ability of national security considerations to overcome that presumption. Any one of these views may be adopted by the courts in the future. Therefore, the advantages and disadvantages of each theory need to be evaluated.

ANALYSIS AND CONTRIBUTION

The Presumption for Injunctive Relief—The District Court's View

Citing *Realty Income Trust v. Eckerd,*[56] Chief District Judge Crabb wrote that given a violation of NEPA, there is a presumption in favor of granting injunctive relief against continuation of the action until the agency complies with NEPA. She decided that this presumption can be overcome only "if an injunction would not serve the purposes of the Act by preserving freedom of choice for the agency after it considers possible adverse environmental consequences of its options."[57]

Judge Crabb reached this restricted interpretation by comparing NEPA to the Endangered Species Act.[58] She looked to *Tennessee Valley Authority v. Hill,*[59] in which the U.S. Supreme Court foreclosed the exercise of usual court discretion to impose injunctions. This limitation was due to the flat prohibition of the destruction of critical habitats under the Endangered Species Act. She found *Hill* persuasive in construing NEPA. In *Hill,* the purpose of the statute—the protection of the endangered species, the snail darter—could only be satisfied by enjoining the completion of a dam. By analogy, Judge Crabb felt that the purpose of NEPA, forcing agencies to consider the environmental impact of their decisions, could be satisfied only by enjoining further work on the ELF system. If

55. The court did not define what it considered to be "countervailing considerations of public interest." *Id. See also* Natural Resources Defense Council, Inc. v. United States Nuclear Regulatory Comm'n., 606 F.2d 1261 (D.C. Cir. 1979).

56. 564 F.2d at 456 (D.C. Cir. 1977).

57. 582 F. Supp. at 1495.

58. 16 U.S.C. §§ 1531-1543 (1982).

59. 437 U.S. 153 (1978).

the Navy were allowed to proceed with the project, Judge Crabb reasoned, the environmental impact statement process would become a mere acceptance of what had already been decided, rather than a process by which the entire program would be reconsidered in light of environmental considerations. Only by maintaining the status quo via an injunction would the purposes of the NEPA be fulfilled.[60]

The crucial point in Judge Crabb's decision was her conclusion that because there was a presumption favoring an injunction when NEPA had been violated,[61] that presumption could be overcome only when an injunction will not promote the purposes of the statute. She neglected to mention, however, that the very case that created the presumption favoring injunctions, *Realty Income Trust v. Eckerd,*[62] *specifically* noted, although in dicta, that national defense considerations could overcome that presumption.[63] The *Eckerd* court wrote that, "Where the countervailing equities are exceptional, as where 'further delay might injure our nation's defense posture,'[64] the action may be allowed to proceed, although the obligation to 'rethink' the decision upon NEPA compliance remains as strict if not stricter."[65] While the goals of NEPA would not be furthered as effectively as if an injunction had been issued, room would be made for countervailing considerations, such as national security.

In choosing not to follow the reasoning of the D.C. Circuit, Chief District Judge Crabb chose to limit judicial discretion once a NEPA violation had been found. Under her decision, courts could decide not to impose an injunction only when enjoining the agency involved would not further the purposes of NEPA.[66] Due to her decision that an injunction furthered the purposes of NEPA, Judge Crabb concluded that she was obligated to enjoin further work on the ELF project pending a supplemental environmental impact statement.[67]

The Presumption for Injunctive Relief—The Circuit Court Majority

The circuit court vacated Chief District Judge Crabb's permanent injunction, holding that the Navy did not violate NEPA by deciding not to file a supplemental environmental impact statement.[68] Circuit Judge Wood, joined by Chief Circuit Judge Cummings, pointed out that even if the

60. 582 F. Supp. at1495-96.
61. *Eckerd,* 564 F.2d at 456.
62. *Id.*
63. *Id.* at 457.
64. *Id.* citing Judge Leventhal's concurrence in *Trident,* 555 F.2d at 830.
65. *Eckerd,* 564 F.2d at 457.
66. *Wisconsin II,* 582 F. Supp. at 1494.
67. *Id.*
68. *Wisconsin IV,* 745 F.2d at 425.

court had found a NEPA violation, it would still have overturned the district court's injunction.

The majority declined to follow the presumption established by the D.C. Circuit in *Realty Income Trust v. Eckerd.*[69] Without citing any authority, Judge Wood wrote that there was no presumption mandating an injunction in this case. The majority determined that NEPA could not be construed to automatically elevate its procedural requirements above other national considerations.[70] The majority did not explain what it meant by "national considerations," but it did include national security within that term.[71]

At this point, the majority disputed the district court's analogy to *TVA v. Hill* (the snail darter case)[72] and the Endangered Species Act. Judge Wood noted the U.S. Supreme Court's recognition that, while Congress may act to foreclose the exercise of usual court discretion possessed by a court of equity, such occasions are rare.[73] The Endangered Species Act clearly decided between the competing interests, the proposed dam and the snail darter habitat.[74] Because Congress had already mandated the outcome of a balancing of those interests, the courts were obligated to comply with that mandate.[75] However, the majority found that neither the specific terms of NEPA nor the interests involved compelled such a result in this case.[76] Nothing in the act explicitly or by inescapable inference restricted Court discretion.[77] Judge Wood noted that NEPA is procedural in nature, forcing agencies only to consider the environmental consequences of the action; the outcome of the decisionmaking process is not regulated.[78] Thus, the act itself allows agencies to subordinate environmental values to other competitive social values.[79]

The Presumption for Injunctive Relief—The Circuit Court Minority

While Circuit Judge Cudahy agreed with the district court that the Navy violated NEPA by not filling a supplemental environmental impact statement, he agreed with the circuit court majority that the injunction should be lifted.[80] The district court erred, he wrote, when it concluded that

69. 564 F.2d at 456.
70. *Wisconsin IV,* 745 F.2d at 425.
71. *Id.*
72. 437 U.S. 153 (1978).
73. Weinberger v. Romero-Barcelo, 456 U.S. 305, 312-13 (1982).
74. *Wisconsin IV,* 745 F.2d at 426.
75. *Id.*
76. *Id.*
77. *Id. citing Romero Barcelo,* 456 U.S. at 313.
78. *Id.*
79. *Id.*
80. *Id.* at 428,

NEPA prohibited it from considering any competing equities.[81] However, he felt "the majority overstated the case."[82]

Noting that less stringent remedies are in most cases inadequate to correct a NEPA violation, Judge Cudahy noted *Eckerd* and agreed with the district court that there should be a presumption for injunctive relief.[83] While a court can decide not to impose an injunction due to powerful countervailing equities such as national security, Judge Cudahy stressed that courts must recognize the clear risk to NEPA goals.[84] While NEPA protects intangible values, in particular guidelines for consideration of environmental values in agency decisionmaking, other equities, such as national security, may be more tangible.[85] NEPA does not protect a particular stream, forest, or endangered species. It seeks only to force governmental agencies to consider the environment in their decisionmaking. National security programs, on the other hand, usually provide an advancement or improvement in the military capability of the nation, or at least the military can cite statistics and tests to indicate these advances and improvements to a court. Courts are ill-equipped, however, to test the assertions of the military concerning the need for a particular project.[86] Judges simply do not have the time, training, or resources to evaluate data presented by the military. Thus, according to Judge Cudahy, only in unusual cases should competing equities like national security prevent an injunction. Otherwise, NEPA and its intangible goals could easily be steamrolled.[87]

Court Discretion in Balancing Environmental Concerns Against National Security

Regardless of her holding, Chief District Judge Crabb could have reached the same result, an injunction against the ELF system, by balancing environmental consequences against national security considerations.[88] Because she noted the advantages and disadvantages of the ELF system at the beginning of her opinion, there is an indication that the extent of the need for the system may have been considered.[89] Following

81. *Id.* at 432.

82. *Id.*

83. *Id. citing Eckerd,* 564 F.2d at 456, and *Watt,* 716 F.2d at 952 (involving an Interior Department project).

84. *Wisconsin IV,* 745 F.2d at 433.

85. *Id.*

86. *Id.* at 433-34.

87. *Id.* at 433.

88. This would have required her to admit that the presumption for injunctive relief under NEPA could be overcome by concerns outside NEPA, such as national security. *See supra* nn. 46-53 and accompanying text.

89. The Navy contended that any delay of the ELF sytem would be contrary to national interests. Navy Secretary John F. Lehman, in an affidavit before the court, stated that the ELF project is a critical safeguard against scientific breakthroughs in the area of submarine detection by other nations,

the reasoning of the D.C. Circuit, courts have the authority to decide that the potential environmental consequences of not imposing an injunction outweigh any detriment to national security. The proposition that NEPA requirements are absolute, and will always defeat national security under the act, had never been stated in a court opinion prior to Judge Crabb's decision.[90]

Circuit Judge Wood's majority opinion decided, in dicta, that the district court abused its discretion by not lifting its permanent injunction. He noted that by allowing the Navy to continue with the project, comparatively few additional resources would be committed, and no imminent irreparable damage to the environment would be caused.[91] Thus, an injunction would not promote NEPA goals because the options open to the Navy would not be significantly greater than those open free of an injunction.[92]

In addition, the Navy had already committed itself to monitoring the potential adverse biological effects of the system.[93] Finally, the majority decided that the injunction would have serious consequences for national defense, delaying the project for at least a year.[94] No facts or studies were cited to establish this national security need other than the assertions of the Navy in the record before the court. The majority apparently took these assertions at face value. Based upon these considerations, but mainly upon the consequences for national security, Judge Wood found that any traditional equitable weighing of interests could only lead to the denial of injunctive relief.[95]

Circuit Judge Cudahy agreed with the majority that an injunction in this case would only delay the project while the Navy considered information that was, at best, indeterminate concerning possible environmental

particularly the Soviet Union. He further added that the Soviets are already capable of utilizing a similar system. ELF Program Manager Captain Ronald L. Koontz, in another affidavit, stated that the injunction imposed by the court would result in at least a full year delay in the ELF system reactivation schedule, increasing program cost by ten to fifteen million dollars. *Wisconsin II*, 582 F. Supp. at 1492-93.

The State of Wisconsin, on the other hand, presented a 1979 General Accounting Office report that stated that the ELF system should be discontinued because it duplicated reliable existing systems; it represented at best a marginal enhancement of communications capability; and the expenditure was not justified given this marginal return. The state further cited testimony by Secretary Lehman before the Senate Armed Services Committee, which admitted that no scientific breakthroughs are expected in this century that would impair the survivability of the strategic submarine fleet. Finally, the state pointed to testimony before the same committee by Admiral Frank B. Kelso, director of the Navy Strategic Submarine Division, which conceded that potential detection of floating wire antennae or communication buoys does not represent a serious threat to nuclear submarine forces. *Wisconsin II*, 582 F. Supp. at 1493.

90. *See supra* text accompanying nn. 46-53.

91. *Wisconsin IV*, 745 F.2d at 427.

92. *Id.*

93. *Id.*

94. *Id.* at 428.

95. *Id.*

harms years or decades away.[96] However, Judge Cudahy was unwilling to accept the Navy's assertions of harm to national security at face value.[97] He argued that courts are simply not equipped to question such assertions.[98] If national security is truly paramount, he suggested, Congress could simply exempt a project from NEPA's requirements, as it has done in the past.[99] He did not cite any examples, and none were found. While he was unwilling to balance national defense assertions against environmental concerns, Judge Cudahy conceded that such a balance might be necessary in future disputes.[100] Whenever possible, however, he felt that courts should leave such judgments to the political branches.[101] Ultimately, Judge Cudahy joined the circuit court majority by finding that an injunction would not serve NEPA goals for ongoing projects like the ELF system.[102]

CONCLUSION

Wisconsin v. Weinberger has, in its various stages, presented three views of a court's discretion to balance environmental concerns against national security considerations in the event of a NEPA violation. The District of Columbia Circuit, Chief District Judge Crabb, and Circuit Judge Cudahy all found a presumption for injunction of agency action when that action is in violation of NEPA. Only the Seventh Circuit Court majority, comprised of Judges Wood and Cummings, found no such presumption. Without citing any authority, the circuit court majority decided that the presumption does not exist when other "national considerations" are involved. The majority failed to define what it meant by "national considerations," thus possibly leaving the way open for a total elimination of any presumption.

While the presumption for injunctive relief is not an explicit part of NEPA, it is vital for the purposes of the act to be achieved. NEPA was enacted to force federal agencies to fully consider environmental concerns in their decisionmaking. As Circuit Judge Cudahy pointed out, a goal this intangible can easily be ignored if put on equal footing with a more tangible goal, such as the construction of a missile silo or a space-based defense system. The NEPA purpose of forcing agencies to consider the environment in their decisionmaking, even when achieved, is not highly visible. A court, when faced with a clear improvement to national security

96. *Id.* at 433.
97. *Id.*
98. *Id.* at 434.
99. *Id.*
100. *Id.*
101. *Id.*
102. *Id.*

and an obscure promotion of environmental concerns, might be likely to swing the balance in favor of national security. A presumption for injunctive relief would force the military to substantiate its claim that the delay of a defense program pending preparation of an environmental impact statement would cause significant harm to national defense.

The presumption is especially important when national security is involved, given the inaccessibility of military information. Without a presumption, parties seeking to enforce NEPA would, as plaintiffs, be compelled to demonstrate that national security concerns are outweighed by NEPA goals in a particular situation. With a presumption, the military would be forced to show the opposite, that NEPA goals are outweighed by national defense needs in the situation at hand. The military, with its superior resources, expertise, and tangible results, should be asked to prove its case, rather than placing the burden on environmental advocates seeking to enforce intangible goals with inferior resources.

Chief District Judge Crabb held the courts simply lack the authority to deny injunctive relief given an agency violation of NEPA, unless an injunction would not further the purposes of the act. While Judge Crabb was correct to be wary of mere assertions of harm to national security due to injunctions, she overcompensated by formulating a policy that would eliminate the discretion of courts in the future. Circuit Judge Cudahy differed with Judge Crabb on this point, noting that unforeseen controversies might arise that would compel a court to choose national security over NEPA in a balancing test. Judge Cudahy shared Judge Crabb's concern for protecting NEPA goals but he provided the system with needed flexibility.

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