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Nuking Freedom of Information and Community Right to Know: how post-9/11 secrecy politics could make America less safe

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> "Government ought to be all outside and no inside . . . . Everybody knows that corruption thrives in secret places, and avoids public places, and we believe it a fair presumption that secrecy means impropriety."
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> — Woodrow Wilson[1]

INTRODUCTION: PUBLIC INFORMATION UNDER FIRE

Following September 11, 2001, public access to information on government and private industry risks to the environment and human health has become a significant controversy. Individuals, government and industry have voiced concerns about the public release of information on chemical plants and nuclear facilities in particular. The Freedom of Information Act ("FOIA"),[2] Clean Air Act ("CAA"),[3] and Emergency Planning and Community Right to Know Act ("EPCRA"),[4] referred to here collectively as the "right to know laws," all give citizens access to information about the hazards posed by the operation of private and government chemical and nuclear facilities. Each statute was enacted with the idea that an informed public improves government operations and industrial safety.[5] The FOIA serves to improve general government openness and accountability by making government records available for public inspection[6] and the EPCRA requires public notice of toxic industrial pollutant discharges and encourages emergency preparedness.[7] However, critics have pointed out that terrorists could use the information on these potential risks for destructive purposes.[8] Some of these critics may have ulterior motives for desiring to suppress public access to information. For example, industries may desire to reduce the regulatory and public image consequences of having to

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[1] WOODROW WILSON, THE NEW FREEDOM: A CALL FOR THE EMANCIPATION OF THE GENEROUS ENERGIES OF A PEOPLE (New York Doubleday, Page, and Co. 1913).

[2] Freedom of Information Act (FOIA), 5 U.S.C. §§ 552-559 (2004).

[3] Clean Air Act (CAA), 42 U.S.C. §§ 7401-7671q (2004).

[4] Emergency Planning and Community Right-to-Know Act (EPCRA) of 1986, 42 U.S.C. §§ 11001-11050 (2004).

[5] *See, e.g.*, Environmental Protection Agency v. Mink, 410 U.S. 73 (1973), for a discussion of the purposes of the FOIA, which does not include a policy declaration section. See ENVIRONMENTAL PROTECTION AGENCY (EPA), EPCRA OVERVIEW (2002), *at* http://yosemite.epa.gov/oswer/ceppoweb.nsf/content/epcraOverview.htm (last visited July 10, 2005), for an explanation of the purposes of EPCRA, which also lacks a policy declaration.

[6] 5 U.S.C. §§ 552-559.

[7] 42 U.S.C. §§ 11001-11050.

[8] *See, e.g.*, Ann Davis, *New Alarms Heat Up Debate On Publicizing Chemical Risks*, WALL ST. J., May 30, 2002, at A1; Angela Logomasini, *Innocent No More, America Can No Longer Be Naive About Security*, WASH. TIMES, Sept. 27, 2001, at A23; David Whitman, *A Highly Explosive Mixture: Volatile Chemicals and Gaps in Plant Security May Create a Lethal Combination*, U.S. NEWS & WORLD REP., Oct. 22, 2001, at 31.

disclose all of their discharges. While the true motive behind some of the criticism of the right to know laws may be unrelated to terrorism, it raises a legitimate issue. Is the U.S. putting itself in danger of attack by making this information available to anyone? This question begs another, perhaps more cynical question: is the danger of terrorists exploiting this information outweighed by the danger presented by our government or domestic industries injuring or killing citizens by carrying on their activities in relative secrecy, with little or no accountability? This note will show that historically, when government is allowed to operate in secrecy and when private industry is allowed to operate free of citizen oversight, they are more certain to create dangers to the public than a terrorist attack aided by information obtained through right to know laws.

Part I of this note describes legislation related to right to know laws. It describes how this legislation has been or may be altered by post-9/11 legislation and Bush Administration policies that are supposed to help secure the nation from terrorists. Part II highlights the many positive attributes of liberal government information disclosure policies and makes the argument that the social and environmental benefits of freedom of information vastly outweigh any threat presented by terrorists using this information. Part III is a case study of the effects of information restriction on human and environmental health during the Cold War-era nuclear technology development in the Former Soviet Union ("FSU") and in the U.S.

> "And therefore I say: 'Know the enemy, know yourself; your victory will never be endangered. Know the ground, know the weather; your victory will then be total.'"
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> — Sun Tzu[9]

I. THE LAWS

A. Freedom of Information and Right To Know Laws

Since the 1960s, Congress has taken many legislative steps to end unnecessary government secrecy. The FOIA gives citizens a broad right to access government records and reports.[10] The EPCRA requires that industries produce an annual report of their toxic releases into the environment.[11] The

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[9] SUN TZU, THE ART OF WAR 129 (Samuel B. Griffith trans., Oxford Univ. Press 1971) (1726).

[10] 5 U.S.C. § 552.

[11] 42 U.S.C. §11023.

presence of citizen suit provisions in most of the environmental statutes is a strong indication that the legislature intended that citizens have a role in enforcement and oversight.[12] The FOIA works hand in hand with the National Environmental Policy Act ("NEPA"), allowing citizens to access environmental impact statements and other agency decision-making records.[13]

This section will briefly describe the FOIA, EPCRA and portions of other environmental protection statutes dealing with information disclosure. This background information is required to understand how post-9/11 legislative changes and Bush Administration policies have threatened to narrow the breadth of government information available to the public, a significant departure from the progressive liberalization of information disclosure characteristic of previous administrations. Finally, this section discusses judicial treatment of freedom of information cases to demonstrate that the judiciary is generally deferential to government claims that information cannot be disclosed due to national security concerns. The position of the judiciary on information disclosure is important when choosing whether to fight for information disclosure in the legal or political arena.

> "A government by secrecy benefits no one. It injures the people it seeks to serve; it damages its own integrity and operation. It breeds distrust, dampens the fervor of its citizens and mocks their loyalty."
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> — Senator Edward V. Long[14]

1. FOIA

Congress originally enacted the FOIA in 1966, after ten years of pressure from civil rights groups and the press, to improve public access to and participation in, government activities.[15] The FOIA, as codified, is part of the Administrative Procedure Act. Significant amendments followed in 1974, 1986 and in 1996.[16] D.C. Circuit Court of Appeals Judge Patricia Wald noted,

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[12] *See, e.g.*, Clean Water Act (CWA), 33 U.S.C. §1365 (2004); CAA, 42 U.S.C. § 7604 (2004); Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. § 9659 (2004); Toxic Substances Control Act (TSCA), 15 U.S.C. § 2619 (2004); Endangered Species Act (ESA), 16 U.S.C. § 1540(g) (2004); EPCRA, 42 U.S.C. § 11046(a)(1).

[13] FOIA guarantees access to the records. 5 U.S.C. 552(a)(2).

[14] 110 CONG. REC. 17,087 (1964) (statement of Sen. Long).

[15] Freedom of Information Act, Pub. L. No. 90-23, 81 Stat. 54 (1967) (codified as amended at 5 U.S.C. §§ 552-559 (2004)). See Patricia M. Wald, *The Freedom of Information Act: A short case study in the perils and paybacks of legislating democratic values*, 33 EMORY L.J. 649, fn. 4 (1984), for a more detailed overview of the events and investigations leading up to the passage of the FOIA.

[16] Freedom of Information Act Amendments of 1974, Pub. L. No. 93-502, § 4, 88 Stat. 1564; Freedom of Information Reform Act of 1986, Pub. L. No. 99-570, tit. I, subtit. N, § 1801, 100 Stat. 3207-48; Electronic Freedom of Information Act Amendments (EFOIA) of 1996, Pub. L. No. 104-

"[l]eading the fight for 'open government' was the press, which cited numerous instances of government agencies' random, unexplained denials of access to information about crucial decisions, denials which had covered up the mistakes or irregularities of the time."[17] The FOIA allows private citizens, public interest groups, elected officials and other parties to make important inquiries into agency actions, increasing agency accountability and responsibility. Under the FOIA, unless an agency has a good reason to withhold all or part of a document — national security, trade secrets and personal records of an employee are among the relatively few exemptions — the agency must provide, in a timely manner, a copy of any document an individual or organization requests.[18]

Twenty years ago, Judge Wald highlighted some of the FOIA's impacts; FOIA requests revealed information on radioactive and toxic drinking water in New Mexico, fraudulent use of government funds, dangerous consumer goods, high rates of cancer among plutonium workers, high birth defects in Utah due to atomic bomb testing and provided material for numerous books and articles on major domestic and foreign conflicts and crises.[19] In 1996, Congress made specific findings that the FOIA "has led to the disclosure of waste, fraud, abuse and wrongdoing in the Federal Government . . . [and] has led to the identification of unsafe consumer products, harmful drugs and serious health hazards."[20] The FOIA continues to be an important tool of historians, journalists

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231, § 2, 110 Stat. 3048.

[17] Wald, *supra* note 15, at 650.

[18] FOIA, 5 U.S.C. § 552(a)(1-6) (2004).

[19] Wald, *supra* note 15, 660-63.

[20] FOIA of 1996, Pub. Law. No. 104-231, § 2, 110 Stat. 3048. In addition, Congress found that:

> (1) the purpose of section 552 of title 5, United States Code, popularly known as the Freedom of Information Act, is to require agencies of the Federal Government to make certain agency information available for public inspection and copying and to establish and enable enforcement of the right of any person to obtain access to the records of such agencies, subject to statutory exemptions, for any public or private purpose;
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> (2) since the enactment of the Freedom of Information Act in 1966, and the amendments enacted in 1974 and 1986, the Freedom of Information Act has been a valuable means through which any person can learn how the Federal Government operates;
>
> (3) the Freedom of Information Act has led to the disclosure of waste, fraud, abuse, and wrongdoing in the Federal Government;
>
> (4) the Freedom of Information Act has led to the identification of unsafe consumer products, harmful drugs, and serious health hazards.

Id.

and public interest organizations.[21]

2. EPCRA

Responding to growing public demand for disclosure about toxic chemicals in U.S. communities and catalyzed by the Union Carbide disaster in Bhopal, India, Congress passed the EPCRA of 1986.[22] The EPCRA applies to all facilities that have a greater than threshold quantity of a substance listed as an "extremely hazardous substance" by the Act.[23] EPCRA requires each state to establish an emergency response commission, which is required to develop a comprehensive emergency response plan to be used in the event of the release of an extremely hazardous substance.[24] All facilities required under the Occupational Safety and Health Act ("OSHA") to create Materials Safety Data Sheets ("MSDS") for hazardous chemicals produced or used therein must send a copy of these MSDSs, as well as a copy of their hazardous chemical inventory, to the local and state emergency planning commission as well as to the local fire department.[25] The hazardous chemical inventory contains information on the quantity of hazardous chemicals at the facility, the quantity in use each day, manner of storage and where in the facility the chemicals are stored. The inventory must also include whether the facility elects to withhold this specific storage information from the general public.[26] Additionally, all facilities covered by the EPCRA need to produce, on an annual basis, a toxic release form, which becomes part of the Toxic Release Inventory ("TRI"), published by and available from the Environmental Protection Agency ("EPA") to any interested citizen.[27]

The toxic release form includes an estimate of the maximum amounts of toxic chemicals entering the environment from that facility, as well as the waste treatment, disposal and efficiency of treatment employed at that facility. The

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[21] The American Civil Liberties Union (ACLU), The White House Office of Management and Budget (OMB) Watch and The Society of Professional Journalists (SPJ) are just a few public interest organizations with significant interest in the FOIA. Each of these organizations devotes a prominent portion of their official websites to news of their use of FOIA, FOIA guidance for citizens and/or general FOIA news. *See* ACLU, NATIONAL SECURITY, *at* http://www.aclu.org/NationalSecurity/NationalSecurityMain.cfm (last visited July 10, 2005); OMB WATCH, INFORMATION & ACCESS, *at* http://www.ombwatch.org/info (last visited July 10, 2005); SPJ, FREEDOM OF INFORMATION: FOI TOOLKIT, *at* http://www.spj.org/foia_toolkit.asp (last visited July 10, 2005).

[22] EPA, *supra* note 5.

[23] EPCRA, 42 U.S.C. § 11002(b) (2004).

[24] *Id.* §§ 11001, 11003.

[25] *Id.* § 11022(a).

[26] *Id.* § 11022(d)(2).

[27] *Id.* § 11023.

local planning commission is required to make these documents available to any person upon request.[28] The Act authorizes a National Academy of Sciences study using mass balancing in order to gauge the efficacy of the Act and other laws related to toxic chemical use and release and to gauge the accuracy of toxic chemical release reporting.[29] The EPCRA also allows for disclosures of information to physicians and includes a citizen suit provision.[30]

The TRI program was warmly praised by President Clinton, who credited the EPCRA and TRIs with reducing toxic chemical releases in cities by seventy-four percent between 1986 and 1995, and nationwide by forty-three percent over the same time period.[31] The EPA has reported that "an analysis of the effect of public release of [TRI] data indicated that information dissemination leads to further risk reduction efforts . . . [t]he 'worst polluting' facilities featured in news accounts appeared to have reduced their emissions significantly more than did the other facilities."[32] Essentially, the EPA concluded that public disclosure of TRI data pressured heavy polluting facilities into adopting less toxic processes and improving their safety and emissions technologies.[33] In addition, some commentators have suggested that the positive effects of risk information dissemination warrant export of the EPCRA model to other countries.[34]

3. CAA — Risk Management Program, § 112(r)

The CAA is implemented, administered and enforced by the U.S. EPA. Like the Clean Water Act, Resource Conservation and Recovery Act, Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), the CAA has a citizen enforcement provision.[35] The CAA also includes a section specifically providing for community oversight and public dissemination of information on the consequences of potential accidental releases of dangerous compounds from private and public chemical facilities.[36] Section

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[28] *Id.* § 11044.

[29] *Id.* § 11023(l). "Mass balancing" is essentially a scientific accounting of the chemicals, comparing the known quantities of chemical necessary for use in an industrial process to the reported output and waste.

[30] *Id.* §§ 11043, 11046.

[31] Joseph Jacobson, *Safeguarding National Security Through Public Release of Environmental Information: Moving the Debate to the Next Level*, 9 ENVTL. LAW. 327, 336 & n.35 (2003).

[32] Final Rule on Distribution of CAA Off-Site Consequence Analysis Information, 65 Fed. Reg. 48110 (Aug. 4, 2000) (to be codified at 40 C.F.R. ch. IV).

[33] *Id.*

[34] Katherine M. Harmon-Stokes, Note, *Community Right-to-Know in the Newly Independent States of the Former Soviet Union: Ending the Culture of Secrecy Surrounding the Environmental Crisis*, 15 VA. ENVTL. L.J. 77 (1995) (suggesting that the Former Soviet Union (FSU) should adopt the use of EPCRA-like TRIs as part of its own public disclosure program).

[35] CAA, 42 U.S.C. § 7604 (2004).

[36] *Id.* § 7412(r)(7)(B).

112(r)(6)(C)(i) of the CAA provides for the establishment of a Chemical Safety and Hazardous Investigation Board. The Board is responsible for investigating, determining and reporting "to the public in writing the facts, conditions, and circumstances and the cause or probable cause of any accidental release resulting in a fatality, serious injury or substantial property damages."[37] Section 112(r)(7)(B)(ii) requires owners or operators of stationary sources with a regulated substance present to prepare a risk management plan ("RMP").[38] This RMP must include a hazard assessment for accidental releases, including potential quantities released, a determination of downwind effects and exposures on surrounding populations, release history and an evaluation of worst-case accidental releases, or Off-Site Consequence Analysis ("OCA").[39]

The RMP must also include a prevention program with safety precautions and maintenance, as well as a response program and public and emergency personnel notification of accidental releases in order to protect the surrounding community and environment.[40] In the past, the EPA has posted a portion of the RMP data on its website, but has never posted the OCA data.[41] Post-9/11, the EPA has removed all RMP data from its website, though the information is available from other sources, such as the Right-to-Know ("RTK") Network.[42]

4. NEPA — EIS

The NEPA requires that all federal agencies complete and release to the public an environmental impact statement ("EIS") for every agency action "significantly affecting the quality of the human environment."[43] The public is permitted to comment on each EIS for a specified period and the agency must include these comments and any agency responses in the final EIS.[44] No agency is exempt, not even the Department of Defense ("DoD"). Any person or individual may obtain a copy of a project's EIS by making a request through the FOIA. Agencies must divulge this information unless it falls under one of the FOIA exemptions, such as national security.[45]

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[37] *Id.* § 7412 (r)(6)(C)(i).

[38] *Id.* § 7412 (r)(7)(B)(ii).

[39] *Id.* § 7412 (r)(7)(B)(ii)(I).

[40] *Id.* § 7412 (r)(7)(B)(ii).

[41] *See infra* text accompanying notes 53-57.

[42] RTK NETWORK, RMP SEARCH, *at* http://www.rtknet.org/rmp/ (last visited July 10, 2005).

[43] National Environmental Policy Act (NEPA) of 1969, 42 U.S.C. § 4332(C) (2004).

[44] Requirements of NEPA, 40 C.F.R. §§ 1506.6, 1506.10 (2004).

[45] FOIA, 5 U.S.C. § 552(b)(1) (2004).

B. The Judiciary and Freedom of Information

Use of legal action to force an agency to release information it is withholding by claiming a FOIA exemption is not a consistently effective means of acquiring information, particularly if the agency uses Exemption One, which exempts information classified for national security or foreign policy reasons.[46] Courts are extremely concerned about over-stepping the constitutionally separated powers, which reserve national security and foreign policy decisions to the other branches of government, particularly the executive branch. In this context, courts are especially inclined to defer to the agency's decision.

In *Weinberger v. Catholic Action of Hawaii/Peace Education Project*, the Supreme Court affirmed that the NEPA requirement to prepare an EIS for projects "significantly affecting the quality of the human environment" [47] extends to the DoD, obligating it to prepare EISs and Environmental Assessments ("EA"), but that the DoD does not have an obligation to disclose these studies because of the FOIA exception for national security.[48] In reaching it's holding, the Court upheld the DoD's refusal to disclose an EIS for an alleged nuclear weapons storage facility.[49] Catholic Action could not prove that the DoD was planning to move nuclear weapons to a new facility, where earth-covered magazines were to be built. The EA for the magazines showed no adverse effect, so the DoD was not required to do an EIS.[50] Catholic Action had reason to believe that nuclear weapons were to be stored at the site, but could not prove it. For national security reasons, the DoD could neither confirm nor deny the location of nuclear weapons. The Court held that since Catholic Action could not prove weapons were there, it could not prove that an EIS need be created, let alone disclosed.[51]

Another commentator, Matthew Silverman, examined the doctrines of state secrets and prior restraints, qualified right of access cases and the FOIA cases.[52] Silverman emphasized that in each of these types of cases, the judiciary must make judgment calls that could stifle political dialogue by being overly

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[46] *Id.*

[47] NEPA, 42 U.S.C. § 4332(C) (2004).

[48] Tracey Colton Green, *Providing for the Common Defense versus Providing for the General Welfare: the Conflicts Between National Security and National Environmental Policy*, 6 S.C. ENVTL. L.J. 137 (1997).

[49] Weinberger v. Catholic Action of Hawaii/Peace Education Project, 454 U.S. 139 (1981).

[50] If an EA shows no adverse effect, a full EIS does not have to be completed. *See* 40 C.F.R. § 1500-1508 (2004).

[51] *Weinberger*, 454 U.S. at 145-147. Other courts have interpreted this holding fairly narrowly, holding it applicable only in the context of nuclear weapons deployment and storage. Green, *supra* note 48 (citing Tongass Conservation Society v. Cheney, 924 F.2d 1137 (1991)).

[52] Matthew Silverman, *National Security and the First Amendment: A Judicial Role in Maximizing Public Access to Information*, 78 IND. L.J. 1101 (2003).

deferential to the agencies, thereby limiting the availability of information from which one could exercise his or her First Amendment rights. By pointing out that the FOIA is also essential to the work of historians, Silvermen makes it clear that the FOIA is not just about activist rabble-rousing — it is a key to the accurate and complete portrayal of history.[53]

C. Threats to Public Access to Information

Several recent government policies and post 9/11 legislative acts and proposals place significant restrictions on public access to information concerning government activities. This section highlights the information restricting portions of several Bush Administration policies, as well as the proposed Domestic Security Enhancement Act and the enacted Homeland Security Act.

1. Assault on Clean Air Act RMP data

One of the post-9/11 agency actions restricting access to information, was the EPA's removal of all the CAA RMP data on past accident reports and safety records from its website.[54] The RMPs were pulled from the EPA's website when government and industry officials became concerned that such reports created an effective "terrorism for dummies" guide for those wishing to harm whole communities of Americans.[55] As noted above, RMPs contain an OCA or "worst-case scenario" analysis of dangers to the community surrounding a regulated facility. OCA information has never been available via EPA's website. The possibility of posting OCAs on the EPA website was foreclosed with the passage of the Chemical Safety Information, Site Security and Fuels Regulatory Relief Act,[56] which limits EPA's publication of such data to its reading rooms and prevents an individual from accessing more than ten RMP

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[53] *Id.* at 1119.

[54] EPA, EPA DATABASE AND SOFTWARE, RMP*INFO™, *at* http://yosemite.epa.gov/oswer/ceppoweb.nsf/content/ds-epds.htm#rmpinfo (last visited July 10, 2005).

> In light of the September 11 events, EPA has temporarily removed RMP Info from its website. EPA is reviewing the information we make available over the Internet and assessing how best to make the information publicly available. We hope to complete that effort as soon as possible.

Id.

[55] Davis, *supra* note 8. Although the EPA pulled the RMPs from its website, they are still available on the web. *See* RTK NETWORK, *supra* note 42 and accompanying text.

[56] Chemical Safety Information, Site Security, and Fuels Regulatory Relief Act (CSISSFRRA) of 1999, 42 U.S.C. § 7412(r)(7)(H) (2004).

OCAs.[57] The far more innocuous safety and accident record data remains absent from the EPA website.[58]

In a January 2001 article, government accountability and right to know advocate group, OMB Watch, expressed the counterproductive result of the EPA's RMP removal aptly: "Does a terrorist really need to know about a facility's plans to improve safety or respond to an accident? Even for the more controversial [worst-case scenario information], how is a terrorist uniquely advantaged? It is hardly difficult to find chemical facilities located near large populations."[59] OMB Watch is just one of many public interest groups and scholars who have asserted that information restrictions such as the RMP data removal simply diminish the ability of the public to inform itself and demand reform, while doing little to reduce the terrorist threat. At least one scholar has reported that RMP OCA data can be quickly and accurately replicated without the use of government reports.[60]

2. FOIA Rollbacks

In a memorandum sent to all federal agency heads on October 12, 2001, then Attorney General John Ashcroft set the tone for what has become a general presumption against public disclosure during the Bush Administration.[61] Ashcroft's memo, citing commitment to national security, directed agencies that "[a]ny discretionary decision . . . to disclose information protected under the FOIA should be made only after full and deliberate consideration of the institutional, commercial and personal privacy interests that could be implicated by disclosure of the information."[62] Ashcroft further assured that "the Department of Justice will defend your decisions unless they lack a sound legal basis or present an unwarranted risk of adverse impact on the ability of other agencies to protect other important records."[63]

This "sound legal basis" standard is a significant departure from the 1993 memo issued by then-Attorney General Janet Reno encouraging agencies to fulfill all FOIA requests, even if an item may "technically or arguably fall within

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[57] Public access to paper copies of off-site consequence analysis information, 40 C.F.R. § 1400.3 (2000).

[58] EPA, *supra* note 54.

[59] OMB WATCH, BENEFITS OF CHEMICAL INFORMATION SHOULD NOT BE FORGOTTEN (Jan. 16, 2002), *at* http://www.ombwatch.org/article/articleview/394/1/39/ (last visited July 10, 2005).

[60] See Jacobson, *supra* note 31, at 389-90, which is discussed in greater detail in Part II.

[61] See, e.g., Christopher H. Schmitt & Edward T. Pound, *The Bush administration is doing the public's business out of the public eye,. Here's how – and why*, U.S. NEWS & WORLD REP., Dec. 22, 2003, at 18, for a broader recounting of Bush Administration secrecy policies.

[62] Memorandum from John Ashcroft, Att'y Gen., to Heads of all Federal Departments and Agencies (Oct. 12, 2001), *available at* http://www.doi.gov/foia/foia.pdf (last visited July 10, 2005).

[63] *Id.*

an exemption," unless the agency "reasonably foresees that disclosure would be harmful to an interest protected by that exemption."[64] The Reno Justice Department thereby applied a "presumption of disclosure," certainly more in keeping with the letter and spirit of the FOIA.[65]

Though a recent U.S. General Accounting Office report found that the majority of agency FOIA officers perceived little overall effect of the Ashcroft memo on their request decisions, thirty-one percent reported a lowered likelihood of granting a discretionary FOIA request following the Ashcroft memo.[66] Of that thirty-one percent, seventy-five percent reported that the Ashcroft memo was the primary factor in denying or fulfilling a request.[67] The George Washington University National Security Archive reported in March of 2003 that while most agencies noted little or no perceived change after issuance of the memo, some agencies underwent very significant training, announcements and policy changes in response to the new Bush Administration policy.[68] Among the agencies reporting the substantial changes were the Navy, Army, Air Force, Nuclear Regulatory Commission and Department of the Interior ("Interior").[69] Each of these agencies issued additional information on or specifically encouraged the use of certain FOIA exemptions.[70]

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[64] Memorandum from Janet Reno, Att'y Gen., to Heads of Departments and Agencies (Oct. 4, 1993), *available at* http://www.usdoj.gov/oip/foia_updates/Vol_XIV_3/page3.htm (last visited July 10, 2005).

[65] *See supra* text accompanying note 20.

[66] U.S. GENERAL ACCOUNTING OFFICE, FREEDOM OF INFORMATION ACT: AGENCY VIEWS ON CHANGES RESULTING FROM NEW ADMINISTRATION POLICY GAO-03-981 (Sept. 2003), *available at* www.gao.gov/new.items/d03981.pdf (last visited July 10, 2005).

[67] *Id.* at 11.

[68] NATIONAL SECURITY ARCHIVE, THE ASHCROFT MEMO:"DRASTIC" CHANGE OR "MORE THUNDER THAN LIGHTNING"? 12-14 (Mar. 14, 2003), *available at* http://www2.gwu.edu/~nsarchiv/NSAEBB/NSAEBB84/FOIA%20Audit%20Report.pdf (last visited July 10, 2005).

[69] *Id.*

[70] FOIA, 5 U.S.C. § 552(b) (2004). The specific exemptions included:

> (b)(2)(related solely to the internal personnel rules and practices of an agency), (b)(3)(specifically exempted from disclosure by statute and the statute either (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld), (b)(5)(inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency) and/or (b)(6)(personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy).

Id.

3. Domestic Security Enhancement Act — "Patriot II"

In February of 2003, the Center for Public Integrity, a non-profit, non-partisan investigative journalism organization obtained a draft copy of Department of Justice legislation entitled "The Domestic Security Enhancement Act of 2003," also referred to as "Patriot II."[71] Roundly criticized by civil rights and privacy advocates across the political spectrum, Patriot II has not been introduced to Congress.[72] In addition to broad abridgements of civil and privacy rights, the Patriot II draft included restrictive provisions related to the environment and right to know. For example, access to RMP reports under § 202 of Patriot II would be limited to persons "who live and work in the geographical area likely to be affected by a worst-case scenario."[73] Further, Patriot II would make it illegal to even take notes on the OCA information.[74] Finally, Patriot II provides that the information in the RMP cannot "disclose the identity or location of any facility or any information from which the identity or location of any facility could be deduced."[75] Thus, if a citizen managed to make it to their regional EPA reading room during business hours to review RMP data on worst-case scenarios for facilities in their own community, they would not be able to take notes on what the report said, nor deduce from which facility the risk was coming from.[76]

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[71] CHARLES LEWIS & ADAM MAYLE, JUSTICE DEPT. DRAFTS SWEEPING EXPANSION OF ANTI-TERRORISM ACT: CENTER PUBLISHES SECRET DRAFT OF 'PATRIOT II' LEGISLATION (Feb. 7, 2003), *at* http://www.publicintegrity.org/report.aspx?aid=94&sid=200 (last visited July 10, 2005); DEP'T OF JUST., DOMESTIC SECURITY ENHANCEMENT ACT OF 2003, STEP-BY-STEP SECTION ANALYSIS (January 9, 2003) (evaluating the non-enacted bill commonly called the Patriot Act II), *at* http://www.publicintegrity.org/docs/PatriotAct/story_01_020703_doc_1.pdf (last visited July 10, 2005).

[72] *See, e.g.*, ACLU, SIGN-ON LETTER TO CONGRESS URGING OPPOSITION TO THE DRAFT DOMESTIC SECURITY ENHANCEMENT ACT (PATRIOT ACT II) (Mar. 17, 2003), *at* http://www.aclu.org/SafeandFree/SafeandFree.cfm?ID=12124&c=206 (last visited July 10, 2005). Signers to this letter opposing the Partiot Act II include: American Baptist Churches USA, ACLU, American Conservative Union, American Library Association, Americans for Tax Reform, Arab American Institute, Center for Constitutional Rights, Center for Democracy and Technology, Center for Human Rights and Constitutional Law, Center for National Security Studies, Common Cause, Consumer Action, Electronic Privacy Information Center, Gun Owners of America, Immigrant Legal Resource Center, National Association for the Advancement of Colored People (NAACP), National Council of La Raza, National Employment Law Project, National Immigration Law Center, National Lawyers Guild, Northwest Immigrant Rights Project, OMB Watch, People for the American Way, Police Accountability Project, Presbyterian Church USA, Washington Office, Women Against War and forty other organizations.

[73] DEP'T OF JUST., *supra* note 71.

[74] *Id.*

[75] *Id.*

[76] *Id.*

4. The Homeland Security Act FOIA exemptions

The Homeland Security Act of 2002 ("HSA"), passed by Congress and signed into law by President Bush on November 11, 2002, includes a number of provisions significantly restricting public access to information.[77] Section 214 encourages individuals and industries to voluntarily divulge information on infrastructural vulnerabilities or other vulnerabilities to terrorism to the Department of Homeland Security, in exchange for the assurance that such information will not be subject to public disclosure under the FOIA.[78] The HSA does not in any way limit industry disclosure, so many environmental, consumer protection and health and safety advocates fear that the provision will serve as a "shelter" for private industry's damaging or embarrassing information. By disclosing information to the government, which is then obligated to prevent its public release, private industry could make use of the FOIA exemption to fend off citizen inquiry into violation of environmental and human health laws. The American Civil Liberties Union and Society of Environmental Journalists, along with many other prominent journalist and public advocacy groups signed letters urging Congress to strike this provision, citing problems with vagueness of scope and application, the presumably unintended industry public disclosure shelter consequences and the existing, sufficient FOIA exemptions.[79] Unfortunately, the HSA was passed with section 214 intact. Senators Leahy, Levin, Jeffords, Lieberman and Byrd have introduced a bill entitled "The Restoration of Freedom of Information Act of 2003," which would strike section 214, remove the broad FOIA exemption, define critical infrastructure and replace it with a new section 214 that would otherwise narrow the scope and meaning of that section, eliminating the ability of industry to use disclosure to the government to avoid public disclosure.[80] The bill was referred to the Judiciary Committee on March 12, 2003.[81]

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[77] Homeland Security Act (HAS) of 2002, Pub. L. No. 107-296, 116 Stat. 2135.

[78] *Id.* § 214.

[79] ACLU, COALITION LETTER TO CONGRESS URGING OPPOSITION TO THE BROAD FREEDOM OF INFORMATION ACT EXEMPTION IN THE HOMELAND SECURITY ACT: OPPOSE BROAD FREEDOM OF INFORMATION ACT EXEMPTION (SEC. 204) IN HOMELAND SECURITY ACT (July 12, 2002), *at* http://www.aclu.org/NationalSecurity/NationalSecurity.cfm?ID=10525&c=111 (last visited July 10, 2005); SOCIETY OF ENVIRONMENTAL JOURNALISTS, FOIA EXEMPTION IN HOMELAND SECURITY ACT OF 2002 (July 10, 2002), *at* http://www.sej.org/foia/letter.htm#leaders (last visited July 10, 2005).

[80] Restoration of the Freedom of Information Act of 2003, S. 609, 108th Cong. (2003) (striking subtitle B from the Homeland Security Act of 2002, replacing §§ 211-215 with a revised § 211), *available at* http://thomas.loc.gov/cgi-bin/query/z?c108:S.609: (last visited July 10, 2005).

[81] THE LIBRARY OF CONG., BILL SUMMARY & STATUS FOR THE 108TH CONGRESS (Mar. 12, 2003), *available at* http://thomas.loc.gov/cgi-bin/bdquery/z?d108:s.00609: (last visited July 10, 2005).

II. BENEFITS OF THE LAWS

A. Free flow of information is necessary for accountable government and private industry

The words of James Madison are often repeated in discussions of the merits of liberal government information dissemination policies:

> "A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both. Knowledge will forever govern ignorance; And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives." [82]

This section will discuss how freedom of information and right to know laws and policies are necessary to maintain an accountable government. Informed and active citizens keep the government and industry accountable for their actions by publicizing pollution, security and other health and safety problems. Wider awareness of such problems increases the likelihood that the citizenry will protest loud enough and be willing to spend enough money to assure that health and safety problems are resolved in a timely manner. The secretive climate necessary for fraud, waste and unbridled exploitation of humans and the environment is greatly reduced when the government institutes a policy of openness. This section will also discuss how terrorists do not need government documents to find vulnerable targets. The U.S.'s approach to national security must shift from trying to cover up vulnerabilities to fixing these security and safety vulnerabilities, thus reducing the consequences of an attack. Finally, this section establishes that the U.S. government nuclear weapons program produced a legacy of severe environmental contamination that amply demonstrates that a government free of citizen accountability is capable of, and nearly certain to, cause serious harm and create risks to its citizens and that citizen oversight is imperative to fixing the nuclear contamination, security and safety problems.

1. Information disclosed by the government and by industry is used for diverse causes in the public interest

The FOIA is instrumental in helping public interest groups expose wasted taxpayer funds on embarrassing, costly or dangerous agency pet projects. Watchdog groups such as the Citizens Against Government Waste, Taxpayers for Common Sense and the Center for Public Integrity use FOIA requests to

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[82] Letter from James Madison, to W.T. Barry (Aug. 4, 1822), *reprinted in* JAMES MADISON, THE COMPLETE MADISON 337 (S. Padover ed, 1953), *cited in* Wald, *supra* note 15.

expose wasteful or otherwise questionable government spending. Citizen groups have used the FOIA to expose excessive or suspect government spending on such diverse subjects as the Microsoft litigation,[83] maintenance costs of a New York Courthouse,[84] unnecessary road-building and timber giveaways,[85] and the award of Iraq War defense and reconstruction contracts.[86] The FOIA has also been useful in publicizing government and industrial safety and health reports. Recent reports on contaminated meat supplies,[87] downer cow testing,[88] mercury levels in fish consumed by pregnant women,[89] the space shuttle Columbia explosion,[90] and perchlorate contaminated drinking water on a Marine base[91] have all been supported by information gained in FOIA requests.

Liberal policies of information disclosure by the government are supported by the American Civil Liberties Union to maintain civil rights, while OMB Watch champions the use of the FOIA for budgetary and regulatory oversight, as well as environmental right to know. Organizations such as the Government Accountability Project use FOIA-obtained documents to help vindicate the claims of whistleblowers and to protect those who have been illegally retaliated against.[92] Environmental groups like EarthJustice[93] and the Natural Resources Defense Council[94] have recently used FOIA to inquire into environmentally

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[83] Joel Brinkley, *U.S. Versus Microsoft: The reaction; Microsoft's friends rue the findings, its foes relish them*, N.Y. TIMES (LATE EDITION (EAST COAST)), Nov. 7, 1999, at A33.

[84] Greg B. Smith, *Court of Supreme Costs: Maintenance prices highest in the land*, N.Y. DAILY NEWS, Jan. 26, 2000, at 27.

[85] TAXPAYERS FOR COMMON SENSE, LOST IN THE FOREST, HOW THE FOREST SERVICE'S MISDIRECTION, MISMANAGEMENT, AND MISCHIEF SQUANDERS YOUR TAX DOLLARS (July 11, 2002), *at* http://www.taxpayer.net/forest/lostintheforest/lostintheforest.pdf (last visited July 10, 2005).

[86] James Cox, *Study: Bush donors rake in contracts*, USA TODAY, Oct. 30, 2003, at B1.

[87] Melody Petersen & Christopher Drew, *The Slaughterhouse Gamble: The risk of self-policing*, N.Y. TIMES (LATE EDITION (EAST COAST)), Oct. 10, 2003, at A1.

[88] Donald G. McNeil, Jr., *Where the Cows Come Home; Sanctuary Farm Applauds Ban on Butchering of Sick Animals*, N.Y. TIMES, Jan. 2, 2004, at B1.

[89] Marian Burros, *Eating Well, Second thoughts on mercury in fish*, N.Y. TIMES, Mar. 13, 2002, at F5.

[90] *NASA Says It Will Assess Engineer's Warning on Tiles*, WASH. POST, Feb. 24, 2003, at A2.

[91] Manuel Roig-Franzia & Catharine Skipp, *Tainted Water in the Land of Semper Fi; Marines Want to Know Why Base Did Not Close Wells When Toxins Were Found*, WASH. POST, Jan. 28, 2004, at A3.

[92] *See, e.g.*, Tom Carpenter, *U.S. Supreme Court clears way for whistleblower trial, at* http://www.whistleblower.org/ (last visited Jan. 9, 2005); Tom Carpenter, *IG Report Documents Serious Weaknesses in Livermore Security, at* http://www.whistleblower.org/ (last visited Jan. 9, 2005).

[93] *See, e.g.*, EARTHJUSTICE, OFFROAD VEHICLE ROADS/SECRET SETTLEMENT TALKS (Jan. 10, 2002), *at* http://www.earthjustice.org/news/display.html?ID=286#roads (last visited July 10, 2005).

[94] *See, e.g.*, NATIONAL RESOURCE DEFENSE COUNCIL (NRDC), HEAVILY CENSORED ENERGY DEPARTMENT PAPERS SHOW INDUSTRY IS THE REAL AUTHOR OF ADMINISTRATION'S ENERGY TASK FORCE REPORT (Mar. 27, 2002), *at* http://www.nrdc.org/media/pressreleases/020327.asp (last visited July 10, 2005).

damaging agency decisions and policy making.

Past Congresses have reaffirmed their belief in the value of maintaining citizen participation for elimination of fraud, abuse and harmful practices in the government and regulated industry by amending and strengthening the FOIA, enacting the EPCRA,[95] and maintaining the citizen suit and public disclosure provisions common to environmental statutes.[96]

2. An informed citizenry can improve safety from terrorists by demanding fixes to problems, not just cover-ups

Freedom of information and community right to know provisions allow citizens to be educated and informed. Informed citizens are in a better position to demand results from their elected officials in dealing with serious health and safety problems; an informed public can more readily demand that wastes and abuses stop and wrongdoers be punished.

In a modern context, threats to national security are not necessarily a large, named, foreign country, but may be smaller, multi-national and perhaps even domestic groups.[97] Today, persons and groups that threaten national security are difficult to identify and eliminate. In the face of this reality, the U.S. government and industries must take steps to reduce vulnerabilities to and consequences of a terrorist attack. A policy of simply trying to hide the vulnerability of potentially dangerous operations is not necessary or sufficient to address terrorist threats. No amount of government suppression of environmental contamination or toxic release risk information would have stopped the events that took place on September 11, 2001.

If, via spies or a company or industry website, a terrorist were to learn that a strategically located chemical depot was near a major population center, he would not necessarily need to know that the facility was experiencing severe shortages of properly trained security personnel or suffered from aging and failing machinery and storage facilities in order to inflict serious injury. In contrast, if the community were to learn of the security and containment failings, they would be able to exert serious pressure on the owner of the facility or the government to fix the failings, to reduce risk by removing chemicals or changing to less hazardous technologies, or to hire and train better security, even if it required the use of public funds. Public dissemination of toxic release, risk management and vulnerability information is not necessary to give terrorists a

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[95] *See* FOIA and EPCRA discussions *supra* Part I.

[96] *See* NEPA and CAA discussions *supra* Part I.

[97] For instance, the Oklahoma City bombing was carried out not by a foreign group, but by U.S. citizens. Timothy McVeigh and Terry Nichols, United States citizens, were found guilty of carrying out the 1995 Oklahoma City bombing. *See, e.g.*, CNN, OKLAHOMA CITY BOMBING TRIALS, *at* http://www.cnn.com/US/9703/okc.trial/ (last visited July 10, 2005).

roadmap to destruction. Terrorists do not need a "terrorism for dummies"[98] guide; terrorists are not dummies.

B. Information restriction does not reduce vulnerability to terrorism

Restricting government and industry information is not likely to work to keep vulnerability information out of the hands of terrorists. In an article advocating liberal dissemination of information collected by the government about chemical facility hazards, Joseph Jacobson, a Judge Advocate with the Air Force, argues that the release of chemical facility hazard information is essential for both maintenance of human and environmental health and for improvement of national security.[99] Jacobson argues that we should presume that terrorists are smart enough to calculate likely damage and death-toll from an attack on a chemical facility without the need for the CAA RMP data.[100] Indeed, terrorists did not need an Off-Site Consequence Analysis to hijack and crash passenger planes into the World Trade Center towers and the Pentagon.

Jacobson found that, with remarkable accuracy, the OCA information in the CAA risk management program reports was easily and quickly estimated using commonly available maps, phone books and corporate websites.[101] In one afternoon of using the internet, he found that he could assemble valuable information for devastating terrorist attacks on chemical facilities affecting three major population centers on both coasts, all without the use of RMP or any other EPA data.[102] Weighed with examples like this, it becomes clear that restriction of right to know data may only delay a internet-savvy terrorist's research a couple of hours, while denying the public basic information about the risks of chemical facilities in their own backyard. Certainly, the demonstrated utility of free public access to information outweighs negligible and uncertain gains in terror prevention from limiting access to this information.

Jacobson concludes that "our national security is best served by a policy of full disclosure — if we assume that potential terrorists are intelligent enough to independently calculate targets with the desired destructive impact, we can move the debate (along with money and resources) toward protecting those targets and minimizing the consequences of attack."[103] Right to know advocates urge the chemical industry to change its strategy from lobbying for suppression of information about vulnerabilities to lobbying for help to fix those

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[98] Davis, *supra* note 8.

[99] Jacobson, *supra* note 31, at 389-90.

[100] *Id.*

[101] *Id.*

[102] *Id.*

[103] *Id.* at 331.

vulnerabilities.

C. Government secrecy in nuclear weapons development has lead to severe exploitation of human and environmental health

The history of nuclear technology development is a prime example of what an unaccountable government is capable of doing to human and environmental health. Conducted in total secrecy, nuclear weapons development during WWII was completed quickly and with nearly no consideration of the long-term environmental and human health consequences for the communities and ecosystems surrounding the nuclear facilities.[104] The soil and water in these parts of the U.S. will remain toxic and radioactive for, in some cases, hundreds of thousands of years.[105]

The end of the Cold War has alleviated much of the perceived need for secrecy; the Soviet Union has collapsed and the U.S. no longer lives in fear of imminent Russian nuclear attack. As this perceived need for secrecy faded, the FOIA requests and periodic releases of information from the Department of Energy ("DOE") revealed a staggering legacy of radioactive pollution.[106] While the FOIA requests themselves cannot cleanup the pollution, they can allow citizens to keep an eye on how cleanup is carried out. Though the Bush Administration mandates implementation of "accelerated cleanup"[107] at DOE

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[104] *See* discussion of nuclear contamination in the U.S. *infra* Part III.

[105] *See generally* ROY E. GEPHART, HANFORD: A CONVERSATION ABOUT NUCLEAR WASTE AND CLEANUP (2003).

[106] *Id.*

[107] Accelerated cleanup is a Bush Administration plan to save money by cleaning up the DOE nuclear weapons facilities faster, but it employs the use of unproven and sometimes presently non-existent technologies. Additional strategies to move the cleanup along more quickly are lowering cleanup standards and renaming waste so as to avoid more stringent cleanup and remediation requirements. DOEs initial attempt at such renaming was struck down in *Natural Resources Defense Council v. Abraham*, 271 F. Supp. 2d 1260 (D. Idaho 2003), but on appeal, the 9th Circuit vacated and remanded to the district court with instructions to dismiss the case for lack of ripeness. NRDC v. Abraham, 388 F.3d 701 (9th Cir. 2004). In the National Defense Authorization Act for Fiscal Year 2005, Pub. Law No. 108-375, Congress included the DOE-authored section 3116, which allows DOE to get around the subject of the NRDC litigation, avoiding the requirement of earlier laws that high level waste stored in tanks be disposed of in a deep geologic repository by labeling the waste as "radioactive waste resulting from the reprocessing of spent nuclear fuel," and essentially allowing DOE to dispose of the waste as it sees fit. The section only affects the Idaho and South Carolina DOE sites, which have only a few waste tanks, but organizations like NRDC fear that this legislation will set an unfavorable precedent for sites like Washington's Hanford, with 177 underground tanks of high-level waste in need of disposal. *See, e.g.*, Press Release, Geoffrey Fettus, NRDC, Backroom Deal: Congress OKs Abandoning Highly Radioactive Waste in South Carolina and Idaho, Threatening Drinking Water Supplies (Oct. 8, 2004), *at* http://www.nrdc.org/media/pressreleases/041007a.asp (last visited July 10, 2005). See Robert Alvarez, *The Legacy of Hanford*, The Nation, Aug. 18, 2003, at 31-35, for a general overview of DOE's accelerated cleanup efforts.

facilities in the name of cost savings,[108] numerous citizen groups and environmental organizations have protested that doing the job quickly is not necessarily doing the job correctly and safely. The Government Accountability Project,[109] Natural Resources Defense Council,[110] Heart of America Northwest,[111] and numerous other organizations have used FOIA-obtained information in their public release and court battles to ensure that the DOE does the job right, without significant risk to worker and environmental safety and health, at the Hanford Nuclear Reservation and other facilities.

D. The past dictates that the future of nuclear technologies must include citizen oversight

Building the atomic bomb and maintaining a nuclear arms race provided the U.S. with the security of an arsenal at least as great as its Cold-War enemy, but it has now become an adage that humans could destroy the Earth many times over with our nuclear stockpile. Now, the Cold War has ended, leaving us with a toxic legacy of long-lived radioactive compounds.

While other commentators have focused on community right to know in the chemical manufacturing context, the remainder of this note will focus on the special dangers of government nuclear weapons facilities and private and public nuclear power generation facilities. Radioactive pollution is far more insidious than most types of chemical pollution because it has the capacity to be so long-lived (persistent organic compounds like PCBs excepted, to some extent), human senses do not detect it and its health effects, and, at least in low levels, it is slow to appear and difficult to trace.[112] As the U.S.'s weapons and nuclear facilities are aging, its enemy is changing. The modern foreign threat are no

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[108] U.S. DEP'T OF ENERGY, REMARKS BY SPENCER ABRAHAM ENVIRONMENTAL MANAGEMENT PROGRAM REFORM PREVIEW FERNALD, OHIO (Jan. 31, 2002), *at* http://www.energy.gov/engine/content.do?PUBLIC_ID=13396&BT_CODE=PR_SPEECHES&TT_CODE=PRESSRELEASE (last visited July 10, 2005); *see also* Matthew L. Wald, *Speeding Nuclear Cleanup Is Seen as a Way to Reduce Work*, N.Y. TIMES, July 12, 2002, at A15.

[109] *See, e.g.*, Tom Carpenter & Clare Gilbert, *New Report Exposes Recent Increase in Dangerous Health and Safety Incidents Involving Hanford Workers*, GAP press release, Sept. 15, 2003, *at* http://www.whistleblower.org/ (last visited July 10, 2005).

[110] *See, e.g.*, Press Release, NRDC, Bush Administration Denies Public Access to Information on Industry Participants in Cheney Energy Task Force (May 10, 2001), *at* http://www.nrdc.org/media/pressreleases/010510.asp (last visited July 10, 2005).

[111] *See, e.g.*, Heart of Am., Nw. v. Dep't of Energy, 28 DOE ¶ 80,128, No. VFA-0620 (Dep't of Energy Nov. 30, 2000), *available at* http://www.oha.doe.gov/cases/foia/vfa0620.htm (last visited July 10, 2005).

[112] *See, e.g.*, U.S. NUCLEAR REGULATORY COMMISSION, BACKGROUNDER ON RADIOACTIVE WASTE (Aug. 2004), *at* http://www.nrc.gov/reading-rm/doc-collections/fact-sheets/radwaste.html (last visited July 10, 2005); U.S. NUCLEAR REGULATORY COMMISSION, FACTSHEET ON BIOLOGICAL EFFECTS OF RADIATION (Dec. 2003), *at* http://www.nrc.gov/reading-rm/doc-collections/fact-sheets/bio-effects-radiation.html (last visited July 10, 2005).

longer nations, rather they are small, sometimes multi-national, groups driven by their own religious, political, or other ideological agendas.

In a Comment to the Widener Law Symposium, Samantha Brady Carter outlines a plan to establish domestic and international solutions to the nuclear threat. She emphasizes that nuclear facilities in the U.S.'s own backyard are weapons of mass destruction because domestic nuclear facility security measures are frighteningly inadequate and that theft and sale of nuclear weapons and materials from the FSU has increased U.S. vulnerability.[113] Carter discusses seven steps that should be immediately taken to secure nuclear facilities in the U.S. and abroad, as submitted to Congress in May of 2002 by Harvard University scholars Matthew Bunn, John P. Holdren and Anthony Weir.[114] Each step in this plan is designed to work toward the goal of *eliminating the vulnerability*. The steps call for creation of "global coalitions" to secure nuclear materials, appointment in the U.S. and FSU of leaders to head the securing effort, increased security of Russian nuclear facilities, elimination or securing of stockpiles of weapon-useable nuclear materials, creation of binding international nuclear security standards, blending down of enriched uranium and development of an ongoing funding source for these efforts.[115]

Thus far, this note has discussed the utility of right to know laws as an important legal tool in enforcement of human and environmental health and safety regulations and elimination of waste, fraud and dangerous conditions created by government and private industry. The note has argued that these advantages plainly outweigh any incremental loss of security due to the possibility that terrorists might access this information, because terrorists do not need detailed government studies to accomplish death and destruction. What terrorists need are vulnerable targets, ideally with inadequate security — RMPs and TRIs could perhaps be helpful to terrorists in this respect, but not significantly more helpful than basic surveillance, maps, phonebooks and industry websites. Freedom of information and right to know statutes are instrumental in locating such vulnerabilities and mobilizing public pressure to eliminate or reduce both the possibility and the consequences of terrorist attack.

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[113] Samantha Brady Carter, *Defining Nuclear Threats and Vulnerabilities After September 11, 2001: A Legal Planning Analysis to Establish National and International Solutions and Standards*, 9 WIDENER L. SYMP. J. 549 (2003) (citing BUNN ET AL., SECURING NUCLEAR WEAPONS AND MATERIALS: SEVEN STEPS FOR IMMEDIATE ACTION (May 2002), *available at* http://www.nti.org/e_research/securing_nuclear_weapons_and_materials_May2002.pdf (last visited July 10, 2005)).

[114] *Id.* (citing BUNN ET AL., SECURING NUCLEAR WEAPONS AND MATERIALS: SEVEN STEPS FOR IMMEDIATE ACTION (May 2002), *available at* http://www.nti.org/e_research/securing_nuclear_weapons_and_materials_May2002.pdf (last visited July 10, 2005)).

[115] *Id.*

Because of the judiciary's wariness of exceeding its Constitutional power and deference to the judgment of the other government branches on matters of national security, it is unlikely to be a consistent ally to citizens in court battles for sensitive information disclosure. As turning to the courts is not the answer, efforts should be focused on inculcating liberal information disclosure policies into federal agency operations. Right to know and freedom of information policies are also essential for accurate portrayal and evaluation of history. Past secrecy in the development of nuclear technologies in both the U.S. and the FSU has lead to mass poisonings and staggering environmental degradation, all without public disclosure and often without even a simple warning.[116] The remainder of the note will discuss the consequences of government secrecy concerning nuclear technologies in the FSU and in the U.S., and why freedom of information is especially critical for nuclear activities.

III. CASE STUDY OF COLD WAR-ERA NUCLEAR TECHNOLOGY AND FREEDOM OF INFORMATION

A. Dissemination of nuclear hazard information is particularly critical to environmental and human health

Radiation is silent and has no color or odor. If liquid radioactive waste, free of other colored wastes, is poured into a stream, the stream does not change in appearance. The stream would not stink or catch fire, unlike the infamous Cuyahoga River.[117] If radiation is released into the air, it does not appear as a green glowing cloud — if it is visible at all, an airborne radioactive release is evidenced only by the dust or vapor that may accompany its release. Unlike chemical pollutants of water, soil and even air, radioactive pollution cannot be detected by the human senses. In addition, unlike many chemical gases, inhalation of radioactive gas often does not immediately cause irritation. One would not know to take even the ineffectual precaution of covering one's mouth, nose, or eyes if one came into contact with an unlabeled radioactive substance. A person would not know that he or she was bathing in a veritable radioactive stew unless signs were prominently posted and the bather was literate.

The difficulty in detecting radioactivity without special instrumentation is compounded by the often-lengthy latency period between exposure and

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[116] *See* discussion of nuclear contamination in the U.S. and FSU *infra* Part III.

[117] The Cuyahoga is a Cleveland river that was so choked with chemical pollutants that it burst into flame on June 22, 1969, thereby providing major impetus for passage of the Clean Water Act. EPA, CUYAHOGA RIVER AREA OF CONCERN (July 9, 2001), *at* http://www.epa.gov/glnpo/aoc/cuyahoga.html (last visited July 10, 2005).

manifestation of an effect. The pathological effects of radioactive pollutant exposure are, except in severe cases, not immediately evident.[118] Exposure to radioactivity manifests itself in maladies like cancers or birth defects, often many years and perhaps a generation or more removed from the original exposure.

Because radioactivity is an invisible hazard, unless armed with functioning Geiger counters, which are radioactivity detection devices, citizens living near, downstream, or downwind of a nuclear facility are wholly dependent on the honest and expeditious announcement of releases at that facility to avoid exposure to dangerous radioactivity. Unimpeded access to information, particularly to scientific data, is also instrumental in the ongoing debate over whether nuclear weapons and energy technologies are worth the risk involved in development, manufacture, testing, storage and use.

A number of scholars have written on this risk-benefit debate and concluded that greater public access to information about nuclear technologies is necessary and would likely lead to widespread rejection of the use of nuclear weapons. Professor Stephen Dycus, who believes nuclear war is the leading threat to the global environment, advocates the use of "NEPA-style environmental impact analysis of our decision to maintain, deploy, and use or threaten to use nuclear weapons."[119] Jonathan Granoff, CEO of the Global Security Institute, has stated that he has "no doubt that, if the peoples of the world were more fully aware of the inherent danger of nuclear weapons and the consequences of their use, they would reject them, and not permit their continued possession or acquisition on their behalf by their governments, even for an alleged need for self-defense."[120] Nowhere are the consequences of nuclear weapon manufacture and testing more painfully evident than in the FSU.

B. Nuclear Hazards in Russia and the Former Soviet Union

The infamous 1986 nuclear power plant accident at Chernobyl is the world's most famous nuclear power plant catastrophe. Professor Murray Feshbach compiled data and reports from Ukrainian authorities indicating that over 5000 people have died as a direct result of radioactive exposure and an additional 12,000 were "badly irradiated."[121] The Ukrainian Minister of the Environment

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[118] FACTSHEET ON BIOLOGICAL EFFECTS OF RADIATION, *supra* note 112.

[119] Stephen Dycus, *Symposium: The Environmental Law of War: Nuclear War: Still the Gravest Threat to the Environment*, 25 VT. L. REV. 753, 755 (2001).

[120] Jonathan Granoff, *Nuclear Weapons, Ethics, Morals, and Law*, 2000(4) B.Y.U. L. REV. 1413, 1420 (2000), *available at* http://lawreview.byu.edu/lawreview/archives/2000/GRA3.PDF (last visited July 10, 2005).

[121] MURRAY FESHBACH, ECOLOGICAL DISASTER: CLEANING UP THE HIDDEN LEGACY OF THE SOVIET REGIME 31 (1995).

reported that perhaps two-thirds of the Ukraine's fifty-two million inhabitants have been "affected."[122] Cesium-137 contamination is spread over seventeen million acres in a concentration of one Curie per square kilometer.[123] Belarus and Norway have also been contaminated by the Chernobyl accident.[124] Unfortunately, the Chernobyl disaster is only the tip of the proverbial iceberg of radioactive contamination in the FSU.

Nuclear plant accidents are not the only, or the worst, examples of radioactive pollution. Professor Feshbach reports that between 1949 and 1987, 618 nuclear test explosions were detonated in the FSU,[125] including 118 at the Arctic island of Novaya Zemlya,[126] and 456 at Semipalatinsk[127] and, at least, seventeen in the Atyrau oblast[128] in Kazakhstan. One hundred and sixteen of the tests in Kazakhstan were aboveground or atmospheric explosions.[129]

Professor Feshbach's report also includes startling information on Russian nuclear submarines in the Arctic and in the Far East. Reports of fires and accidental sinkings of whole submarines and intentional sea dumping of old reactors and other nuclear wastes are numerous.[130] The sinkings and waste dumping associated with the Northern Fleet are of particular worry to Scandinavian countries, while the fleet in the Far East has been dumping waste and reactors in the Sea of Japan, affecting Japanese and U.S. interests.[131] Already many of the submarines have accidentally sunk, while many others are not seaworthy enough to be moved for dismantling.[132] Even if the subs were mobile, Russia does not have the adequate facilities or infrastructure to accommodate the spent fuel and waste produced by the Northern Fleet.[133]

In a note discussing the merits of sub-seabed disposal of nuclear waste, Christopher Meisenkothen includes a summary of the serious problems with disposal of nuclear submarines all over the world, but most acutely felt in Russia.[134] As Russia's Cold-War fleet of about 249 nuclear submarines are

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[122] *Id.*

[123] *Id.*

[124] *Id.*

[125] *Id.* at 43.

[126] *Id.*

[127] Vadim Nee & Bella K. Sewall, *Can Kazakhstan Profit from Radioactive Waste? Domestic and International Legal Perspectives on a Proposal to Import Radioactive Waste*, 15 GEO. INT'L ENVTL. L. REV. 429, 430 (2003).

[128] FESHBACH, *supra* note 121, at 21.

[129] Nee & Sewell, *supra* note 127, at 430.

[130] FESHBACH, *supra* note 121, at 44-47.

[131] *Id.* at 45-52.

[132] *Id.*

[133] *Id.*

[134] Christopher Meisenkothen, Note, *Subseabed Disposal of Nuclear Waste: An International Policy Perspective*, 14 CONN. J. INT'L L. 631 (1999).

decommissioned, the struggling and often financially insolvent Russian government must determine how to deal with the reactors and spent fuel. Shipment over land to its single spent fuel reprocessing facility at Mayak, in the Ural Mountains, is an impractical venture. Mayak itself is deteriorating, with contamination and pollution reportedly in excess of five times that seen at Chernobyl.[135]

Further, a loaded train only has the capacity for 588 fuel assemblies, while there are 50,000 fuel assemblies in need of disposal.[136] Meanwhile, the materials are stored in perhaps leaky and probably under-protected storage facilities at shipyards and military bases. Facing this financial and logistical challenge, Russia has turned to open sea dumping of submarines, as well as other nuclear wastes, encased only in metal drums — thirteen submarine reactors, six with spent fuel still inside, were dumped near the island of Novaya Zemlya in the Arctic Ocean.[137] In 1996, Russia admitted to having dumped 2.5 million Curies of radioactive waste from eighteen decommissioned nuclear reactors and 13,150 waste containers into the Arctic.[138]

1. Rivers and Lakes

The Mayak facility in the Chelybinsk region of the Ural Mountains has also been a source of serious contamination. Between 1949 and 1952, uncontained radioactive waste was dumped into the Techa River; accidental dumpings in the Techa and in Lake Karachay in 1957 and 1967 resulted in radiation levels sixty times background level.[139] The Soviets began using Lake Karachay, which is isolated, at least on the surface, from neighboring water bodies because the Techa had become extremely contaminated. The Mayak facility's uncontrolled radioactive dumping to the Techa River killed all of the fish and forced the evacuation of thousands of downstream villagers — all of whom regularly bathed, fished and drank from the river.[140] The enormous quantities of nuclear waste dumped in Lake Karachay have earned it the title of "most polluted spot

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[135] *Id.* at 641 (citing Marina Kalashnikova, *Russia's Nuclear Waste Disposal is a Global Concern*, BIZEKON NEWS, Jan. 22, 1998 and David Hoffman, *Rotting Nuclear Subs Pose Threat in Russia; Moscow Lacks Funds for Disposal*, WASH. POST, Nov. 16, 1998, at A1).

[136] *Id.*

[137] *Id.* at 642 (citing Joshua Handler, *The Lasting Legacy – Nuclear Submarine Disposal*, JANE'S NAVY INT'L, Jan./Feb. 1998, at 12).

[138] Jon L. Woodard, *Rivers in Peril: An Examination of International Law and Land-based Nuclear Pollution in the Former Soviet Union*, 11 GEO. INT'L ENVTL. L. REV. 741, 746 (1999).

[139] FESHBACH, *supra* note 121, at 48.

[140] Woodard, *supra* note 138, at 751 (citing John-Thor Dahlburg, *Soviet Nuclear Bomb Drive Took a Vast Human Toll; Radiation: Shocking Episodes Are Revealed. In One, Workers Were Sent into Mine a Day After an Atomic Blast*, L.A. TIMES, Sept. 3, 1992, at A1).

on Earth."[141] As a result, subterranean migration of Lake Karachay's water threatens nearby rivers.[142] In total, about half of the FSU's total radioactive waste has been injected directly into the ground, mostly at sites near rivers.[143]

Over one billion Curies emanate from the Mayak site today, with over 120 million Curies in holding ponds.[144] This astounding concentration of radioactive waste is presently penetrating the river basins, such as the Ob.[145] Contaminated river flow from the Techa and the Ob ultimately empty into the Arctic Sea,[146] where the pollution become the source of international concern. Robert N. Gates, former CIA Director, told the Senate Intelligence Committee in 1992 that radioactivity from Chelybinsk and other remote, inland facilities "was discovered in the Arctic as early as 1951," and that this radioactivity "profoundly affects the entire north."[147]

2. Unsecured Nuclear Facilities

If it were not enough that the FSU's nuclear storage, containment and waste disposal practices pose risks of release and resultant environmental damage that would make Chernobyl seem like a firecracker, contaminating huge parts of the global environment for centuries if not millennia, the FSU nuclear facilities are dangerously unsecured. The Russian authorities staff these facilities with poorly and inconsistently paid and often inadequately trained security personnel. These workers are often understandably desperate to feed their families and cover other living expenses, setting up a prime environment for employee theft of nuclear materials for sale on the black market.[148]

C. Kazakhstan and Spent Fuel Reprocessing

Throughout the Cold War, Russia used the large and relatively sparsely populated state of Kazakhstan, which is now independent, to conduct underground and atmospheric nuclear tests.[149] The government used the populace as unwitting test subjects for radioactive exposure, never informing them of the tests or moving them out of danger. Now many human and

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[141] *Id.* at 744; *see also* NICHOLAS K. LENSSEN, NUCLEAR WASTE: THE PROBLEM THAT WON'T GO AWAY, Worldwatch Institute Paper No. 106, at 15 (1991).

[142] *Id.* at 744-745.

[143] Woodard, *supra* note 138, at 741 (citing William Broad, *Russians Admit Burying Nuclear Waste*, GUARDIAN, Nov. 22, 1994, at 26).

[144] *Id.*

[145] *Id.*

[146] *Id.*

[147] *Id.*

[148] FESHBACH, *supra* note 121, at 25-30.

[149] *Id.* at 21-22.

environmental health problems are emerging, including birth defects, cancers and environmental degradation and contamination.[150] Radioactive fallout over vast areas has rendered those areas dangerous for human habitation; nuclear facilities are in serious disrepair and are poorly guarded.[151]

Despite the serious human and environmental health problems in Kazakhstan, the Kazakh government is proposing to begin importing and reprocessing spent nuclear fuel from other countries, including Russia, the European Union and Great Britain.[152] The Kazakh government is desperate for a source of income since the collapse of the Soviet Union left this state with little independent revenue-generating infrastructure, serious health problems and environmental ruin.

Vadim Nee and Bella Sewall, attorneys with Law and Environment Eurasia Partnership, discuss the dangerous possibility of Kazakh nuclear waste importation for Kazakhstan, the countries surrounding it and all countries near any nuclear waste transportation route. Ill-equipped and undersecured FSU countries, like Kazakhstan, are attempting to use international nuclear waste as a revenue source by offering to treat or store it, further polluting the FSU and threatening the health of the surrounding humans and environment.[153] In the interest of international environmental health and environmental justice, international nuclear policymakers must undertake a serious inquiry into the international and domestic, legal and ethical, implications of sending more nuclear waste to a heavily contaminated, impoverished region.

As an alternative to becoming a defacto international nuclear waste dump, Kazakhstan and similarly situated countries are in dire need of economic aid. Financial assistance is necessary to begin addressing the cleanup and health effects of decades of nuclear pollution and to get their nuclear facilities secured against saboteurs and thieves. World leaders must make their citizens aware of the appalling state of nuclear security, so that the citizens will be willing to support, with their taxes, the costly efforts to contain and secure this dangerous material.

D. Punishment for Protesters

Russian nuclear pollution problems reached today's height in large part due to the secrecy with which nuclear technologies were developed. Military, government and journalist personnel who have revealed nuclear pollution, dumping, storage and leakage problems have been assailed with the

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[150] *Id.* at 19-30, 73; *see also* Nee & Sewall, *supra* note 127.

[151] FESHBACH, *supra* note 121, at 25-30.

[152] Nee & Sewall, *supra* note 127, at 432.

[153] *Id.*

government's and military's accusations of revealing "state secrets" to foreign nations, even when all information disclosed was in public records. For example, Russian journalist Grigory Pasko was twice imprisoned by the Russian military for supposedly revealing state secrets.[154] Drawing from publicly available documents, he confirmed for Japanese journalists that the Soviets had dumped liquid radioactive wastes into the Sea of Japan. His story has drawn significant international attention, including Amnesty International, who adopted him as a prisoner of conscience.[155] His release on parole in 2003, after six years in and out of prison, provided some encouragement for those hoping for improved fairness in the Russian judicial system. Unfortunately, the good news of Pasko's release is tempered with the disappointing news that the Russian Supreme Court has refused to vacate Pasko's conviction.[156]

> "I am convinced that ecology cannot be secret. Environmental openness is an inalienable human right. Any attempt to conceal any information about harmful impact on people and the environment is a crime against humanity."
>
> — Alexandr Nikitin[157]

Alexandr Nikitin is a Russian nuclear whistleblower and winner of the Goldman Environmental Prize.[158] He was instrumental in alerting the world to the Russian sea dumping of Northern Fleet nuclear submarines and the serious difficulties Russia has with decommissioned nuclear submarine waste storage. Using publicly available information, Nikitin assisted the Bellona Foundation, a Scandinavian environmental group, in producing a 1995 report entitled "The Russian Northern Fleet: Sources of Radioactive Contamination."[159] The report includes information about dangerous nuclear material storage practices,

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[154] David Holley, *Judge Paroles Russian Journalist, Environmental whistle-blower and military reporter vows to clear his name of treason*, L.A. TIMES, Jan. 24, 2003, A11.

[155] AMNESTY INTERNATIONAL, ENVIRONMENTAL DEFENDER GRIGORY PASKO FREED! (Jan. 21, 2003), *at* http://takeaction.amnestyusa.org/action/results.asp (last visited July 10, 2005).

[156] RASHID ALIMOV, RUSSIAN SUPREME COURT REFUSES TO REVERSE PASKO VERDICT—AGAIN (Aug. 9, 2003), *at* http://www.bellona.no/en/international/russia/envirorights/pasko/31114.html (last visited July 10, 2005).

[157] *See* GOLDMAN ENVIRONMENTAL PRIZE, ALEXANDER NIKITIN, *at* http://www.goldmanprize.org/recipients/recipientProfile.cfm?recipientID=38 (last visited July 10, 2005).

[158] *Id.*

[159] BELLONA FOUND., NORTHERN FLEET BACKGROUND (providing access to both the new and old Russian Northern Fleet: Sources of Radioactive Contamination Reports), *at* http://www.bellona.no/imaker?sub=1&id=8751 (last visited July 10, 2005); NILS BOEHMER ET AL., BELLONA REPORT 3:2001 THE ARCTIC NUCLEAR CHALLENGE (2001), *available at* http://www.bellona.no/pdfs/Report_3/The_Arctic_Nuclear_Challenge.pdf (last visited July 10, 2005).

accidents and dumping by the Russian Navy. Nikitin was imprisoned, interrogated and accused of espionage by the Russian authorities, but was ultimately acquitted of all charges.[160] The Russian authorities inflicted all of these punishments without ever telling Nikitin precisely what he had been charged with or what law he had broken.[161] The European Court on Human Rights reviewed Nikitin's case and found the Russian prosecution's actions to be "arbitrary and abusive," but did not rise to the level of violation of Nikitin's rights under the European Convention on Human Rights.[162]

Sergei Pashenko is an atmospheric scientist from Siberia. He is a member of the Russian Academy of Science and teaches in Novosibirsk. Part of his work involves monitoring the air and water for radioactive contamination.[163] Pashenko has been harassed by the Russian government numerous times for recording the ambient air radioactivity from his home in Novosibirsk and publishing the data on a public website. He has been arrested, questioned and accused of spying by government intelligence officials many times. Russian intelligence officers once interrogated him at his home in the presence of his young daughter.[164] His scientific instruments have also been confiscated, including a Global Positioning System of the type available to any civilian consumer in the U.S.[165]

In 2000, Pashenko and other scientists produced a report documenting dangerous levels of radioactivity in the Siberian River Tom.[166] A nuclear power generating facility was located upstream, but it had not had a reported accident since 1993. Pashenko and his team discovered radioactive isotopes in river water samples that were too short-lived to be more than a few days old.[167] It is possible that an undisclosed military facility is operating within the upstream complex, but Russian law forbids inquiry into a military activity.[168] On the same river, Pashenko and other members of the expedition observed local people bathing and fishing in the river. Curious about the contaminant loads in the local food fish, the scientists bought a fish from a passing fisherman and

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[160] BELLONA FOUND., THE NIKITIN CASE, *at* http://www.bellona.no/en/international/russia/envirorights/nikitin/index.html (last visited July 10, 2005).

[161] *Id.*

[162] JON GAUSLAA, PROSECUTION'S ACTIONS ARBITRARY AND ABUSIVE (July 26, 2004), *at* http://www.bellona.no/en/international/russia/envirorights/nikitin/34855.html (last visited Jan. 9, 2005).

[163] Paul Webster, *In the line of fire*, NEW SCIENTIST, Aug. 10, 2002, at 44.

[164] *Id.*

[165] *Id.*

[166] NORM BUSKE ET AL., RADIOACTIVE WASTE OF RIVER TOM (Gov't Account. Project 2000).

[167] *Id.* at 2.

[168] Webster, *supra* note 163.

discovered that it too was contaminated with dangerous levels of radioactivity.[169]

The Russian government's mistreatment of concerned individuals who publicly disseminate information about radioactive releases provides a chilling example of how pervasive government secrecy can be used to violate human rights, even years after the demise of the initiating regime. Russia and the newly independent states have produced a legacy of human and environmental poisoning that threatens the long-term health of the residents of northern latitudes, but the Russian government persists in its efforts to persecute nuclear whistleblowers. Unfortunately, the environmental contamination and other problems associated with nuclear secrecy are not limited to the FSU.

E. Nuclear dumping and radioactive fallout in the U.S. . . . Not in my backyard?

1. Hanford Nuclear Reservation

Hanford Nuclear Reservation is situated on over 500 square miles of high steppe grassland in southeastern Washington.[170] Most of the facility is bordered by a bend in the mighty Columbia River. In the 1940s, the cold and plentiful Columbia River water and the relatively sparse population of this region made this land appear well-suited for the production of fuel for what was to be the most destructive weapon ever created by man — plutonium fuel for the Nagasaki bomb was made at Hanford.[171] Nine reactors were ultimately built onsite, supplying fuel for the American side of the nuclear arms race. The legacy of nuclear weapons production has left Hanford the most severely contaminated place in the Western Hemisphere.[172]

The first reactors drew in cold river water to cool the reactors, then directly discharged the water, contaminated with radioactive compounds, back into the river.[173] The Columbia, like the Siberian River Tom in more recent times, ran radioactive during portions of the last sixty years.[174] For decades, low-level radioactive waste was mixed with a myriad of toxic compounds and dumped into unlined soil ditches, often very close to the banks of the Columbia.[175]

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[169] BUSKE, *supra* note 166, at 11.

[170] GEPHART, *supra* note 105, at 1.5.

[171] *Id.* at 1.4-1.5.

[172] *Id.* at 5; *see also Hanford Nuclear Site, at* http://www.whistleblower.org/ (last visited July 10, 2005).

[173] *Id.* at 5.41.

[174] *Id.*

[175] *Id.* at 5.1-5.3.

Millions of gallons of waste were disposed of in this fashion.[176] Even ground disposal sites relatively far away from the river's edge are now thought to be the source of springs of hexavalent chromium and strontium-90 that flow out of the ground and down the banks of the Columbia.[177]

Early estimates of soil porosity put travel time of liquid wastes to the river at more than fifty years, long enough for many of the dangerous radioactive isotopes to decay out.[178] Travel time has recently been confirmed to be only two years for some contaminants.[179] It was initially supposed that the waste would adhere to soil particles and be more or less stuck. While that may have been true in the beginning, the soil particles under Hanford eventually became saturated and lost their ability to adhere to any more chemicals. This effect is easily illustrated by wetting a sponge and holding it up to a water faucet. Once the sponge is saturated, the water flows through it at the same rate as it emerges from the faucet.

High-level wastes, consisting of highly radioactive wastes mixed with other toxic substances, were pumped into 177 giant single or double shelled waste tanks buried in the earth. Almost half of these tanks are confirmed or suspected to be leaking.[180] The DOE estimates that one million gallons of high-level waste has leaked from the tanks — seeping into the ground beneath the tanks and moving into the groundwater, toward the Columbia.[181] The DOE is presently undergoing a time-consuming and costly effort to at least partially empty the leaking tanks and store the waste elsewhere.

The radioactive chemicals working their way into the Columbia have combined with other toxins from upstream and on the Hanford site to collect in resident fish. Local indigenous groups, such as the Yakama Indian Nation, depend upon Columbia Basin fish for the staple component of their fish-based traditional diet. Today, resident fish carry high enough burdens of toxic chemicals in their bodies to cause a one in sixty excess cancer risk among area tribal people who eat the fish in traditional quantities.[182] The damage to fish resources and land-based resources such as hunting, medicine and food gathering grounds, as well as destruction of places of religious and spiritual significance prompted the Yakama to file suit against the U.S. The Yakama

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[176] *Id.* at 5.25.

[177] *Id.* at 5.25-5.31.

[178] *Id.* at 5.34-5.37.

[179] *Id.*

[180] *Id.* at 5.6-5.11.

[181] *Id.*

[182] EPA, COLUMBIA RIVER BASIN FISH CONTAMINANT STUDY, 1996-1998 No. 910-R-02-006 (1998), *available at* http://yosemite.epa.gov/r10/oea.nsf/0703bc6b0c5525b088256bdc0076fc44/c3a9164ed269353788256c09005d36b7/$FILE/Fish%20Study.PDF (last visited July 10, 2005).

Nation is presently litigating against the DOE to force the DOE to perform a natural resources damages assessment under the CERCLA.[183]

The Hanford nuclear contamination legacy is not confined to onsite dumping and disposal to the Columbia River. The Hanford "downwinders" are people who live near Hanford and believe themselves to have been exposed to radioactive Iodine-131 ("I-131") and other radioactive contaminants from officially documented intentional or accidental airborne radioactivity releases in prior decades. A particularly appalling example of an intentional release is the "Green Run" release of 8,000-11,000 Curies of I-131 on the night of December 3, 1949, without evacuating or otherwise warning the surrounding community.[184] By contrast, the much publicized Three-Mile Island accident released only about fifteen Curies of I-131[185] and necessitated the precautionary evacuation of all pregnant women and preschool-aged children within a five-mile radius of the plant.[186] The Green Run was an experiment apparently for the purpose of improving the U.S.'s ability to record Soviet nuclear activities by tracking nuclear fallout.[187] Between 1944 and 1951, the Hanford facility was responsible for the release of hundreds of thousands of Curies[188] of radioactive I-131; at least one source puts the figure at 727,900 Curies.[189] The "downwinders," stricken with thyroid disease and a host of other medical problems, are engaged in ongoing, and largely unsuccessful, litigation with the DOE for compensation and medical monitoring.[190]

2. Other Nuclear Facilities

Hanford is certainly not the only facility in the U.S. Nuclear complex to have poisoned its neighboring human population and environment, necessitating an ongoing, costly cleanup effort. Los Alamos in New Mexico,[191] Fernald in

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[183] *Confederated Tribes and Bands of the Yakama Nation v. U.S. Dep't of Energy*, Am. Compl. Civil No. CY-02-3105-WFN (E.D. Wash. Jan. 21, 2003).

[184] MICHAEL D'ANTONIO, ATOMIC HARVEST: HANFORD AND THE LETHAL TOLL OF AMERICA'S NUCLEAR ARSENAL 119, 270 (1993).

[185] *Id.* at 270.

[186] U.S. NUCLEAR REG. COMM'N, FACTSHEET ON THE ACCIDENT AT THREE MILE ISLAND (Mar. 31, 2005), *at*: http://www.nrc.gov/reading-rm/doc-collections/fact-sheets/3mile-isle.html (last visited July 10, 2005).

[187] D'ANTONIO, *supra* note 184, at 125.

[188] *Id.* at 126.

[189] John Stang, *1944-1951: 727,900 Curies of radioactive iodine released*, TRI-CITY HERALD, Jan. 29, 1999.

[190] *See, e.g.*, Hanford Downwinders Coalition v. Dowdle, 71 F.3d 1469 (9th Cir. 1995).

[191] *See, e.g.*, DEP'T OF ENERGY, NEW MEXICO, *at* http://www.em.doe.gov/doe/em/cda/state_channel_front_door/0,2126,14763_10126,00.html (last visited July 10, 2005).

Ohio,[192] Savannah River in South Carolina,[193] Rocky Flats in Colorado,[194] and Oak Ridge in Tennessee[195] are but a few of the most seriously contaminated sites in the DOE complex. In support of the DOE Office of Environmental Management's ("EM") budget request for FY 2004, Assistant Secretary Jesse Roberson told a Senate committee that for the whole DOE complex, "the EM program is responsible for safely disposing of eighty-eight million gallons of radioactive liquid waste, 2500 metric tons of spent nuclear fuel, 135,000 cubic meters of transuranic waste, and well over one million cubic meters of low level waste."[196] The EM program is the cleanup arm of the DOE, responsible for funding and overseeing cleanup at all the DOE sites. Robert Alvarez, a Senior Scholar with the Institute for Policy Studies, reported "[s]ince 1989, more than $60 billion has been spent for the DOE cleanup, and an additional $200 billion is estimated as needed to deal with the daunting environmental legacy of the nuclear arms race over the next several decades. Hanford's budget alone is bigger than the Environmental Protection Agency's entire Superfund program."[197] The EM's budget request for 2004 was $7.24 billion.[198]

Regardless of how quickly or thoroughly the DOE cleans up the Cold-War legacy sites, the cost to U.S. taxpayers will be hundreds of billions of dollars. The Bush Administration the DOE's accelerated cleanup plan moves the closure date at Hanford from 2070 to 2035, at a potential cost savings of fifty billion dollars, but despite monetary savings, several DOE watchdog groups fear that accelerated cleanup is a fatally inferior cleanup with serious worker and environmental health and safety consequences.[199] It is clear that American

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[192] *See, e.g.*, FERNALD CLOSURE PROJECT, FERNALD PERFORMANCE MANAGEMENT PLAN, *at* http://www.fernald.gov/NewsUpdate/fpmp.htm (last visited July 10, 2005).

[193] *See, e.g.*, SAVANNAH RIVER OPERATIONS OFF., THE DRAFT SAVANNAH RIVER SITE ENVIRONMENTAL MANAGEMENT PROGRAM PERFORMANCE MANAGEMENT PLAN – 2004, *at* http://sro.srs.gov/srs_pmp.htm (last visited July 10, 2005).

[194] *See, e.g.*, DEP'T OF ENERGY, COLORADO, *at* http://www.em.doe.gov/doe/em/cda/state_channel_front_door/0,2126,14763_10124,00.html (last visited July 10, 2005).

[195] *See, e.g.*, DEP'T OF ENERGY, TENNESSEE, *at* http://www.em.doe.gov/doe/em/cda/state_channel_front_door/0,2126,14763_10106,00.html (last visited July 10, 2005).

[196] JESSE ROBERSON, TESTIMONY OF JESSE ROBERSON ASSISTANT SECRETARY FOR ENVIRONMENTAL MANAGEMENT U.S. DEPARTMENT OF ENERGY BEFORE THE SUBCOMMITTEE ON ENERGY AND WATER DEVELOPMENT COMMITTEE ON APPROPRIATIONS U.S. SENATE APRIL 7, 2003, *at* http://www.em.doe.gov/doe/em/cda/content_detail_front_door/0,2119,14763_22306_23394,00.html (last visited July 10, 2005).

[197] Alvarez, *supra* note 107, at 31-35.

[198] ROBERSON, *supra* note 196.

[199] *See, e.g.*, Heart of Am., Nw., *at* http://www.heartofamericanorthwest.org/ (last visited July 10, 2005); Gov't Accountability Project (GAP), *at* http://www.whistleblower.org/ (last visited July 10, 2005). See also the recent GAP report on worker safety in the accelerated cleanup "tank farms"

citizens have paid, and will continue to pay, a hefty health and economic price for whatever sense of security has been produced by this ultra secret weapons enterprise.

CONCLUSION

If the public knows about security weaknesses at our nuclear facilities, the public is more likely to demand, and pay for, a quick and effective resolution to these problems. If, on the other hand, agency personnel or contractors sweep problems under the rug, the public is at the mercy of the agency or contractors' good faith to rectify the problem. Agency or contractor personnel working with limited budgets, concerned about looking bad and losing additional funding or control or, as with contractors, worried about losing bonus pay for getting projects finished ahead of schedule, may just as soon not deal with the problem, suppressing or covering up any internal reports of the problem to avoid any but a select few from knowing about it. The facilities remain vulnerable to accidents, terrorists and saboteurs, all without the affected public's knowledge.

"absolute power corrupts absolutely"

— Lord Acton[200]

A. Free access to information and right to know as a human right

In addition to the very clear advantages to information disclosure, including citizen pressure to eliminate the threat, the withholding of information may rise to the level of an abuse of human rights. The secret contamination of land, air and water by the Soviet government and the Cold-War era U.S. government demonstrate that withholding knowledge about exposures to deadly toxins and radionuclides bred a human and environmental health atrocity. Few would argue against the proposition that the Soviet government violated the human rights of its citizens while it contaminated the land and food and exposed its citizens to nuclear testing without their knowledge or consent. The Hanford "downwinders," Columbia Basin tribes and many other citizens living near nuclear production and test sites have also been exposed to toxins without their knowledge or consent, this, too, is arguably a violation of their human rights.

The FOIA, EPCRA and other public participation and right to know laws are both used by the public to keep communities safe from unwitting exposures to

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at Hanford. GAP, KNOWING ENDANGERMENT: WORKER EXPOSURE TO TOXIC VAPORS AT THE HANFORD TANK FARMS (Sept. 2003), *available at* http://www.whistleblower.org/ (last visited July 10, 2005).

[200] Letter from Lord Acton, to Bishop Mandell Creighton (1887).

toxins and to keep industry and government accountable for their actions. If the DOE had to disclose the toxic and radioactive compounds it was releasing into the air, water and soil during and after completion of the Manhattan Project at Hanford, a much more serious inquiry into costs and benefits of the manufacture and use of nuclear weapons would have been necessary, Cold War notwithstanding.

B. A democratic government must assure the coexistence of national security and environmental protection

Some scholars have suggested that it is the duty of our government to ensure that environmental protection and national security coexist. Ekundayo George, an attorney in private practice in New Jersey, argues from the premise that the purpose of the state is to provide for military security and for the social welfare; that military security and environmental protection, which is a part of social welfare, are entwined.[201] George notes that the U.S. has repeatedly sold out social welfare for military security, to our own detriment;[202] after all, what is left to secure and protect if the U.S. destroys the health of its environment and citizenry to be a military leader? As an example, George cites an in-progress National Cancer Institute and Centers for Disease Control study that suggests that tens of thousands of non-fatal cancers in the U.S. may be attributable to fallout from the above-ground nuclear testing conducted by the U.S., Britain and the Soviet Union in the mid-twentieth century.[203]

Public disclosure just makes sense. The history of the nuclear weapons operations in the U.S. and abroad is more than enough evidence that government officials in positions of power will not always use that power to the public's benefit. It is a recognized feature of human nature that many people would rather save their own reputation then take the blame for an embarrassing accident or incident. Thus, transparency in government is the necessary antidote to abuse of power and a fundamental tenet of a participatory legal system, like our democracy.

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[201] Ekundayo B. George, *Whose Line in the Sand: Can Environmental Protection and National Security Coexist, and Should the Government Be Held Liable for not Attaining This Goal?*, 27 WM. & MARY ENVTL. L. & POL'Y REV. 651 (2003).

[202] *Id.*

[203] *Id.* at 654 (citing NAT'L CANCER INST. & CTRS. FOR DISEASE CONTROL, FEASIBILITY STUDY OF THE HEALTH CONSEQUENCES TO THE AMERICAN POPULATION FROM NUCLEAR WEAPONS TESTS CONDUCTED BY THE UNITED STATES AND OTHER NATIONS (2003), *available at* http://www.cdc.gov/nceh/radiation/fallout/falloutreport.pdf (last visited July 10, 2005)).

"Democracy dies behind closed doors."

— Judge Damon Keith[204]

Hiding the problem also hinders clean-up, repairs and process changes to reduce vulnerability to attack and improve safety of employees and the surrounding community. One of the reasons we have the FOIA, OSHA and EPCRA is that we have decided that workers and communities have an inherent right to know, to make informed choices and take safety precautions based on where they live and work. Freedom of information and community right to know laws are also important to government accountability. Oversight organizations can keep tabs on agencies and elected officials to assure that they are doing their duties to protect public and environmental health. The public and agency administrations will have a basis to remove individuals who are not doing their job or are doing it poorly, replacing them with more responsible persons. The laws are also necessary to protect whistleblowers from reprisal and termination. It would be very difficult to prosecute a government employer for illegal retaliation if the government withheld all evidence of the events that led up to the whistleblowing and retaliation. An accountable government is more responsive to citizens' needs and freer of fraud, waste and other wrongdoing.

Finally, liberal policies on freedom of information and right to know are the very basis of improving the human living environment and community safety. In a democracy, government exists for the citizens. All branches of government ultimately serve the citizen and all branches are accountable to citizens. Governments must not withhold information from citizens, because citizens are the driving force behind improvement and reform. The U.S. cannot hide from the dangers in its environment. It cannot hide its vulnerabilities from its enemies forever. In order to reduce its vulnerabilities, it must improve safety, security and environmental pollution practices at its nuclear facilities. These improvements are most quickly and efficiently carried out when a single-minded populace demands it. National security does not depend on government's assurances that there is no danger, or that the government knows what is best for its citizens — national security depends on a populace able to make informed decisions about how do deal with hazards in our environment.

"The liberties of a people never were, nor ever will be,secure, when the transactions of their rulers may be concealed from them."

— Patrick Henry[205]

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[204] Detroit Free Press v. Ashcroft, 303 F.3d 681, 683 (6th Cir. 2002).

[205] Patrick Henry, June 9, 1788 (debating the adoption of the Federal Constitution).