

The NEPA "Nuclear Loophole" : The Homeporting Saga of the U.S.S. Missouri

by John McCaull

On July 4, 1987, San Francisco residents eagerly waited in line to tour the 58,000 ton U.S.S. Missouri battleship resting in the harbor. The battleship was anchored in the Bay prior to sailing for the Persian Gulf. This publicity event highlights San Francisco's ongoing struggle over the proposed "homeporting" of the Missouri Battle Group at Hunter's Point Naval Base in the San Francisco Bay. The controversy pits those who foresee substantial economic benefits for the city against those who fear serious environmental risks. There are several environmental problems with the homeporting scheme, but the most unaddressed problem could be the most serious. The U.S. Navy has admitted that the U.S.S. Missouri has nuclear weapons aboard. Yet the Navy is not willing, nor obligated by law, to discuss the environmental implications of these nuclear weapons.

As Representative Ronald Dellums (D-Ca.) stated in a San Francisco Chronicle editorial, the Missouri homeporting scheme is part of a nationwide plan (San Francisco Chronicle, Dec. 8, 1987, sec. A at 23. Hereafter Chronicle). The Navy intends to establish numerous homeport sites in populous cities around the country. The sites will form "Surface Action Groups" with nuclear capability. The plan was unveiled in 1982 by Navy Secretary John Lehman in conjunction with a goal to expand the Navy's fleet to 600 ships. San Francisco is merely beginning to contemplate the divisive issues which homeporting engenders, just as New York, Seattle, and Newport, R.I. have done recently.

THE NAVY'S COMPLIANCE WITH NEPA

The National Environmental Policy Act (NEPA) requires an Environmental Impact Statement (EIS) whenever a "major Federal action significantly affecting the quality of the human environment..." is proposed (42 U.S.C. sec. 4332(2)(C); NEPA sec. 102(2)(C)). NEPA's EIS requirement serves two important functions. The first function encourages federal agencies to incorporate environmental factors into their decision-making process. The second, informational function reassures and informs the public that environmental factors were considered when evaluating agencies' proposed actions.

The Hunter's Point plan creates environmental problems which the Navy has not addressed conscientiously. The Navy filed a complete EIS for

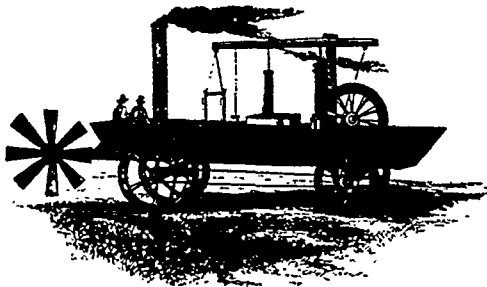
the proposal, which in late July, the Environmental Protection Agency (EPA) approved. The EPA stated that the project "would not significantly affect San Francisco Bay or threaten public health" (Chronicle, July 28, 1987, sec. A, at 2). The Navy's EIS focused on the necessary harbor dredging to accommodate the Missouri's deep hull and the cleanup of 30 or more hazardous waste sites permeating the Hunter's Point Naval Base (Id.). The EPA stated that the toxic wastes created "no imminent or substantial public health threat" and that no Superfund designation for the site was needed (Id.).

The EPA's cooperative acceptance of the Navy's EIS strongly contrasts the California State Department of Health Service's December 1987 cleanup order. The Department required the Navy to clean up the Bases's toxic sites which contained various levels of asbestos, heavy metals, PCBs, and solvents such as benzene and trichloroethylene (Chronicle, December 12, 1987, sec. A, at 7). Critics of the EIS charge that the statement paid scant attention to the possibility of nuclear accidents and gave insufficient opportunity for public notice and comment. This situation has occurred across the U.S. in cities where homeporting has been proposed.

HOMEPORTING THE U.S.S. IOWA IN NEW YORK CITY

New York City recently dealt with the homeporting issue. In 1985, various New York City Council members and an environmental coalition sued the U.S. Navy for failing to comply with NEPA requirements in their proposal to homeport the battleship U.S.S. Iowa and its escort-group at Staten Island's Stapleton Waterfront. Specifically, the suit charged that the Navy's EIS deficiently addressed environmental issues related to the ships' nuclear capability (Plaintiff's Complaint, Hudson River Sloop Clearwater, Inc. v. Dept. of the Navy, No. 85 Civ. 3137 (S.D.N.Y. 1987). For a virtually identical lawsuit, see also Hudson River Sloop Clearwater, Inc. v. Dept. of the Navy, 659 F. Supp. 674 (E.D.N.Y. 1987)). Although eventually dismissed by the court, the suit excellently summarizes the Navy's disregard for NEPA's goals and requirements.

The plaintiffs in Hudson requested injunctive and declaratory relief because the defendants "fail[ed] and refuse[d] to discuss any of the risks or potential



environmental impacts of a nuclear weapons accident" (Complaint at 20). The complaint alleged that the Navy violated numerous NEPA sections such as "worst case analysis of potentially catastrophic impacts" (40 C.F.R. sec. 1502.22(b)), "analysis of economic and social impacts" (40 C.F.R. sec. 1508.14. see also 40 C.F.R. sec. 1502.23; 32 C.F.R. sec. 775.9), and a thorough discussion of all reasonable alternatives to the proposed action (40 C.F.R. sec 1502.14; 32 C.F.R. secs. 214.4(b) & 775.3(b)(4)). These C.F.R. citations refer to NEPA's implementing regulations which the President's Council on Environmental Quality (CEQ) issued. These regulations are binding on all federal agencies, including the Department of Defense. The Navy's EIS maintained that for reasons of "national security," it could neither confirm nor deny the presence of nuclear weapons aboard the Iowa Surface Action Group's ships. This is also the Navy's stated policy regarding the U.S.S. Missouri's nuclear capability.

The district court dismissed Hudson on condition that the Navy file a supplemental EIS. This second EIS also failed to discuss the nuclear risks because the Navy again raised its national security shield and limited its disclosure responsibilities.

The legitimacy of the Navy's claim must be questioned. It is a matter of public, scholarly and Congressional record that the Navy is "reactivating [the] four Iowa-class battleships [the U.S.S. New Jersey, U.S.S. Iowa, U.S.S. Wisconsin, and U.S.S. Missouri] ... to be armed with Tomahawk sea-launched cruise missiles (SCLMs)." (Complaint at 20). Tomahawk SCLMs carry either high explosive or nuclear warheads which have a 1500 mile range and are primarily used for land attack purposes. In testimony before the House Armed Services Committee, Rear Admiral Stephen J. Hostettler, Director of the Joint Cruise Missile Project, said that all variants of the Tomahawk SCLM "will be deployed on the Iowa-class battleships and other naval platforms including cruisers and destroyers." (Complaint at 22). Other Navy officials have made similar unequivocal statements that the Iowa-class ships and their consorts are equipped with nuclear arms. These ships also carry other nuclear weapons such as Harpoon missiles and nuclear-tipped torpedoes.

WEINBERGER V. CATHOLIC ACTION OF HAWAII -- THE NAVY'S PRECEDENT

The Navy's "we don't need to talk about it" EIS policy regarding nuclear risks seems illogical,

dangerous, and in conflict with NEPA's mandate. Yet Supreme Court precedent exists which guts much of NEPA's force with respect to this issue. In Weinberger v. Catholic Action of Hawaii/Peace Education Project, 454 U.S. 139, 102 S. Ct. 197 (1981), the Supreme Court held that a Navy EIS need not address the impacts of federal actions exempted under the Freedom of Information Act (FOIA) (454 U.S. at 145). In this case, the Navy was enlarging the West Loch ammunition storage facility on Oahu, Hawaii. The Navy wanted a potential nuclear weapon storage facility.

As authority for the FOIA exemption, the Supreme Court cited NEPA sec. 102(2)(C) (Id. at 142) and stated "public disclosure of the EIS shall be governed by FOIA" (Id. at 144). The FOIA balances "the public's need for access to official information with the Government's need for confidentiality" (Id.). FOIA's Exemption One covers matters "that are ... specifically authorized under criteria established by an Executive Order to be kept secret in the interest of national defense or foreign policy" (5 U.S.C. sec. 552(b)(1) (1976)). Executive Order 12065, 3 C.F.R. 190 (1978-79 Comp.) confers authority upon specified government officials to exempt information for national security reasons (454 U.S. at 144), and "[v]irtually all information relating to the storage of nuclear weapons is classified" for such reasons (Id.). Thus, since nuclear weapons' locations are classified for national security reasons, this information is "exempt from the public disclosure requirements of NEPA" (Id. at 145).

The Court held that the Navy's EIS need not discuss contemplated projects, merely proposed projects (Id. at 146). "To say that the West Loch facility is "nuclear capable" is to say little more than that the Navy has contemplated the possibility that nuclear weapons ... may at some time be stored here. It is the proposal to store nuclear weapons ... that triggers the Navy's obligation to prepare an EIS" (Id.).

Due to FOIA, however, the Court stated that the Navy need not confirm or deny the presence of nuclear weapons at ammunition storage sites (Id.). Thus, the EIS requirement is never triggered because a storage proposal is never made.

The Supreme Court overruled the Ninth Circuit Court of Appeals' "hypothetical EIS" which would discuss the environmental effects of a project's nuclear weapons without admitting the weapons' presence (643 F.2d 569, 572 (9th Cir. 1980)). The Supreme Court ruled that a hypothetical EIS "departed from the express intent of Congress ... in [NEPA] sec. 102(2)(C)" (454 U.S. 139, 144).

Weinberger v. Catholic Action of Hawaii is poorly reasoned and should not release the Navy from NEPA's requirements. The Supreme Court's deference in this case to the national security classification is especially difficult to justify with respect to the Hunter's Point plan since the Missouri's nuclear capability has been admitted. The Court somehow concludes in Weinberger that if the Navy need not confirm or deny nuclear weapons' presence, then the action must be viewed as "contemplated"

rather than "proposed" (*Id.* at 146). Since NEPA only requires an EIS for proposed federal actions, the Court uses semantics to rule that the Navy is not required to prepare an EIS. Now with the U.S.S. Missouri, the "neither admit nor deny" argument and the national security blanket are being used again in order to avoid discussing potential nuclear accidents' environmental impacts.

THE MISSOURI PLAN -- A WASTE OF MONEY?

Ignoring the failure to discuss nuclear weapons, the Navy's Hunter's Point EIS insufficiently covers the cost-benefit and social-impact analyses. The Hunter's Point/Bayview area has an estimated unemployment rate ranging from 35 to 55%, and employment projections for the homeporting plan have reached as high as 7000 new positions (Chronicle, Oct. 21, 1987, sec. A, at 22). Former Mayor Dianne Feinstein (an ardent supporter of the homeporting plan) projected that the plan's enactment would lead to a \$255 million increase in the region's economy (Chronicle, July 4, 1987, sec. A, at 1). These brave forecasts, however, must be viewed alongside the Navy's Final Record of Decision for the Hunter's Point Plan, calculating a net loss of 180 civilian jobs due to the displacement of small businesses and artisans who rent in the naval yard.

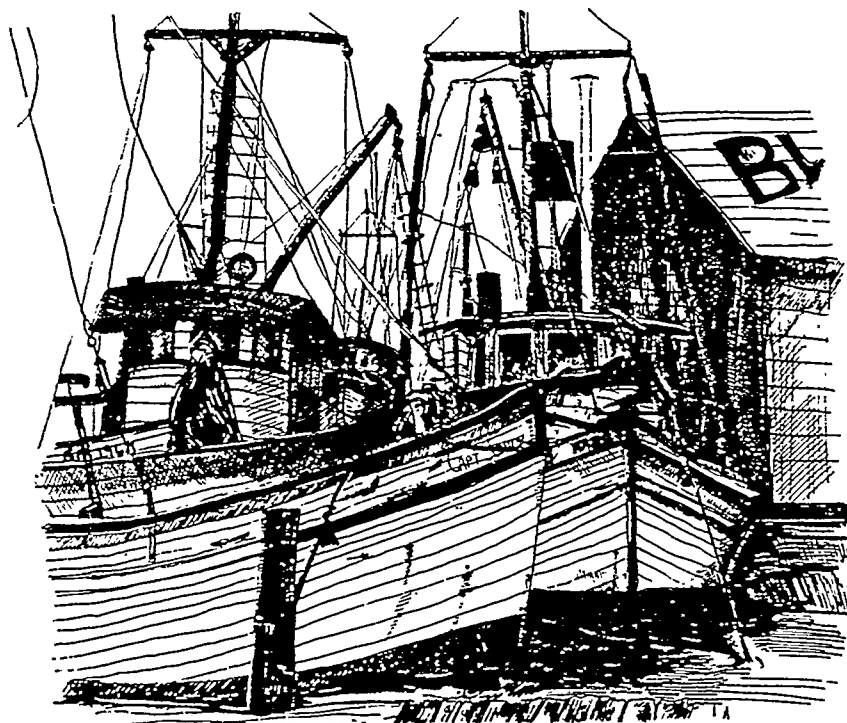
As with the U.S.S. Iowa EIS, the Navy's Hunter Point EIS fails to address several major economic costs. The costs of harbor dredging, hazardous waste cleanup, and tighter maritime controls for increased security are understated in the Navy's EIS. The economic justifications are further weakened by a General Accounting Office study mentioned in Rep. Dellums' editorial, which stated that sufficient ports existed for a 600 ship navy, and thus, new

berthing facilities are not needed (Chronicle, Dec. 8, 1987, sec. A, at 23). An Alameda County Report "assails" the Missouri plan's impact on local housing, schools, and employment, while raising serious questions regarding transportation of nuclear weapons through Alameda (Chronicle, Nov. 11, 1987, sec. A, at 4). The Navy's ship repair projections have been heavily criticized, and the "no action" alternative -- leaving the Missouri in its present Long Beach location -- was not discussed.

The most potentially dangerous and expensive problem with the Hunter's Point plan, however, is that Hunter's Point does not have nuclear weapon offloading facilities. This means that the Navy must utilize either Alameda Naval Air Station or Mare Island Naval Reservation in order to handle nuclear missiles. This expense alone makes the accuracy of the Navy's long-range operational cost scenarios dubious. The potential for nuclear accidents is also increased.

OUTLOOK FOR THE FUTURE

Rep. Dellums, the House Armed Services Subcommittee on Military Installation and Facilities Chair, was instrumental in defeating \$22.4 million of FY 1988 appropriations for the Hunter's Point plan. The military spending package which passed included homeporting funds for New York, Seattle, and Texas, but none for California. Senator Pete Wilson (R-Ca.) and former Mayor Dianne Feinstein have tried numerous political tactics to circumvent the funding prohibition with no success. Mayor Art Agnos is opposed to the plan, but the Board of Supervisors, the Navy, Sen. Wilson, and Ms. Feinstein have stressed that the San Francisco homeporting issue is not dead. Nationwide, the homeporting scheme is still very much alive, and in New York and Seattle, construction and dredging projects are already underway.



CONCLUSIONS

NEPA must obligate the Navy to publicly discuss (via the EIS process) potential impacts of the U.S.S. Missouri's nuclear weapons. The holding in Weinberger v. Catholic Action of Hawaii should apply only if a legitimate, undisclosed national security matter is involved. Why apply the national security exception to the Hunter's Point EIS when the Navy has already informed the public that the Iowa-class battleships carry nuclear weapons? Navy personnel have written articles and announced in Congress that the Missouri has nuclear missiles aboard. Therefore, the "neither admit nor deny" argument used to avoid NEPA's scope is defeated by the Navy itself!

The Navy's nationwide homeporting plan includes three justifications: 1) reducing vulnerability to a "Pearl Harbor" type attack, 2) increasing response readiness, and 3) revitalizing the ship repair business. (Chronicle, July 4, 1987, sec. A, at 1). San Francisco residents must decide if these somewhat suspect goals outweigh the environmental dangers the Hunter's Point plan will entail. With increasing national debt, the U.S. must carefully scrutinize an expensive homeporting plan. The Navy's bias and optimistic forecasts along with the Supreme Court's shortsighted

deference should not defeat common sense, jeopardizing San Francisco residents' safety.

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For information relating to New York City homeporting issues, contact Leonard Marks of Gold, Farrel & Marks at (212)481-1700.

John McCaull is a second year law student at King Hall. He received a B.A. degree in Political Science from the State University of New York, Genesco. John has spent time in Washington D.C. lobbying for nuclear arms control, and he feels that nuclear weapons are a threat to our environment.

Ecotage : Environmental Boon or Bane?

by Kerry Zachariasen

Radical grass roots organizations are currently kicking new activity and controversy into the environmental movement. Most local environmental groups operate with a philosophy similar to the large, professional environmental organizations in Washington D.C., pressuring authorities through traditionally accepted methods such as lobbying and leafleting. However, a new approach -- firebrand, radical environmentalism -- is drawing increasing attention. Often known as ecotage (or ecological sabotage by those who favor it and eco-terrorism by those who do not), this form of environmentalism directly and physically confronts the issues.

Environmental activity today covers a wide spectrum of approaches, philosophies, and strategies. Washington lobbying organizations (eg. Sierra Club, National Wildlife Federation, Wilderness Society) have become virtual corporations. These organizations handle complex litigation, introduce bills to Congress, and typically address broad problems such as ozone depletion, oil drilling, toxic waste, and acid rain. They play a vital role in environmental protection. Some see

this corporate character, however, as limiting the effectiveness of these organizations.

On a different level, national organizations work in a grass roots basis solving local problems directly within their communities. They work with farmers to develop conservationist farming techniques (Small Farmers Resources Project, Nebraska). They focus on groundwater contamination and municipal garbage burning (Environmental Task Force). They lobby in Washington and state capitols (American Farmland Trust). (243 Nation 368, 369 (Oct. 18, 1986)). These traditional grass roots environmental groups have had a significant impact on their local environments without causing controversy. The radical activities of groups such as Earth First!, however, have created tremendous controversy both in the public and within the environmental movement itself.

Earth First! is the most well known radical environmental group, although several other groups share similar strategies and ideals. Indeed, Earth First!'s motto expresses the basic underlying principle