

## **NEPA Compliance with Classified Actions**

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### **Abstract**

In 1970 President Richard M. Nixon signed the National Environmental Policy Act of 1969 (NEPA). As part of the National Environmental Policy Act of 1969, the Council on Environmental Quality (CEQ) was established by Congress ensuring all federal agencies meet their obligations under NEPA. With the enactment of NEPA, all federal agencies are required to submit an environmental impact statement (EIS) which identifies and evaluates all environmental impacts (adverse or beneficial); all effects (direct, indirect or cumulative), and any reasonable alternatives on all federal projects. The EIS shows that all impacts with regard to natural and cultural resources and its effects were evaluated and analyzed to the fullest extent possible and must be made available to the public and other federal agencies for review and comments. This process captures the intent of NEPA and provides the decisionmakers with the best choice. However, with the Global War on Terrorism and heightened National Security issues; how do we complete the NEPA process involving classified projects/materials? Is there any environmental oversight for classified information or is it subjected to an environmental exemption?

The following paper discusses complying with the NEPA process with regard to classified projects/materials; the Freedom of Information Act (FOIA) and Presidential exemptions and case law.

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## **Introduction**

In 1969, the United States federal government took a giant leap toward protecting the environment for mankind. This important step was the establishment of the National Environmental Policy Act (NEPA) of 1969.<sup>1</sup> This Act established guidelines for the implementation of Section 102(2)(C) of the law for protection and enhancement of our natural environment and set forth the procedures federal agencies must follow and to meet. NEPA requires federal agencies in the executive branch to evaluate their intended actions to minimize and hopefully alleviate any negative impact their actions may have on the environment before they make a final decision.

The second step of this giant leap was the creation of the Council on Environmental Quality, (CEQ) established with the enactment of NEPA of 1969, as amended (42 U.S.C 4321-4347).<sup>2</sup> The CEQ is responsible for developing regulations and guidelines that help all federal agencies in their commitment to comply with NEPA. In 1979 these guidelines were codified and are applicable to all federal agencies. Within the Department of Defense (DoD), each branch of service is required to develop their own regulations and rules to implement the CEQ requirements. At times, the public awareness that NEPA requires is not obtained during military projects because of the secrecy required by the military in protection of our nation's defense. In such cases, compliance with the CEQ regulations is still met and supported by court decisions and other federal acts.

## History on Environmental Movement

Numerous people and events lead to the passage of the National Environmental Policy Act of 1969. One of these events occurred in the late nineteenth century when John Wesley Powell, a geologist and ethnologist, was conducting surveys of the Rocky Mountains, Grand Canyon and the Colorado River. Powell's promotion of conservation of western lands spearheaded our government to instill limitations on intensive ranching and agricultural land use. With the government's new vision, the foundation for public land management was established. In 1891 to 1894 Powell became the Director of the U.S. Geological Survey (USGS), advocating conservation for water resources in the arid regions of the United States.

The Hetch Hetchy Valley event in Yosemite National Park proved to test the values of a preservationist, John Muir, and a utilitarian, Gifford Pinchot. John Muir, noted for advocating for redwoods and wilderness, was the founder of the Sierra Club and helped establish the movement to preserve Yellowstone, Yosemite and other national and state parks. He promoted the spiritual values of living in harmony with nature, thus seeing himself as a preservationist. In contrast to John Muir, Gifford Pinchot believed in utilizing the landscape, thus allowing the cutting of timber in national forests and to reconstitute the landscape to its natural state by providing leadership in the management of natural resources and protection of national forests.<sup>3</sup> In 1900 Pinchot established the Society of American Foresters, defining the occupation of a forester as a true profession.

Another event was the signing of the Antiquities Act of 1906 by President Theodore Roosevelt. This act gave the President the authority to protect federal lands without waiting for the long process of approval through Congress. With the forming of the Roosevelt's Progressive Party, our country was emerging with "conservationists" whose concerns was to preserve the condition of the natural environment. The following is a speech of the philosophy of conservation from President Roosevelt in August 31, 1910 at Osawatomie, Kansas which reiterated the importance of the conservation of existing environmental resources:

*"Conservation means development as much as it does protection. I recognize the right and duty of this generation to develop and use the natural resources of our land, but I do not recognize the right to waste them, or to rob, by wasteful use, the generations that come after us...Moreover, I believe that the natural resources must be used for the benefit of all people, and not monopolized for the benefit of the few...of all the questions which came before this nation,*

*short of the actual preservation of its existence in a great war, there is none which compares in importance with the great central task of leaving this land even a better land our descendants than it is for us, and training them into a better race to inhabit the land and pass it on. Conservation is a great moral issue, for it involves the patriotic duty of insuring the safety and continuance of the nation.”<sup>4</sup>*

In the era after both World War I and II the American economy escalated; however, this economic boom also had adverse environmental problems. These problem, most of which were ignored until the radioactive fallout which occurred in St. George, Utah and the resurgence of author Rachel Carson’s book, *Silent Spring*.<sup>5</sup> The public began to comprehend the integrity of our resources was being jeopardized and became conscious about the natural and physical environment.

In the late 1960s, the infamous Cleveland’s Cuyahoga River<sup>6</sup> incident caused primarily because of chemicals and pesticides discharged into the river by industry, resulted in the re-emergence of environmental concerns and once again became a major issue to the public. The significant impacts of these environmental matters caused the politicians to become proactive. The ensuing environmental movement regarding pollution control resulted in the Clean Water Act<sup>7</sup> and created both federal and state environmental protection agencies.<sup>8</sup>

Growing public concerns and interest in natural resources prompted President Richard M. Nixon to sign the National Environmental Policy Act (NEPA) of 1969 as amended (42 U.S.C. 4321-4347), and the establishment of the Council of Environmental Quality (CEQ).

Today, NEPA is the most significant piece of environmental legislation enacted in the United States. NEPA established the fundamental principles for good planning in order to help make better decisions for proposed actions. All projects utilizing federal funding, work performed or permits acquired by a federal agency, must adhere to the NEPA process. In other words, this analysis process takes place during the initial stages of planning, siting, and design. If applied efficiently, this procedure can identify any operational and environmental considerations at an early stage ensuring ecosystem sustainability and to threatened or sensitive resources. Good planning allows evaluation of reasonable alternatives and potentially minimizing costs for mitigation measures. However, if applied inefficiently, this process can be very costly and time consuming.

As defined in Section 2 under the National Environmental Policy Act of 1969, as amended “The purpose of this Act is: To declare a national policy which will encourage productive and enjoyable harmony between man and his environment and biosphere and stimulates the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality.”<sup>9</sup> Prior to this act, environmental regulations were practically non-existent.

The CEQ was established within the Executive Office of the President by Congress as part of the NEPA of 1969 and additional responsibilities were provided by the Environmental Quality Improvement Act of 1970. This process provides federal agency officials a platform on which to base their decisions regarding the best use, protection and preservation of the environment. The guidelines of Section 101<sup>10</sup> and 102<sup>11</sup> helps establish and carry out this policy.

### **NEPA and Military Actions**

Traditionally, military actions have taken place without much consideration for preservation of the natural environment. The use of DDT<sup>12</sup> and asbestos,<sup>13</sup> the development and use of nuclear weapons along with the development and use of chemical and biological warfare weapons, can have a negative impact on the environment. Since the terrorist attack on September 11, 2001, the military operations tempo to combat the Global War on Terrorism increased to new heights. Not only has the military’s activity increased, but the people of the United States of America have become more concern with activities regarding military actions and their impact on the environment.

The awareness of NEPA requirements to protect our natural and cultural resources by federal agencies has become a major factor for DoD and its training efforts. The increase in popularity of Non Government Organizations (NGOs), like the Sierra Club, National Wildlife Federation and the Natural Resource Defense Council has magnified this awareness on the DoD. The DoD is under an environmental compliant microscope because of the historically bad stewardship the military has shown in regards to NEPA requirements and environmental law.

In the 1940s, the area known as the Nevada Test Site withdrew land for a practice bombing range. Native American Tribes (i.e., Pahrump Paiute Tribe, Bishop Paiute Tribe, Northwest Band of Shoshone Nation) were displaced from their land unable to access rights to hunt and gather native plants. The bad stewardship coupled with the CEQ mandated federal regulations and the

growing public understanding of NEPA requirements prompted the DoD to adhere to the Sikes Act.<sup>14</sup> The Sikes Act requires the DoD to work with other federal and state agencies to help protect environmental resources on military reservations while preserving our National Defense.

Increased secrecy of military training operations conflicts with NEPA's mandate to disclose all potential environmental impact to the general public. To provide realistic training for our military forces, the military requires realistic training grounds in areas resembling our enemy's natural and physical environment. The Chief of Naval Operations is directed by law, specifically the U.S. Code, Section 5062, to maintain, train and equip all naval forces for combat so they are capable of winning wars and maintaining freedom of the seas.<sup>15</sup> For example, the Navy Seals must be trained in diverse conditions, in both sea and land training. Past activities include missions in many different ecosystems, like the jungles of Vietnam, the desert of Iraq, and recently saving the life of Captain Richard Phillips from pirates in the Indian Ocean. To achieve and maintain this realistic level of training, use of previously undisturbed areas may be affected.

The U.S. Air Force is in a similar situation as the Navy. In the western United States, there are test ranges of restricted ground and air space the Air Force uses to train their pilots and the pilots of other branches of service as well as ground forces. These ranges are located in California, Nevada and Utah; each is culturally historic and rich in artifacts and natural resources. The majority of these areas are active bombing ranges, tank training ranges, ground force exercise areas and very dangerous to the general public. This land is withdrawn from public access for safety considerations but also withdrawn to accommodate necessary military test and training activity and to maintain the secrecy of military training plans and operations.

The CEQ regulations recognize there are situations in which some information should not be released, even though the information is important to decisionmakers. Environmental assessments and environmental impact statements which address classified proposals may be safeguarded and restricted from public dissemination in accordance with an agencies' own regulations. These documents may be organized so that classified portions can be included as annexes, allowing the unclassified portions to be made available to the public.<sup>16</sup>

## **NEPA and the United States Air Force**

The CEQ allows each agency to develop specific procedures for implementing the law and regulations and customizing these procedures to fit its own mission and needs. For example, based on 32 CFR part 989, the U.S. Air Force (USAF) developed Policy directive 32-70 and uses Air Force Instruction 32-7061 to comply with the *Environmental Impact Analysis Process* (EIAP), fulfilling the procedural requirements of NEPA outlined under the CEQ regulations. Like all federal agencies, the US Air Force's goal is ensuring commitment to the EIAP by producing a defensible document that meets the spirit, intent, and objective of NEPA and the environmental impact analysis process. To initiate the EIAP, the USAF uses Air Force Form 813, Request for Environmental Impact Analysis.

### **Air Force Form 813**

To efficiently initiate the NEPA process in the Air Force, the proponent must complete and submit to the USAF Environmental Management department an AF Form 813. The proposed action is evaluated by subject matter experts with respect to their field of expertise (e.g., natural/cultural resources, water quality, air quality, etc.) to analyze and disclose potential environmental effects in the proposed project. The environmental impact analysis can be positive or negative; have long or short term impacts; direct, indirect or cumulative effects. The analysis gathered determines the level of effort required to complete the NEPA process. This level of effort can range from a simple categorical exclusion; meaning the level of effort has been determined to have no substantive environmental impact, or to a higher level of effort such as an environmental assessment (EA) or environmental impact statement (EIS); which requires a more complex and extensive study. If the EA document provides sufficient evidence and analysis indicating the environmental impacts are insignificant, then a finding of no significant impact or FONSI is the defining document. However, if the document provides sufficient evidence and analysis indicating the proposed project is to be a major federal action significantly affecting the quality of the human environment or if the action is controversial, more analysis is required and an EIS must be prepared.

NEPA and the CEQ require the USAF to follow specific guidelines when addressing EAs and EISs. The following criteria includes the purpose and need for the proposed action; any alternatives as valid proposals including the proposed action; identification of alternatives considered and why they were dismissed; discuss the affected environment and the

environmental consequences; cumulative, direct, and indirect impacts and its alternative, and any mitigation measures if required.

According to the CEQ, analysis of alternatives is the heart of an EA or EIS document and requires the USAF to analyze all reasonable alternatives; including the “no action” alternative, or baseline of existing impact, as fully as the proposed action alternative. This process gives the decisionmakers and the general public a voice in decisions, demonstrating a “hard look” of all alternatives and not just the proposed action.<sup>17</sup> The effort demonstrates with the options available, that a decision was made through a reasoning process that emphasized the environmental benefits, concerns, costs, and risks against other interests.<sup>18</sup>

As presented earlier, the CEQ allows each agency to develop specific procedures for implementing the law and regulations and customizing these procedures to fit its own mission and needs. When the military action is classified, the Air Force completes its established process to comply with NEPA requirements but does not make the classified documents available to the public. When possible, EAs and EISs are organized in such a way that classified portions are developed as annexes so that unclassified portions can be provided to the public.<sup>19</sup>

As directed by the CEQ, the U.S. Air Force published procedures which reference the use of 32 CFR part 989.26 to handle classified NEPA actions. Specifically:

*“(a) Classification of an action for national defense or foreign policy purposes does not relieve the requirement of complying with NEPA. In classified matters, the Air Force must prepare and make available normal NEPA environmental analysis documents to aid in the decision-making process; however, Air Force staff must prepare, safeguard, and disseminate these documents according to established procedures for protecting classified documents. If an EIAP document must be classified, the Air Force may modify or eliminate associated requirements for public notice (including publication in the Federal Register) or public involvement in the EIAP. However, the Air Force should obtain comments on classified proposed actions or classified aspects of generally unclassified actions, from public agencies having jurisdiction by law or special expertise, to the extent that such review and comment is consistent with security requirements. Where feasible, the EPF may need to help appropriate personnel from those agencies*

*obtain necessary security clearances to gain access to documents so they can comment on scoping or review the documents.*

*(b) Where the proposed action is classified and unavailable to the public, the Air Force may keep the entire NEPA process classified and protected under the applicable procedures for the classification level pertinent to the particular information. At times (for example, during weapons system development and base closures and realignments), certain but not all aspects of NEPA documents may later be declassified. In those cases, the EPF should organize the EIAP documents, to the extent practicable, in a way that keeps the most sensitive classified information (which is not expected to be released at any early date) in a separate annex that can remain classified; the rest of the EIAP documents, when declassified, will then be comprehensible as a unit and suitable for release to the public. Thus, the documents will reflect, as much as possible, the nature of the action and its environmental impacts, as well as Air Force compliance with NEPA requirements.*

*(c) Where the proposed action is not classified, but certain aspects of it need to be protected by security classification, the EPF should tailor the EIAP for a proposed action to permit as normal a level of public involvement as possible, but also fully protect the classified part of the action and environmental analysis. In some instances, the EPF can do this by keeping the classified sections of the EIAP documents in a separate, classified annex.*

*(d) For §989.26(b) actions, an NOI or NOA will not be published in the Federal Register until the proposed action is declassified. For §989.26(c) actions, the Federal Register will run an unclassified NOA which will advise the public that at some time in the future the Air Force may or will publicly release a declassified document.*

*(e) The EPF similarly protects classified aspects of FONISIs, RODs, or other environmental documents that are part of the EIAP for a proposed action, such as by preparing separate classified annexes to unclassified documents, as necessary.*

*(f) Whenever a proponent believes that EIAP documents should be kept classified, the EPF must make a report of the matter to SAF/MIQ, including proposed modifications of the normal EIAP to protect classified information. The EPF may make such submissions at whatever level of security classification is needed to provide a comprehensive understanding of the issues. SAF/MIQ, with support from SAF/GC and other staff elements as necessary, makes final decisions on EIAP procedures for classified actions.’’<sup>20</sup>*

### **Freedom of Information Act**

In the CEQ’s mandate to federal agencies to disclose the environmental impacts of their actions, NEPA requires that such effects be disclosed “as provided by the Freedom of Information Act (FOIA).” Established in 1966, The Freedom of Information Act is a law authorizing access to information produced by the federal government. It is often described as the law that keeps citizens in the know about their government. By this wholesale inclusion of FOIA, NEPA adopted FOIA’s exemption for matters properly classified as secret in the interest of national security. However, military matters are exempt from disclosure if categorized as “classified” or if the information compromises national security. Therefore, the military can avoid disclosure of classified information if the proposed action fits under a specified FOIA exemption.<sup>21</sup>

Under FOIA, agencies must disclose any information that is requested; if their request is denied, the person may acquire standing in the courts. However, not all records can be released under the FOIA. Congress established certain categories of information that are not required to be released in response to a FOIA request because release would be harmful to governmental or private interests. These categories are called "exemptions" from disclosures. Still, even if an exemption applies, agencies may use their discretion to release information. Conversely, when there is no foreseeable harm in doing so and disclosure is not otherwise prohibited by law under

the FOIA, agencies must disclose any information that is requested – unless that information is protected from public disclosure.

There are nine exemptions that are protected from public exemptions.<sup>22</sup> Agencies can deny releasing any requested information if this information fits into one of the nine exemptions. Exemption 1, which protects disclosure from national security information, is the exemption the DoD uses to protect classified information developed during the NEPA process.

Under the Freedom of Information Act, Exemption 1 protects information that is properly classified by the rules established in the Executive Order 12,958.<sup>23</sup> The Supreme Court recognizes that one of the President's responsibilities is to protect our nations security, which includes developing policy that establishes what information must be classified to preserve our national security interest. The federal judiciary's role in the FOIA is to review Exemption 1 claims.

Beginning with President Harry S. Truman in 1951, each president established a new or revised the current executive order governing the protection of national security information. The classification executive order provides the legal framework for classification decisions made by subject matter experts. Exemption 1 protects from disclosure national security information that has been properly classified in accordance with the presidential executive order. To be afforded such protection, information must meet the requirements of the executive order and be properly marked as classified information.<sup>24</sup>

### **Presidential Exemption**

The Resource Conservation and Recovery Act (RCRA)<sup>25</sup> is a substantive environmental laws passed by Congress. RCRA gives the Environmental Protection Agency (EPA) authority to regulate the treatment, storage, transportation, and disposal of hazardous waste. The EPA expresses this authority with an intricate permitting program that can make compliance complex and burdensome for the regulated entity. This program mandates regulatory requirements for inventories of hazardous wastes generated and the requirement for EPA and state inspection of hazardous waste facilities.<sup>26</sup> Within the Air Force, potential for hazardous waste is identified during the NEPA process, specifically during the AF Form 813 process. These requirements often present the largest concerns for national security at DoD facilities because inspectors need to observe the processes that generate the hazardous wastes and because their reports are public

records. However, if the hazardous waste is of a classified nature, it can be protected from public records through a Presidential Exemption.

Presidential Exemptions for reporting hazardous waste are referenced in 42 U.S.C. section 6961(a). This exemption allows the President to exempt hazardous waste information for a period of year with additional one year exemptions possible with a new review and determination by the President. Specifically, the exemption says “The President may exempt any solid waste management facility of any department, agency, or instrumentality in the executive branch from compliance with such a requirement if he determines it to be in the paramount interest of the United States to do so. No such exemption shall be granted due to lack of appropriation unless the President shall have specifically requested such appropriation as a part of the budgetary process and the Congress shall have failed to make available such requested appropriation. Any exemption shall be for a period not in excess of one year, but additional exemptions may be granted for periods not to exceed one year upon the President's making a new determination. The President shall report each January to the Congress all exemptions from the requirements of this section granted during the preceding calendar year, together with his reason for granting each such exemption.”<sup>27</sup> This Presidential exemption is rarely invoked and with very little litigation concerning the exemption. Only two Presidents invoked exemptions, President Carter in 1980 and President Clinton in 1995. The precursor to President Clinton's exemption was an U.S. Air Force case in which the court ordered the EPA Administrator to either declassify the report and make the report public or seek a presidential exemption. President Clinton evoked the exemption determining that the exemption was in best interest of the United States.<sup>28</sup>

### **Case Law**

Based on the CEQ policy, federal agencies are directed to develop their own actions to comply with NEPA requirements. Public disclosure of information is the major factor of the NEPA process but federal agencies are not always required to disclose their information to the public. The privilege to withhold information from the public is not taken lightly and is only done so with respect to classified matters and or national defense. When public outcry for release of information occurs, federal agencies defended their position in court actions to withhold NEPA information.

In the 1981 case of *Weinberger v. Catholic Action of Hawaii/Peace Education Project*, the Supreme Court ruled on a suit taken against the U.S. Navy.<sup>29</sup> “The Plaintiff sued to require the Navy to prepare an EIS for alleged plans to store nuclear weapons in a proposed facility in Hawaii. The Navy had completed an EA for construction of a weapons storage facility. Those documents, however, were classified as the facility was capable of storing nuclear weapons. The lower court decided that NEPA applied to the Navy’s actions, but that given national security provisions and the Navy’s own regulations, the Navy had complied with NEPA to the fullest extent possible. The circuit court of appeals disagreed, requiring the agency to prepare and release a hypothetical EIS for the operation of a facility capable of storing nuclear weapons. The Supreme Court overturned the appeals court decision, finding that a hypothetical EIS was a creature of judicial cloth and not mandated by statute or regulation. The Court acknowledged the twin goals of NEPA; a) ensuring federal agency decision-making utilized environmental considerations; and b) informing the public that those necessarily coextensive. Thus, NEPA contemplates that in a given circumstance a federal agency might have to include environmental considerations in its decision-making process, yet withhold public disclosure. The Navy still needed to consider environmental goals regardless of the classified nature of the material and the exemption found in Freedom of Information Act Exemption 1”.<sup>30</sup>

“Although NEPA does not contain an exception for projects which implicate national security concerns, *Catholic Action* does provide a shield from public scrutiny with respect to national defense proposals. The military must still comply with NEPA’s directive of considering environmental impacts in the decisionmaking process – even where the project may deal with classified information. An internal EIS need not be prepared where a project is merely “contemplated” but only when actually “proposed.” In *Catholic Action*, however, the Court recognized that it could not be established that a proposal to deploy nuclear weapons at the site existed until the Navy made such an official disclosure”.<sup>31</sup>

As depicted above, the military must comply with NEPA’s directive of considering environmental impacts in the decision making process even when dealing with classified information. The difference, as supported by judicial proceedings, is withholding information from public disclosure based on protection of classified information or national defense matters.

## **Conclusion**

Over the last 40 years, the NEPA process has become a major part of environmental planning for federal agencies. The establishment of the CEQ gives federal agencies the authority to develop their own procedures to execute NEPA directives. These processes comply with NEPA in respect to the protection and enhancement of our natural environment. If the federal agency chooses to disclose information, the environmental analysis required under NEPA of the proposed action is presented in two separate documents. One document is a public document and the other is a classified document. The classified document may address environmental data that is sensitive to national security and compilation of data regarding water, air, geology, chemical compounds, etc., could identify and compromise the military mission or the scope of the classified operations. Supreme Court cases have supported federal agencies in their decision not to disclose public information due to the classified nature or if the information could compromise national security.

The NEPA process must always happen, and federal agencies are given no exception to this requirement. Once the NEPA process is completed, federal agencies have options in place to protect their information if the NEPA decisionmaker deems appropriate. One of these options, Exemption 1 of the FOIA, is used to protect classified information from public disclosure. This information must meet the classification standards in the Presidential Executive Order and be properly classified to be afforded this exemption. Additionally, Presidential Exemptions can be invoked to protect classified or national security information for public disclosure. As the Weinberger case shows, there is no national security exemption from NEPA, although in appropriate circumstances information presented to an agency decisionmaker in a NEPA document may be withheld from the public in whole or in part.

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