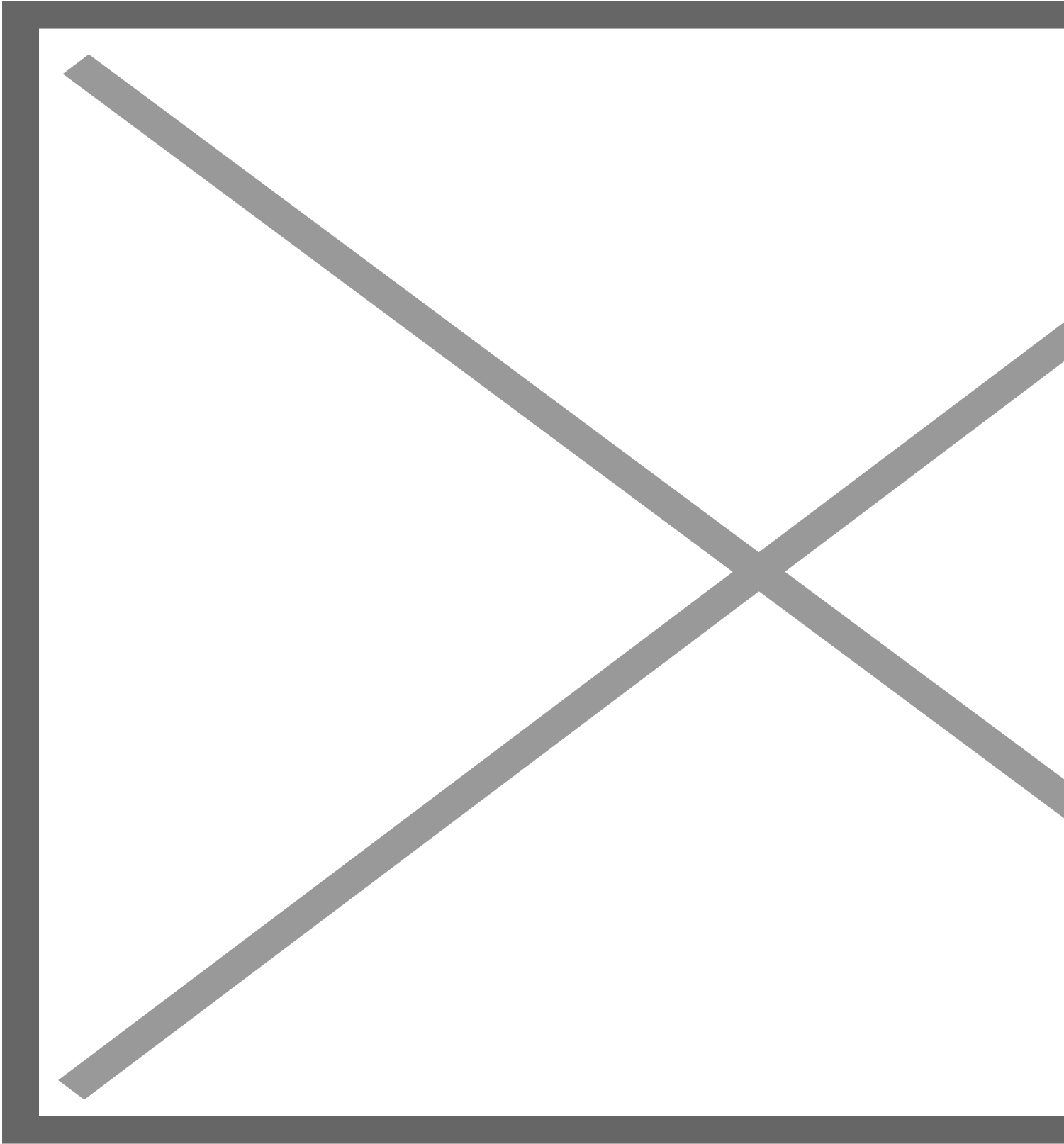


## **NEPA Violations Did Not Undermine Validity of EIS for Nuclear Missile Maintenance Facility**

The Ninth Circuit rejected challenges to the Navy's plans to construct a new nuclear missile maintenance facility. Although the court found that the Navy had violated NEPA by failing to adequately disclose information in the environmental impact statement, it held that these violations were harmless because they would not have improved public participation or changed the Navy's decisionmaking. [\*Ground Zero Center for Non-Violent Action v. U.S. Department of the Navy\*](#) (9th Cir. No. 14-35086, June 27, 2017). **Background** The plaintiffs challenged the Navy's plans to construct a new wharf for maintenance of nuclear missiles at Naval Base Kitsap in Bangor, Washington, alleging that the Navy had violated NEPA. The Navy had redacted three of the appendices to the EIS in their entirety on the ground that they contained sensitive information relating to nuclear material. During the litigation, however, in response to public records requests or as part of the administrative record, the Navy released significant information that had not been previously disclosed in the EIS. This included portions of the EIS appendices that had been redacted when the EIS was published. The new documents indicated that the Department of Defense Explosives Safety Board had rejected the proposed project because of concerns regarding the risk of an explosion. However, the Navy had received an exemption from the Secretary of the Navy allowing it to proceed with construction without conducting additional safety studies required by the Safety Board.



The plaintiffs argued that the Navy had violated NEPA by (1) redacting the portions of the EIS appendices that it later released publicly, (2) not adequately disclosing the project's risks and the Safety Board's disapproval, and (3) not evaluating reasonable alternatives in the EIS. The district court granted summary judgment for the Navy on the plaintiffs' NEPA claims. The district court also sealed portions of the record that contained classified and controlled information that the Navy had inadvertently disclosed, and ordered the plaintiffs not to discuss or reference any of those documents in a court hearing and not to further disseminate those documents. The

plaintiffs appealed to the Ninth Circuit. **NEPA Claims** First, the plaintiffs argued that the Navy violated NEPA by not disclosing the appendices when it published the EIS. NEPA requires that an agency disclose information, including appendices to an EIS, "to the fullest extent possible." The Freedom of Information Act (which applies to NEPA), however, contains an exception for disclosing sensitive nuclear information if it "could reasonably be expected to have an adverse effect" on public safety or security. The Ninth Circuit agreed with the plaintiffs that the Navy violated NEPA by redacting the appendices in their entirety. The court explained that the Navy's subsequent disclosure of portions of the appendices during the litigation indicated that material should have been disclosed in the EIS. The court concluded, however, that the Navy's NEPA violation was harmless because the plaintiffs did not demonstrate that information in the appendices would have made a difference in the Navy's decisionmaking or public participation. Second, the plaintiffs argued that the EIS should have disclosed that the Safety Board had rejected the Navy's proposal. The court observed that the Navy was not necessarily required to disclose the Safety Board's risk analysis, because the Safety Board has a mandate to assess "maximum possible protection" whereas NEPA requires analysis only of "reasonably foreseeable" risks. The court held that the EIS was not required to discuss the Safety Board's concerns because the risk of explosion was so remote that it fell below NEPA's "reasonably foreseeable" standard. The court also held, however, that the EIS should have disclosed the Safety Board's comments as part of the Navy's required interagency consultations, because NEPA requires that an EIS make available the results of its required consultations with other agencies. Here again, though, the court held that the Navy's NEPA violation was harmless. The court explained that public participation would not have been measurably enhanced because the Safety Board's risk assessment concerned risk levels that the Navy was not required to discuss in the EIS. Third, the plaintiffs argued that the alternatives considered in the EIS were too narrow because, except for the no-action alternative, they all involved constructing an explosives wharf in the same location, and they differed only in construction and design details. The court explained that the Navy had "considerable discretion" to define the project's purpose and need. The court held that the alternatives in the EIS were reasonable because constructing a new wharf was the only way to meet the project's goals of increasing the operational capacity of its nuclear missile maintenance facilities at Kitsap, and no other location at Kitsap was feasible. **The Gag Order** The plaintiffs argued that the district court's nondisclosure order was unconstitutionally vague and was an unconstitutional restraint on free speech in violation of the First Amendment. Drawing on the law regarding discovery protective orders and prior restraints, the Ninth Circuit concluded that a court may restrict a litigant from disseminating documents that it obtained from public filings that were later sealed if the court identifies "a compelling reason" and "articulate[s] a factual basis for its ruling without relying on hypothesis or conjecture." The court remanded to the district court to determine whether this standard could be met. **Conclusion** The Ninth Circuit held that although the Navy had violated NEPA in two ways—by failing to adequately disclose information in the EIS appendices and by failing to disclose the results of the Safety Board's interagency consultation—both violations were harmless because they would not have improved public participation or changed the Navy's decisionmaking. The decision reaffirms that violations of NEPA do not undermine the validity of an EIS unless they materially impede NEPA's goals by causing the agency to be less than fully aware of the environmental consequences of the proposed action or by otherwise materially affecting the substance of the agency's decision.

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