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## No Harm, No Foul: How the Ninth Circuit's Decision in Ground Zero Center for Non-Violent Action v. United States Department of the Navy Essentially Weakens the EIS as an Enforcement Mechanism of NEPA

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NO HARM, NO FOUL:  
HOW THE NINTH CIRCUIT'S DECISION IN  
*GROUND ZERO CENTER FOR NON-VIOLENT ACTION V.*  
*UNITED STATES DEPARTMENT OF THE NAVY*  
ESSENTIALLY WEAKENS THE EIS AS AN  
ENFORCEMENT MECHANISM OF NEPA

I. INTRODUCTION

The United States Department of the Navy (the Navy) operates a nuclear submarine program known as “TRIDENT.”<sup>1</sup> Through TRIDENT, the Navy equips submarines with nuclear ballistic missiles and utilizes them as a central part of the United States’ “strategic nuclear deterrent Triad.”<sup>2</sup> TRIDENT’s Pacific fleet is stationed at Naval Base Kitsap in Bangor, Washington, where missiles attached to submarines undergo routine maintenance at a facility known as an Explosives Handling Wharf (EHW).<sup>3</sup> During the 1990s, the Navy upgraded the missiles used on their TRIDENT submarines.<sup>4</sup> Although the upgraded missiles represented an improvement to the program, they required frequent maintenance as they aged, which the Navy recognized would eventually place a heavy operational burden on the base’s EHW.<sup>5</sup>

The Navy’s efforts to alleviate that burden through the construction of another EHW prompted resistance from numerous advocacy groups, including Ground Zero Center for Non-Violent

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1. *Ground Zero Ctr. for Non-Violent Action v. U.S. Dep’t of Navy*, 860 F.3d 1244, 1248 (9th Cir. 2017) (describing Navy’s TRIDENT submarine program).

2. *Fact File, TRIDENT II (D5) Missile, AMERICA’S NAVY*, [http://www.navy.mil/navydata/fact\\_display.asp?cid=2200&tid=1400&ct=2](http://www.navy.mil/navydata/fact_display.asp?cid=2200&tid=1400&ct=2) (last visited Feb. 26, 2018) (noting how TRIDENT contributes to United States’ nuclear deterrence strategy). The strategic nuclear deterrent Triad is a national security policy that was developed by the United States in the 1960s that promoted the development and maintenance of three “nuclear delivery vehicles.” Amy F. Woolf, *U.S. Strategic Nuclear Forces: Background, Developments, and Issues*, CONG. RESEARCH SERV. 2 (Aug. 8, 2017), <https://fas.org/sgp/crs/nuke/RL33640.pdf>. Those vehicles originally included long-range missiles based in the territorial United States, long-range missiles on submarines, and heavy bombers. *Id.* at 1. The United States developed the policy during the Cold War period to deter a Soviet attack. *Id.* at 1-2. The United States reduced its nuclear triad arsenal after the Cold War, but continued to maintain and modernize the remaining weapons. *Id.* at 4.

3. *Ground Zero II*, 860 F.3d at 1248 (describing activities at Naval Base Kitsap).

4. *Id.* (discussing missile upgrade in 1990s).

5. *Id.* (describing current facilities’ inability to meet increased missile-maintenance demands).

Action (Ground Zero).<sup>6</sup> Ground Zero, an organization dedicated to halting the proliferation of nuclear weapons, emerged in 1977 in direct response to the construction of the Washington naval base.<sup>7</sup> Since its establishment, Ground Zero has consistently protested the presence of nuclear weapons on the base and worked to stop the continued development of the TRIDENT program.<sup>8</sup> Part of Ground Zero's advocacy work operates through litigation of the Navy's TRIDENT program activities.<sup>9</sup> The focus of this Note is one example of Ground Zero's advocacy of non-violence through the use of the judicial system.<sup>10</sup>

In *Ground Zero Center for Non-Violent Action v. United States Department of the Navy (Ground Zero II)*,<sup>11</sup> the Ninth Circuit Court of Appeals considered the latest challenge by Ground Zero against an action proposed by the Navy to further develop its TRIDENT program.<sup>12</sup> Despite Ground Zero's efforts to use this case as an advocacy tool, the Ninth Circuit ultimately ruled in favor of the Navy.<sup>13</sup> Although the Ninth Circuit issued several rulings, this Note analyzes only the Ninth Circuit's holdings with respect to two of the Navy's alleged violations of federal environmental law: first, the Navy's failure to disclose appendix information upon the original release of an Environmental Impact Statement (EIS) the Navy was required to produce under the National Environmental Policy Act

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6. *The Trident Nuclear Weapon System*, GROUND ZERO FOR NONVIOLENT ACTION, <http://www.gzcenter.org/learn-more/> (last visited Oct. 9, 2017) (summarizing subject of organization's advocacy).

7. *See About Ground Zero Center*, GROUND ZERO FOR NONVIOLENT ACTION, <http://www.gzcenter.org/learn-more/ground-zero-center/> (last visited Oct. 9, 2017) (describing founding of organization).

8. *Id.* (listing Ground Zero's activities in relationship to TRIDENT program).

9. *See id.* (describing Ground Zero's advocacy through "strategies and tactics for nonviolent campaigns").

10. *See generally* *Ground Zero Ctr. for Non-Violent Action v. U.S. Dep't of Navy*, 383 F.3d 1082 (9th Cir. 2004) (describing court's decision regarding previous action brought by Ground Zero against Navy). For a further reading of Ground Zero's advocacy through interactions with the judicial system, *see Category Archives: Legal*, GROUND ZERO FOR NON-VIOLENT ACTION, <http://www.gzcenter.org/category/legal/> (last visited Oct. 12, 2017) (listing articles related to Ground Zero's legal battles with Navy).

11. 860 F.3d 1244 (9th Cir. 2017) (stating court's opinion for *Ground Zero II* case).

12. *See generally id. at 1248* (describing case on appeal originally brought by Ground Zero against Navy for recently proposed action).

13. For a further discussion of the Ninth Circuit's holdings, see *infra* notes 45-50 and accompanying text.

of 1969 (NEPA); second, the Navy's failure to disclose in the EIS another agency's concerns with the proposed wharf.<sup>14</sup>

Part II describes the underlying facts of *Ground Zero II*.<sup>15</sup> Part III provides a comprehensive discussion of the EIS requirements and the relevant legal background surrounding the Ninth Circuit's rulings in the instant case.<sup>16</sup> Part IV describes the court's rulings regarding the Navy's failure to disclose appendix information and the Safety Board's conditional approval of the wharf's proposed location.<sup>17</sup> Part V examines the Ninth Circuit's reasoning and its relationship to relevant precedent and legal standards.<sup>18</sup> Finally, Part VI discusses the potential impact of the Ninth Circuit's holdings on future cases involving alleged NEPA violations for failing to disclose particular information in an EIS.<sup>19</sup>

## II. FACTS

In the 1990s, in order to meet the increasingly frequent maintenance requirements of upgraded and aging ballistic missiles held at Naval Base Kitsap, the Navy began the proposal process for the construction of a second EHW (EHW-2).<sup>20</sup> As mandated by NEPA, the Navy prepared an EIS.<sup>21</sup> The EIS evaluated the potential negative impacts of EHW-2's construction on the surrounding environment, the absence of feasible possible alternative sites for the wharf, and the Navy's efforts to comply with relevant agencies' safety regulations.<sup>22</sup> The EIS also included multiple appendices, three of

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14. For a further discussion of the Ninth Circuit's rulings relevant to this Note, see *infra* notes 45-48 and accompanying text.

15. For a summary of the factual background of *Ground Zero II*, see *infra* notes 20-50 and accompanying text.

16. For a discussion of the instant case's legal background, see *infra* notes 51-122 and accompanying text.

17. For a narrative analysis of the court's decision, see *infra* notes 123-148 and accompanying text.

18. For a critical analysis of the court's opinion, see *infra* notes 149-183 and accompanying text.

19. For a discussion of the legal impact of *Ground Zero II*, see *infra* notes 184-197 and accompanying text.

20. See *Ground Zero Ctr. for Non-Violent Action v. U.S. Dep't of Navy*, 860 F.3d 1244, 1248 (9th Cir. 2017) (noting Navy's determination one EHW was insufficient to meet maintenance requirements of aging missiles). According to the Navy, missile maintenance would require "400 'operational days' . . . worth of maintenance sessions in a year," while the current EHW is only capable of 300 operational days per year. *Id.*

21. See *id.* (citing 42 U.S.C. § 4321 *et seq.*) (describing Navy's preparation of EIS to discuss potential environmental impacts of wharf construction project). For a further discussion of the Environmental Impact Statement requirement, see *infra* notes 56-62 and accompanying text.

22. See *id.* at 1248-49 (describing issues discussed in EIS).

which (Appendices A, B, and C) were completely redacted after being deemed “unfit for public dissemination” because they included information designated as “Unclassified Controlled Nuclear Information ‘(UCNI).’”<sup>23</sup> After completing the other NEPA procedural requirements, the Navy determined it would commence with plans to construct EHW-2 adjacent to the original EHW.<sup>24</sup>

Following the Navy’s release of the final EIS, Ground Zero Center for Non-Violent Action, along with other advocacy groups and activists (collectively referred to as “Ground Zero”), brought suit against the Navy and other officials for failing to meet NEPA’s disclosure requirements.<sup>25</sup> During the litigation process, the Navy released documents revealing information not included in the Navy’s final EIS.<sup>26</sup> Some documents demonstrated that the Defensive Explosives Safety Board (Safety Board), an agency tasked with ensuring no harm results to “life and property” in areas surrounding ammunition storage facilities, only issued “conditional site approval” for EHW-2.<sup>27</sup> The Safety Board issued conditional approval because it was concerned about the potential risk of an “explosive mishap” on one wharf triggering a series of explosions between the two wharfs.<sup>28</sup> The documents also showed that the Navy eventually sought and acquired site approval from the Secretary of the Navy,

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23. *See id.* at 1249 (discussing existence of appendices and reasons for redacting contents). The court described the appendices as follows:

Appendix A contained supplemental information describing the purpose and need for the project, Appendix B contained additional information regarding alternatives to EHW-2 that the Navy had considered, and Appendix C contained information regarding the distance “within which activities and facilities are restricted to assure protection to life and property in the event of an accident” . . . .

*Id.* For a further discussion of UCNI, see *infra* notes 70-71 and accompanying text.

24. *See id.* (describing Navy’s announcement of its decision to move forward with EHW-2’s construction after receiving public feedback and issuing final EIS).

25. *See Ground Zero*, 860 F.3d at 1249 (noting parties to suit against Navy and plaintiffs’ primary cause of action). Ground Zero sought a court order enjoining the Navy from continuing its development of EHW-2. *Id.*

26. *See id.* (highlighting information not disclosed by Navy in EIS). The previously undisclosed information was discovered in documents submitted to the district court and garnered by Ground Zero through FOIA requests. *Id.* at 1249 n.2.

27. *See id.* at 1249-50 (describing revelation that Safety Board failed to issue full approval of EHW’s construction); 10 U.S.C. § 172 (2011) (establishing Safety Board and describing purposes of board).

28. *See Ground Zero*, 860 F.3d at 1250 (discussing Safety Board’s concern with proposed distance between two wharfs that could increase risk of multiple explosions). The Safety Board determined it would have approved the site if the Navy commissioned a study proving the likelihood of multiple explosions was minimal. *Id.* The Navy directed the Board’s attention to past safety studies concerning two EHWs at a similar base in Georgia, but the Board “was not satisfied with the Navy’s reliance on those studies.” *Id.*

who is authorized to “approve construction despite any Safety Board concerns.”<sup>29</sup>

During the litigation process, the Navy submitted less redacted versions of the final EIS’s appendices that contained information regarding the Navy’s safety evaluation of EHW-2.<sup>30</sup> While the appendices were originally redacted in full, “the Navy had ‘conducted additional review during the preparation of the Core Administrative Record and . . . determined that portions of these documents should not be designated as UCNI’” and were therefore suitable for public release.<sup>31</sup> In response to these submissions, Ground Zero filed a motion for summary judgment arguing the Navy violated NEPA because the information regarding the safety risks of EHW-2, the Safety Board’s conditional approval, and the previously redacted information from the appendices, should have been disclosed in the final EIS.<sup>32</sup> Ground Zero also alleged that the Navy failed to conduct “a reasonably thorough analysis” of EHW-2’s potential environmental impacts.<sup>33</sup> The Navy denied these allegations and filed its own summary judgment motion.<sup>34</sup> The district court granted summary judgment in favor of the Navy, denied Ground Zero’s summary judgment motion, and denied Ground Zero’s request for an injunction.<sup>35</sup>

During the litigation process, the Navy’s attorney informed the district court that the Navy inadvertently released documents “containing Classified Information and/or Unclassified Controlled Nuclear Information.”<sup>36</sup> The district court issued an order (Order) sealing the inadvertently released documents and restricting their public dissemination.<sup>37</sup> In response, Ground Zero filed a motion to reverse the court’s Order, arguing that some of the information

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29. *See id.* (describing Navy’s ability to circumvent Safety Board and gain site approval through “secretarial certification”).

30. *See id.* (discussing Navy’s submission of less redacted versions of Appendices A, B, and C to court). The court noted that “Appendix A was released in its entirety; Appendix B was released in a partially redacted form; but Appendix C remained entirely redacted except for a textual description of its contents.” *Id.*

31. *See id.* (describing Navy’s reasons for entering less redacted versions of appendices into administrative record).

32. *See id.* (listing Ground Zero’s arguments in support of its request for injunction).

33. *See Ground Zero*, 860 F.3d at 1250 (describing additional claim made by Ground Zero against Navy).

34. *See id.* (noting Navy filed for summary judgment on NEPA claims).

35. *See id.* (listing district court’s rulings on motions filed by opposing parties).

36. *See id.* at 1250-51 (describing issue that arose during litigation regarding mistaken disclosure of sensitive nuclear information).

37. *See id.* at 1250-51 (describing district court’s order).

had already been disseminated to the public and the media, and the Order constituted a violation of Ground Zero's First Amendment and due process rights.<sup>38</sup> The district court rejected Ground Zero's arguments and denied the motion.<sup>39</sup>

Ground Zero filed an appeal with the Ninth Circuit Court of Appeals, challenging the district court's rulings on both the EIS and the Order.<sup>40</sup> First, Ground Zero argued the Navy violated NEPA by failing to disclose the information made available during litigation in Appendices A, B, and C in the original EIS.<sup>41</sup> Second, Ground Zero claimed the Navy committed another violation when it failed to disclose the Safety Board's conditional approval of EHW-2.<sup>42</sup> Ground Zero further contended the Navy conducted an "insufficiently thorough" analysis of potential alternative locations for EHW-2 in their EIS.<sup>43</sup> Finally, Ground Zero argued the Order violated due process on the basis of vagueness and the First Amendment because it constituted a "prior restraint on speech."<sup>44</sup>

After considering these claims individually, the Ninth Circuit made a series of rulings.<sup>45</sup> First, the court held that the Navy violated NEPA when it failed to disclose the information from the appendices made public during litigation in their original EIS.<sup>46</sup> However, the Ninth Circuit ruled that the Navy's failure to disclose

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The Order sealed portions of the record and directed that . . . no party was to discuss or reference any of the documents identified by the order "in any hearing in this matter[;]"[ ] no party was to "further disseminate[ ]" any of the documents; and . . . the parties were to return all the CDs in their possession containing the record, as well as their copies of the identified documents.

*Id.*

38. *See Ground Zero*, 860 F.3d at 1257-58 (outlining Ground Zero's arguments in support of motion to unseal records and lift district court's restrictions). Ground Zero contended that the district court's order violated due process because it was "unconstitutionally vague" and failed to consider whether the organization could disseminate the sealed information in the future if it was obtained by independent sources. *Id.* Ground Zero also argued the Order violated the First Amendment because it constituted an unconstitutional prior restraint. *Id.* at 1258.

39. *Id.* at 1251 (describing district court's ruling on Ground Zero's motion).

40. *Id.* at 1250-51 (noting Ground Zero's challenge of district court's rulings).

41. *Id.* at 1250 (describing Ground Zero's argument with respect to previously unreleased appendices from EIS).

42. *Ground Zero*, 860 F.3d at 1251 (listing appellants' arguments with respect to Navy's EIS).

43. *Id.* (describing Ground Zero's challenge to thoroughness of alternatives analysis).

44. *Id.* at 1268 (describing Ground Zero's First Amendment challenge to district court's order).

45. *Id.* at 1263 (listing Court's rulings on Ground Zero's claims against Navy).

46. *Id.* at 1252 (holding Navy's failure to disclose information from appendices in original EIS constituted NEPA violation).

this information was harmless.<sup>47</sup> The Ninth Circuit also agreed with Ground Zero's argument that the Navy violated NEPA by failing to disclose the Safety Board's conditional approval of the wharf construction site but, again, concluded this error was harmless.<sup>48</sup> Next, the Court rejected Ground Zero's contention that the Navy failed to conduct a thorough analysis of alternative sites for EWH-2.<sup>49</sup> Finally, the court directed that Ground Zero's First Amendment claim be addressed on remand under "a stricter standard" to determine whether the district court properly restricted further dissemination of documents inadvertently released by the Navy during litigation.<sup>50</sup>

### III. BACKGROUND

The National Environmental Policy Act of 1969 is considered fundamental legislation for environmental protection policy in the United States.<sup>51</sup> Congress passed NEPA to prevent harm to the environment, promote human health through environmental protection, and provide widespread education about vital national resources.<sup>52</sup> To effectuate these goals, NEPA compels federal agencies to evaluate the potential environmental impacts of "major Federal actions significantly affecting the quality of the human environment."<sup>53</sup> NEPA expressly dictates that federal agencies must comply with the Act's requirements "to the fullest extent pos-

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47. *Ground Zero*, 860 F.3d at 1252 (describing Navy's failure to disclose relevant information from appendices as "harmless error").

48. *Id.* at 1256 (explaining Navy's failure to disclose Safety Board's conditional approval "was inconsistent with . . . responsibility NEPA imposed," but was ultimately harmless).

49. *Id.* at 1257 (describing Ninth Circuit's conclusion that analysis of alternative sites was reasonable).

50. *Id.* at 1260 (describing court's holding on First Amendment issue). The Ninth Circuit announced that on remand, the lower court was required to "identify 'a compelling reason [to impose the restriction] and articulate the factual basis for its ruling'" to determine whether further restrictions on the documents could be imposed. *Id.* at 1261 (quoting *Kamakana v. City of Honolulu*, 447 F.3d 1172, 1179 (9th Cir. 2006)).

51. See Gilda M. Tuoni, *NEPA and the Freedom of Information Act: A Prospect for Disclosure*, 4 B.C. ENVTL. AFF. L. REV. 179, 179-80 (1975) (citing 115 CONG. REC. 19008 (1969)) (describing how NEPA was first act of Congress that regulated "management of . . . country's present and future environment").

52. 42 U.S.C. § 4321 (1970) (listing goals of NEPA).

53. 42 U.S.C. § 4332(2)(C) (1970) (describing scope of NEPA's requirements). NEPA does not set out a standard for what constitutes a major federal action, but the statute explicitly establishes its applicability to "proposed" actions. *Id.*



sible.”<sup>54</sup> NEPA does not require agencies to achieve the law’s substantive environmental protection goals; rather, NEPA operates by mandating federal agencies to *consider* the potential effects of their actions on the environment.<sup>55</sup>

#### A. NEPA and Environmental Impact Statements

To encourage agency compliance, NEPA includes “action forcing” provisions that require agencies to not only fully consider the potential environmental impacts of their projects, but to “provide for broad dissemination of relevant environmental information.”<sup>56</sup> To this end, NEPA requires federal agencies to prepare environmental impact statements in conjunction with proposals made for major federal actions.<sup>57</sup> NEPA compels an agency proposing a major federal action to provide information in its EIS pertaining to five specific categories.<sup>58</sup> Those details include:

- (i) the environmental impact of the proposed action, (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented, (iii) alternatives to the proposed action, (iv) the relationship between local short-term uses of man’s environment and the maintenance and enhancement of long-term productivity, and (v) any irreversible and irretrievable commitments of

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54. 42 U.S.C. § 4332 (1970) (describing Congress’ intent to have agencies fully comply with NEPA); *see also* Flint Ridge Dev. Co. v. Scenic Rivers Ass’n of Okla., 426 U.S. 776, 787 (1976) (explaining NEPA’s command that agencies fully comply with Act’s requirements was “neither accidental nor hyperbolic”).

55. *See* Marsh v. Or. Nat. Res. Council, 490 U.S. 360, 371 (1989) (discussing how NEPA operates by requiring consideration of environmental effects of federal actions, as opposed to mandating substantive results).

56. *See* Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 350 (1989) (citing Kleppe v. Sierra Club, 427 U.S. 390, 410 n.21 (1976)) (describing methods established by NEPA to achieve “sweeping policy goals”).

57. 42 U.S.C. § 4332(2)(C) (1970) (describing NEPA’s environmental impact statement mandate). To determine whether an EIS is mandated, an agency must look to the regulations set forth by the Counsel on Environmental Quality (CEQ), which was established under NEPA. *See* DOT v. Public Citizen, 541 U.S. 752, 757 (2004) (explaining how CEQ, established under NEPA, “has promulgated regulations to guide federal agencies in determining what actions are subject to that statutory requirement.”). The CEQ regulations allow agencies to prepare a limited version of an EIS, known as an Environmental Assessment (EA), when it is not necessarily apparent whether an EIS is required under NEPA. *Id.* If the EA reveals that an EIS is not required for a particular action, the agency that prepared the EA “must issue a finding of no significant impact (FONSI),” which articulates why the proposed action would not have any substantial impact on the surrounding environment. *Id.* at 757-58 (citing 40 C.F.R. §§ 1501.4(e), 1508.13).

58. *See* 42 U.S.C. § 4332(2)(C) (1970) (listing required components of EIS).

resources which would be involved in the proposed action should it be implemented.<sup>59</sup>

Significantly, NEPA also directs federal agencies proposing a major federal action to coordinate with “any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved.”<sup>60</sup> This requirement, known as the agency consultation mandate, must take place prior to preparing the final EIS, as it serves as “the preliminary draft statement on which comments from other agencies are to be sought.”<sup>61</sup> The mandate furthers NEPA’s central goals by compelling an agency to consider information provided by other agencies that have the requisite experience to identify environmental risks or issues specific to a proposed federal action.<sup>62</sup>

## B. NEPA and Public Disclosure

The statutory language of NEPA does not establish a “formal role for the public” in evaluating the potential environmental impacts of proposed major federal actions.<sup>63</sup> NEPA does direct, however, that copies of an EIS be submitted to the President and the Council on Environmental Quality (CEQ), and be made available to the public for review.<sup>64</sup> Additionally, CEQ regulations instruct agencies to create procedures that promote public involvement in evaluating environmental impact statements.<sup>65</sup> Moreover, NEPA

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59. *Id.* (illustrating required components of EIS).

60. 42 U.S.C. § 4332(2)(C)(i)-(v) (1970) (describing agency consultation mandate).

After preparing a draft environmental impact statement and before preparing a final environmental impact statement the agency shall . . . [o]btain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved or which is authorized to develop and enforce environmental standards.

40 C.F.R. § 1503.1(a)(1).

61. FRANK P. GRAD, TREATISE ON ENVIRONMENTAL LAW VOL. 4 § 9.03(3)(c), at 9-180 (Matthew Bender & Co. 1998) (discussing procedural requirements of agency consultation requirement).

62. *See* Warm Springs Dam Task Force v. Gribble, 621 F.2d 1017, 1021 (9th Cir. 1980) (stating purpose of requiring agencies to acquire commentary from other agencies on potential environmental risks of proposed federal action).

63. *See* GRAD, *supra* note 61, at 9-184 (discussing relationship between public and goals of NEPA).

64. *See id.* § 9.01 (“Copies of [an EIS] . . . shall be made available to the President, the Council on Environmental Quality, and to the public”).

65. *See id.* (describing federal regulations promoting public involvement in carrying out NEPA’s goals); *see also* 40 C.F.R. § 1506.6(a)-(b) (requiring agencies “make diligent efforts” to promote public involvement).

explicitly directs that the public disclosure of information contained in an EIS be governed by the Freedom of Information Act (FOIA).<sup>66</sup> Although Congress enacted FOIA to promote transparency and access to government materials, in the context of NEPA, an agency can withhold information from an EIS if the material satisfies one of the exemptions under FOIA.<sup>67</sup>

In particular, when an agency proposes a major federal action that intersects with national security issues, such as those relating to nuclear weapons, the agency may prevent the dissemination of information contained in the EIS on the basis of FOIA's "National Security Exemption."<sup>68</sup> The Secretary of Defense is also authorized to place restrictions on public dissemination of agency material if it "could reasonably be expected to have a significant adverse effect on the health and safety of the public or the common defense and security by significantly increasing the likelihood of illegal production of nuclear weapons, or theft, diversion, or sabotage of special nuclear materials, equipment, or facilities."<sup>69</sup> The Department of Defense has statutory authority to disallow public review of information that is not restricted under the previous standard, but may not

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66. See GRAD, *supra* note 61, at 9-184 (noting public dissemination of EIS is governed by 5 U.S.C. § 552 (1966)); see also *Weinberger v. Catholic Action of Haw./Peace Educ. Project*, 454 U.S. 139, 145 (1981) (providing "NEPA's public disclosure requirements are expressly governed by FOIA").

67. See Tuoni, *supra* note 51, at 180 (explaining FOIA "exempts from its scope nine areas of sensitive concern"). The nine FOIA exemptions are as follows: Exemption 1: Information that is classified to protect national security[;] Exemption 2: Information related solely to the internal personnel rules and practices of an agency[;] Exemption 3: Information that is prohibited from disclosure by another federal law[;] Exemption 4: Trade secrets or commercial or financial information that is confidential or privileged[;] Exemption 5: Privileged communications within or between agencies[;] Exemption 6: Information that, if disclosed, would invade another individual's personal privacy[;] Exemption 7: Information compiled for law enforcement purposes that [meets one of seven standards][;] Exemption 8: Information that concerns the supervision of financial institutions[;] Exemption 9: Geological information on wells.

The United States Department of Justice, *Frequently Asked Questions*, FOIA.GOV, <https://www.foia.gov/faq.html> (last visited Dec. 30, 2017).

68. See Amy J. Sauber, *The Application of NEPA to Nuclear Weapons Production, Storage, and Testing: Weinberger v. Catholic Action of Hawaii/Peace Education Project*, 11 B.C. ENVTL. AFF. L. REV. 805, 815 (1984) (explaining agencies' reliance on National Security Exemption, which places "disclosure restrictions on information which the President has determined must be kept secret to protect the national defense or to advance foreign policy"); see also 5 U.S.C. § 552(b)(1) (1966) (mandating certain information is subject to restriction from disclosure if it is "(A) specifically authorized under criteria established by Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive Order").

69. 10 U.S.C. § 128(a)(1)-(2) (2016) (establishing standard for withholding unclassified, but potentially sensitive, material from response to FOIA request).

be appropriate for public dissemination, by designating the information as Unclassified Controlled Nuclear Information (UCNI).<sup>70</sup> The Department of Defense may designate information as UCNI and protect it from disclosure when it meets the “adverse effects test,” meaning “the unauthorized dissemination of such information could reasonably be expected to have an adverse effect on the health and safety of the public or the common defense and security by increasing significantly the likelihood of the illegal production of nuclear weapons.”<sup>71</sup>

### C. Supreme Court Cases

The Supreme Court has not established concrete standards regarding the specific kind of information that an agency must disclose to satisfy NEPA’s five informational requirements.<sup>72</sup> The Court has, however, considered whether an agency’s failure to disclose or include particular information in an EIS renders that EIS insufficient under NEPA.<sup>73</sup> In *Weinberger v. Catholic Action of Hawaii/Peace Education Project*,<sup>74</sup> the Supreme Court considered the issue of whether the Navy was required to prepare a “Hypothetical Environmental Impact Statement” (HEIS).<sup>75</sup> A HEIS statement requires the Navy to hypothesize about the impact of storing nuclear weapons at a proposed facility without revealing the type, amount, and purpose of the weapons to be stored there.<sup>76</sup> The suit in *Weinberger* revolved around the Navy’s preparation of an Environmental

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70. See 32 C.F.R. § 223.6(a)(1) (2012) (describing standards for identifying UCNI and withholding it from public disclosure).

71. *Id.* (describing standards for identifying UCNI and withholding it from public disclosure). To be protected, the information must meet the adverse effects test, be unclassified, and “pertain to security measures, including plans, procedures, and equipment, for the physical protection of DoD SNM, SNM equipment, SNM facilities, or nuclear weapons in DoD custody.” *Id.* at § 223.6(b)(i)-(iii). “DoD” refers to the Department of Defense. 32 C.F.R. § 223.3 (2012). “SNM” refers to “special nuclear material,” which is defined as “(1) plutonium, uranium enriched in the isotope 233 or in the isotope 235, and any other material which the Commission . . . determines to be special nuclear material, but does not include source material; or (2) any material artificially enriched by any of the foregoing, but does not include source material.” 42 U.S.C. § 2014 (2005)

72. See 42 U.S.C. § 4332 (2)(C)(i)-(v) (1970) (listing categories of information that must be included in EIS). For a further discussion of Supreme Court decisions on requirements of EIS, see *supra* notes 56-62 and accompanying text.

73. For a further discussion of the Supreme Court’s commentary on information included in an EIS, see *infra* notes 74-94 and accompanying text.

74. 454 U.S. 139 (1981).

75. *Id.* at 140-41 (describing issue of “Hypothetical Environmental Impact Statement” considered by Supreme Court).

76. *Id.* at 143-44 (describing court of appeals’ decision challenged on appeal).

Assessment (EA) for a proposed ammunition storage facility.<sup>77</sup> After completing the EA, the Navy determined that no significant impact on the environment would result from the construction of the ammunition storage facility, and declined to prepare an EIS.<sup>78</sup> The Navy's FONSI decision prompted advocacy groups to bring suit against the Navy for violating NEPA, arguing that the site's potential nuclear storage capabilities required the Navy to prepare an EIS.<sup>79</sup> On appeal, the Ninth Circuit attempted to balance national security concerns with the public disclosure goals of NEPA and held that the Navy was required to prepare a HEIS, addressing the site's potential nuclear capabilities while shielding the Navy from having to acknowledge classified nuclear information.<sup>80</sup>

The Supreme Court reversed the court of appeals' decision and held that preparation of a HEIS was not required.<sup>81</sup> Justice Rehnquist concluded that the court of appeals' decision contradicted "the express intent of Congress" to have FOIA govern the public disclosure of information in an EIS.<sup>82</sup> According to Justice Rehnquist, NEPA's language dictated that an agency must evaluate the environmental impacts of its proposed actions, but NEPA does not necessarily require an agency to disclose documents related to that decision-making process.<sup>83</sup> As Justice Rehnquist noted, given that classified information included in the Navy's consideration of environmental impacts was exempted from disclosure under FOIA, the Ninth Circuit's mandate that the Navy prepare a HEIS disrupted the balance between public disclosure and national security concerns under FOIA.<sup>84</sup>

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77. *See id.* at 141 (explaining Navy's preparation of environmental assessment). For a further discussion of Environmental Assessments, see *supra* note 57 and accompanying text.

78. *Id.* at 141 (describing circumstances leading advocacy groups to file suit against Navy).

79. *See Weinberger*, 454 U.S. at 142 (discussing advocacy groups' suit and allegations against Navy).

80. *Id.* at 143-44 (describing Ninth Circuit's holding).

81. *Id.* at 146 (describing Supreme Court's holding).

82. *Id.* at 144 (discussing Congress's intent for FOIA to balance public access to government documents and government's interest in secrecy).

83. *See id.* at 143 (citing *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 161-62 (1975)) (explaining Supreme Court's prior conclusion that FOIA does not mandate disclosure of certain information by agencies if those agencies are not compelled by other law to do so).

84. *Weinberger*, 454 U.S. at 145 (discussing "Congress has thus effected a balance between the needs of the public for access to documents prepared by a federal agency and the necessity of nondisclosure or secrecy. The Court of Appeals in this case should have accepted the balance . . . rather than engrafting onto the statutory language unique concepts of its own making.").

In *Robertson v. Methow Valley Citizens Council*,<sup>85</sup> advocacy groups challenged the Forest Service's issuance of a special use permit to Methow Recreation, Inc. (MRI), which allowed the company to develop a ski resort on a six thousand foot mountain in Okanogan County, Washington, known as "Sandy Butte."<sup>86</sup> Upon receipt of MRI's permit application, the Forest Service and local officials collaborated to prepare an EIS, which included the potential effects of resort development on the on-site and off-site environments and "conceptual" steps that could be taken to mitigate negative environmental impacts.<sup>87</sup> The advocacy groups argued that the Forest Service's EIS was insufficient under NEPA because it failed to give adequate consideration to the resort's potential impact on air quality and the mule deer population.<sup>88</sup>

In reversing the court of appeals' decision that the EIS was inadequate, the Supreme Court rejected the Ninth Circuit's conclusion that particular action must be taken to mitigate negative environmental impacts of proposed actions.<sup>89</sup> According to the Supreme Court, the Ninth Circuit erred in imposing a subsequent duty on agencies to include specific statements regarding mitigation methods.<sup>90</sup> Justice Stevens acknowledged that, under the statutes and regulations, agency discussion of possible steps for alleviating negative effects of development on the surrounding environment is "one important ingredient" of an EIS.<sup>91</sup> Without this information, the Justice noted, the public would not be able to fully "evaluate the severity of the adverse effects" of proposed major federal actions.<sup>92</sup> Justice Stevens argued, however, that there was a

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85. 490 U.S. 332 (1989).

86. *Id.* at 337-38, 344 (describing action taken by MRI that was challenged by advocacy groups).

87. *Id.* at 338-340 (outlining various components of EIS prepared for proposed ski resort).

88. *Id.* at 345-46, 350 (noting advocacy groups' central claim against Forest Service's decision to issue permit to MRI).

89. *Id.* at 346, 353 (describing Supreme Court's decision to reverse court of appeals).

90. *Robertson*, 490 U.S. at 353 (rejecting Ninth Circuit's imposition of duty to include particularized mitigation methods in EIS). The Supreme Court also held that 1) a "worst case analysis" assessing the impact of the project on the environment was not required and its absence did not make the Forest Service's EIS "inadequate," and 2) the Forest Service's failure to include a "mitigation plan" in the EIS did not violate its own regulations. *Id.* at 356, 358-59.

91. *Id.* at 351 (noting how language of NEPA and CEQ regulations establish requirement that mitigation steps be sufficiently discussed in EIS); *see also* 40 C.F.R. § 1508.25(b)(3) (requiring agencies to consider "mitigation measures" in EIS).

92. *Robertson*, 490 U.S. at 352 (noting discussion of mitigation steps is necessary to inform interested groups of potential environmental consequences of proposed action).

“fundamental distinction” between including a discussion of mitigation steps in an EIS to ensure potential negative impacts on the environment were considered, and the actual formulation and implementation of a concrete mitigation plan.<sup>93</sup> Requiring the implementation of a substantive mitigation plan would, according to the Supreme Court, be incongruous with NEPA’s primary “reliance on procedural mechanisms.”<sup>94</sup>

#### D. Ninth Circuit Precedent

The Ninth Circuit has repeatedly acknowledged that the EIS serves two primary purposes: to demonstrate that an agency has fully considered the potential negative impacts of its proposed action on the environment, and to provide the public with “relevant information” about the proposal’s environmental effects.<sup>95</sup> The Ninth Circuit evaluates the sufficiency of an EIS by considering whether a particular agency has taken a “hard look” at environmental impacts of proposed major federal actions.<sup>96</sup> What constitutes taking a “hard look” varies based on context, but can include the following: disclosing and addressing conflicting scientific viewpoints in a final EIS; conducting a “cumulative impact analysis” of past, present, and future projects in the surrounding environment; and discussing potential steps to mitigate environmental impacts.<sup>97</sup>

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93. *Id.* (describing distinction between considering mitigation steps and developing substantive mitigation plan, which is not warranted under NEPA).

94. *Id.* at 353 (noting inconsistency with intent of statute that would arise upon implementation of substantive mitigation plan).

95. *See* *Sierra Club v. Tahoe Reg’l Planning Agency*, 840 F.3d 1106, 1115 (9th Cir. 2016) (citing *Idaho Wool Growers Ass’n v. Vilsack*, 816 F.3d 1095, 1102 (9th Cir. 2016)) (describing EIS as “procedural requirement” with dual purpose ensuring “careful consideration” of environmental impacts and public dissemination of relevant information); *see also* *Lands Council v. McNair*, 629 F.3d 1070, 1075 (9th Cir. 2010) (describing NEPA and its requirements as having dual purposes of ensuring careful consideration of environmental impacts on federal projects and disseminating related information to public).

96. *See* *No GWEN All. of Lane Cty., Inc., v. Aldridge*, 855 F.2d 1380, 1385 (9th Cir. 1988) (“Our role in this case is not to consider the propriety of constructing GWEN, but rather to [e]nsure that the Air Force in exercising its discretion to develop GWEN has taken a ‘hard look’ at the environmental consequences flowing from its substantive decision.”); *see also* *Nw. Env’tl. Advocates v. Nat’l Marine Fisheries Serv.*, 460 F.3d 1125, 1128 (9th Cir. 2006) (“[Appellant] claims, the Final Supplemental Integrated Feasibility Report and Environmental Impact Statement fails to take a ‘hard look’ at the channel deepening project’s various impacts.”).

97. *See* *Ctr. for Biological Diversity v. U.S. Forest Serv.*, 349 F.3d 1157, 1167 (9th Cir. 2003) (“[W]e hold that Appellees were required to disclose and respond to [opposing] viewpoints in the final impact statement itself.”); *see also* *Nw. Env’tl. Advocates v. Nat’l Marine Fisheries Serv.*, 460 F.3d 1125, 1134 (9th Cir. 2006) (“[W]e agree with the district court that the Corps’ cumulative impact analysis satisfied NEPA’s ‘hard look’ requirement.”); *see also* *Great Basin Res. Watch v. Bu-*

If, in a particular case, it is determined that an agency has failed to take a “hard look” at the environmental effects of a proposed major federal action, the Ninth Circuit then considers whether the error was harmless.<sup>98</sup> Specifically, the Ninth Circuit determines “whether the error caused the agency not to be fully aware of the environmental consequences of the proposed action, thereby precluding informed decisionmaking [sic] and public participation, or otherwise materially affected the substance of the agency’s decision.”<sup>99</sup> This standard is rooted in the Administrative Procedure Act, which requires courts reviewing agency actions to take into “due account . . . the rule of prejudicial error.”<sup>100</sup>

In a recent case, *Oregon Natural Desert Association v. Jewel*,<sup>101</sup> the Ninth Circuit provided some guidance as to the kind of NEPA violation that does not constitute a harmless error.<sup>102</sup> In that case, the court concluded that an EIS prepared for the development of a wind-energy project in Oregon violated NEPA because it failed to accurately address the project’s potential impact on the winter-foraging activities of a local bird species, the greater sage-grouse.<sup>103</sup>

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reau of Land Mgmt., 844 F.3d 1095, 1106 (9th Cir. 2016) (“We hold that the BLM complied with NEPA in discussing possible mitigation measures to address the effects that would flow from poor pit-lake water quality.”). A “cumulative impact analysis” evaluates “the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions.” *Nw. Env’tl. Advocates v. Nat’l Marine Fisheries Serv.*, 460 F.3d 1125, 1134 (9th Cir. 2006) (quoting 40 C.F.R. § 1508.7). An agency proposing a major federal action is required to conduct a cumulative impact analysis in its EIS. *See* 40 C.F.R. §1508.25(c)(3).

98. *See Idaho Wool Growers Ass’n v. Vilsack*, 816 F.3d 1095, 1104 (9th Cir. 2016) (stating harmless error standard).

99. *Id.* (explaining standard used by Ninth Circuit courts to determine whether harm resulted because of NEPA violation).

100. *See id.* (citing 5 U.S.C. § 706 (2012)) (defining scope of review for courts evaluating agency decisions).

101. 840 F.3d 562 (9th Cir. 2016).

102. *Or. Nat. Desert Ass’n*, 840 F.3d at 570 (concluding NEPA violation at issue was not harmless).

103. *Id.* at 569 (announcing court’s holding that EIS proposed wind-energy project failed “to provide ‘[a]ccurate scientific analysis,’ which is ‘essential to implementing NEPA.’”). The proposed wind-energy project, which was to be developed on a privately-owned tract of land on Steens Mountain in Oregon, was considered one of the few remaining habitats for sagebrush. *Id.* at 565. Sagebrush, a plant found mainly in the Midwestern and Western parts of the United States, is vital to the greater sage-grouse’s survival, particularly in winter months. *Id.* at 565-66; *See Forest Jay Gauna, Plant of the Week: Sagebrush*, U.S. DEP’T OF AGRIC. FOREST SERV., [https://www.fs.fed.us/wildflowers/plant-of-the-week/artemisia\\_tridentata.shtml](https://www.fs.fed.us/wildflowers/plant-of-the-week/artemisia_tridentata.shtml) (last visited May 7, 2018). The court explained that The United States Bureau of Land Management (BLM), which prepared the EIS for the project, acknowledged that the project could pose a potential danger to the sagebrush



The court noted that the Bureau of Land Management (BLM), which prepared the EIS, based its erroneous conclusions about the presence of the greater sage-grouse on the project site during winter months on research conducted at nearby sites, as opposed to the site actually chosen for the project.<sup>104</sup> According to the Ninth Circuit, this did not constitute harmless error because the lack of sufficient information impeded the public's ability to "tailor its comments to address concerns regarding the potential winter presence of sage[-]grouse at the [project] site," prevented the BLM from sufficiently assessing the wind-energy project's impact on the greater sage-grouse, and inhibited the BLM from formulating adequate mitigation measures.<sup>105</sup>

Prior to deciding the instant case, the Ninth Circuit decided *Ground Zero Center for Non-Violent Action v. United States Department of the Navy (Ground Zero I)*,<sup>106</sup> in which the court evaluated the Navy's failure to prepare NEPA documentation for a proposed action.<sup>107</sup> In that case, Ground Zero challenged the Navy's proposed program to upgrade handling facilities at Naval Base Bangor (now known as Naval Base Kitsap).<sup>108</sup> This program, known as the "Backfit Program," was originally set to commence in 1989, but was stalled by the termination of the Cold War until President Bill Clinton authorized the program to move forward in 2000.<sup>109</sup>

In early 1999, the National Marine Fisheries Service (NMFS) identified two species of fish located at Naval Base Kitsap as "threatened."<sup>110</sup> The Navy evaluated the potential impact of the Backfit Program on the two fish species and determined the pro-

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habitat, but did not conduct research on the project site to determine whether sage grouse would actually be present on the site during the winter. *Id.* at 567.

104. *Id.* at 567 (explaining BLM based its conclusions about greater sage-grouse on surveys conducted in East and West Ridge sites).

105. *See id.* at 570-71 (explaining error was not harmless because BLM's inaccurate analysis "materially impeded" public commentary and BLM's decision-making process).

106. 383 F.3d 1082 (9th Cir. 2004).

107. *Id.* at 1084 (summarizing circumstances prompting Ground Zero's commencement of lawsuit).

108. *Id.* at 1084-85 (describing program challenged by Ground Zero). In the 1970s, upon selecting the Bangor site, the Navy prepared an EIS to consider the potential environmental impacts of the TRIDENT program on the community. *Id.* at 1084. After numerous supplements to the EIS, the Navy concluded an upgrade to the TRIDENT II system could be accomplished at some "unspecified future date." *Id.* After settling on an upgrade plan in the 1980s, the Navy issued a new EIS for the Backfit Program in 1989. *Id.* at 1085.

109. *Id.* at 1085 (describing program challenged by Ground Zero).

110. *Id.* (discussing listing of threatened fish species located at naval base).

gram would not have any adverse impact.<sup>111</sup> The Navy shared its conclusions with NMFS, but did not prepare any NEPA documentation.<sup>112</sup> Ground Zero filed suit and alleged, in part, that the Navy had violated NEPA for failing to prepare documentation analyzing the potential environmental impacts of the Backfit Program.<sup>113</sup> The district court granted summary judgment in favor of the Navy, prompting Ground Zero to appeal on the basis that NEPA allegedly required the Navy to prepare an EIS to analyze potential risks of accidental explosions of the upgraded missiles on the base.<sup>114</sup>

The Ninth Circuit affirmed the district court's decision in favor of the Navy.<sup>115</sup> The court noted that CEQ regulations required agencies to analyze "'reasonably foreseeable' environmental effects of their proposed actions."<sup>116</sup> The court reaffirmed its longstanding rejection of a rule requiring agencies to include and analyze in an EIS every possible environmental impact.<sup>117</sup> Instead, the court found all that was required of agencies was to conduct a "reasonable thorough discussion of the significant aspects of the probable environmental consequences."<sup>118</sup> In applying these principles to the facts, the court determined that it was unnecessary for the Navy to prepare an additional EIS because it had previously conducted an analysis of potential risks of accidental explosions on the base and concluded that the risks were extremely small.<sup>119</sup>

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111. *Ground Zero I*, 383 F.3d at 1085 (describing conclusions of Navy's analysis of Backfit Program's potential effects on threatened fish species).

112. *Id.* (describing Navy's actions following analysis of Backfit Program's potential effects on threatened fish species).

113. *Id.* (describing Ground Zero's allegation against Navy). Ground Zero also contended the Navy was required to analyze potential impacts of terrorism, earthquakes, and tsunamis on the base. *Id.* at 1085-86. Additionally, Ground Zero brought a challenge under the Endangered Species Act, but this claim is beyond the scope of this Note. *Id.* at 1085.

114. *Id.* at 1086 (stating Ground Zero's claim on appeal). Ground Zero argued that NEPA required preparation of an EIS to evaluate potential effects of explosions from both the upgraded missiles and missiles armed with nuclear warheads. *Id.*

115. *Id.* at 1092 (affirming district court's grant of summary judgment in favor of Navy).

116. *Ground Zero I*, 383 F.3d at 1089 (citing 40 C.F.R. §§ 1502.16, 1508.8(b)) (describing federal regulations that dictate types of environmental impacts to be discussed in EIS).

117. *Id.* (quoting *No GWEN All. of Lane Cty., Inc. v. Aldridge*, 855 F.2d 1380, 1385 (9th Cir. 1988)) (noting historical rejection of requirement that agencies evaluate all possible environmental impacts in EIS).

118. *Id.* at 1089-90 (quoting *Trout Unlimited v. Morton*, 509 F.2d 1276, 1283 (9th Cir. 1974)) (stating Ninth Circuit's standard for sufficient analysis in EIS).

119. *Id.* at 1091 (concluding Navy was not required to prepare additional NEPA documentation).

The court also rejected Ground Zero's argument that the Navy was required to produce a new EIS based on its reliance on the Department of Defense's base planning standards throughout its EIS.<sup>120</sup> As the court noted, the Department of Defense must evaluate risks to ensure "maximum possible protection" of people and property on a base, a standard that is higher than NEPA's "reasonably foreseeable" risk standard described above.<sup>121</sup> Consequently, NEPA's risk assessment standard did not rise to the level of those set forth by the Department of Defense, and as the court concluded, the Navy was not required to conduct further analysis beyond the risk assessment already performed.<sup>122</sup>

#### IV. NARRATIVE ANALYSIS

In addressing the Navy's alleged violations of NEPA in *Ground Zero II*, the Ninth Circuit noted the Navy's EIS and its appendices would be evaluated under the "hard look" standard.<sup>123</sup> To determine whether the Navy's redacted disclosures satisfied this standard, the court considered each item of withheld information individually, beginning with the Navy's failure to include information in the appendices of the final EIS that were later released through litigation.<sup>124</sup>

To evaluate the sufficiency of the Navy's disclosures, the court relied on the express statutory language of NEPA, conclusions of the Supreme Court in *Weinberger*, and various federal regulations.<sup>125</sup> According to the court, NEPA required the Navy to demonstrate that the information contained within the appendices could be withheld from public disclosure as UCNI at the point "when the Navy first refused to disclose any part of the appendices."<sup>126</sup> The

120. *Id.* at 1090 (finding Ground Zero's argument erroneous).

121. *Ground Zero I*, 383 F.3d at 1090 (describing divergent risk analysis standards of Department of Defense and NEPA).

122. *Id.* at 1091 (concluding Navy successfully complied with NEPA's requirements).

123. *Ground Zero II*, 860 F.3d at 1251 (setting forth standard of review for instant case). For a further discussion of the "hard look" standard, see *supra* notes 96-97 and accompanying text.

124. *Id.* at 1251-53 (addressing Ground Zero's allegation that Navy violated NEPA by failing to disclose "later-produced appendix information").

125. *Id.* at 1252 (listing applicable law and precedent). The Court's reliance on NEPA's statutory language, the Supreme Court's conclusions in *Weinberger*, and various federal regulations was predicated on the Navy's original claim, when the final EIS and redacted appendices were first released, that the information was subject to nondisclosure due to its status as UCNI. *Id.* at 1249. For a further discussion of UCNI, see *supra* notes 70-71 and accompanying text.

126. *Id.* (describing circumstances under which Navy was required to demonstrate exemption from disclosure).

court agreed with Ground Zero's argument that the Navy's eventual disclosure of the appendix information indicated that the Navy did not meet the UCNI standard under FOIA when the Navy originally released the entirely redacted appendices.<sup>127</sup> Absent the UCNI exemption under FOIA, the Navy was required to disclose the appendix information to satisfy NEPA's demand that disclosure be made "to the fullest extent possible."<sup>128</sup> The court concluded the Navy's failure to disclose the information at the time of the EIS's release constituted a violation of NEPA.<sup>129</sup>

Despite finding that the Navy violated NEPA, the Ninth Circuit determined that the Navy's nondisclosure was harmless.<sup>130</sup> The court rejected Ground Zero's argument that the Navy's initial redaction of Appendix C impeded the public's ability to judge the comprehensiveness of the Navy's safety evaluation regarding EHW-2 and therefore reduced public "pressure for meaningful study."<sup>131</sup> The court noted that Appendix C's label, "Explosives Safety Arcs for Existing EHW and Proposed Second EHW," would not have misled readers to believe that this particular appendix included an extensive safety evaluation.<sup>132</sup> According to the court, the public's ability to comment on the proposed construction of EHW-2 was not affected by the failure to disclose the information in Appendix C.<sup>133</sup>

The court went on to address Ground Zero's claim that the Navy violated NEPA by failing to disclose the Safety Board's conditional approval of the proposed location for EHW-2.<sup>134</sup> The Navy

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127. *Id.* (accepting Ground Zero's argument that Navy's disclosure of appendix information during litigation is evidence that Navy could not meet nondisclosure standard under FOIA).

128. *Ground Zero II*, 860 F.3d at 1252 (describing disclosure standard under NEPA).

129. *Id.* (holding Navy's failure to release non-redacted appendices at time of final EIS's original release constituted violation of NEPA).

130. *Id.* (concluding Navy's failure to disclose information in appendices was harmless).

131. *Id.* at 1252-53 (describing Ground Zero's argument opposing claim of Navy's harmless error). The court focused only on Appendix C, and Ground Zero failed to indicate how the "revealed portions of Appendix A or B [ ] would have made a difference in agency decisionmaking or public participation." *Id.* at 1252.

132. *Id.* at 1253 (discussing relevance of Appendix C to public's ability to participate in evaluating environmental impact of proposed EHW-2). Ground Zero argued the release of an un-redacted version of Appendix C upon the final EIS's release would have alerted the public to the Navy's insufficient explosives safety evaluation. *Id.* at 1252-53. The court concluded the plain language of Appendix C's heading made Ground Zero's contention "unpersuasive." *Id.* at 1253.

133. *Ground Zero II*, 860 F.3d at 1253 (determining Appendix C's heading would not alert reader to presence of "thorough analysis of safety risks").

134. *Id.* at 1253-56 (discussing Ground Zero's challenge to Navy's failure to disclose Safety Board's disapproval).

argued, based on the decision in *Ground Zero I*, that they were not required to disclose the Safety Board's concerns surrounding the Navy's safety evaluation because the risks prompting the Safety Board to issue conditional approval were "similarly remote" to the risks discussed in *Ground Zero I*.<sup>135</sup> The court distinguished *Ground Zero*'s arguments against the Navy, noting the Navy's failure to disclose the conditional site approval could constitute either: (1) a failure to satisfy the "hard look" standard, or (2) a failure to satisfy NEPA's agency consultation mandate.<sup>136</sup>

With regard to the first challenge, the court ultimately found that the Navy's risk assessment satisfied the "hard look" standard.<sup>137</sup> Affording deference to the Navy's decision-making, the court determined that the Navy took numerous steps to carefully analyze the potential risks of EHW-2.<sup>138</sup> The court reaffirmed the Ninth Circuit's longstanding principle that an EIS is not required to discuss "every conceivable environmental impact."<sup>139</sup> The court determined that the Navy's failure to disclose the Safety Board's concerns did not violate NEPA's "hard look" standard because the risks, although relevant under the Safety Board's more stringent standard of review, were insignificant for NEPA purposes.<sup>140</sup>

The court, nonetheless, pointed to NEPA's statutory language, as well as Ninth Circuit precedent, and concluded that "the Navy's own adequate determination that the risk of explosion was low does not excuse its failure to disclose . . . the results of its consultation with the Safety Board."<sup>141</sup> The court noted that NEPA's agency consultation mandate "applies with special force to the Safety

135. *Id.* at 1253 (describing Navy's view that it had no obligation to disclose conditional approval because safety risks surrounding construction of EHW-2 were small).

136. *Id.* at 1253-54 (distinguishing specific arguments made by *Ground Zero* regarding Navy's nondisclosure of conditional site approval).

137. *Id.* at 1255 (concluding Navy's evaluation of safety risks associated with EHW-2 satisfied "hard look" standard).

138. *Ground Zero II*, 860 F.3d at 1254 (describing steps taken by Navy to evaluate potential safety hazards of EHW-2). The steps taken by the Navy included an analysis of fatality risks, an evaluation of the risks associated with the distance between explosives handling sites in Georgia, consultations with the Safety Board and internal and external representatives, written documentation on safety risks from Navy Command, and accommodations with various explosives handling requirements set forth by the Safety Board. *Id.*

139. *Id.* (citing *Ground Zero Ctr. For Non-Violent Action v. U.S. Dep't of Navy*, 383 F.3d 1082, 1089 (9th Cir. 2004)) (discussing Ninth Circuit's rejection of idea that EIS should include all potential environmental impacts).

140. *Id.* at 1255 (noting failure to disclose Safety Board disapproval "[did] not necessarily demonstrate substantive noncompliance with NEPA").

141. *Id.* (discussing sources of law that required Navy to disclose Safety Board's disapproval).

Board” because the Safety Board was created under federal law for the explicit purpose of preventing harm from military operations.<sup>142</sup> The Navy utilized Safety Board requirements in preparing its EIS, and therefore implied that it would comply with those requirements in the construction of EHW-2.<sup>143</sup> According to the court, the Navy’s “affirmative reliance” on the Safety Board’s standards, coupled with its nondisclosure of the conditional site approval, hindered NEPA’s public participation goals.<sup>144</sup>

The Ninth Circuit ruled, however, that the NEPA violation based on the agency consultation mandate also constituted a harmless error.<sup>145</sup> In coming to its conclusion, the court emphasized the legislative intent of NEPA, specifically, having agencies provide opposing viewpoints regarding environmental impacts of major federal actions to foster “informed decisionmaking [sic] and public participation.”<sup>146</sup> The court determined that the Navy fully considered opposing viewpoints during its preparation of the EIS and, given the low safety risks associated with EHW-2, was not required to discuss the Safety Board’s concerns with the project.<sup>147</sup> According to the court, public participation was not impeded by the nondisclosure because the information would not have improved public knowledge of the proposed wharf.<sup>148</sup>

## V. CRITICAL ANALYSIS

In finding the Navy violated NEPA by failing to disclose appendix information and information regarding the Safety Board’s conditional approval of EHW-2’s proposed locations, the Ninth Circuit reinforced its commitment to its established interpretation of rele-

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142. *Id.* (discussing Navy’s obligation to disclose consultation with Safety Board based on reasons for Safety Board’s existence).

143. *Ground Zero II*, 860 F.3d at 1256 (noting Navy’s reliance on Safety Board’s standards in decision-making “created the appearance” that Navy intended to meet those standards).

144. *Id.* (summarizing actions taken by Navy that failed to satisfy NEPA).

145. *Id.* (holding Navy’s NEPA violation for failing to disclose Safety Board’s conditional approval was harmless).

146. *Id.* (quoting *Idaho Wool Growers Ass’n v. Vilsack*, 816 F.3d 1095, 1102-04) (describing congressional intent of NEPA).

147. *Id.* (reiterating principle that NEPA does not require discussion of every possible environmental impact in EIS).

148. *Ground Zero II*, 860 F.3d at 1266 (determining public participation goals were not impeded because information regarding Safety Board’s concerns was not of sufficient concern to render its disclosure necessary).

vant legal standards and regulations.<sup>149</sup> The Ninth Circuit's determinations that the nondisclosure of both the appendix information and the Safety Board's disapproval were harmless errors, however, paradoxically undermine a central purpose of NEPA's creation: that the public be involved in evaluating the risks of proposed federal actions to the environment.<sup>150</sup>

#### A. Nondisclosure of Information from Appendices

The Ninth Circuit correctly held that the Navy violated NEPA by failing to disclose the information contained in the appendices of its final EIS, which was later released during litigation.<sup>151</sup> As the court asserted, although NEPA requires that information be disclosed "to the fullest extent possible," the nondisclosure would have been justified if the Navy had satisfied the UCNI standard at the time when it first withheld the information from public review.<sup>152</sup> This point is supported by the *Weinberger* decision, in which the Supreme Court unequivocally affirmed the principle that Congress's express intent in drafting NEPA was to have public disclosure under the Act be governed by FOIA and its progeny.<sup>153</sup> Given that the Navy later released the previously-redacted information from the appendices on its own determination, the court properly considered this willing disclosure to be an indication of the Navy's inability to meet the UCNI standard.<sup>154</sup> The court further concluded that the information should have been disclosed in order to comply with NEPA.<sup>155</sup>

While the Ninth Circuit consistently determined that the nondisclosure conflicted with NEPA's requirements, its finding that the

149. For a further discussion of the Ninth Circuit's findings that the Navy violated NEPA for failing to disclose appendix information and the Safety Board's disapproval of the wharf site, see *infra* notes 151-155 and accompanying text.

150. For a further discussion of the Ninth Circuit's conclusions that the nondisclosures constituted harmless errors, see *supra* notes 130-133, 145-148 and accompanying text.

151. See *Ground Zero II*, 860 F.3d at 1253 (concluding Navy violated NEPA for failing to disclose information from appendices in release of final EIS).

152. See *id.* at 1252 (stating NEPA's requirement that disclosure be made to "fullest extent possible" and noting Navy could have had sufficient justification to withhold appendix information if it had satisfied standard at point it first attempted to withhold information from public dissemination).

153. For a further discussion of the Supreme Court's analysis in *Weinberger*, see *supra* notes 74-84 and accompanying text.

154. For a further discussion of the Ninth Circuit's consideration of the Navy's failure to meet the UCNI standard, see *supra* notes 125-129 and accompanying text.

155. See *Ground Zero II*, 860 F.3d at 1252 (noting Navy did not argue on appeal that information from appendices met UCNI standard).

nondisclosure constituted harmless error appears to overlook aspects of its own precedent.<sup>156</sup> The court rejected Ground Zero's argument that the nondisclosure of information from Appendix C impeded public involvement in evaluating the Navy's analysis of environmental risks.<sup>157</sup> In doing so, the court noted that Appendix C's label, "Explosives Safety Arcs for Existing EHW and Proposed Second EHW," made it unlikely that the public would have considered its information important to understanding the Navy's risk analysis.<sup>158</sup> Significantly, as the majority explained in its summary of the case, "Appendix C contained information regarding the distance 'within which activities and facilities are restricted to assure protection to life and property in the event of an accident.'"<sup>159</sup> This was likely crucial information to the Navy's decision-making process, and as Ground Zero argued, "important to the public's understanding" and consideration of the Navy's safety analysis of EHW-2.<sup>160</sup> Moreover, the Ninth Circuit in *Oregon Natural Desert Association* concluded that a government's failure to apprise the public of information that would allow for informed consideration and commentary does not constitute a harmless error.<sup>161</sup> Given that the Navy in *Ground Zero II* did just that by failing to disclose information that would inform the public of the potential risks EHW-2 could have posed to the surrounding environment, the court's finding of harmless error appears difficult to justify.<sup>162</sup>

## B. Nondisclosure of Safety Board's Conditional Approval

The court properly found that a NEPA violation occurred on Ground Zero's second claim, namely, that the Navy failed to promote NEPA's public participation goals by not disclosing the Safety

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156. *Id.* (holding Navy's NEPA violation for failing to disclose information from appendices constituted harmless error).

157. *Id.* at 1253 (finding Ground Zero's argument that Navy's failure to release information in Appendix C impeded public evaluation of Navy's risk analysis to be "unpersuasive").

158. *Id.* (explaining reasoning behind its conclusion that Ground Zero's argument regarding importance of Appendix C to public commentary was erroneous).

159. *Id.* at 1249 (quoting U.S. DEP'T OF NAVY, TRIDENT SUPPORT FACILITIES EXPLOSIVES HANDLING WHARF (EHW-2) FINAL ENVIRONMENTAL IMPACT STATEMENT (2012)) (describing content of Appendix C).

160. See *Ground Zero II*, 860 F.3d at 1253 (describing Ground Zero's argument regarding Navy's failure to release information from Appendix C).

161. For a further discussion of *Or. Nat. Desert Ass'n v. Jewell*, see *supra* notes 101-105 and accompanying text.

162. For a further discussion of Ninth Circuit precedent regarding harmless error in NEPA cases, see *supra* notes 99-105 and accompanying text.



Board's conditional approval of EHW-2's proposed location.<sup>163</sup> In rejecting Ground Zero's first argument that the nondisclosure violated the "hard look" standard, the court concluded that *Ground Zero I* supported the Navy's failure to disclose the Safety Board's disapproval because, in both cases, the Navy conducted safety risk analyses of potential explosions and determined the risks were insignificant.<sup>164</sup> Because the Ninth Circuit in *Ground Zero I* concluded that the Navy was not required to prepare a new EIS to discuss those insignificant risks, it logically follows that, under the hard look standard, the Navy was also not required to discuss the Safety Board's concerns regarding potential explosions in the EIS for EHW-2.<sup>165</sup>

The Ninth Circuit, however, correctly determined that the failure to include the Safety Board's disapproval in the EIS was a violation of NEPA's agency consultation mandate.<sup>166</sup> As the court noted, NEPA requires an agency proposing a major federal action to coordinate with "any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved."<sup>167</sup> The court explained that consultation with the Safety Board was particularly relevant in this matter, as the Safety Board was designed to ensure public safety and prevent harm to property that could result from military activities.<sup>168</sup> The Safety Board's conclusions about the project were therefore especially relevant to the Navy's decision-making process.<sup>169</sup> Because NEPA's statutory language explicitly identifies public involvement and informed decision-making goals, the Ninth Circuit's finding that the Safety Board's concerns should have been included in the EIS for public

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163. See *Ground Zero II*, 860 F.3d at 1253-54 (describing Ground Zero's claims regarding failure to disclose Safety Board's conditional approval).

164. *Id.* at 1254-55 (comparing facts of *Ground Zero I* and instant case).

165. See *id.* at 1255 (quoting *Ground Zero Ctr. for Non-Violent Action v. U.S. Dep't. of Navy*, 383 F.3d 1083, 1089 (9th Cir. 2004)) (noting court in *Ground Zero I* "rejected the notion that every conceivable environmental impact must be discussed in an EIS").

166. *Id.* at 1256 (finding Navy's failure to disclose Safety Board's disapproval constituted abdication of responsibility imposed on it by NEPA).

167. *Id.* at 1255 (emphasis added) (quoting 42 U.S.C. § 4332(2)(C)) (describing agency consultation mandate). For a further discussion of the agency consultation mandate, see *supra* notes 60-61 and accompanying text.

168. See *Ground Zero II*, 860 F.3d at 1255 (quoting Department of Defense, *Directive 6055.9E* at 2 (Aug. 19, 2005)) (describing applicability of agency consultation mandate to Safety Board in this case).

169. See *id.* at 1255-56 (explaining how Safety Board's "special expertise" warranted inclusion of its comments in Navy's EIS).

review was appropriate.<sup>170</sup> In reaching this conclusion, the court also noted the Navy's frequent reliance on the Safety Board standards in planning the EHW-2's construction.<sup>171</sup> The court reasoned that such reliance, coupled with the failure to disclose the Safety Board's disapproval, violated the agency consultation mandate and public commentary goals of NEPA.<sup>172</sup>

The Ninth Circuit, in reviewing the Navy's decision not to include the Safety Board's disapproval of EHW-2's proposed location in the EIS, again improperly concluded this error was harmless.<sup>173</sup> In determining that the Navy was not required to disclose the Safety Board's concerns in the EIS, the court simply relied on the fact that the Navy considered opposing viewpoints during the EIS's preparation, even though those viewpoints were not disclosed, and on the low safety risks presented by the wharf.<sup>174</sup>

The Ninth Circuit's holding once again represents an apparent divergence from past precedent.<sup>175</sup> As the court noted in *Ground Zero II*, it is true that an agency is not required to discuss every possible risk that is associated with a proposed project in an EIS.<sup>176</sup> The court, however, pointed to specific instances where the Navy relied on the Safety Board's explosives safety standards throughout the EIS.<sup>177</sup> For example, the court pointed to a portion of the EIS where the Navy rejected an alternative site for the wharf because "it would not comply with the Safety Board's guidelines surrounding the proper handling of explosives."<sup>178</sup> By doing so, the Navy implicitly acknowledged that the Safety Board's standards and concerns about the project were crucial to its decision-making process regarding EHW-2.<sup>179</sup> Consequently, the Navy was obligated to include the Safety Board's concerns regarding EHW-2 because of

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170. For a further discussion of public participation goals of NEPA, see *supra* notes 64-65 and accompanying text.

171. See *Ground Zero II*, 860 F.3d at 1256 (describing Navy's "affirmative reliance" on Safety Board standards in decision-making process).

172. *Id.* at 1255-56 (describing how Navy's actions were "inconsistent" with NEPA's requirements regarding agency consultation and disclosure).

173. *Id.* (holding failure to disclose Safety Board consultation was harmless).

174. *Id.* at 1256 (summarizing reasons for finding harmless error).

175. For a further discussion of Ninth Circuit precedent regarding harmless error and NEPA violations, see *supra* notes 99-105 and accompanying text.

176. See *Ground Zero II*, 860 F.3d at 1255 (noting Ninth Circuit's longstanding principle that agencies are not required to discuss insignificant risks in EIS).

177. *Id.* at 1256 (referring to Navy's compliance with Safety Board standards throughout EIS).

178. *Id.* (describing specific instance in which Navy relied on Safety Board's standards in EIS).

179. *Id.* (discussing *Ground Zero*'s contention that Navy misrepresented itself as complying with Safety Board's standards).

NEPA's direction that disclosures are made to the fullest extent possible.<sup>180</sup> Moreover, the Navy's failure to include its consultation with the Safety Board impeded the public's ability to evaluate potential safety risks that the Navy considered in its decision-making process.<sup>181</sup> This is precisely the kind of error the Ninth Circuit previously deemed to be harmful in *Oregon Natural Desert Association*, where the court concluded the BLM's failure to include sufficient information regarding a wind-energy project's risks to a local bird species interfered with "informed decisionmaking [sic] and public participation."<sup>182</sup> The Ninth Circuit's failure to find the Navy's nondisclosure harmless in *Ground Zero II* is therefore contradictory with its precedent.<sup>183</sup>

## VI. IMPACT

The Ninth Circuit's rulings with respect to the Navy's nondisclosure of appendix information and the Safety Board's concerns constitute a paradox.<sup>184</sup> On the one hand, the court upheld and consistently adhered to relevant standards under NEPA and associated regulations in finding that the Navy's nondisclosures violated NEPA.<sup>185</sup> On the other hand, the Ninth Circuit contravened its own precedent by concluding the NEPA violations constituted harmless errors, when a previous error of similar significance was deemed to be not harmless.<sup>186</sup> The effects of the court's holding are two-fold: first, this decision has the potential to result in inconsistent application of the harmless error standard in future cases; second, the Ninth Circuit's holding potentially weakens the EIS as an "action forcing" provision of NEPA.<sup>187</sup>

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180. For a further discussion of NEPA's compliance standard, see *supra* note 54 and accompanying text.

181. See 42 U.S.C. § 4332 (1970) (describing Congress' intent to have agencies fully comply with NEPA).

182. *Or. Nat. Desert Ass'n v. Jewell*, 840 F.3d 562, 571 (9th Cir. 2016) (explaining that BLM's inadequate EIS interfered with public's ability to comment on environmental risks associated with wind-energy project).

183. For a further discussion of Ninth Circuit precedent regarding harmless error and NEPA violations, see *supra* notes 99-105 and accompanying text.

184. For an examination of the ramifications of the Ninth Circuit's decision, see *infra* notes 185-197 and accompanying text.

185. For an analysis of the court's justification for finding the Navy in violation of NEPA, see *supra* notes 149-183 and accompanying text.

186. For an analysis of the court's reasoning, see *supra* notes 149-183 and accompanying text.

187. For an analysis of the effect of the court's holding on the "harmless error" standard and the EIS as a procedural instrument, see *infra* notes 193-197 and accompanying text.

In its opinion, the court noted that the information not disclosed by the Navy in its EIS would not have furthered the public's knowledge regarding the environmental risks, and the analysis of such risks, associated with EHW-2.<sup>188</sup> Setting aside whether this was actually the case, the court's reliance on this point in finding both NEPA violations to constitute harmless errors appears to add a level of analysis to the application of the "harmless error standard."<sup>189</sup> Specifically, the Ninth Circuit seemed to require that, to find a harmful error, the information not disclosed by the agency must have been capable of enhancing the public's understanding of the potential environmental impacts of a project or of the proposing agency's analysis of potential risks to the surrounding environment.<sup>190</sup> Although this may be a reasonable analysis for the court to conduct, the problem with this standard is that the court offers no guidance about what kind of information sufficiently enhances public knowledge of potential environmental impacts or of an agency's risk assessment of those potential impacts.<sup>191</sup> Consequently, applying this requirement in future Ninth Circuit cases involving NEPA violations will likely result in varying and inconsistent decisions.<sup>192</sup>

When considering the impact of the Ninth Circuit's decision in this case, it is important to remember that NEPA, as discussed by the Supreme Court in *Robertson*, is fundamentally a procedural statute.<sup>193</sup> In practice, this means NEPA does not compel results in the form of preventing environmental harm.<sup>194</sup> Rather, the statute merely requires agencies to consider the potential environmental impacts of their actions and to allow the public to assess agencies' considerations of those potential impacts.<sup>195</sup> The court, in limiting

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188. For an explanation of why the court found the nondisclosure of the appendix information and the Safety Board's disapproval to be harmless on the basis of that information's content, see *supra* notes 132, 148 and accompanying text.

189. For a further discussion of the Ninth Circuit's "harmless error" standard, see *supra* notes 99-105 and accompanying text.

190. For a summary of the Ninth Circuit's embrace of an elevated "harmful error" standard, see *supra* notes 132, 148 and accompanying text.

191. For a critical analysis of the court's reasoning, see *supra* notes 149-183 and accompanying text.

192. For a description of the court's problematic conclusion limiting public oversight of government projects that have the potential to effect environmental harm, see *supra* notes 132, 148 and accompanying text.

193. For a discussion of the Supreme Court's dialogue in *Robertson* describing NEPA as a procedural statute, see *supra* note 94 and accompanying text.

194. For a recounting of NEPA's reliance on action forcing provisions, see *supra* note 56 and accompanying text.

195. For a discussion of NEPA's mandate that agencies both consider potential environmental impacts of proposed projects and disseminate information

the kind of information that will result in a finding of a non-harmless error if not disclosed in an EIS, may incentivize agencies to disclose less information to the public and to give less weight to certain kinds of information when evaluating the potential environmental risks of future projects.<sup>196</sup> This, in turn, could weaken the EIS as an action forcing provision, thereby undermining the very mechanism specifically designed to enable NEPA to effectuate its overarching goals of environmental protection.<sup>197</sup>

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about such considerations to the public, see *supra* notes 56-57 and accompanying text.

196. For an explanation of how the Ninth Circuit's holding avails agencies of a strategy for avoiding public oversight, see *supra* notes 132, 148 and accompanying text.

197. For a discussion of NEPA's reliance on action forcing provisions, see *supra* note 56 and accompanying text.

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