

# Journal of Environmental and Sustainability Law

---

Missouri Environmental Law and Policy Review  
Volume 13  
Issue 1 *Fall 2005*

Article 5

---

2005

## **Bombs Under Bangor: The Ninth Circuit Holds Submarine Base Siting Beyond the Scope of NEPA and the ESA. Ground Zero Center for Non-Violent Action v. U.S. Department of the Navy**

Crystal L. Hermann

Follow this and additional works at: <https://scholarship.law.missouri.edu/jesl>



Part of the [Environmental Law Commons](#)

---

### **Recommended Citation**

Crystal L. Hermann, *Bombs Under Bangor: The Ninth Circuit Holds Submarine Base Siting Beyond the Scope of NEPA and the ESA. Ground Zero Center for Non-Violent Action v. U.S. Department of the Navy*, 13 Mo. Envtl. L. & Pol'y Rev. 46 (2005)

Available at: <https://scholarship.law.missouri.edu/jesl/vol13/iss1/5>

This Note is brought to you for free and open access by the Law Journals at University of Missouri School of Law Scholarship Repository. It has been accepted for inclusion in Journal of Environmental and Sustainability Law by an authorized editor of University of Missouri School of Law Scholarship Repository. For more information, please contact [bassettcw@missouri.edu](mailto:bassettcw@missouri.edu).

## BOMBS UNDER BANGOR: THE NINTH CIRCUIT HOLDS SUBMARINE BASE SITING BEYOND THE SCOPE OF NEPA AND THE ESA

*Ground Zero Center for Non-Violent Action v. U.S. Department of the Navy*<sup>1</sup>

### I. INTRODUCTION

In *Ground Zero Center for Non-Violent Action v. United States Department of the Navy*, the Ninth Circuit Court of Appeals held that Presidential action is beyond the scope of both the National Environmental Policy Act<sup>2</sup> (“NEPA”) and the Endangered Species Act<sup>3</sup> (“ESA”).<sup>4</sup> In *Ground Zero*, the Navy chose the Bangor, Washington submarine base as the prospective location for the Backfit Program, which would upgrade the base from housing Trident I missiles to housing Trident II missiles.<sup>5</sup> Although the Navy suggested the Bangor base, President Clinton made the ultimate decision to locate the Backfit Program in Bangor.<sup>6</sup> In determining that the decision to locate the base was beyond the scope of both NEPA and the ESA, the Ninth Circuit reasoned that the Navy had no discretion to cease operations at the submarine base, and therefore requiring the Navy to comply with the procedural requirements of NEPA and the ESA would be futile.<sup>7</sup> The Ninth Circuit’s determination is consistent with other courts’ findings that NEPA and the ESA do not apply to actions made by the President in his official capacity. This note focuses on the logic behind exempting Presidential actions from NEPA and ESA requirements.

### II. FACTS AND HOLDING

Ground Zero Center for Nonviolent Action (“Ground Zero”) brought this action against the U.S. Department of the Navy (“Navy”) alleging that the Navy was in violation of NEPA and the ESA.<sup>8</sup> Specifically, Ground Zero alleged that the Navy failed to properly investigate the environmental impacts of an accidental detonation of the Trident II missile and also failed to consult with the National Marine Fisheries Service (“NMFS”) regarding the effects of an explosion on threatened fish species.<sup>9</sup>

The Navy developed the Trident Missile during the Cold War to retaliate against an attack on the United States.<sup>10</sup> The Navy is currently phasing out the Trident I missile to make room for the updated Trident II missile.<sup>11</sup> In the United States, two naval bases house submarines equipped to launch both the Trident I and II missiles.<sup>12</sup> At issue in this case is the Naval Submarine Base Bangor (“Bangor”), which is located in Washington’s Puget Sound Basin.<sup>13</sup> In the early 1970’s, the Navy selected Bangor as the prospective site for its facility and conducted a detailed assessment of the potential adverse impacts of the Trident program on the community and the environment.<sup>14</sup> At that time, the Navy issued an Environmental Impact Statement (“EIS”)

<sup>1</sup> 383 F.3d 1082 (9th Cir. 2004) [hereinafter “*Ground Zero*”].

<sup>2</sup> 42 U.S.C. § 4321 (2000).

<sup>3</sup> The Endangered Species Act of 1973, Pub. L. No. 93-205 (1973) (codified at 16 U.S.C. §§ 1531-1544 (2000)).

<sup>4</sup> *Ground Zero*, 383 F.3d at 1092-93.

<sup>5</sup> *Id.* at 1084.

<sup>6</sup> *Id.* at 1085.

<sup>7</sup> *Id.* at 1092-93.

<sup>8</sup> *Id.* at 1083-84. Collectively “Ground Zero” consists of The Ground Zero Center for Nonviolent Action, the Waste Action Project, Washington Physicians for Social Responsibility, Cascadia Wildlands Project, Peace Action of Washington, Mary Fleysteen, and Glen Milner. *Id.* at 1084.

<sup>9</sup> *Id.* at 1084.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* Both the Naval Submarine Base Kings Bay, Georgia and the Naval Submarine Base Bangor, Washington are capable of storing submarines used to launch the Trident missiles. *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

detailing the results of the assessment.<sup>15</sup> When conducting the examination the Navy considered the effects of an upgrade from Trident I missiles to Trident II missiles, although the Navy did not specify a date for renovation of the base.<sup>16</sup>

In 1989, the Navy again analyzed the environment impacts of upgrading the Bangor facility after forming the final upgrade plan, the D-5 (Trident II) Backfit Facility Program (“Backfit Program”).<sup>17</sup> Because the final specifications of the plan differed from the original assumptions, the Navy issued an Environmental Assessment (“EA”) “addressing the potential impact of the Backfit Program on the Bangor environment.”<sup>18</sup> The Navy issued a Finding of No Significant Impact (“FONSI”) based on the results of the EA, which concluded that the Backfit Program would not significantly impact the environment.<sup>19</sup> The Navy planned to begin construction on the Bangor facility in 1989, but the end of the Cold War sparked discussions as to the necessity of the Backfit Program.<sup>20</sup> As a result, the Navy postponed construction.<sup>21</sup> In 1994, President Clinton determined that the Backfit Program should proceed at a reduced scale.<sup>22</sup>

Under the 1994 revision of the Backfit Program, the Navy reexamined both its original 1974 EIS and supplements, as well as the 1989 EA.<sup>23</sup> Because the Backfit Program was a scaled down version of the 1989 plan, the Navy found the potential adverse environmental impacts consistent with the analysis completed in 1989.<sup>24</sup> Therefore, the Navy did not conduct an additional EA for the project.<sup>25</sup> In March 1999, the National Marine Fisheries Service (“NMFS”) listed the Hood Canal Summer Run Chum Salmon and the Puget Sound Chinook Salmon as threatened species.<sup>26</sup> The Navy consulted with the NMFS on the possible impact of the Backfit Program on the threatened fish species.<sup>27</sup> The Navy concluded that the program would have no negative effects on the species.<sup>28</sup>

On June 22, 2001, Ground Zero commenced this action in the U.S. District Court for the Western District of Washington alleging that the Navy violated NEPA and the ESA.<sup>29</sup> The district court granted partial summary judgment in favor of the Navy on “Ground Zero’s claims that the Navy was required to evaluate the environmental impacts of storing and handling Trident II missiles armed with nuclear warheads at Bangor, the environmental impacts of potential terrorist attacks on the base, and the environmental impacts of a possible earthquake or tsunami.”<sup>30</sup> On October 28, 2002, the district court granted summary judgment in favor of the Navy on the remaining issues.<sup>31</sup> The court held that the Navy did not need to publish a new EIS for the Backfit Program because the 1989 EIS covered the action, the Navy’s decision not to publish a new EIS deserved deference, the Navy was not required to publish a supplemental EIS for the Bangor base upgrade, and the Navy complied with the ESA when it investigated the program’s effect on the threatened fish species.<sup>32</sup>

<sup>15</sup> *Id.* The Navy supplemented the original 1974 EIS four separate times, once in 1976, twice in 1977, and once in 1978. *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 1085.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* The 1989 Backfit Program upgrade plan had a projected cost of \$248 million. *Id.* The President’s revised plan was about one-third the size and one-tenth the cost of the 1989 plan. *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* The Navy forwarded its findings to the NMFS, and the NMFS never responded. *Id.* Therefore, the Navy determined that it was not necessary to investigate further. *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at 1085-86.

<sup>31</sup> *Id.* at 1086.

<sup>32</sup> *Id.*

Ground Zero appealed the grant of summary judgment.<sup>33</sup> On appeal, Ground Zero made three claims.<sup>34</sup> First, Ground Zero insisted that the Navy must conduct an EIS analyzing the impact of an accidental explosion of a conventionally armed Trident II missile.<sup>35</sup> Second, Ground Zero contended that NEPA requirements mandate that the Navy assess the environmental risks of an explosion of a Trident II missile armed with nuclear warheads.<sup>36</sup> Third, Ground Zero argued that the Navy violated the ESA because it did not consult with the NMFS regarding the effect of an accidental missile explosion on the threatened fish species.<sup>37</sup>

The Ninth Circuit Court of Appeals affirmed the district court's grant of summary judgment in favor of the Navy in the instant decision.<sup>38</sup> The court reasoned that NEPA does not require the Navy to examine the effects of an accidental missile explosion in an EIS because the chances of an explosion are so remote and because the Navy only has limited discretion regarding Backfit Program operations.<sup>39</sup> Similarly, the court found that the Navy's failure to consult the NMFS did not violate the ESA for the same reasons: the Navy lacked discretion to cease Backfit Program operations and the chance of an explosion is minimal.<sup>40</sup>

### III. LEGAL BACKGROUND

#### A. *The National Environmental Policy Act*<sup>41</sup>

In 1969, Congress enacted NEPA in response to the public's growing concerns about environmental degradation.<sup>42</sup> NEPA requires agencies to "consider environmental factors, in addition to financial and technical factors, in their planning and decision-making processes."<sup>43</sup> While NEPA does not require agencies to achieve certain substantive environmental results, it does demand that agencies take a hard look at the environmental consequences of agency action.<sup>44</sup> NEPA's basic policy instructs the federal government to use all practicable means and measures to avoid environmental degradation, preserve historic, cultural, and natural resources, and promote the "widest range of beneficial uses of the environment" without undesirable and unintended consequences.<sup>45</sup>

Although NEPA does not contain environmental guidelines, it does not leave agencies without guidance.<sup>46</sup> Congress recognized the need for an advisory body to establish the administrative procedures to aid federal agencies in NEPA compliance, resulting in the creation of the Council on Environmental Quality ("CEQ").<sup>47</sup> If judicial review of an agency's action is necessary, the courts will give effect to the procedures set forth by CEQ in NEPA administration.<sup>48</sup>

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 1092.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> 42 U.S.C. § 4321.

<sup>42</sup> *Id.* The purpose of NEPA is:

To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate 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.

*Id.*

<sup>43</sup> <http://www.fema.gov/ehp/nepa.shtm> (last visited Oct. 24, 2005).

<sup>44</sup> *See* 42 U.S.C. § 4321.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* The CEQ consists of three members and is part of the Executive Branch of government. 61B AM. JUR. 2D *Pollution Control* § 99 (2005). The CEQ duties include the following: assist and advise the President in preparing the NEPA required Environmental Quality Report, review various

In analyzing the environmental impacts of the agency action under NEPA, the agency can provide one of two reports: an “Environmental Impact Statement” (“EIS”) or a “Finding of No Significant Impact” (“FONSI”).<sup>49</sup> To help the agency decide which report is appropriate, the agency conducts an “Environmental Assessment” (“EA”), which results in a concise public document that provides sufficient evidence to support the agency’s choice of either an EIS or a FONSI.<sup>50</sup> Conducting an EA assists the agency in determining whether the likelihood of a significant environmental impact on an area justifies the time and expense of preparing a full EIS.<sup>51</sup>

NEPA requires “agencies of the Federal government” to prepare a detailed EIS for legislative proposals and “other major Federal actions significantly affecting the quality of the human environment.”<sup>52</sup> For NEPA purposes, “federal agency” does not include “the Congress, the Judiciary, or the President.”<sup>53</sup> By its own language, the procedural mandates of NEPA do not apply to presidential action.<sup>54</sup>

### B. *The Endangered Species Act*<sup>55</sup>

Congress passed the ESA of 1973 due to the increasing alarm that “various species of fish, wildlife, and plants in the United States have been rendered extinct as a consequence of economic growth and development untempered by adequate concern and conservation.”<sup>56</sup> According to legislative history, the purpose of the ESA was “to provide for conservation, protection and propagation of endangered species of fish and wildlife by Federal action and by encouraging the establishment of State endangered species conservation programs.”<sup>57</sup> President Nixon signed the ESA into law on December 28, 1973, at which time he remarked that “[t]his legislation provides the Federal Government with the needed authority to protect an irreplaceable part of our national heritage-threatened wildlife.”<sup>58</sup>

Some scholars deem Section 7 of the ESA as “perhaps the most important protection accorded to species by law.”<sup>59</sup> Section 7 requirements generally prohibit federal agencies from jeopardizing or damaging the habitat of an endangered species.<sup>60</sup> To ensure that an agency action will not adversely affect the continued existence of a species, the agency must consult with either the Fish and Wildlife Service (“FWS”) or the National Marine Fisheries Service (“NMFS”).<sup>61</sup>

The agency has two options, both of which satisfy the consultation requirement: conduct a biological assessment or engage in informal consultation.<sup>62</sup> First, the agency may engage in an informal consultation with the FWS or NMFS to aid the agency in determining whether the proposed action requires formal consultation.<sup>63</sup> If the informal consultation suggests that the proposed agency action is unlikely to adversely affect a threatened

---

federal government activities for NEPA compliance, develop and recommend environmental policies to the President, document and define changes in plant and animal systems, and to aid policy makers in decision making. *Id.*

<sup>48</sup> Daniel R. Mundelker, *An Outline of NEPA and Its Administration*, NEPA Law and Litigation 2d § 2.8 (2005). See 61B AM. JUR. 2D *Pollution Control* § 99 (2004) (finding that the CEQ’s interpretation of NEPA is entitled to substantial deference).

<sup>49</sup> 38 AM. JUR. 3d *Proof of Facts* 547 § 4 (2004).

<sup>50</sup> 40 C.F.R. §§ 1501.3, 1501.4, 1508.9 (2005).

<sup>51</sup> 42 U.S.C. § 4332 (2000).

<sup>52</sup> *Id.* § 4332(C).

<sup>53</sup> 40 C.F.R. § 1508.12 (2005).

<sup>54</sup> See 42 U.S.C. § 4332(2).

<sup>55</sup> 16 U.S.C. § 1531.

<sup>56</sup> *Id.* § 1531(a)(1).

<sup>57</sup> S. Rep. No. 93-307, U.S. Code Cong. & Admin. News 2989 (1973).

<sup>58</sup> Richard Nixon, Public Papers of the Presidents of the United States, 1973, at 1027-28 (1975), available at <http://www.presidency.ucsb.edu/ws/index.php?pid=4090&st=&st1=>.

<sup>59</sup> THE STANFORD ENVIRONMENTAL LAW SOCIETY, THE ENDANGERED SPECIES ACT 78 (Stanford Univ. Press 2001).

<sup>60</sup> See 16 U.S.C. § 1536(a)(2) (2000).

<sup>61</sup> *Id.* § 1536(a)(3); see also 50 C.F.R. § 402.14(a) (2000).

<sup>62</sup> See 50 C.F.R. §§ 402.12, 402.13.

<sup>63</sup> *Id.* § 402.13.

or endangered species, and both the agency and FWS or NMFS agree, the agency is relieved of further consultation requirements.<sup>64</sup> Second, the agency may conduct a “biological assessment” to determine whether the planned agency action will affect an endangered species.<sup>65</sup> If the biological assessment reveals that the agency action is likely to harm a protected species, the agency must engage in formal consultation with either FWS or NMFS.<sup>66</sup> But if the biological assessment concludes that no listed species will be harmed by the proposed action, and the FWS or NMFS agrees, then the agency need not engage in formal consultation.<sup>67</sup>

#### IV. INSTANT DECISION

Ground Zero appealed the district court’s grant of summary judgment in favor of the Navy.<sup>68</sup> On appeal, Ground Zero argued that the Navy violated NEPA when it failed to investigate the probable significant environmental impacts of an accidental explosion of a Trident II missile.<sup>69</sup> In addition, Ground Zero asserted that the Navy violated the ESA when it failed to consult the NMFS regarding the possible effects of a Trident II missile explosion on threatened fish species.<sup>70</sup> Because neither NEPA nor ESA has a judicial review provision, the appellate court chose to review the district court’s grant of summary judgment under the arbitrary and capricious standard of the Administrative Procedure Act.<sup>71</sup>

The court first considered whether the Navy’s actions violated NEPA.<sup>72</sup> Ground Zero argued that the Navy should have prepared an EIS about the probable significant environmental impacts of a Trident II missile explosion on the Bangor area.<sup>73</sup> The Navy countered Ground Zero’s argument by asserting that the decision to implement the Backfit program was a presidential action, and therefore, NEPA does not apply.<sup>74</sup> Ground Zero offered no evidence to dispute that President Clinton ordered the implementation of the Backfit Program, which placed Trident II missiles in Bangor.<sup>75</sup> The court agreed with the Navy’s argument that President Clinton decided to locate the Backfit Program in Bangor.<sup>76</sup> Since a presidential decision is not reviewable under NEPA, the decision to locate the Trident II missiles in Bangor is not subject to NEPA regulations.<sup>77</sup>

Although the court determined that President Clinton ordered the implementation of the Backfit Program, the court also found that the Navy still has discretion over the program.<sup>78</sup> Ground Zero argued that the Navy must comply with NEPA when it exercises its discretionary power, which could result in an accidental deployment of a Trident II missile.<sup>79</sup> Between 1992 and 1996, the Navy conducted a study to determine the chance of an accident during Trident II missile loading and unloading operations.<sup>80</sup> The study concluded that the chance of an accident was about one in one million.<sup>81</sup> Furthermore, the study showed that even if an

<sup>64</sup> *Id.*

<sup>65</sup> 16 U.S.C. § 1536(c)(1).

<sup>66</sup> *See id.*

<sup>67</sup> 50 C.F.R. § 402.12(k)(1).

<sup>68</sup> *Ground Zero*, 383 F.3d at 1086.

<sup>69</sup> *Id.* at 1084.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at 1086; *see also* 5 U.S.C. § 706(2)(A) (2000).

<sup>72</sup> *Ground Zero*, 383 F.3d at 1084.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* at 1087-88. The Navy’s defense rests mainly on a largely classified document, Presidential Decision Directive Number 30 of 1994. *Id.* at 1088. However, the court did not review this document but instead looked to unchallenged statements on the record of persons very familiar with the Backfit Program. *Id.* *See* 40 C.F.R. § 1508.12 (providing that “federal agency” does not include the Congress, the Judiciary, or the President for NEPA purposes).

<sup>75</sup> *Ground Zero*, 383 F.3d at 1089.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.* at 1090.

<sup>81</sup> *Id.*

accident occurred, the chance of an explosion was between one in 100 million and one in one trillion.<sup>82</sup> The Ninth Circuit maintained consistency with the precedent it had set in *Trout Unlimited v. Morton*<sup>83</sup> by finding that “[a] reasonably thorough discussion of the significant aspects of the probable environmental consequences is all that is required by an EIS.”<sup>84</sup> “An EIS need not discuss remote and highly speculative consequences.”<sup>85</sup>

Ground Zero raised three arguments in support of its contention that the Navy’s study does not satisfy NEPA.<sup>86</sup> First, Ground Zero offered an expert who declared the Navy’s risk calculations “unbelievable.”<sup>87</sup> Second, Ground Zero argued that the Navy must assess the environmental impacts of an accidental missile explosion because the Navy incorporated the risk into the blueprints of the base.<sup>88</sup> Third, Ground Zero contended that there is incomplete or unavailable information relating to an accidental explosion, which could result in “catastrophic consequences.”<sup>89</sup> The court determined that the Navy’s study done between 1992 and 1996 adequately analyzed the risk and effects of an accidental explosion.<sup>90</sup> Therefore, the Navy satisfied the procedural requirements of NEPA.<sup>91</sup>

Next, the court turned to Ground Zero’s claim that the Navy violated the ESA.<sup>92</sup> Ground Zero argued that the Navy had violated Section 7 of the ESA by failing to consult with the NMFS about the effects of a missile explosion on the threatened salmon species.<sup>93</sup> The court rejected Ground Zero’s claim because the Navy has no discretion to discontinue the Backfit Program in Bangor because the decision was a presidential action.<sup>94</sup> Additionally, the court acknowledged that the Navy engaged in some discretionary actions that could be covered under the ESA.<sup>95</sup> However, the court rejected any ESA requirements because Ground Zero’s claim rested solely on the risk of an accidental explosion, which is not a discretionary act of the Navy.<sup>96</sup> Therefore, the Navy did not act in an arbitrary or capricious manner by failing to consult NMFS about the effects of an accidental explosion on the threatened salmon species.<sup>97</sup>

The court concluded that the Navy had not acted arbitrarily or capriciously in failing to analyze the risk of an accidental explosion under NEPA or the ESA.<sup>98</sup> Finding no violation of NEPA or the ESA, the Ninth Circuit Court of Appeals affirmed the district court’s grant of summary judgment.<sup>99</sup>

## V. COMMENT

Normally, NEPA requires the preparation of an EIS prior to the start of any action potentially adverse to the environment. However, the mandates of NEPA apply only to “federal agencies,” which “does not mean the

<sup>82</sup> *Id.*

<sup>83</sup> 509 F.2d 1276 (9th Cir. 1974).

<sup>84</sup> *Ground Zero*, 383 F.3d at 1089 (quoting *Trout Unlimited*, 509 F.2d at 1283).

<sup>85</sup> *Trout Unlimited*, 509 F.2d at 1283. For example, the court found that agencies are not required to investigate the environmental impacts of the increased risk of nuclear war when constructing military communication towers. *Ground Zero*, 383 F.3d at 1090 n.6 (citing *No GWEN Alliance of Lane County, Inc. v. Aldridge*, 855 F.2d 1380, 1381, 1386 (9th Cir. 1988)). In addition, agencies do not need to analyze the environmental effects that a highly unlikely earthquake would have on a dam. *Ground Zero*, 383 F.3d at 1090 n.6 (citing *Warm Springs Dam Task Force v. Gribble*, 621 F.2d 1017, 1026-27 (9th Cir. 1980)).

<sup>86</sup> *Ground Zero*, 383 F.3d at 1090.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* at 1091.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Id.* at 1092.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* at 1091-92.

<sup>99</sup> *Id.* at 1092.

Congress, the Judiciary, or the President.”<sup>100</sup> It has long been accepted that presidential actions are beyond the scope of NEPA. In previous cases, when the President has received advice or assistance in exercising his presidential discretion, the courts still deemed the action as a “presidential action” beyond the scope of NEPA.<sup>101</sup>

The Ninth Circuit in *Ground Zero* continued the trend of finding joint actions beyond the scope of NEPA when the President acts in conjunction with an agency normally bound by NEPA’s procedural mandates.<sup>102</sup> In *Ground Zero*, the Navy admitted to having “discretion over the siting and modifications of facilities required for the Trident II upgrade.”<sup>103</sup> However, the court found that the President had made the actual decision, regardless of any recommendations made by the Navy.<sup>104</sup>

Withholding application of NEPA requirements from the President is in line with the intent Congress promulgated when it issued NEPA. Through NEPA, Congress responded to the growing concern of environmental degradation by forcing federal agencies to consider possible adverse environmental effects that could be caused by the agency’s action.<sup>105</sup> There is no indication that Congress intended to subrogate the President’s authority to act in matters specifically entrusted to him.<sup>106</sup> This is especially true in highly sensitive areas such as the military defense of the nation.

Intuitively it makes sense that Presidential actions are not subject to NEPA review. The President has many official duties and cannot be expected to have expertise in every area operating in the Executive Branch. However, federal agencies are nearly as old as the Constitution itself and have gained knowledge and experience in their respective areas throughout the years.<sup>107</sup> This expertise results in the qualities that Americans have grown to appreciate and expect from the federal agencies: regularity, consistency, evenhandedness, and participation.<sup>108</sup> Clearly, the President should take advantage of an agency’s background and knowledge in a particular area when making decisions with far-reaching repercussions. If the President fell under the purview of NEPA whenever he consulted an agency, the President would be less likely to consult the people most qualified to render an opinion on the proposed action.

Furthermore, the President of the United States must be able to quickly execute decisions that are personally entrusted to him. While NEPA does not require any specific outcome, the statute does require that certain procedures be followed. In some situations, the brief delay that will inevitably occur while an agency evaluates the proposed action will have no adverse affect. However, the President must be able to make quick decisions, especially in areas regarding national security. If the President’s decision were subject to NEPA’s procedural requirements, the President could not quickly execute his delegated authority without risk of a NEPA violation.

Since Presidential actions are not subject to NEPA review, it would be futile to require federal agencies to invest time, money, and effort into an environmental impact statement. While NEPA requires agencies to

<sup>100</sup> 40 C.F.R. § 1508.12.

<sup>101</sup> See *State of Alaska v. Carter*, 462 F. Supp. 1155, 1160 (D. Alaska 1976) (finding argument that the Secretary of the Interior could not aid the President in declaring a national monument under the Antiquities Act “approaches the absurd”).

<sup>102</sup> Although the Ninth Circuit held the President and Navy’s joint siting of the Bangor base beyond the scope of NEPA in *Ground Zero*, the Ninth Circuit court had recently required that the agency charged with motor vehicle safety undertake extensive review of the President’s decision to lift a trade moratorium. See *Department of Transportation v. Public Citizen*, 541 U.S. 752 (2004) (holding that Federal Motor Carrier Safety Administration had no discretion to prevent cross border operations and therefore had no requirement to evaluate the environmental effects of the operations under NEPA or the Clean Air Act).

<sup>103</sup> *Ground Zero*, 383 F.3d at 1089.

<sup>104</sup> *Id.*

<sup>105</sup> See *Marsh v. Oregon Natural Res. Council*, 490 U.S. 360, 371-72 (1989) (finding that preparation of an EIS ensures that the Federal government infuses the environmental goals of NEPA into ongoing programs).

<sup>106</sup> Brief for the Petitioners at 26, *Dep’t of Transp. v. Public Citizen*, 541 U.S. 752 (2004) (No. 03-358). The United States Constitution directs that the “President shall be Commander in Chief of the Army and Navy of the United States.” U.S. CONST. Art. II, § 2, cl. 1.

<sup>107</sup> The first Congress formed the Departments of Foreign Affairs, War, and the Treasury. PETER L. STAUSS ET AL., *GELLHORN AND BYSE’S ADMINISTRATIVE LAW* 35 (University Casebook Series Editorial Board et al. eds., 10th ed. 2003).

<sup>108</sup> See *id.* at 10.



prepare environmental impact statements, Congress does not supply extra funding to fuel the preparation of reports.<sup>109</sup> Given the already lacking monetary support, agencies are often forced to rely on private entities to aid in the cost of preparing an environmental impact statement.<sup>110</sup> Requiring an agency to prepare an environmental assessment in a situation where the proposed action would proceed regardless of the statement's findings, would be a waste of the agency's already limited resources.

Along the same line of reasoning, it would be illogical to require an agency to comply with the ESA when the agency has no discretion to alter its actions. The ESA requires that agencies ensure that its actions are unlikely to "jeopardize the continued existence of any endangered species or threatened species."<sup>111</sup> Section 7 of the ESA requires that an agency consult with either the Fish and Wildlife Service ("FWS") or the National Marine Fisheries Service ("NMFS").<sup>112</sup> First, the federal agency would need to consult with either the FWS or the NMFS to determine whether the proposed action might have an adverse impact on endangered or threatened species.<sup>113</sup> Next, if the consultation revealed a possibility of harm to an endangered or threatened species, the agency would have to evaluate the potential adverse effects.<sup>114</sup> However, when an agency has no discretion to alter the action in question, requiring ESA compliance would be inconsistent with the purpose of the ESA, which is to preserve a species, because the proposed action would proceed regardless of the possible adverse effects on endangered or threatened species.<sup>115</sup>

As a result of the court's holding in *Ground Zero*, the President can continue to make decisions with the assistance of the agency most competent to advise him. Also, Presidential decisions remain exempt from review under both NEPA and the ESA.

## VI. CONCLUSION

The crux of the decision in *Ground Zero*, on both the ESA and NEPA claims, rests on the Navy's inability to alter its course of action. The President chose to site the Trident II missile operations in Bangor, Washington. Ultimately, any adverse environmental consequence would arise from the decision to locate the base in Bangor. Had the President chosen a different location for the Backfit Program, any environmental claims stemming from that decision would likely face the same result: beyond the scope of our nation's environmental statutes.

CRYSTAL L. HERMANN

<sup>109</sup> See LYNTON KEITH CALDWELL, THE NATIONAL ENVIRONMENTAL POLICY ACT 67 (1998) (finding that Congress has never given agencies money to carry out environmental impact statements).

<sup>110</sup> See *id.* at 67-68.

<sup>111</sup> 16 U.S.C. § 1536(a)(2).

<sup>112</sup> 16 U.S.C. § 1536(a)(3), see also 50 C.F.R. § 402.14(a).

<sup>113</sup> 50 C.F.R. § 402.13.

<sup>114</sup> 50 C.F.R. § 402.12(a).

<sup>115</sup> See *Natural Res. Def. Council v. Houston*, 146 F.3d 1118, 1125-26 (9th Cir. 1998) (finding that "[w]here there is no agency discretion to act, the ESA does not apply"). See also *Sierra Club v. Babbitt*, 65 F.3d 1502, 1508-09 (9th Cir. 1995) (stating that Section 7 of the ESA only applies where "there is discretionary Federal government involvement or control").