

COMMENT

A POSTSCRIPT TO CALVERT CLIFFS'

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Of the abundance of environmental legislation recently enacted, the National Environmental Policy Act of 1969¹ (NEPA) continues to be the subject of much of the important litigation in the area of environmental protection.² In large measure, the current importance of NEPA directly results from the effect that its provisions have had, and will continue to have, on the activities and procedures of the Atomic Energy Commission (AEC). The significance of the connection between NEPA and the AEC unquestionably arises from the authority of the AEC to regulate the use of nuclear energy through its licensing power. Not only is the Commission authorized to regulate radiological pollution caused by the direct discharge of atomic wastes, but perhaps more importantly, the Commission is at least indirectly empowered to control the thermal pollution likely to result from the anticipated increased use of nuclear energy by the electric power industry.³ Traditionally, the Commission has appeared⁴ either unwilling

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¹ 42 U.S.C. §§ 4331 et seq. (1970).

² One need only look at the broad coverage the Act receives in this Special Issue of the Boston College Industrial and Commercial Law Review in order to realize its significance.

³ Thermal pollution results from the direct discharge of water used to cool atomic reactors back into its original source. The water of a river or a bay is usually utilized to cool the heated generators of the nuclear power plants; naturally, the water absorbs the heat, causing a significant temperature increase. When the used water is discharged into the body of water from which it was initially taken, the heat from the discharge is diffused through the water source thereby raising its temperature, in many cases, substantially.

As one might suspect, nuclear power plants are placed adjacent to these water sources in order to insure an ample supply of cooling water. In many instances, the most convenient location for the plant is next to an estuary area, which is normally sheltered by land and fairly shallow. These areas constitute the most favorable environmental context in which marine life may develop. For this context to exist, a delicate balance of atmospheric conditions must be maintained. A crucial factor in this delicate balance is the water temperature; any fluctuation of it can seriously disrupt, if not destroy, the context.

The discharge of heated water into the estuaries obviously affects the water source temperature and can consequently disrupt the estuary's delicate environment. As part of its responsibility in issuing licenses and permits, the AEC must take the necessary steps to minimize damage to the estuary environment. Although NEPA's requirement of an impact statement should alert the Commission to these dangers, the necessity for providing adequate amounts of electricity may counterbalance these precautions as the demand for power increases. Consequently, the role of the Commission in controlling thermal pollution will continue to be significant as additional power plants are constructed.

or reluctant to act in order to prevent the type of environmental damage which thermal pollution engenders. It is this reluctance which has alarmed many environmentalists.⁵

Recently, however, the United States Court of Appeals for the District of Columbia reviewed the practices and procedures of the Commission in the landmark decision of *Calvert Cliffs' Coordinating Committee, Inc. v. Atomic Energy Commission*.⁶ In finding that the procedures of the AEC failed to conform with the requirements of NEPA,⁷ the court provided encouragement to citizens anxious for change in the Commission's environmental posture. In essence, the decision mandated that the procedural requirements of NEPA must be complied with "to the fullest extent possible" by federal agencies under the Act's jurisdiction.⁸ More importantly, the court also found that the Commission had not acted in good faith in fulfilling these requirements, thereby suggesting that the courts do have authority, under the Act,⁹ to declare that an agency's procedures for determining environmental impact are inadequate, even though they may conform to the "letter" of the law.¹⁰

In the immediate aftermath of *Calvert Cliffs'*, it seemed certain that the newly declared necessity for procedural compliance with NEPA would guarantee to the public adequate disclosure of the environmental effects of all AEC decisions. This response was reinforced by both the AEC's failure to appeal the decision and the attitude of the new Chairman of the Commission, Dr. James R. Schlesinger. Prior to *Calvert Cliffs'*, the Commission had been committed to a policy of promoting nuclear energy and, consequently, the nuclear power industry.¹¹ The natural result of this policy was, of course, an intentional disregarding of environmental hazards of nuclear projects as well as a less than complete investigation of their potential dangers in order to lower industry costs. With the contemporaneous appointment of Chairman

For a detailed discussion of this problem, see Reis, *Environmental Activism: Thermal Pollution—AEC and State Jurisdictional Considerations*, at p. 633 *supra*.

⁴ See *New Hampshire v. AEC*, 406 F.2d 170 (1st Cir. 1969), cert. denied, 395 U.S. 962 (1969). In this case, the court accepted the Commission's argument that AEC responsibility extended only to radiological pollution. The possibility of thermal pollution resulting from a licensed nuclear power plant, the court decided, was not properly the responsibility of the Commission. 406 F.2d at 176.

⁵ This was the concern of the petitioners in *Calvert Cliffs' Coordinating Committee, Inc. v. AEC*, 449 F.2d 1109 (D.C. Cir. 1971).

⁶ *Id.* For a detailed discussion of the court's holdings, see Casenote, at p. 802 *infra*.

⁷ 449 F.2d at 1112.

⁸ *Id.* at 1114 and 1118.

⁹ *Id.* at 1115.

¹⁰ *Id.* at 1116.

¹¹ See Larson, *Present State and Future Outlook of Nuclear Power Generation in the United States*, 12 *Atomic Energy L.J.* 274, 292-93 (1970); see also *N.Y. Times*, Oct. 21, 1971, at 1, col. 5.

Schlesinger and the decision in *Calvert Cliffs*, the Commission publicly announced a shift in policy away from solely promoting the industry and toward "serving the public interest."¹² Indeed, at this point, it appeared to environmentalists that the Commission was finally moving in the right direction.

Since then, however, a number of events have dramatically affected both the improved method¹³ of disclosing nuclear energy hazards, engendered by *Calvert Cliffs*, and NEPA itself. Although the AEC promulgated new regulations governing its investigating procedures subsequent to *Calvert Cliffs*—a matter that this comment will consider further—a series of later court decisions regarding the nuclear test at Amchitka Island has clouded the meaning and impact of NEPA, perhaps permanently impairing its effectiveness as regards nuclear pollution control.

I. THE NEW REGULATIONS

In September, 1971, the Commission responded to the order of the *Calvert Cliffs* court by filing new procedures for investigating the environmental impact of projects either requiring the approval of or undertaken by the AEC.¹⁴ Specifically, the procedures were drafted to conform to the stringent requirements of NEPA. In *Calvert Cliffs*, the court had focused its review on the inadequacies of AEC procedures in considering the environmental impact of projects and activities within AEC jurisdiction. Although the case was concerned solely with the Commission's procedures regarding the necessity of raising environmental information during a Commission hearing on a proposed

¹² Id. In the preface to its new regulations, the Commission stated that it "intends to be responsive to the conservation and environmental concerns of the public." 36 Fed. Reg. 18071 (Sept. 9, 1971).

¹³ The improved method of disclosure actually consists of the "detailed statement" requirements of NEPA and their rigorous judicial enforcement. The "detailed" or impact statement is compiled by the agency which is carrying out, or has authority over, the action or activity which may have an impact on the environment. The statute requires that the detailed statement include information regarding:

- (a) the environmental impact of the proposed action;
- (b) any adverse environmental effects which cannot be avoided should the proposal be implemented;
- (c) alternatives to the proposed action;
- (d) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity; and
- (e) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

42 U.S.C. § 4332(2)(c)(i)-(v) (1970). Rigid enforcement of these requirements, it is argued, will increase the likelihood of disclosure of nuclear energy hazards. See discussion in text at note 37 infra.

¹⁴ The new procedures are compiled in 36 Fed. Reg. 18071 (Sept. 9, 1971) and 36 Fed. Reg. 19158 (Sept. 30, 1971).

project,¹⁵ the implications of the decision logically extend to other procedures of the Commission as well as to those of other federal agencies.

As prescribed by NEPA, the requirements imposed on AEC procedures are designed to insure the agency's accumulation and assessment of environmental information with regard to the particular project currently under agency consideration. Of the procedural requirements mandated by the Act, the requirement that the agency must prepare an impact statement has been construed by the courts¹⁶ as the most important in disclosing potential environmental danger. In light of these decisions and the general mandate of *Calvert Cliffs*, the Commission has moved to improve its procedures for gathering both information and opinions for inclusion in the impact statement.¹⁷

Prior to *Calvert Cliffs*, AEC procedures permitted the Commission to defer to the findings of other agencies in regard to the probable impact of a proposed project.¹⁸ Consequently, the AEC often refrained from conducting its own investigation in areas which it believed were within the domain of other agencies. The new procedures,

¹⁵ The court indicated that it was concerned with "specific parts" of the Commission's procedural rules. The court summarized the rules as follows:

(1) Although environmental factors must be considered by the agency's regulatory staff under the rules, such factors need not be considered by the hearing board conducting an independent review of staff recommendations unless affirmatively raised by outside parties or staff members. (2) Another part of the procedural rules prohibits any such party from raising non-radiological environmental issues at any hearing if the notice for that hearing appeared in the Federal Register before March 4, 1971. (3) Moreover, the hearing board is prohibited from conducting an independent evaluation and balancing of certain environmental factors if other responsible agencies have already certified that their own environmental standards are satisfied by the proposed federal action. (4) Finally, the Commission's rules provide that when a construction permit for a facility has been issued before NEPA compliance was required and when an operating license has yet to be issued, the agency will not formally consider environmental factors or require modifications in the proposed facility until the time of the issuance of the operating license. Each of these parts of the Commission's rules will be described at greater length and evaluated under NEPA in the following sections of this opinion. 449 F.2d at 1116-17.

¹⁶ A number of recent cases have emphasized the necessity for agency issuance of adequate impact statements before agency action may be taken or approval of projects granted. See, e.g., *Kalur v. Resor*, 335 F. Supp. 1, Civil No. 1331, 3 E.R.C. 1458 (D.D.C. Dec. 22, 1971) (holding that the Army Corps of Engineers must file impact statements before issuance of discharge permits under the Refuse Act of 1899); *New York City v. United States*, — F. Supp. —, 40 U.S.L.W. 2474 (E.D.N.Y. Jan. 20, 1972) (ICC must file impact statement before permitting abandonment of New York harbor railroad operations); *Green County Planning Bd. v. FPC*, — F.2d —, 40 U.S.L.W. 2521 (2d Cir. Jan. 17, 1972) (Federal Power Commission must issue detailed environmental impact statement before its hearing examiners recommend initial approval of major power projects affecting the environment).

¹⁷ The preface to the new regulations indicates that AEC changes will be made in preparing impact statements. See 36 Fed. Reg. 18071 (Sept. 9, 1971).

¹⁸ 10 C.F.R. § 50, App. D at 249 (1971).

in contrast, recognize the Commission's responsibility to investigate numerous environmental impacts, including those which may affect thermal and other water quality standards.¹⁹ Moreover, the Commission will henceforth submit the relevant impact statement to those federal agencies designated by the Council on Environmental Quality as having "jurisdiction by law or special expertise with respect to any environmental impact involved."²⁰ This procedure should help insure that the impact statement will include essential information concerning environmental impacts and, at the same time, it will assist the Commission in assessing all environmental factors before reaching a decision.

In making its assessment, the Commission will now also consider the suspension of certain construction permits and licenses, pending NEPA environmental review.²¹ Prior to the *Calvert Cliffs'* decision, the AEC had refused to reconsider projects which had been authorized previous to the enactment of NEPA.²² The new regulation makes all the licenses and permits of projects authorized prior to NEPA's effective date vulnerable to suspension and review.²³ Furthermore, the new rule also indicates that the Commission will interrupt the construction of any nuclear facility at any time to reassess its environmental impact and, if the review merits it, the Commission will order the adoption of an alternative course of action for the facility.²⁴

This latter procedure, in particular, is indicative of the Commission's policy shift in paying greater heed to the public interest. Obviously, any Commission action that interrupts or forestalls the construction of a nuclear facility will increase its financial cost. This additional expense will, in large measure, be borne by the industry over which the Commission had, until recently, extended protective umbrage.

In spite of their positive tone, however, the new regulations provide at least one procedure which ignores the mandate of NEPA.

¹⁹ The environmental report of the applicant, upon which the Commission will draft its preliminary detailed statement,

shall include a discussion of the status of compliance of the facility with applicable environmental quality standards and requirements . . . which have been imposed by Federal, State, and regional agencies having responsibility for environmental protection. In addition, the environmental impact of the facility shall be fully discussed with respect to matters covered by such standards and requirements *irrespective of whether a certification from the appropriate authority has been obtained.* . . .

³⁶ Fed. Reg. 18073 (Sept. 9, 1971) (emphasis added).

²⁰ *Id.*

²¹ *Id.* at 18075. This regulation pertains to permits issued prior to January 1, 1970—the effective date of NEPA.

²² 449 F.2d at 1117.

²³ 36 Fed. Reg. 18075 (Sept. 9, 1971).

²⁴ *Id.*

Section D. 3 of the new regulations permits the operation of a nuclear plant at twenty percent or more of its full operating power where the Commission gives prior approval even though the AEC has not yet completed its NEPA environmental review.²⁵ Although the regulation permits this operation only "in emergency situations or [in] situations where the public interest so requires,"²⁶ the rule effectively permits operation without the submission of an impact statement. Several organizations challenged the adequacy of this AEC regulation in *Izaak Walton League v. Schlesinger*.²⁷ There, the petitioners alleged that the Commission, while in the process of conducting an environmental review, authorized the operation of a nuclear plant at a level which would cause a significant, adverse impact on the quality of the environment.²⁸ In finding against the Commission,²⁹ the court unequivocally affirmed the policy of NEPA:

The requirement that all federal agencies prepare . . . [a] detailed statement prior to the taking of action which may have a significant impact on the environment is . . . mandatory . . . and must be performed in all circumstances prior to the taking of [such] agency action.³⁰

It is hoped that the court's reiteration of NEPA's mandate has closed this potentially dangerous "loophole" in the new regulations. In a broader sense, as a result of this decision, the regulations may now be viewed as having moved closer to guaranteeing full Commission compliance with the provisions of the Act.

While the new procedures in general and the stated shift in the Commission's policy both seemed to provide encouragement for a better regulatory control of the dangers connected with nuclear energy production, a cloud from the blast at Amchitka Island has, at least for the moment, obscured the true course of these changes. Whether the cloud will permanently obstruct NEPA's effectiveness is not yet certain. Although a review of the judicial proceedings which preceded the Amchitka nuclear test is unlikely to alleviate this uncertainty, such an analysis does indicate the type of challenges which NEPA may have to endure in future litigation.

²⁵ *Id.*

²⁶ *Id.*

²⁷ 337 F. Supp. 287, Civil Nos. 2207 and 2208, 3 E.R.C. 1453 (D.D.C. Dec. 22, 1971).

²⁸ The plant in this case would operate at nearly 50% of its capacity. *Id.* at 294.

²⁹ The court found that there was a substantial showing of noncompliance with NEPA and therefore enjoined the Commission from issuing an operating permit.

³⁰ 3 E.R.C. at 1455.

II. THE AMCHITKA LITIGATION

In early 1971, the Nixon Administration, in conjunction with its proposed Safeguard missile system, obtained congressional authorization for the underground detonation of a nuclear device on Amchitka Island, Alaska.⁸¹ The responsibility for conducting the test fell to the AEC and, in connection with its responsibilities, the Commission drafted an impact statement. Shortly after the details of the proposed test were made public, numerous environmental protection groups⁸² as well as the Canadian government⁸³ began a series of efforts aimed at preventing the test. Of these, the one which attracted the most public attention—and the one which deserves our consideration for its probable effect on NEPA—consisted of a series of suits petitioning federal courts to enjoin the blast.⁸⁴ The complaints in this series of cases focused on the narrow issue of the inadequacy of the AEC's impact statement. The petitioners alleged that the impact statement did not contain relevant data and reports from members of other federal agencies.⁸⁵ This information, it was alleged, recommended against the Amchitka test "specifically because of [its] potential harm to the environment."⁸⁶

As with the AEC hearing procedure questioned in *Calvert Cliffs*, the adequacy of the environmental impact statement required by

⁸¹ The congressional approval came in the form of appropriations for the blast. Congress, however, barred the test before mid-1972 unless the President authorized it. The President gave his authorization for the blast on October 27, 1971. N.Y. Times, Oct. 28, 1971, at 1, col. 5.

⁸² See *id.*

⁸³ *Id.* The Canadian government applied diplomatic pressure on the Secretary of State to cancel the test.

⁸⁴ The New York Times reported that seven environmental organizations filed legal action to stop the blast. *Id.* For purposes of this comment, the analysis will focus on the series of appeals waged in the suit brought by the Committee for Nuclear Responsibility, Inc.

⁸⁵ Committee for Nuclear Responsibility, Inc. v. Seaborg, — F.2d —, Civil No. 71-1732 at 2-3 (D.C. Cir. Oct. 5, 1971).

In the Appendix to his dissenting opinion in Committee for Nuclear Responsibility, Inc. v. Schlesinger, 404 U.S. 917, 92 S. Ct. 242 (1971), Justice Douglas set forth the data and reports which the Commission had failed to include in its impact statement. The reports in question included those from:

- (a) Russell Train, Chairman of the Council on Environmental Quality;
- (b) Edward E. David, Jr., Director of the Office of Science and Technology;
- (c) William D. Ruckelshaus, Administrator of the Environmental Protection Agency;
- and
- (d) Glenn T. Seaborg, Chairman of the Atomic Energy Commission.

404 U.S. at 920, 92 S. Ct. at 244.

As note 45 *infra* indicates, these reports did contain information which questioned the safety of the blast.

⁸⁶ Committee for Nuclear Responsibility, Inc. v. Seaborg, — F.2d —, Civil No. 71-1732 at 8-9 (D.C. Cir., Oct. 5, 1971).

NEPA compelled the courts in these cases to make a highly sensitive determination. An adverse determination regarding the breadth of NEPA's mandate could undermine the purpose of the Act and curb its effectiveness. The well-recognized purpose of the impact statement, in addition to its presentation of alternative courses of action, is to guarantee disclosure of all the possible effects the proposed action may have on the environment.³⁷ A corollary purpose, inherent in the provisions of the requirement, is to alert both the agency and the public to any potential dangers, so that appropriate preventative³⁸ or remedial³⁹ action may be taken by the agency.⁴⁰ Consequently, administrative or judicial justification for excluding relevant information or expert opinions from the impact statement must, in most cases,⁴¹ curb the Act's effectiveness in fostering adequate disclosure. In all of the decisions⁴² concerned with the AEC's compliance with NEPA, the respondent-Commission argued that certain environmental reports⁴³ need not be included in the impact statement, and that the petitioner should not have access to them through discovery proceedings. The basis for their exclusion, it was contended, was legitimately grounded in the agency's discretion under the Act, for reasons of national defense and security, and the executive privilege.

A. *The Lower Court Decisions*

In the first of these cases,⁴⁴ the Circuit Court of Appeals for the District of Columbia was asked to review the granting of a motion for summary judgment in favor of the respondent Commission. Here, the petitioner, the Committee for Nuclear Responsibility, had sought to use discovery proceedings in order to examine reports which the AEC had refused to include in its impact statement.⁴⁵ The petitioner con-

³⁷ 449 F.2d at 1114.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.* This action may be either voluntary or involuntary, if compelled by court order.

⁴¹ An exception, of course, would be where an irresponsible opinion is excluded—its exclusion would not curb the breadth of disclosure made in the impact statement. One of the courts which reviewed the Amchitka petition rather summarily made this point. See *Committee for Nuclear Responsibility, Inc. v. Seaborg*, — F.2d —, Civil No. 71-1732 at 7-8 (D.C. Cir., Oct. 5, 1971). The court, however, did not indicate what the test of an "irresponsible opinion" should be. *Id.*

⁴² Several appeals were taken from *Committee for Nuclear Responsibility, Inc. v. Seaborg*. The relevant decision will be fully cited to each separate case when specifically discussed in the text.

⁴³ For a list of these reports see note 35 *supra*. See also note 45 *infra*.

⁴⁴ *Committee for Nuclear Responsibility, Inc. v. Seaborg*, — F.2d —, Civil No. 71-1732 (D.C. Cir., Oct. 5, 1971).

⁴⁵ See note 35 *supra*. Among the reports, the memorandum opinion of Russell Train, Chairman of the Council of Environmental Quality, indicated that the likelihood of an earthquake resulting from the blast could not be totally dismissed. See 92 S. Ct. at 246-47.

tended that the Commission's failure to include these reports violated NEPA's provisions. While carefully noting the Commission's discretion to include only responsible opinions in its impact statement, the court also emphasized that the AEC impact statement procedure should comply in "good faith" with the requirements of the Act.⁴⁶ The emphasis of the court on the "good faith" of AEC compliance with NEPA's provisions seemed both to echo the mandate of *Calvert Cliffs* and to reaffirm the validity of the holding in that case. In the closing sentence of the opinion, however, an ominous note was sounded: the right of the petitioner to continue his discovery on remand, the court indicated, was "subject of course to the possible interposition of valid claims of *privilege*."⁴⁷

As expected, the Commission did raise the "executive privilege" argument to exclude certain reports and data from the petitioner's discovery procedures.⁴⁸ The Commission not only interposed the privilege, but also argued in both the district and circuit courts that the privilege was absolute. In effect, the Commission asserted that it could invoke this privilege without having to consider the benefit to the public in providing access to the privileged information.⁴⁹ On appeal, the circuit court tersely rejected the Commission's contention: "[i]n our view, this claim of absolute immunity for documents in possession of an executive department or agency, upon the bold assertion of its head, is not sound law."⁵⁰

Although the court found the privilege to be limited, this limitation will likely not lessen significantly its detrimental impact on

⁴⁶ Committee for Nuclear Responsibility, Inc. v. Seaborg, — F.2d —, Civil No. 71-1732 at 8 (D.C. Cir., Oct. 5, 1971).

⁴⁷ Id. at 9.

⁴⁸ Committee for Nuclear Responsibility, Inc. v. Seaborg, — F.2d —, Civil No. 71-1854 (D.C. Cir., Oct. 28, 1971).

⁴⁹ Wigmore provides the classic definition of privileged communications in his treatise on Evidence. The privilege may be recognized in judicial proceedings, he asserts, when the four following conditions are met:

- (1) The communications must originate in a *confidence* that they will not be disclosed.
- (2) This element of *confidentiality must be essential* to the full and satisfactory maintenance of the relation between the parties.
- (3) The *relation* must be one which in the opinion of the community ought to be sedulously fostered.
- (4) The *injury* that would inure to the relation by the disclosure must be greater than the benefit thereby gained from correct disposal of the litigation.

8 J. Wigmore, Evidence § 2285, at 527 (McNaughton rev. 1961). Of these conditions, the fourth is obviously the one which attempts to balance the injury to the relations between members of the Executive branch and the benefit to the public in having the information disclosed. The government's argument thus focused on the absolute privilege of executive officials to communicate with each other without the possibility of compelled disclosure of their communications during judicial proceedings.

⁵⁰ Committee for Nuclear Responsibility, Inc. v. Seaborg, — F.2d —, Civil No. 71-1854 at 7 (D.C. Cir., Oct. 28, 1971).

NEPA's effectiveness. This conclusion logically results from an analysis of the investigation which a court must undertake in order to determine whether the privilege should be available. Normally, in making this determination, the court must balance the benefits of putting the information into the hands of the public against the detriment to the party who raises the privilege—in this case the Executive.⁵¹ In most instances, the Executive, including administrative agencies, can proffer a strong argument, based on national defense needs, for recognizing the privilege. The area of nuclear energy, in particular, provides an obvious context in which this argument may be raised. Furthermore, this context is not limited solely to nuclear activity directly related to the production of armaments for national defense, as was the blast at Amchitka Island. Quite conceivably, the government could argue that huge nuclear power plants are of vital importance in maintaining a minimum level of domestic security and prosperity because of the power they produce. Their role, it could be argued, is so essential to these goals that extensive disclosures of nuclear plant operating procedures or construction plans could render them vulnerable to sabotage. Any court burdened with the responsibility of assessing these contentions would likely be inclined to sustain the privilege in order to insure against possible danger to the national electric power system.

When viewed in terms of NEPA's disclosure requirements in the impact statement, these possible uses of the executive privilege, even though limited, portend an uncertain future for the Act. These possibilities suggest that the executive privilege must be construed narrowly if the Act is to be rescued from impotence. A solution which would adequately preserve the salutary effect of NEPA's provisions and, at the same time, assure national security will have to separate the material contained in the "security" document into "discoverable" environmental and "classified" defense categories. Although some material, as a result of natural overlap, will not be easily classified along these lines, the courts in such circumstances must assume the responsibility of scrutinizing the "top secret" label in order to make certain that it is justified.

B. *The Supreme Court Decision*

To some degree the Supreme Court was confronted with this responsibility in the Amchitka case, *The Committee for Nuclear Responsibility, Inc. v. Schlesinger*.⁵² Although the narrow issue presented to

⁵¹ See condition (4) in *supra* note 49. The relation of which that condition speaks consists of the relations between various members of the Executive.

⁵² 404 U.S. 917, 92 S. Ct. 242 (1971).

the Court in a special Saturday session was whether the Court should enjoin the blast pending completion of the petitioner's discovery proceedings, the Court's decision to deny the injunction ominously indicates the Court's unwillingness to assume this responsibility.

During oral argument on behalf of the Commission, Mr. Justice Brennan specifically asked the Solicitor General the question: "assuming that the environmental impact statement was deficient, and assuming therefore the blast was illegal, do you still take the position that the Court should allow the blast to take place and deny the injunction?"⁵³ The Solicitor General answered affirmatively, on the grounds that Congress had allocated 200 million dollars for the blast and that the President had approved of the nuclear test. At another point in his argument, the Solicitor General responded to a question concerning the financial cost of delaying the test by replying that the costs would be increased geometrically for every day of delay.

The denial of the request for the injunction by the narrow margin of a 4-3 vote seemingly indicates that the Court weighed other factors besides the blast's violation of NEPA. The Court undoubtedly had to consider the narrow issue of whether to grant equitable relief in the form of an injunction restraining the test. It is quite conceivable that in regard to this issue the Court did observe the requirements of NEPA and at the same time adopted the reasoning of the circuit court of appeals in this same case.⁵⁴ The circuit court had concluded that "[w]hile we deny preventive relief, it should be clear that plaintiffs may yet prevail in their claim that the AEC failed to comply with NEPA in approving the [Amchitka] test."⁵⁵ Although the case presented "a substantial question as to the legality of the proposed test . . . [the court reasoned that] it [did] not necessarily follow that the plaintiffs [were] entitled to an injunction against the test."⁵⁶ Specifically, then, the court of appeals decision recognized that an injunction would be issued only where there was a showing that irreparable harm would otherwise result. Because of the "meager state of the record" before it, the court felt constrained to refuse an injunction;⁵⁷ it is not unlikely that the Supreme Court may have felt similarly constrained.

Beyond the narrow question of equitable relief, a more fundamental issue may have concerned the Supreme Court in the Amchitka case—namely, the possible collision between the three branches of Amer-

⁵³ My account of the oral argument in this case is based on my own perceptions and on notes I made while sitting in the gallery during the special session.

⁵⁴ *Committee for Nuclear Responsibility, Inc. v. Seaborg*, — F.2d —, Civil No. 71-1869 (D.C. Cir., Nov. 3, 1971).

⁵⁵ *Id.* at 5.

⁵⁶ *Id.* at 3.

⁵⁷ *Id.* at 5.

ican Government: the staging of the blast at Amchitka was not solely an AEC decision; the President had expressly approved it and the Congress had appropriated the funds for its execution.⁵⁸ The unequivocal approval of the test by both the Executive and Legislative branches may well have affected the Court's decision. Thus, in the majority's view, the Court's intervention at this considerably late stage in the test preparations might well have been criticized by the other branches as an over-reaching by the judiciary neither necessary nor desirable in light of the circumstances surrounding the blast.

It is also conceivable that the Court balanced the benefits of disclosing the information contained in the "top secret" documents with the detriment—in financial cost and the weakening of national security—to the Executive if disclosure were to be made. Since there was no written majority opinion in this case,⁵⁹ the view that the Court effected a careful balancing of interests in regard to executive privilege is, of course, somewhat conjectural. If not explicitly, the decision at least indirectly contravenes the holding and spirit of *Calvert Cliffs'* that "if the [AEC] decision [under NEPA] was reached procedurally without individualized consideration and balancing of environmental factors—conducted fully and in good faith—it is the responsibility of the courts to reverse."⁶⁰ Mr. Justice Douglas, in a written dissent, quoted this portion of the *Calvert Cliffs'* opinion;⁶¹ conceivably and unfortunately, his reiteration may indicate that the Court did in fact consider the impact of NEPA but nonetheless found that its reach did not extend to the reports and documents cloaked behind the executive privilege.

CONCLUSION

A review of the litigation relating to the Amchitka blast leads to one clear conclusion: these decisions have not given the procedural provisions of the National Environmental Policy Act the broad application which the *Calvert Cliffs'* court recognized as necessary and proper. Whether this conclusion reflects the manner in which the Act will be construed in future cases is speculative at present. It is possible, however, that the Act's environmental policy may be disregarded, as apparently it was in the Supreme Court decision, whenever the government can persuasively argue that national defense and security would be threatened.

Continued governmental reliance on this argument, and on the executive privilege, in order to avoid compliance with NEPA's provi-

⁵⁸ See discussion in note 3 supra.

⁵⁹ Mr. Justice Douglas submitted his dissent in writing.

⁶⁰ 449 F.2d at 1115.

⁶¹ 404 U.S. at 918, 92 S. Ct. at 243.

sions also seems likely. In matters of national defense, it could be argued that public disclosure of certain information regarding nuclear activity could prove damaging; this argument undoubtedly will be relied on in those cases. Unquestionably, use of nuclear power for domestic purposes will increase, particularly in the electric power industry. As the demand for power grows, a concomitant demand for the construction of nuclear power plants may well cause the Commission to be less exacting in investigating their environmental impacts. If the public is denied access to environmental information by federal agencies, and if the assertion of the executive privilege prevents disclosure by judicial order, then the dangers of thermal pollution will likely grow unabated. At this juncture, for purposes of needed clarification, another case is necessary; one which, unlike the Amchitka litigation, will squarely present to the Supreme Court the question of the reach of NEPA's provisions. Only a reaffirmation of the principles of *Calvert Cliffs* by the Court will restore to the Act the degree of effectiveness it was once believed to possess.