

# CITIZEN RESISTANCE TO CHEMICAL WEAPONS INCINERATION: CAN NEPA GIVE LOCAL COMMUNITIES LEVERAGE OVER MILITARY ARMS DECOMMISSIONING PROGRAMS?

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**Abstract:** Thousands of tons of chemical weapons are currently being stored in eight locations across the United States. Both a congressional act and an international treaty require the U.S. Army to destroy these chemical weapon stockpiles. The Army plans to use on-site incineration to destroy the weapons stored at four of these sites, and it has recently decided to use non-incineration processes to destroy the chemical agents stored at the other four sites. Two recent cases have been filed challenging the Army's decision to continue pursuing incineration at half of the sites, alleging that the Army has violated the National Environmental Policy Act (NEPA) by failing to complete a supplemental environmental impact statement for the incineration program. This Note discusses why a court considering these issues should find that the Army has violated NEPA, and it also considers whether NEPA will be successful in stopping the Army's use of incineration.

## INTRODUCTION

For most people in the United States, the threat of being exposed to a chemical weapon is not an everyday concern. They are not worried about the disastrous effects that these deadly chemical agents could have on their lives.<sup>1</sup> For some, however, the threats posed by chemical weapons are a part of everyday life. In eight locations

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<sup>1</sup> See Agency for Toxic Substances and Disease Registry, U.S. Dep't of Health and Human Servs., *ToxFAQs for Nerve Agents* [hereinafter ATSDR, *ToxFAQs for Nerve Agents*] (discussing the risks associated with nerve agents, including how exposure might occur and the health effects of exposure), at <http://www.atsdr.cdc.gov/tfactsd4.html> (last updated Nov. 22, 2004); Agency for Toxic Substances and Disease Registry, U.S. Dep't of Health and Human Servs., *ToxFAQs for Sulfur Mustard* [hereinafter ATSDR, *ToxFAQs for Sulfur Mustard*] (discussing the risks associated with mustard gas, including how exposure might occur and the health effects of exposure), at <http://www.atsdr.cdc.gov/tfacts49.html> (last updated Nov. 22, 2004).

throughout the United States, there are thousands of tons of chemical weapons.<sup>2</sup> Most of these chemical weapons have been stored at these locations for over thirty-five years.<sup>3</sup> People nearby live in fear of a chemical leak, an accidental detonation, or any number of other frightening scenarios.<sup>4</sup> In 1988, these people faced an additional concern—the Army’s decision to use on-site incineration to destroy the chemical weapons stored in those communities.<sup>5</sup>

Most parties agree that the destruction of the chemical weapons stockpile is both necessary and in the public interest.<sup>6</sup> Moreover, under the Department of Defense Authorization Act of 1986 and the Chemical Weapons Convention, the Army is required to destroy the chemical agents by 2007.<sup>7</sup>

There is disagreement, however, regarding the method that should be used to dispose of the weapons.<sup>8</sup> Opponents of incineration, including environmental groups and those living near the storage sites, argue that an alternative method of disposal should be used because of the effects that incineration will have on the environment

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<sup>2</sup> Chem. Weapons Working Group Inc. v. U.S. Dep’t of the Army, 935 F. Supp. 1206, 1209 (D. Utah 1996), *aff’d*, 111 F.3d 1485 (10th Cir. 1997).

<sup>3</sup> See Christopher T. DeLisi, *The Incineration of Chemical Warfare Agents by the United States Army: Is It the Best Method for Disposal?*, 7 DICK. J. ENVTL. L. & POL’Y 75, 78 (1998).

<sup>4</sup> See *id.*

<sup>5</sup> Families Concerned About Nerve Gas Incineration v. U.S. Dep’t of the Army, No. CV-02-BE-2822-E, at 2–3 (N.D. Ala. July 8, 2003) (mem. of op.), *available at* <http://www.cwvg.org/ALorder.pdf>. The Army issued its Record of Decision selecting on-site incineration as the method of disposal for the stored chemical weapons in February 1988. *Id.*

<sup>6</sup> See, e.g., 1st Amended Complaint at 10, Chem. Weapons Working Group, Inc. v. U.S. Dep’t of Def. (D.D.C. filed Mar. 11, 2003) [hereinafter CWWG Complaint] (No. 1:03CV00645) (available upon request from the Chemical Weapons Working Group); 1st Amended Complaint at 143, Families Concerned About Nerve Gas Incineration v. U.S. Dep’t of the Army (N.D. Ala. filed Feb. 14, 2003) [hereinafter Families Concerned Complaint] (No. CV-02-N-2822-E) (available upon request from the Chemical Weapons Working Group).

<sup>7</sup> See generally Department of Defense Authorization Act of 1986, 50 U.S.C. § 1521 (2000); Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, Jan. 13, 1993, 1974 U.N.T.S. 316 [hereinafter CWC]. Although the Defense Authorization Act states that the “stockpile elimination deadline” was December 31, 2004, it also states that the date for completing the destruction of the United States’ stockpile is to be established by any treaty banning the possession of chemical weapons that is ratified by the United States. See 50 U.S.C. § 1521(b)(2), (5). The CWC, which was ratified by the United States, mandates the destruction of all chemical weapons by 2007. Org. for the Prohibition of Chem. Weapons, *Destruction of Chemical Weapons*, at [http://www.opcw.org/html/glance/destruct\\_glance.html](http://www.opcw.org/html/glance/destruct_glance.html) (last visited Mar. 30, 2005).

<sup>8</sup> See generally CWWG Complaint at 20 (arguing that the Army’s proposed use of incineration to destroy the chemical weapons is not in the public’s best interest); Families Concerned Complaint at 143 (same).

and public health.<sup>9</sup> The Army has argued that on-site incineration is safe and will have only a limited impact on the environment.<sup>10</sup>

One tool that opponents have used to challenge the Army's decision to use on-site incineration is the National Environmental Policy Act (NEPA).<sup>11</sup> The first of these challenges came in *Chemical Weapons Working Group, Inc. v. United States Department of the Army*, where the plaintiffs argued that the Army had violated NEPA by failing to complete a supplemental environmental impact statement (SEIS) that took into account new information regarding the incineration program.<sup>12</sup> In that case, the U.S. District Court for the District of Utah gave deference to the Army's decision not to complete an SEIS.<sup>13</sup>

Following *Chemical Weapons Working Group*, the Army has maintained its plan to use on-site incineration at four of the eight locations.<sup>14</sup> However, the Army has recently decided to use nonincineration processes to destroy the stored chemical agents at the other four sites.<sup>15</sup> This decision to use alternative processes, as well as incidents at the Army's two operational incineration facilities, have led to a new set of cases challenging the Army's plan to continue pursuing incineration at half of the sites.<sup>16</sup> Plaintiffs are again arguing, this time in the District Court for the District of Columbia, that the Army is violating NEPA by failing to complete an SEIS, as those living near the sites where incineration will be used wonder why alternative processes are not being used in their communities.<sup>17</sup>

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<sup>9</sup> See CWWG Complaint at 11–12 (arguing that the incineration facilities will emit toxic compounds into the environment); see also Greenpeace, *Incineration*, at [http://www.greenpeace.org/international\\_en/campaigns/intro?campaign\\_id=3989](http://www.greenpeace.org/international_en/campaigns/intro?campaign_id=3989) (last visited Mar. 30, 2005) (discussing the impacts of incineration).

<sup>10</sup> David A. Koplow, *How Do We Get Rid of These Things? Dismantling Excess Weapons While Protecting the Environment*, 89 Nw. U. L. Rev. 445, 518 (1995).

<sup>11</sup> *Chem. Weapons Working Group Inc. v. U.S. Dep't of the Army*, 935 F. Supp. 1206, 1208 (D. Utah 1996), *aff'd*, 111 F.3d 1485 (10th Cir. 1997); CWWG Complaint at 3; Families Concerned Complaint at 153.

<sup>12</sup> *Chem. Weapons Working Group*, 935 F. Supp. at 1208.

<sup>13</sup> See *id.* at 1218, 1219.

<sup>14</sup> CWWG Complaint at 3.

<sup>15</sup> *Id.*

<sup>16</sup> See generally CWWG Complaint; Families Concerned Complaint.

<sup>17</sup> See CWWG Complaint at 3, 4; Families Concerned Complaint at 153. The NEPA claim raised by plaintiffs in *Families Concerned*, which was filed in Alabama District Court, was later consolidated into the NEPA claim raised in the *Chemical Weapons Working Group* case, which was filed in the D.C. District Court. See E-mail from Craig Williams, Director, Chemical Weapons Working Group, to author (Apr. 4, 2004, 21:57:36 EST) (on file with author).

This Note will discuss why a court considering the issue should find that the Army has violated NEPA by failing to complete an SEIS for the incineration program. The court should find that an SEIS is required for the incineration program because significant new information has become available, and substantial changes have been made to the project, both of which are relevant to the environmental effects of the program.<sup>18</sup> The court should overturn the Army's decision not to complete an SEIS because it was arbitrary, capricious, or an abuse of discretion.<sup>19</sup> The court should also find that the NEPA claims currently raised by the plaintiffs are distinguishable from the NEPA claims raised in *Chemical Weapons Working Group*, which were rejected by the court.<sup>20</sup>

Part I of this Note discusses the chemical weapons dilemma faced by the United States, including a look at the chemical weapons stockpile and the legal mandates for destruction. Part II focuses on NEPA, what requirements it establishes for the destruction process and how courts have applied the statute in the past. Part III discusses the Army's decision to use incineration to destroy the chemical weapons stockpile, as well as the arguments raised by those opposed to incineration. Part IV discusses the *Chemical Weapons Working Group* case and, more specifically, how the court responded to the plaintiffs' NEPA claims. Part V looks at recent developments and the new cases which have been filed challenging the Army's use of incineration. Part VI considers whether NEPA will be successful in stopping the Army's use of incineration as a means of destroying the chemical weapons stockpile.

## I. THE CHEMICAL WEAPONS DILEMMA

Chemical weapons were used most heavily during World War I.<sup>21</sup> During this time, the United States created a stockpile of chemical weapons as protection against other countries that had developed chemical agents.<sup>22</sup> Historically, U.S. policy allowed for the use of these

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<sup>18</sup> See Environmental Impact Statement, 40 C.F.R. § 1502.9(c)(1)(i), (ii) (2003).

<sup>19</sup> See *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 377 (1989); *Wisconsin v. Weinberger*, 745 F.2d 412, 417 (7th Cir. 1984) (quoting Administrative Procedure Act § 706(2)(A)); *Greenpeace v. Stone*, 748 F. Supp. 749, 765 (D. Haw. 1990).

<sup>20</sup> See *Chem. Weapons Working Group Inc. v. U.S. Dep't of the Army*, 935 F. Supp. 1206, 1220 (D. Utah 1996), *aff'd*, 111 F.3d 1485 (10th Cir. 1997).

<sup>21</sup> Lieutenant Colonel Warren G. Foote, *The Chemical Demilitarization Program—Will It Destroy the Nation's Stockpile of Chemical Weapons by December 31, 2004?*, 146 MIL. L. REV. 1, 4 (1994).

<sup>22</sup> See *id.* at 4–5.

weapons for retaliatory and deterrent purposes.<sup>23</sup> In the past two decades, however, this policy has changed.<sup>24</sup> A congressional act, an international treaty, and a presidential declaration all have disavowed further use of chemical weapons.<sup>25</sup> Furthermore, the Army has been directed by Congress and an international convention to destroy the existing chemical weapons stockpile.<sup>26</sup> Faced with these legal mandates, as well as the risks posed by continued storage of the weapons, the Army must confront the dilemma of how to deal with thousands of tons of stored chemical weapons that are no longer needed—or tolerated.<sup>27</sup>

### A. *The United States Chemical Weapons Stockpile*

The U.S. stores its chemical weapons stockpiles in eight communities: Aberdeen, Maryland; Anniston, Alabama; Lexington, Kentucky; Newport, Indiana; Pine Bluff, Arkansas; Pueblo, Colorado; Tooele, Utah; and Umatilla, Oregon.<sup>28</sup> In 1995, there were approximately 30,000 tons of chemical warfare agents spread among these different sites.<sup>29</sup> Although the majority of these weapons would be useless in a military attack due to their age, design, and unpredictability, they have been in storage since 1968, when the production of

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<sup>23</sup> See *id.* at 5.

<sup>24</sup> See *id.*

<sup>25</sup> See *id.* See generally Department of Def. Authorization Act of 1986, 50 U.S.C. § 1521 (2000); CWC, *supra* note 7. In 1991, President Bush declared that chemical weapons could no longer be used for any purpose once the CWC became effective. Foote, *supra* note 21, at 5.

<sup>26</sup> See generally 50 U.S.C. § 1521; CWC, *supra* note 7.

<sup>27</sup> See DeLisi, *supra* note 3, at 78; Foote, *supra* note 21, at 5. See generally 50 U.S.C. § 1521; CWC, *supra* note 7.

<sup>28</sup> DeLisi, *supra* note 3, at 77; Koplow, *supra* note 10, at 473. Each of these locations has stored the following percentage of the total U.S. stockpile: Tooele, Utah, 42.3%; Pine Bluff, Arkansas, 12%; Umatilla, Oregon, 11.6%; Pueblo, Colorado, 9.9%; Anniston, Alabama, 7.1%; Aberdeen, Maryland, 5%; Newport, Indiana, 3.6%; and Lexington, Kentucky, 1.6%. Major Lawrence E. Rouse, *The Disposition of the Current Stockpile of Chemical Munitions and Agents*, 121 MIL. L. REV. 17, 18 (1988).

<sup>29</sup> Families Concerned About Nerve Gas Incineration v. U.S. Dep't of the Army, No. CV-02-BE-2822-E, at 2 (N.D. Ala. July 8, 2003) (mem. of op.), available at <http://www.cwwg.org/ALorder.pdf>; Chem. Weapons Working Group Inc. v. U.S. Dep't of the Army, 935 F. Supp. 1206, 1209 (D. Utah 1996), *aff'd*, 111 F.3d 1485 (10th Cir. 1997).

chemical weapons ceased.<sup>30</sup> The destruction of the stockpile will cost an estimated \$24 billion.<sup>31</sup>

The weapons that make up the United States' stockpile are unitary chemical weapons.<sup>32</sup> Most of the chemicals found in the stored weapons are nerve agents, like sarin and VX, and blister agents, like mustard gas.<sup>33</sup>

Even a small amount of a nerve agent can be lethal if it is swallowed, inhaled, or if it touches the eyes or skin.<sup>34</sup> Exposure to nerve agents can lead to shortness of breath, nausea, vomiting, involuntary defecation and urination, seizures, paralysis, coma, and death by asphyxiation.<sup>35</sup> If these chemicals were to enter the environment, they would remain in the air for a few days, possibly being inhaled by those in the vicinity.<sup>36</sup> If the chemicals were to reach the soil or water, they could evaporate into the atmosphere or possibly contaminate the groundwater.<sup>37</sup>

Exposure to blister agents can also have catastrophic effects.<sup>38</sup> Mustard gas, which actually is a liquid, can cause skin burns, blisters, blindness, respiratory disease, and death.<sup>39</sup> In addition, studies have proven that it is a carcinogen, and exposed men can suffer from lower sperm counts.<sup>40</sup> If mustard gas were released into the water or soil,

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<sup>30</sup> DeLisi, *supra* note 3, at 77–78; Foote, *supra* note 21, at 3, 7; Rouse, *supra* note 28, at 17–18. Following World War II, many countries reached the conclusion that chemical weapons would be uncontrollable during a military attack because weather and terrain conditions influence their effects. Koplow, *supra* note 10, at 462. Although chemical weapons were considered inappropriate for the battlefield, chemical weapons stockpiles were maintained in order to discourage other countries from attacking. *Id.* at 463.

<sup>31</sup> Lois Ember, *Lagging Schedules, Rising Costs*, CHEM. & ENG'G NEWS, Oct. 8, 2001, at 12. In 1985, the Army estimated the cost of destroying the chemical weapon stockpile at \$1.7 billion. *Id.* This estimate was increased to \$15.3 billion in 1998, and increased again to \$24 billion in 2001. *See id.*

<sup>32</sup> *Families Concerned*, No. CV-02-BE-2822-E, at 2 n.2. Unitary chemical weapons contain dangerous chemicals in their active form. *Id.*

<sup>33</sup> DeLisi, *supra* note 3, at 77; Rouse, *supra* note 28, at 19; *see also Families Concerned*, No. CV-02-BE-2822-E, at 3 (noting that the chemical agents stored at Anniston, Alabama include the nerve agents sarin and VX and the blister agent mustard gas); Chem. Weapons Working Group Inc. v. U.S. Dep't of the Army, 935 F. Supp. 1206, 1209 (D. Utah 1996), *aff'd*, 111 F.3d 1485 (10th Cir. 1997) (stating that the blister agent mustard gas and the nerve agents GB and VX were stored at Tooele, Utah).

<sup>34</sup> Rouse, *supra* note 28, at 19; ATSDR, *ToxFAQs for Nerve Agents*, *supra* note 1, at 1.

<sup>35</sup> ATSDR, *ToxFAQs for Nerve Agents*, *supra* note 1, at 2; *see* Foote, *supra* note 21, at 8; Rouse, *supra* note 28, at 19.

<sup>36</sup> *See* ATSDR, *ToxFAQs for Nerve Agents*, *supra* note 1, at 1.

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

<sup>38</sup> *See* ATSDR, *ToxFAQs for Sulfur Mustard*, *supra* note 1.

<sup>39</sup> *See id.* at 1; Rouse, *supra* note 28, at 20.

<sup>40</sup> ATSDR, *ToxFAQs for Sulfur Mustard*, *supra* note 1, at 1, 2.

some of the chemical would evaporate into the air and the rest would remain in the water or soil until broken down, which could take anywhere from a few minutes to a few days.<sup>41</sup>

Although the chemical weapons stockpile has little military value, almost all of the chemicals have maintained their lethality.<sup>42</sup> The longer these weapons are stored around the country, the greater the possibility that a leak or accidental detonation will occur.<sup>43</sup> The weapons are also susceptible to natural disasters, like earthquakes.<sup>44</sup> There are also concerns about possible terrorist use of the stored chemical agents.<sup>45</sup> According to a risk analysis completed by the Army while evaluating the use of incineration at the Tooele site, the risk of disaster is one hundred times greater if the weapons are not destroyed.<sup>46</sup> In addition, continued storage of the chemical agents is costly. The cost of maintaining and securing the stockpile has been estimated at \$63.8 million annually.<sup>47</sup>

### B. Legal Authority Demanding Destruction

The Army's need to destroy the weapons arises not only from the fear of an accident, but also because the Army is legally bound, under both a congressional act<sup>48</sup> and an international treaty,<sup>49</sup> to destroy the stockpile. In 1986, Congress passed the Department of Defense Authorization Act requiring the Secretary of Defense to destroy all of the chemical weapons being stored throughout the country.<sup>50</sup> The deadline for completing this task, first set at September 30, 1994 and later extended to December 31, 2004,<sup>51</sup> is now 2007.<sup>52</sup> In order to satisfy

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<sup>41</sup> *Id.* at 1.

<sup>42</sup> See Koplow, *supra* note 10, at 473, 474.

<sup>43</sup> *Chem. Weapons Working Group Inc. v. U.S. Dep't of the Army*, 935 F. Supp. 1206, 1209 (D. Utah 1996), *aff'd*, 111 F.3d 1485 (10th Cir. 1997); DeLisi, *supra* note 3, at 78.

<sup>44</sup> *Chem. Weapons Working Group*, 935 F. Supp. at 1209; DeLisi, *supra* note 3, at 78.

<sup>45</sup> See Org. for the Prohibition of Chem. Weapons, *Chemical Terrorism*, at [http://www.opcw.org/html/glance/chemterror\\_glance.html](http://www.opcw.org/html/glance/chemterror_glance.html) (last visited Mar. 30, 2005).

<sup>46</sup> *Chem. Weapons Working Group*, 935 F. Supp. at 1216; see also Koplow, *supra* note 10, at 532 (noting that the "no action" alternative to dealing with the chemical weapons stockpile presents both environmental and safety risks).

<sup>47</sup> Rouse, *supra* note 28, at 18. This estimate, which was provided in a report prepared by the Chemical Warfare Review Commission in 1985, is probably much higher by now.

<sup>48</sup> See Department of Def. Authorization Act of 1986, 50 U.S.C. § 1521 (a) (2000).

<sup>49</sup> See generally CWC, *supra* note 7.

<sup>50</sup> 50 U.S.C. § 1521 (a).

<sup>51</sup> *Id.* § 1521 (b) (5); *Chemical Weapons Working Group*, 935 F. Supp. at 1209.

<sup>52</sup> *Families Concerned About Nerve Gas Incineration v. U.S. Dep't of the Army*, No. CV-02-BE-2822-E, at 2 (N.D. Ala. July 8, 2003) (mem. of op.), available at <http://www.cwmg.org/ALorder.pdf>; see discussion *supra* note 7.

the requirements of this Act, the Army must destroy the weapons in a way that provides for “maximum protection for the environment, the general public, and the personnel who are involved in the destruction of the lethal chemical agents and munitions.”<sup>53</sup>

Additional pressure for timely destruction of the weapons comes from the International Convention on Prohibition of the Development, Production, Stockpiling, and Use of Chemical Weapons and on their Destruction (CWC or Chemical Weapons Convention),<sup>54</sup> which was ratified by the United States in 1993.<sup>55</sup> As of November 19, 2004, 167 countries had become parties to the Chemical Weapons Convention.<sup>56</sup> The CWC seeks to ban the use of chemical weapons and requires that signatory nations destroy their existing chemical weapons and the facilities where the weapons were produced.<sup>57</sup> The deadline for completing destruction of the chemical agents is April 29, 2007.<sup>58</sup> If a country experiences problems with its destruction program, it is possible for it to get a five-year extension of the deadline.<sup>59</sup> If the Army fails to meet the requirements of this treaty, the United States could face sanctions for non-compliance.<sup>60</sup>

## II. THE NATIONAL ENVIRONMENTAL POLICY ACT

Another legal directive that the Army will have to consider while disposing of the chemical weapons stockpile is the National Environ-

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<sup>53</sup> 50 U.S.C. § 1521(c)(1)(A).

<sup>54</sup> See CWC, *supra* note 7.

<sup>55</sup> Org. for the Prohibition of Chem. Weapons, *States Parties to the Chemical Weapons Convention*, at [http://www.opcw.org/html/db/members\\_frameset.html](http://www.opcw.org/html/db/members_frameset.html) (last visited Mar. 30, 2005).

<sup>56</sup> *Id.*

<sup>57</sup> See Org. for the Prohibition of Chem. Weapons, *supra* note 7.

<sup>58</sup> See *id.* (noting that the CWC requires all member countries to destroy their chemical weapons within ten years after the CWC entered into force); Org. for the Prohibition of Chem. Weapons, *supra* note 55 (showing that the CWC entered into force on April 29, 1997).

<sup>59</sup> See CWC, *supra* note 7, Annex on Implementation and Verification, pt. IV(A), paras. 24–28, 1974 U.N.T.S. at 393; Org. for the Prohibition of Chem. Weapons, *supra* note 7. This five-year extension can be granted if a country experiences “technological, financial, ecological, or other inhibitions beyond its control.” Koplow, *supra* note 10, at 467–68.

<sup>60</sup> See CWC, *supra* note 7, art. XII, 1974 U.N.T.S. at 349; DeLisi, *supra* note 3, at 80. These sanctions may include suspension of the party’s privileges and rights under the treaty or collective measures against the party. CWC, *supra* note 7, art. XII, 1974 U.N.T.S. at 347. In extreme cases, the non-compliance may be brought to the attention of the United Nations. *Id.*



mental Policy Act (NEPA).<sup>61</sup> NEPA was enacted in 1969 to ensure that environmental concerns are a part of all major decisions made by federal agencies.<sup>62</sup> The statute aims to make federal agencies more conscious of the environmental impacts of their decisions by keeping the public informed through the NEPA compliance process.<sup>63</sup> NEPA does not require agencies to reach any particular conclusions in their decision-making process; the act just seeks to ensure that environmental concerns have been considered.<sup>64</sup> For instance, even though NEPA requires agencies to identify alternatives which might be better for the environment, it does not require the agencies to choose one of these alternatives.<sup>65</sup> Therefore, judicial review of agency decisions is limited to looking at whether or not the procedural requirements of NEPA have been followed.<sup>66</sup>

### A. *The EIS and the SEIS*

At the heart of NEPA is the requirement that an environmental impact statement (EIS) be prepared for all major federal actions that significantly affect the quality of the human environment.<sup>67</sup> This EIS

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<sup>61</sup> National Environmental Policy Act of 1969, 42 U.S.C. § 4321–4370 (2000); Rouse, *supra* note 28, at 30.

<sup>62</sup> See *Weinberger v. Catholic Action of Haw./Peace Educ. Project*, 454 U.S. 139, 143 (1981); *Wisconsin v. Weinberger*, 745 F.2d 412, 416 (7th Cir. 1984); Amy J. Sauber, Comment, *The Application of NEPA to Nuclear Weapons Production, Storage, and Testing: Weinberger v. Catholic Action of Hawaii/Peace Education Project*, 11 B.C. ENVTL. AFF. L. REV. 805, 805 (1984).

<sup>63</sup> See *Catholic Action of Haw.*, 454 U.S. at 143; Koplow, *supra* note 10, at 485; Sauber, *supra* note 62, at 805. NEPA requires that the environmental impacts of major federal actions be disclosed to the public as provided by the provisions of the Freedom of Information Act (FOIA). Sauber, *supra* note 62, at 811, 814.

<sup>64</sup> *Weinberger*, 745 F.2d at 416.

<sup>65</sup> ZYGMUNT J.B. PLATER ET AL., ENVIRONMENTAL LAW AND POLICY: NATURE, LAW AND SOCIETY 510 (3d ed. 2004); see also Koplow, *supra* note 10, at 485 (noting that agencies are not required by NEPA to choose alternatives that have the least negative environmental consequences).

<sup>66</sup> See *Weinberger*, 745 F.2d at 416; see also *Strycker's Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223, 227–28 (1980) (holding that if an agency follows the procedural requirements of NEPA in making its decision, the court's role is limited to making sure that the environmental consequences of the decision have been considered by the agency); *Vt. Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 558 (1978) (recognizing that the actual requirements NEPA imposes upon agencies are procedural).

<sup>67</sup> National Environmental Policy Act of 1969 § 102(2)(c), 42 U.S.C. § 4332(2)(C) (2000). “[T]o the fullest extent possible, all federal agencies shall ‘include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement’ discussing, *inter alia*, the environmental impact of the proposed action and possible alternatives.”

must include the environmental impact of the proposed action and alternatives to the proposed action.<sup>68</sup>

The Council for Environmental Quality (CEQ) has promulgated regulations to implement NEPA.<sup>69</sup> These regulations stress the importance of considering alternatives to a proposed project,<sup>70</sup> describing the alternatives section as central to the EIS.<sup>71</sup> The regulations require that the NEPA process be used as a means of identifying and evaluating reasonable alternatives to a proposed project that may have less negative environmental effects.<sup>72</sup> Agencies are directed to “emphasize real environmental issues and alternatives,”<sup>73</sup> and to comparatively assess all alternatives objectively.<sup>74</sup>

According to CEQ regulations, agencies are required to prepare an SEIS whenever there is significant new information or circumstances which are relevant to the environmental effects of a proposed project, or when substantial changes are made to the project which are relevant to its environmental impacts.<sup>75</sup> The agency has discretion to decide whether or not an SEIS is required.<sup>76</sup> In deciding whether an SEIS is necessary, agencies should apply a rule of reason.<sup>77</sup> An SEIS is not required every time new information arises.<sup>78</sup> In *Marsh v. Oregon Natural Resources Council*, the U.S. Supreme Court established the rule that an SEIS is required “[i]f there remains ‘major Federal action’ to occur, and if the new information is sufficient to show that the remaining action will ‘affect[t] the quality of the human environment’ in a significant manner or to a significant extent not already considered.”<sup>79</sup> Agencies are directed to look at whether the environmental consequences of a proposed project, as considered in the original EIS, have

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*Catholic Action of Haw.*, 454 U.S. at 142 (alteration in original) (quoting 42 U.S.C. § 4332(2)(C)).

<sup>68</sup> *Catholic Action of Haw.*, 454 U.S. at 142.

<sup>69</sup> CWWG Complaint at 22; Rouse, *supra* note 28, at 30.

<sup>70</sup> See Purpose Policy and Mandate, 40 C.F.R. § 1500.2(b), (e) (2003).

<sup>71</sup> See Environmental Impact Statement, 40 C.F.R. § 1502.14.

<sup>72</sup> 40 C.F.R. § 1500.2(e).

<sup>73</sup> *Id.* § 1500.2(b).

<sup>74</sup> 40 C.F.R. § 1502.14(a), (b).

<sup>75</sup> *Id.* § 1502.9(c)(1)(i), (ii).

<sup>76</sup> *Wisconsin v. Weinberger*, 745 F.2d 412, 417 (7th Cir. 1984); see also *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 377 (1989) (holding that the Court must defer to the “informed discretion” of the agency because analysis of the relevant evidence requires the agency’s expertise).

<sup>77</sup> *Marsh*, 490 U.S. at 373.

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

<sup>79</sup> *Id.* at 374 (second and third alterations in original).

been affected by the new information.<sup>80</sup> Even after proposed projects have received approval, agencies are still required to take a “hard look” at the environmental consequences.<sup>81</sup>

Courts will uphold an agency’s decision of whether or not to complete an SEIS unless it is arbitrary, capricious, or an abuse of discretion.<sup>82</sup> Under this limited standard of review, the agency’s decision will not be set aside as long as it is based upon consideration of all relevant factors and there has not been a “clear error of judgment.”<sup>83</sup> The court will defer to the agency’s expertise as long as it is convinced that the agency has made a reasonable decision regarding the significance of the new information.<sup>84</sup> Even if a court might find other arguments more persuasive, it must defer to the agency’s reasonable discretion.<sup>85</sup>

In *Marsh*, plaintiffs, nonprofit organizations, brought suit against the Army Corps of Engineers (the Corps) alleging that the Corps had violated NEPA by failing to prepare an additional SEIS prior to construction of a dam.<sup>86</sup> The plaintiff’s claim relied on two documents showing that the effects of the dam on water quality would be greater than previously contemplated by the Corps.<sup>87</sup> The Court deferred to the Corps’s decision that the new information did not require an SEIS.<sup>88</sup> The Court found that the Corps had taken a hard look at the two documents and determined that the information was not significant enough to require an SEIS.<sup>89</sup> The Court held that the Corps’s decision not to complete an SEIS was not arbitrary, capricious, or an abuse of discretion because it was based upon a reasonable evaluation of the relevant information.<sup>90</sup>

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<sup>80</sup> See *Weinberger*, 745 F.2d at 418.

<sup>81</sup> *Marsh*, 490 U.S. at 374.

<sup>82</sup> *Id.* at 377; *Weinberger*, 745 F.2d at 417; *Greenpeace v. Stone*, 748 F. Supp. 749, 765 (D. Haw. 1990).

<sup>83</sup> *Marsh*, 490 U.S. at 378 (quoting *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971)).

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> See *id.* at 363. In that case, the Corps had already completed a final SEIS, but plaintiffs argued that the new information required an additional SEIS. See *id.* at 365.

<sup>87</sup> See *id.* at 369. Plaintiffs argued that the Corps had violated NEPA by failing to prepare a second SEIS to take into account these documents, which were prepared after the Corps had completed its SEIS in 1980. *Id.* at 368.

<sup>88</sup> See *id.* at 385.

<sup>89</sup> *Marsh*, 490 U.S. at 385.

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

### B. NEPA and the Military

The judiciary has previously dealt with how NEPA applies to actions taken by the military.<sup>91</sup> Military actions can greatly impact the environment, triggering the requirements of NEPA.<sup>92</sup> There can be a conflict, however, between the requirement that the EIS be made available to the public and concerns of national security.<sup>93</sup> In *Weinberger v. Catholic Action of Hawaii/Peace Education Project*, the U.S. Supreme Court held that, while the military has to make environmental concerns a part of its decisionmaking process, matters of national security may be exempt from disclosure under the Freedom of Information Act (FOIA).<sup>94</sup> The Court held that Congress's decision to make public disclosure under NEPA subject to FOIA expressed its intention that the military's need to protect national security overrides the public's right to be informed.<sup>95</sup> Although courts have been willing to protect classified information from being publicly disclosed, they have not created a general military exception to NEPA.<sup>96</sup>

### III. THE DECISION TO INCINERATE

Prompted by the dangers of continued storage and the legal pressure to destroy the weapons, the Army had to decide how to dispose of the stockpile.<sup>97</sup> Under the CWC, each member country is free to decide which method it will use to destroy its chemical agents, with the stipulation that it destroy the weapons in a manner that will not harm

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<sup>91</sup> See generally *Weinberger v. Catholic Action of Haw./Peace Educ. Project*, 454 U.S. 139 (1981) (considering whether an EIS had to be prepared before the Navy could proceed with building an ammunition and weapons storage facility that was capable of storing nuclear weapons); *Wisconsin v. Weinberger*, 745 F.2d 412 (7th Cir. 1984) (considering whether the Navy had to prepare an SEIS for a low frequency submarine communications system that it planned to reactivate and expand).

<sup>92</sup> Sauber, *supra* note 62, at 806.

<sup>93</sup> See *Catholic Action of Haw.*, 454 U.S. at 141, 142-43; Sauber, *supra* note 62, at 806.

<sup>94</sup> 454 U.S. at 143, 144-45, 146. The Court held that matters classified in the interest of national defense are exempt from disclosure under FOIA and therefore are also exempt from NEPA's mandate of public disclosure. See *id.* at 144-45. The Court did find, however, that the Navy could be required to prepare an EIS, even if solely for internal purposes. *Id.* at 146.

<sup>95</sup> See *id.* at 145.

<sup>96</sup> See Amy Sheridan, *National Security Exemptions in Federal Pollution Laws*, 19 WM. & MARY ENVTL. L. & POL'Y REV. 287, 298 (1995) (noting that although an EIS might be exempt from disclosure for national security reasons, no agency is exempt from preparing an EIS under any circumstances); Sauber, *supra* note 62, at 820, 832; see also *Catholic Action of Haw.*, 454 U.S. at 146.

<sup>97</sup> See *supra* Part I.

people or the environment.<sup>98</sup> For instance, the CWC prohibits the use of land burial, open pit burning, and sea dumping as means of disposal.<sup>99</sup> Each of these environmentally unsafe disposal methods has been used by the United States Army in the past.<sup>100</sup> Once these practices were discontinued,<sup>101</sup> the Army had to evaluate new disposal technologies to determine how to safely dispose of the chemical weapons stockpile.

### A. *The Army's Decision to Incinerate the Weapons*

The Army began experimenting with incineration as a means of destroying chemical weapons in the 1970s.<sup>102</sup> In 1979, the Chemical Weapons Munitions Disposal System (CAMDS) was built in Tooele, Utah to assess the incineration process.<sup>103</sup> Pursuant to NEPA, in 1986 the Army circulated a Draft Programmatic Environmental Impact Statement (DPEIS) assessing the environmental impact of destroying the chemical agents as compared with continued storage.<sup>104</sup> A Final Programmatic Environmental Impact Statement (FPEIS) was completed in 1988.<sup>105</sup> The FPEIS assessed alternative means for destroying the weapons stockpile, including destruction by nuclear explosion and

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<sup>98</sup> Org. for the Prohibition of Chem. Weapons, *supra* note 7; Org. for the Prohibition of Chem. Weapons, *Environmental Concerns and Provisions*, at [http://www.opcw.org/html/db/chemdemil\\_environment.html](http://www.opcw.org/html/db/chemdemil_environment.html) (last visited Mar. 30, 2005) [hereinafter OPCW, *Environmental Concerns*].

<sup>99</sup> OPCW, *Environmental Concerns*, *supra* note 98.

<sup>100</sup> DeLisi, *supra* note 3, at 85; Koplow, *supra* note 10, at 514–15; Rouse, *supra* note 28, at 34.

<sup>101</sup> DeLisi, *supra* note 3, at 85.

<sup>102</sup> See *id.* (discussing the Army's incineration program at Rocky Mountain Arsenal, Colorado beginning in 1972).

<sup>103</sup> Chem. Weapons Working Group Inc. v. U.S. Dep't of the Army, 935 F. Supp. 1206, 1209 (D. Utah 1996), *aff'd*, 111 F.3d 1485 (10th Cir. 1997).

<sup>104</sup> Chem. Weapons Working Group, 935 F. Supp. at 1210. The DPEIS looked at four possibilities: (1) continued storage, (2) using one national disposal facility to destroy the chemicals, (3) using two regional disposal facilities, or (4) using on-site disposal at each of the eight storage locations. Rouse, *supra* note 28, at 43. Continued storage was not a realistic alternative because of the possible safety and environmental problems and also because Congress had already passed the Department of Defense Authorization Act requiring that the weapons be destroyed. See *id.* at 49. The use of a single national disposal center was rejected due to the increased health, safety, and environmental risks of transporting the chemicals. See *id.* at 49–53. The use of regional disposal facilities was also rejected for similar concerns about the health and environmental risks of transporting the chemicals. See *id.* at 53–57. The DEIS selected on-site disposal as the preferred method for destroying the chemical weapons. *Id.* at 57.

<sup>105</sup> Chem. Weapons Working Group, 935 F. Supp. at 1210.

the use of chemical processes like neutralization.<sup>106</sup> Each of the proposed alternatives was rejected by the Army as unproven or unreasonable.<sup>107</sup> The Army decided to use on-site incineration to destroy the chemical weapons stored at each of the eight locations.<sup>108</sup> It concluded that the environmental impacts of on-site incineration were “quite limited in scope and significance.”<sup>109</sup> This decision was made public in February 1988 when the Army issued its Record of Decision.<sup>110</sup>

Although the DPEIS and FPEIS applied to all eight storage sites, the Army expressed its intention to prepare site-specific environmental impact statements for each of the locations.<sup>111</sup> In 1989, a Draft Environmental Impact Statement (DEIS), followed by a Final Environmental Impact Statement (FEIS) and Record of Decision, expressed the Army’s decision to use on-site incineration at the storage site in Tooele, Utah.<sup>112</sup> The Army prepared to construct the first full-blown incineration plant in the continental United States.<sup>113</sup>

Beginning in 1988, the Johnston Atoll Chemical Agent Disposal System (JACADS) was used to evaluate the incineration process.<sup>114</sup> JACADS was a fully operational incineration facility that was built to serve as an archetype for the incineration plants that the Army planned to build in the future.<sup>115</sup> Using information gathered from the operation of JACADS, the Army constructed the Tooele Chemical Disposal Facility (TOCDF) in Tooele, Utah in 1993.<sup>116</sup>

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<sup>106</sup> CWWG Complaint at 15.

<sup>107</sup> *Chem. Weapons Working Group*, 935 F. Supp. at 1210. For example, the chemical neutralization process was rejected because it took too long, was unsuccessful in completely destroying the chemical agents, created hazardous waste, and any benefits achieved were potentially reversible. Koplow, *supra* note 10, at 516; see Rouse, *supra* note 28, at 35–36.

<sup>108</sup> *Chem. Weapons Working Group*, 935 F. Supp. at 1210.

<sup>109</sup> Koplow, *supra* note 10, at 518 (quoting PROGRAM MANAGER FOR CHEMICAL DEMILITARIZATION, CHEMICAL STOCKPILE DISPOSAL PROGRAM FINAL PROGRAMMATIC ENVIRONMENTAL IMPACT STATEMENT 4-1 (1988)).

<sup>110</sup> Families Concerned About Nerve Gas Incineration v. U.S. Dep’t of the Army, No. CV-02-BE-2822-E, at 2–3 (N.D. Ala. July 8, 2003) (mem. of op.), available at <http://www.cwwg.org/ALorder.pdf>; *Chem. Weapons Working Group*, 935 F. Supp. at 1210. A Record of Decision, which is separate from the EIS, gives the agency’s decision, the reasons for the decision, a list of alternatives, and explains how the agency has complied with applicable laws. See 40 C.F.R. § 1505.2 (2003).

<sup>111</sup> *Chem. Weapons Working Group*, 935 F. Supp. at 1210.

<sup>112</sup> *Id.*

<sup>113</sup> DeLisi, *supra* note 3, at 87.

<sup>114</sup> See *id.* at 86.

<sup>115</sup> *Chem. Weapons Working Group*, 935 F. Supp. at 1210.

<sup>116</sup> See *id.* at 1211.

### B. *Opposition to Incineration*

The Army's decision to use on-site incineration to dispose of the chemical weapons stockpile was met with opposition from the beginning.<sup>117</sup> Today, opponents continue to argue for the use of an alternative method of disposal, claiming that incineration will negatively affect human health and the environment.<sup>118</sup> For instance, incinerators create toxic waste, like dioxins, which are released into the environment and can have harmful effects on human health.<sup>119</sup> In addition, the use of incinerators can cause heavy metals and unburned toxic chemicals to be released into the environment.<sup>120</sup> Opponents argue that exposure to these toxic wastes will create problems that communities will deal with for years.<sup>121</sup>

### IV. CITIZENS PROTEST INCINERATION: *CHEMICAL WEAPONS WORKING GROUP, INC. v. UNITED STATES DEPARTMENT OF THE ARMY*

On May 10, 1996, before incineration at TOCDF began, the Chemical Weapons Working Group, the Sierra Club, and the Vietnam Veterans of America Foundation,<sup>122</sup> filed suit against the United States Army.<sup>123</sup> On June 12, 1996, the plaintiffs filed a motion seeking injunctive relief to prevent the defendants from conducting test burns at the site.<sup>124</sup> Among the plaintiffs' claims was that the Army had violated NEPA by neglecting to complete an SEIS taking into account substantial new information that had become available regarding the incineration program.<sup>125</sup> Specifically, the plaintiffs argued that the Army had failed to consider evidence of various dangerous incidents alleged to have occurred at JACADS, arguing that TOCDF was at risk for similar incidents.<sup>126</sup> The plaintiffs also argued that the defendants

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<sup>117</sup> *Id.* at 1206. See generally CWWG Complaint; Families Concerned Complaint.

<sup>118</sup> See ELIZABETH CROWE & MIKE SCHADE, LEARNING NOT TO BURN, A PRIMER FOR CITIZENS ON ALTERNATIVES TO BURNING HAZARDOUS WASTE 3 (2002), available at <http://www.cwwg.org/learningnottoburn.pdf>; Greenpeace, *supra* note 9.

<sup>119</sup> See *Chem. Weapons Working Group*, 935 F. Supp. at 1213 (acknowledging that the incinerators at TOCDF will create and release dioxins); Greenpeace, *supra* note 9 (stating that dioxins can lead to a wide range of health problems, including cancer).

<sup>120</sup> Greenpeace, *supra* note 9.

<sup>121</sup> See CROWE, *supra* note 118, at 3.

<sup>122</sup> *Chem. Weapons Working Group, Inc. v. U.S. Dep't of the Army*, 111 F.3d 1485, 1487 (10th Cir. 1997).

<sup>123</sup> *Chem. Weapons Working Group*, 935 F. Supp. at 1208.

<sup>124</sup> *Id.* at 1208-09.

<sup>125</sup> *Id.* at 1208.

<sup>126</sup> *Id.* at 1212.

had violated NEPA by not properly assessing risks associated with the dioxins which would be released from the incinerator.<sup>127</sup> Moreover, the plaintiffs contended that the Army had violated NEPA by failing to consider recent developments in alternative technologies.<sup>128</sup>

On July 13, 1996, one month after the plaintiffs' motion was filed, the Army issued a Record of Environmental Consideration (REC) stating that no significant new information had appeared since it had decided to use on-site incineration at Tooele, and therefore an SEIS was not required.<sup>129</sup> Even though the Army acknowledged that some problems had arisen in the operation of JACADS, it concluded that these flaws did not indicate that operation of TOCDF would have any significant environmental impacts that were not accounted for in the Tooele FEIS.<sup>130</sup> While the Army admitted that there had been three releases of chemical agents into the atmosphere from JACADS, it confirmed that changes had been made at TOCDF to address these problems.<sup>131</sup> In addition, the Army acknowledged that an employee at the JACADS facility had been injured by a nerve agent spill, but argued that the injury resulted from a failure to follow standard procedure, as opposed to a failure in equipment, design, or operation.<sup>132</sup> In response to the plaintiffs' arguments regarding the release of dioxins, the Army argued that the risks associated with the release of dioxins are uncertain.<sup>133</sup> The Army also submitted evidence to counter the plaintiffs' contention that alternative technologies were available, arguing that these alternatives were immature and would take years to implement at the Tooele storage site.<sup>134</sup>

When evaluating the plaintiffs' likelihood of success on their claim that the Army had violated NEPA by failing to complete an SEIS, the court emphasized the deference owed to the Army's REC.<sup>135</sup> The court noted that its role in the case would be limited to considering whether the Army's decision was reasonable based on the Army's

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<sup>127</sup> *Id.* at 1213.

<sup>128</sup> *See id.* at 1214. The Army did prepare an REC, in which it claimed to have completed an updated review of the use of incineration at TOCDF, including expected impacts and alternatives. CWWG Complaint at 16. The REC, however, considered only two alternatives: on-site incineration and no action. *Id.*

<sup>129</sup> *Chem. Weapons Working Group*, 935 F. Supp. at 1210.

<sup>130</sup> *Id.* at 1211.

<sup>131</sup> *Id.* at 1212.

<sup>132</sup> *See id.*

<sup>133</sup> *See id.* at 1213.

<sup>134</sup> *See id.* at 1214.

<sup>135</sup> *See Chem. Weapons Working Group*, 935 F. Supp. at 1218.



“evaluation of the significance—or lack of significance—of the new information.”<sup>136</sup>

Under this limited standard of review, the court held that the Army’s decision had to be upheld because it was not arbitrary or capricious.<sup>137</sup> The court concluded that the evidence of the alleged incidents at JACADS was not new information that would require the preparation of an SEIS because these problems were anticipated and measures had been taken by the Army to correct them at TOCDF.<sup>138</sup> Similarly, the court held that recent information regarding the risks posed by dioxins, as well as information about alternative technologies, did not require an SEIS because the significance of the information was uncertain and the Army had the discretion to decide whether the information was substantial enough to require an SEIS.<sup>139</sup>

After concluding that the plaintiffs were unlikely to win on the merits of this claim, the court denied the plaintiffs’ motion for a preliminary injunction.<sup>140</sup> This decision was affirmed by the Court of Appeals for the Tenth Circuit.<sup>141</sup>

On August 22, 1996, trial incineration of chemical agents commenced at TOCDF.<sup>142</sup> At this time, TOCDF was operating in a “shake-down” period, which was intended to identify possible problems with the facility’s operation.<sup>143</sup> On January 11, 1997, the plaintiffs initiated a second motion for preliminary injunction to prevent further incineration at TOCDF.<sup>144</sup> The plaintiffs argued that new evidence, which had become available since their first motion for an injunction was denied, required the defendants to prepare an SEIS.<sup>145</sup>

During the shakedown period, TOCDF experienced some operational problems.<sup>146</sup> The plaintiffs used this as evidence that TOCDF was being operated in a “trial-and-error” manner, which was not how the project was contemplated when the EIS was prepared.<sup>147</sup> The

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<sup>136</sup> *Id.* (quoting *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 378 (1989)).

<sup>137</sup> *See id.* at 1218–19.

<sup>138</sup> *Id.* at 1218.

<sup>139</sup> *See id.* at 1218–19.

<sup>140</sup> *See id.* at 1220.

<sup>141</sup> *See Chem. Weapons Working Group, Inc. v. U.S. Dep’t of the Army*, 111 F.3d 1485, 1489 (10th Cir. 1997).

<sup>142</sup> *Chem. Weapons Working Group, Inc. v. U.S. Dep’t of the Army*, 963 F. Supp 1083, 1086 (D. Utah 1997).

<sup>143</sup> *Id.*

<sup>144</sup> *See id.* at 1085.

<sup>145</sup> *Id.*

<sup>146</sup> *See id.* at 1086.

<sup>147</sup> *See id.* at 1086–87.

plaintiffs also presented evidence that the health risks resulting from the toxic chemicals being emitted from the smokestacks were “both more real and quantitatively greater than previously disclosed.”<sup>148</sup> Accordingly, the plaintiffs again argued that the Army had violated NEPA by not preparing an SEIS.<sup>149</sup>

The court once again denied the plaintiffs’ motion for injunctive relief.<sup>150</sup> The court held that the evidence presented by the plaintiffs concerning operational problems at TOCDF and evidence regarding emissions from the smokestacks was not new information, since it was either previously considered or had been remedied.<sup>151</sup> Similar to its holding on the plaintiffs’ first motion for injunctive relief, the court found that the plaintiffs’ claim raised a factual issue that was within the Army’s discretion.<sup>152</sup> In considering the plaintiffs’ likelihood of success on the merits, the court again applied a narrow standard of review, deferring to the Army’s judgment in not preparing an SEIS.<sup>153</sup>

These two motions for preliminary injunctive relief were the only times that the court would consider the merits of the plaintiffs’ NEPA claim. When the case went to trial in June 1999, the court determined that the plaintiffs’ NEPA claim was barred by the six-year statute of limitations.<sup>154</sup> When the suit was filed in 1996, it was already too late for the plaintiffs to challenge both the FPEIS and the site-specific FEIS for Tooele, which were completed in 1988 and 1989 respectively.<sup>155</sup>

## V. RECENT DEVELOPMENTS AND NEW CHALLENGES TO THE ARMY’S PLAN TO INCINERATE

### A. *The Shortcomings of Incineration*

By early 2001, construction of additional incineration facilities in Alabama, Arkansas, and Oregon was completed.<sup>156</sup> Even during the

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<sup>148</sup> *Chem. Weapons Working Group*, 963 F. Supp. at 1093.

<sup>149</sup> *See id.* at 1085.

<sup>150</sup> *Id.* at 1098.

<sup>151</sup> *See id.*

<sup>152</sup> *See id.*

<sup>153</sup> *See id.*

<sup>154</sup> *Chem. Weapons Working Group, Inc. v. U.S. Dep’t of the Army*, No. 2:96-CV-425C, 2000 WL 1258380, at \*11 (D. Utah 2000). Since challenges to NEPA decisions are brought under the Administrative Procedure Act (APA), the six-year statute of limitations which applies to APA claims is applicable to the plaintiffs’ NEPA claim. *Id.*

<sup>155</sup> *See id.*

<sup>156</sup> E-mail from Craig Williams, Director, Chemical Weapons Working Group, to author (Apr. 4, 2004, 21:57:36 EST) (on file with author). Construction of the incinerators began

trial burn phases, these facilities have been plagued with problems, including unplanned shutdowns, mechanical problems, trial burn failure, and agent migration.<sup>157</sup> In addition, the Army's operation of TOCDF has continued to face problems<sup>158</sup> and opposition.<sup>159</sup> In July 2002, workers were exposed to nerve agent, causing the facility to shut down for eight months.<sup>160</sup> The plant resumed operation on March 28, 2003, but in the next thirty-eight days, it was shutdown three more times, for a total of eleven days.<sup>161</sup> There have also been issues with the operation of JACADS, where there was a release of nerve agent in August 2002.<sup>162</sup> Furthermore, opponents argue that the incineration program has not been nearly as efficient or cost-effective as originally planned.<sup>163</sup> Operation of JACADS, which was anticipated to last five years, has lasted almost eleven years.<sup>164</sup> TOCDF was predicted to take six months to incinerate one class of weapons.<sup>165</sup> Instead, it took over four years.<sup>166</sup>

#### B. *The Army's Decision to Use Other Disposal Methods*

While the Army is still pursuing the use of incineration to dispose of the chemical weapons stored at four of the sites,<sup>167</sup> it has decided to use nonincineration processes at the other four.<sup>168</sup> While no SEIS has

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in 1997 when each of the sites received a RCRA permit. *Id.* As of the fall of 2004, the Alabama facility was in the agent trial burn phase, the Oregon facility was awaiting the permits necessary to begin agent trial burns, and the Arkansas facility was in the surrogate trial burn phase. *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> See Press Release, Chem. Weapons Working Group, Army's Utah Chem Weapons Burner Shuts Down—Again: 3rd Time in 38 Days (May 5, 2003), [http://www.cwwg.org/pr\\_05.05.03utahhalt.html](http://www.cwwg.org/pr_05.05.03utahhalt.html) (last visited Mar. 30, 2005).

<sup>159</sup> Press Release, Chem. Weapons Working Group, Environmental, Civil Rights, Veterans Groups File Suit to Prevent Threat from Burning Chemical Weapons in Alabama (Nov. 19, 2002), [http://www.cwwg.org/pr\\_11.19.02alsuit.html](http://www.cwwg.org/pr_11.19.02alsuit.html) (last visited Mar. 30, 2005).

<sup>160</sup> Press Release, *supra* note 158; Press Release, *supra* note 159.

<sup>161</sup> See Press Release, *supra* note 158.

<sup>162</sup> See Press Release, *supra* note 159.

<sup>163</sup> See Press Release, *supra* note 158.

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

<sup>167</sup> CWWG Complaint at 3. The Army still plans to use incineration in Alabama, Arkansas, Oregon, and Utah. *Id.*

<sup>168</sup> See *id.* at 3. The Army has decided to use non-incineration processes in Colorado, Indiana, Kentucky, and Maryland. *Id.* Craig Williams, Director of Chemical Weapons Working Group, explains that this decision is based on the fact that these are the four sites where the grassroots opposition to incineration has had the most political influence. E-mail from Craig Williams, Director, Chemical Weapons Working Group, to author (Apr. 8, 2004, 13:11:11 EST) (on file with author). In 1992, this political power led Congress to

been created to consider alternatives for the sites set to use incineration, a site-specific SEIS was prepared for each of the other sites, prompting the Army to choose alternative technologies at these sites.<sup>169</sup> For instance, the FEIS for the Pueblo, Colorado site, which was published in March 2002, considered four different alternatives and selected chemical neutralization followed by biodegradation as the disposal method to be used.<sup>170</sup> Similarly, an FEIS for the Richmond, Kentucky site was published in December 2002, which considered five different alternative technologies and led to the Army's decision to use chemical neutralization followed by supercritical water oxidation.<sup>171</sup>

The Army's decision to use nonincineration processes at these four sites shows that there are alternative technologies that could be used to dispose of the chemical agents.<sup>172</sup> As of June 2002, there were four alternative technologies that could be used instead of incineration at any of the eight storage sites: (1) neutralization and biological treatment; (2) neutralization and supercritical water oxidation; (3) neutralization, supercritical water oxidation, and gas phase chemical reduction; and (4) Silver II electrochemical oxidation.<sup>173</sup> These disposal technologies were proven successful by the Assembled Chemical Weapons Assessment (ACWA) program, a federal program developed

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require the Army to explore alternative methods of disposal for storage sites which contained less than five percent of the U.S. stockpile, which included Indiana, Kentucky, and Maryland. *Id.*

In 1996, the Army stated that neutralization could be used to dispose of the chemical agents in Indiana and Maryland. *Id.* The Army claimed that neutralization could not be used in Kentucky because that site (like Alabama, Arkansas, Colorado, Oregon, and Utah) contained assembled chemical weapons, as opposed to just chemical agents. *Id.* In 1996, Congress directed the Army to identify at least two alternative disposal technologies that could be used to dispose of assembled chemical weapons. *Id.* This law prohibited spending money on an incineration program in Colorado and Kentucky. *Id.* The remaining states, Alabama, Arkansas, Oregon, and Utah, declined to join in the moratorium on incineration. *Id.*

This led to the division of the storage sites between those where incineration would still be pursued and those where the Army was directed to look for alternatives. *Id.* Mr. Williams noted that the Army continued to fight for incineration, even at the Colorado and Kentucky sites, but that these sites managed to win the fight due to the "political unity in opposition" to the incineration program. *Id.*

<sup>169</sup> See CWWG Complaint at 16, 17. The Army did complete a site-specific EIS for each of the sites, but these did not consider any alternatives to incineration. *Id.* at 16. Following this, no site-specific SEIS was ever prepared for Alabama, Arkansas, Oregon, and Utah, while a site-specific SEIS has been prepared for each of the other four sites. *Id.* at 16, 17.

<sup>170</sup> *Id.* at 17.

<sup>171</sup> *Id.* at 18.

<sup>172</sup> See *id.* at 3, 17, 18.

<sup>173</sup> See CROWE, *supra* note 118, at 24.

to identify nonincineration processes for the disposal of chemical agents.<sup>174</sup> No site-specific SEIS addressing these alternative technologies has been prepared for Alabama, Arkansas, Oregon, or Utah.<sup>175</sup>

### C. Recent Litigation

In response to these recent developments, two new suits have been filed in an effort to stop further incineration of chemical agents.<sup>176</sup> The first lawsuit, *Families Concerned About Nerve Gas Incineration v. United States Department of the Army*, was filed in November 2002 in the District Court for the Northern District of Alabama.<sup>177</sup> The plaintiffs' goal in initiating this suit was to prevent incineration at the Anniston Chemical Disposal Facility (ANCDF) and to force the Army to use an alternative method of disposal.<sup>178</sup> In March 2003, a second lawsuit, *Chemical Weapons Working Group, Inc. v. U.S. Department of Defense*, was filed in the District Court for the District of Columbia.<sup>179</sup> Plaintiffs seek to enjoin the defendants from further operation of the incineration facility at TOCDF and to prevent full-blown incineration from beginning at the Alabama, Arkansas, and Oregon sites.<sup>180</sup>

Among the plaintiffs' claims is that the Army has violated NEPA by failing to prepare an SEIS for the incineration program.<sup>181</sup> The plaintiffs argue that the Army was required to prepare both a SPEIS, which assessed the incineration program's effects on human health and the environment and the alternative technologies that are avail-

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<sup>174</sup> *Id.* The success of the ACWA Program in identifying viable alternative technologies prompted the Army to complete an SEIS for four of the sites. CWWG Complaint at 17.

<sup>175</sup> See CWWG Complaint at 16, 27. In addition, the Final EIS for the ACWA Program decided to take no action at the Alabama and Arkansas sites and did not assess the use of non-incineration technologies at the Oregon or Utah sites. *Id.* at 18.

<sup>176</sup> See generally *id.*; Families Concerned Complaint at 143.

<sup>177</sup> *Families Concerned*, No. CV-02-BE-2822-E, at 1; Families Concerned Complaint at 13. While the defendants filed a motion to dismiss some of the plaintiffs' claims, they did not move to dismiss the NEPA claim against them. *Families Concerned*, No. CV-02-BE-2822-E, at 24. Therefore, the plaintiffs' claim that the Army had violated NEPA by failing to complete an SEIS has not been dismissed. See *id.* The plaintiffs' NEPA claims have since been consolidated into the NEPA claim raised in *Chemical Weapons Working Group, Inc. v. U.S. Department of Defense*, filed in the District of Columbia. E-mail from Craig Williams, Director, Chemical Weapons Working Group, Inc., to author (Apr. 4, 2004, 21:57:36 EST) (on file with author).

<sup>178</sup> See Press Release, *supra* note 159.

<sup>179</sup> CWWG Complaint at 1, 41.

<sup>180</sup> See *id.* at 4.

<sup>181</sup> CWWG Complaint at 20, 22; Families Concerned Complaint at 153.

able, as well as a site-specific SEIS for the Alabama, Arkansas, Oregon, and Utah sites.<sup>182</sup>

Plaintiffs argue that the Army's decision to use alternative technologies at four of the eight storage sites demonstrates the Army's belief that reasonable alternatives to incineration exist.<sup>183</sup> These new technologies were not evaluated when the defendants completed their FPEIS in 1988, nor have they been considered in a site-specific SEIS for Alabama, Arkansas, Oregon, or Utah.<sup>184</sup> In addition, the plaintiffs argue that new information regarding problems at TOCDF and JACADS requires the defendants to prepare an SEIS.<sup>185</sup> These incidents were not addressed during the original NEPA process and the Army has failed to address them through an SEIS.<sup>186</sup> Without taking these incidents or information about new alternative technologies into account, the Army could not adequately assess the impact that incineration will have on human health and the environment or the comparative risks of incineration alternatives.<sup>187</sup>

## VI. WILL NEPA BE ABLE TO STOP THE INCINERATION?

In order to be successful on their NEPA claims, the plaintiffs in the recently filed cases will first have to establish that the EIS requirement of NEPA applies to the Army's destruction of the chemical weapons stockpile.<sup>188</sup> Next, they will have to convince the court that the new information regarding alternative technologies and incidents at the operational incinerators and the changes that have been made to the incineration program are significant and substantial enough to trigger the requirement that an SEIS be completed.<sup>189</sup> The plaintiffs will have to demonstrate that the Army's decision not to complete an SPEIS or site-specific SEIS for Alabama, Arkansas, Oregon, and Utah should be overturned because it is arbitrary, capricious, or an abuse of

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<sup>182</sup> See CWWG Complaint at 20–21, 29–30.

<sup>183</sup> See *id.* at 24, 27 (arguing that it is undisputed that viable alternative technologies exist and that the Army is assessing and using these technologies at other sites).

<sup>184</sup> See *id.* at 16, 24.

<sup>185</sup> See *id.* at 25–26; Families Concerned Complaint at 173–83.

<sup>186</sup> See CWWG Complaint at 25–26; Families Concerned Complaint at 173–83.

<sup>187</sup> See CWWG Complaint at 20–21, 29–30; Families Concerned Complaint at 153.

<sup>188</sup> See National Environmental Policy Act of 1969 § 102(2)(c), 42 U.S.C. § 4332(2)(C) (2000).

<sup>189</sup> See Environmental Impact Statement, 40 C.F.R. § 1502.9(c)(1)(i), (ii) (2003).

discretion.<sup>190</sup> Finally, the plaintiffs will have to overcome the precedent established in *Chemical Weapons Working Group*, in which the court deferred to the Army's decision not to complete an SEIS, and convince the court that the holding in that case does not foreclose the possibility of a different conclusion in the two cases that have recently been filed.<sup>191</sup>

### A. *The Applicability of NEPA*

The Army's planned incineration of the chemical weapons stockpile falls under the EIS requirement of NEPA because it is a major federal action that will significantly affect the quality of the human environment.<sup>192</sup> The federal government has committed, and continues to commit, substantial resources to the incineration activities which will take place in Alabama, Arkansas, Oregon and Utah, making these activities major federal actions.<sup>193</sup> In addition, the incineration that will occur at these sites will significantly affect the quality of the environment.<sup>194</sup> It is known that the use of incinerators causes dioxins, heavy metals, and unburned toxic chemicals to be released into the environment.<sup>195</sup> Due to these effects on the quality of the human environment, NEPA requires that an EIS be prepared for the incineration program.<sup>196</sup> The EIS must include the environmental impacts of incineration, as well as alternative technologies that could be used instead of incineration.<sup>197</sup>

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<sup>190</sup> See *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 377 (1989); *Wisconsin v. Weinberger*, 745 F.2d 412, 417 (7th Cir. 1984); *Greenpeace v. Stone*, 748 F. Supp. 749, 765 (D. Haw. 1990).

<sup>191</sup> See *Chem. Weapons Working Group Inc. v. U.S. Dep't of the Army*, 935 F. Supp. 1206, 1218, 1219 (D. Utah 1996), *aff'd*, 111 F.3d 1485 (10th Cir. 1997).

<sup>192</sup> See CWWG Complaint at 21; Families Concerned Complaint at 153-63; DeLisi, *supra* note 3, at 81-82.

<sup>193</sup> CWWG Complaint at 21; Families Concerned Complaint at 153; see also *Chem. Weapons Working Group*, 935 F. Supp. at 1217 (finding that the daily operation of TOCDF constitutes a major federal action, triggering the SEIS requirements of NEPA).

<sup>194</sup> CWWG Complaint at 21; Families Concerned Complaint at 163.

<sup>195</sup> *Chem. Weapons Working Group*, 935 F. Supp. at 1213 (noting that dioxins will be created and released into the environment by the TOCDF incinerators); See CWWG Complaint at 22 (arguing that the incineration facilities will actually create toxic chemicals, as well as releasing dioxins, PCBs, and unburned chemical agents into the environment); Families Concerned Complaint at 163; Greenpeace, *supra* note 9 (discussing how incinerators lead to the release of heavy metals, unburned toxic chemicals, and new chemicals that are formed during the incineration process).

<sup>196</sup> See National Environmental Policy Act of 1969 § 102(2)(C), 42 U.S.C. § 4332(2)(C) (2000).

<sup>197</sup> See *id.*

There is currently no general exemption for military actions which would take the Army's incineration program outside the reach of NEPA.<sup>198</sup> In *Weinberger v. Catholic Action of Hawaii/Peace Education Project*, the U.S. Supreme Court acknowledged that classified material is exempt from the public disclosure requirement of NEPA.<sup>199</sup> The Court also held that, even in situations where an EIS would be exempt from public disclosure requirements, NEPA would still require the agency to make environmental considerations a part of their decisionmaking process.<sup>200</sup> The Court suggested that an EIS would be required even if prepared only for internal use.<sup>201</sup> Since military actions are subject to the EIS requirements imposed by NEPA, with only the limited exception that they can be exempted from public disclosure, the Army is required to comply with the requirements of NEPA while undertaking the incineration program.<sup>202</sup> In addition, the Army has not argued that the information surrounding the chemical weapons stockpile is classified, so it would not even be exempt from the public disclosure requirement.<sup>203</sup>

In 1988, the Army completed an EIS for the incineration program, arguably conceding that NEPA applied to the project.<sup>204</sup> In addition, in the *Chemical Weapons Working Group* case, the court also acknowledged that the Army was bound to meet the requirements of NEPA.<sup>205</sup> Thus, in the two recent cases, the court should find that the Army is obligated to satisfy the requirements of NEPA in completing the incineration program.

### B. The SEIS Requirement

After it completed an EIS for the incineration program, the Army was under a duty to supplement that EIS if significant new information arose or substantial changes were made to the project that were relevant to its environmental effects.<sup>206</sup> In each of the cases challenging the Army's use of incineration, plaintiffs have argued that the Army has

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<sup>198</sup> See Saber, *supra* note 62 at 820, 832; Sheridan, *supra* note 96, at 298.

<sup>199</sup> See 454 U.S. 139, 144–45 (1981).

<sup>200</sup> *Id.* at 146.

<sup>201</sup> *Id.*

<sup>202</sup> See *id.*

<sup>203</sup> See *id.* at 142–43.

<sup>204</sup> See *Chem. Weapons Working Group Inc. v. U.S. Dep't of the Army*, 935 F. Supp. 1206, 1210 (D. Utah 1996), *aff'd*, 111 F.3d 1485 (10th Cir. 1997).

<sup>205</sup> See *id.* at 1217.

<sup>206</sup> See Environmental Impact Statement, 40 C.F.R. § 1502.9(c)(1)(i), (ii) (2003).



neglected its duty to complete an SEIS.<sup>207</sup> They have contended that there is significant new information regarding both alternative technologies and also problems at the Army's existing incineration facilities.<sup>208</sup> In addition, the Army's decision to use nonincineration processes at four of the storage sites is a substantial change to the incineration program which should also be considered in an SEIS.<sup>209</sup> The plaintiffs must convince the court that the new information which has arisen, and the changes which have been made to the project, are so significant and substantial that the Army is required to complete an SEIS before it can proceed.<sup>210</sup>

Under the SEIS requirements established in the CEQ regulations and the test applied by the U.S. Supreme Court in *Marsh v. Oregon National Resources Council*, the court should find that the Army was required to prepare an SEIS for the incineration program.<sup>211</sup> Applying the regulations promulgated by the CEQ, the court should find that the Army was required to prepare an SEIS for the incineration program because there is significant new information which is relevant to the environmental effects of the project, as well as substantial changes made to the project which are relevant to its environmental impacts.<sup>212</sup> The court should find that new information concerning alternative technologies requires preparation of an SEIS because the Army's decision to use nonincineration processes at four of the sites shows that there are reasonable alternatives to the incineration program.<sup>213</sup> An SEIS should be used to evaluate the environmental effects of using these alternatives at the remaining sites.<sup>214</sup> The court should also find that the new information regarding chemical releases which have occurred at JACADS and TOCDF—as well as information which suggests that the incineration program has been neither as efficient nor as cost-effective as planned—is significant information that is relevant to the environmental effects of the incineration program, thereby requiring that an SEIS be prepared to consider this

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<sup>207</sup> *Chem. Weapons Working Group*, 935 F. Supp. at 1208; See CWWG Complaint at 20, 29; Families Concerned Complaint at 153.

<sup>208</sup> CWWG Complaint at 24, 25–26; Families Concerned Complaint at 173–83.

<sup>209</sup> CWWG Complaint at 17.

<sup>210</sup> See 40 C.F.R. § 1502.9(c)(1)(i), (ii).

<sup>211</sup> See *supra* Part II.A.

<sup>212</sup> See 40 C.F.R. § 1502.9(c)(1)(i), (ii).

<sup>213</sup> CWWG Complaint at 24, 27.

<sup>214</sup> *Id.*

new information.<sup>215</sup> Moreover, the requirement that an SEIS be completed has also been generated by changes in the incineration program, which are arguably substantial and relevant to the project's environmental impacts.<sup>216</sup> The court should find that the Army's decision to use nonincineration processes at four of the sites, as opposed to using on-site incineration at all eight sites as originally planned, is a substantial change to the project, the environmental effects of which must be assessed in an SEIS.<sup>217</sup>

The CEQ regulations further support a finding that the information regarding alternative technologies is significant enough to trigger the SEIS requirement by describing the alternatives section as central to the EIS requirement.<sup>218</sup> Under these regulations, the Army is required to use the NEPA compliance process to identify and assess reasonable alternatives to the incineration program that may have less negative environmental effects.<sup>219</sup> By failing to consider the environmental effects of alternative processes, the Army is ignoring the CEQ's mandate that agencies emphasize alternatives and assess each alternative objectively.<sup>220</sup> Since the CEQ has made it clear that the evaluation of alternatives is a major component of the EIS requirement, the failure to address alternative technologies through the completion of an SEIS could be seen by the court as a serious violation of the duties imposed upon the Army by NEPA.<sup>221</sup> Since the Army has already chosen to use alternative technologies at half of the sites, demonstrating that there are reasonable alternatives which may have less negative environmental effects, the court could find that the Army is violating the policy of NEPA by failing to use the NEPA process to evaluate the use of these alternatives at all eight sites.<sup>222</sup>

The conclusion that the Army is violating NEPA by not preparing an SEIS could also be reached under the test established in *Marsh v. Oregon Natural Resources Council*.<sup>223</sup> In that case, the U.S. Supreme Court held that an SEIS must be prepared when new information shows that a major federal action that remains to occur will affect the quality of the

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<sup>215</sup> *Id.* at 25–26; Families Concerned Complaint at 173–83; Press Release, *supra* note 158.

<sup>216</sup> CWWG Complaint at 17.

<sup>217</sup> *See id.*; Environmental Impact Statement, 40 C.F.R. § 1502.9(c)(1)(i) (2003).

<sup>218</sup> *See* 40 C.F.R. § 1502.14.

<sup>219</sup> *See* Purpose, Policy, and Mandate, 40 C.F.R. § 1500.2(e) (2003).

<sup>220</sup> *See id.* 1500.2(b), 1502.14(a).

<sup>221</sup> *See* 40 C.F.R. § 1502.14.

<sup>222</sup> *See id.* § 1500.2(e).

<sup>223</sup> *See Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 374 (1989).

human environment in a significant manner or extent not already considered.<sup>224</sup> Applying this test, the court should determine that major federal action is still needed, since the incineration program is not yet completed.<sup>225</sup> The court should conclude that an SEIS is required for the remaining action because the new information regarding alternative technologies and problems at the existing incinerators is sufficient to show that the completion of the incineration program will affect the quality of the human environment in a significant manner or to an extent that was not considered in the original EIS.<sup>226</sup> Since the Army completed a site-specific SEIS for half of the sites, which led it to choose nonincineration processes at these sites, the court should find that the Army has failed to apply a rule of reason in deciding whether an SEIS is necessary for the other four sites, as well as for the incineration program as a whole.<sup>227</sup> The court should conclude that the Army has not taken a “hard look” at the environmental consequences of the incineration program in relation to the new information that has arisen since the project was originally approved.<sup>228</sup>

The Army, on the other hand, could argue that it is not required to prepare an SEIS for the four sites set to use incineration or for the incineration program as a whole. The Army could argue that an SEIS is not required under the CEQ regulations because the new information regarding alternative technologies and problems at the operational incinerators is neither significant nor relevant to the environmental effects of the incineration program.<sup>229</sup> The court could find that, under the Court’s holding in *Marsh*, an SEIS is not required every time new information becomes available, and that the Army has the discretion to decide whether or not an SEIS is necessary.<sup>230</sup> Like the Court in *Marsh*, the court here could conclude that the Army did take a hard look at the environmental consequences of the project in relation to the new information.<sup>231</sup> Unlike the Court in *Marsh*, however, it may be hard for the court to defer to the Army’s decision that an SEIS is not necessary since it has already completed a site-specific SEIS for four of the sites.<sup>232</sup> By doing this, the Army has arguably ac-

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<sup>224</sup> *Id.*

<sup>225</sup> *See id.*

<sup>226</sup> *See id.*

<sup>227</sup> *See id.* at 373.

<sup>228</sup> *See id.* at 374.

<sup>229</sup> *See* Environmental Impact Statement, 40 C.F.R. § 1502.9(c)(1)(i), (ii) (2003).

<sup>230</sup> *See Marsh*, 490 U.S. at 373, 377.

<sup>231</sup> *See id.* at 385.

<sup>232</sup> *See id.*; CWWG Complaint at 17.

knowledge that there is new information that requires the completion of an SEIS.<sup>233</sup> The court should consider the Army's decision to complete a site-specific SEIS for four of the sites in deciding whether the new information and changes which have been made to the incineration program require the preparation of an SEIS.<sup>234</sup>

*C. Arbitrary, Capricious or an Abuse of Discretion*

The biggest hurdle that the plaintiffs will face is convincing the court that the Army's decision not to complete an SEIS is arbitrary, capricious, or an abuse of discretion.<sup>235</sup> Even if the plaintiffs convince the court that new information and changes made to the project merit an SEIS, they must still convince the court to overturn the Army's decision.<sup>236</sup> In general, it is up to the agency's discretion whether to complete an SEIS, and the court will uphold this decision unless it is arbitrary, capricious, or an abuse of discretion.<sup>237</sup>

Plaintiffs can convince the court that the Army's decision is arbitrary, capricious, or an abuse of discretion by showing that the decision was not based upon consideration of all relevant factors, constituting a clear error of judgment.<sup>238</sup> The court should find that, since there is new information about dangerous incidents that have occurred at the operational incinerators, and since the Army has chosen to use nonincineration processes at four of the sites, it is a clear error of judgment for the Army not to complete an SEIS.<sup>239</sup> Even if the court found that the Army's decision not to complete an SEIS was based upon consideration of all the relevant new information, the court should not be convinced that the Army made a reasonable decision regarding the significance of this new information.<sup>240</sup> The court should not defer to the Army's expertise because it is unreasonable for the Army not to complete a site-specific SEIS that considers alternative technologies for four of the sites when it has actually already

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<sup>233</sup> See CWWG Complaint at 17.

<sup>234</sup> See *id.*

<sup>235</sup> See *Marsh*, 490 U.S. at 377; *Wisconsin v. Weinberger*, 745 F.2d 412, 417 (7th Cir. 1984); *Greenpeace v. Stone*, 748 F. Supp. 749, 765 (D. Haw. 1990).

<sup>236</sup> See *Marsh*, 490 U.S. at 377; *Weinberger*, 745 F.2d at 417; *Greenpeace*, 748 F. Supp. at 765.

<sup>237</sup> See *Marsh*, 490 U.S. at 377; *Weinberger*, 745 F.2d at 417; *Greenpeace*, 748 F. Supp. at 765.

<sup>238</sup> See *Marsh*, 490 U.S. at 378.

<sup>239</sup> See CWWG Complaint at 17, 24, 26; Families Concerned Complaint at 173-83.

<sup>240</sup> See *Marsh*, 490 U.S. at 378.

selected a nonincineration process for the other four sites.<sup>241</sup> Since the alternatives section has been described as central to the EIS requirement, the court should find that the Army failed to exercise reasonable discretion by not considering these viable alternatives for the whole incineration program.<sup>242</sup>

The Army could argue that its decision not to complete an SEIS is not arbitrary, capricious, or an abuse of discretion because it was based upon consideration of all the relevant new information and was not a clear error in judgment.<sup>243</sup> Under *Marsh*, the court must defer to the reasonable discretion of the Army, even if the court finds the plaintiff's arguments more persuasive.<sup>244</sup> The Army could argue that it has made a reasonable decision regarding the significance of the new information regarding alternative technologies and incidents at the operational incinerators.<sup>245</sup>

The Army could also argue that its decision not to complete an SEIS is similar to the decision of the Army Corps of Engineers in *Marsh*.<sup>246</sup> In that case, the Court deferred to the Corps's decision that new information did not require an SEIS, holding that this decision was not arbitrary, capricious, or an abuse of discretion because the Corps had reasonably evaluated the relevant documents and there was not a clear error of judgment.<sup>247</sup> Like the Court in *Marsh*, the court here could find that the Army has evaluated the relevant new information regarding alternative technologies and incidents at TOCDF and JACADS.<sup>248</sup>

Unlike in *Marsh*, however, the court should find that the Army's decision not to complete an SEIS was arbitrary, capricious, and an abuse of discretion because it was a clear error of judgment.<sup>249</sup> In *Marsh*, the Court held that it was not a clear error of judgment for the Corps to decide not to complete an SEIS which took into account two new documents which showed that the environmental effects of the

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<sup>241</sup> See *id.*; CWWG Complaint at 17.

<sup>242</sup> See Environmental Impact Statement, 40 C.F.R. § 1502.14 (2003); *Marsh*, 490 U.S. at 378.

<sup>243</sup> See *Marsh*, 490 U.S. at 378.

<sup>244</sup> See *id.*

<sup>245</sup> See *id.*

<sup>246</sup> See *id.* at 385 (holding that the Corps met the requirements of NEPA when it decided that an SEIS was not necessary).

<sup>247</sup> See *id.*

<sup>248</sup> See *id.*

<sup>249</sup> See *Marsh*, 490 U.S. at 378.

dam it was constructing would be greater than previously thought.<sup>250</sup> Here, in addition to new information regarding the environmental effects of the incineration program, there is new information about alternative technologies, as well as a decision by the Army to use non-incineration processes at half of the sites.<sup>251</sup> The court should find that the Army made a clear error of judgment since its decision that the new information was not significant enough to merit an SEIS for four of the sites is unreasonable given that the Army has already completed an SEIS for the remaining sites and has chosen nonincineration processes to be used at these sites.<sup>252</sup>

#### D. *Overcoming the Precedent Established in Chemical Weapons Working Group*

Finally, the plaintiffs will have to convince the court that their NEPA claims are distinguishable from the claims raised in *Chemical Weapons Working Group, Inc. v. United States Department of the Army*, which were rejected by the court.<sup>253</sup> In that case, plaintiffs relied on incidents that had occurred at JACADS, new information concerning dioxins, and recent developments in alternative technologies, in order to argue that the Army was violating NEPA by not completing an SEIS for the incineration program.<sup>254</sup> Similarly, in the two new cases, plaintiffs claim that an SEIS should be prepared because of new information about problems at the operational incinerators and alternative technologies.<sup>255</sup>

In reaching a decision on the plaintiffs' NEPA claims, it will be fairly easy for the court to rely upon the holding in the previous *Chemical Weapons Working Group* case in dealing with the plaintiffs' claims concerning incidents which have occurred at JACADS and TOCDF.<sup>256</sup> In *Chemical Weapons Working Group*, the court rejected the plaintiffs' claim that incidents which had occurred at JACADS required an SEIS, holding that the information was not new since it had been anticipated and measures had been taken to correct the prob-

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<sup>250</sup> See *id.* at 369, 385.

<sup>251</sup> See CWWG Complaint at 17, 25–26; Families Concerned Complaint at 173–83.

<sup>252</sup> See CWWG Complaint at 16, 17.

<sup>253</sup> See *Chem. Weapons Working Group Inc. v. U.S. Dep't of the Army*, 935 F. Supp. 1206, 1220 (D. Utah 1996), *aff'd*, 111 F.3d 1485 (10th Cir. 1997).

<sup>254</sup> See *id.* at 1212, 1213, 1214.

<sup>255</sup> See CWWG Complaint at 25–26; Families Concerned Complaint at 173–83.

<sup>256</sup> See *Chem. Weapons Working Group*, 935 F. Supp. at 1218.

lems at TOCDF.<sup>257</sup> In the recent cases, the court could apply the same reasoning and reject the plaintiffs' claim that incidents which have occurred at JACADS and TOCDF require that an SEIS be completed.<sup>258</sup> The court could once again defer to the judgment of the Army and find that the information regarding the issues which have arisen is not new information which requires an SEIS because the problems were anticipated by the Army.<sup>259</sup> The court could also find that the problems will be remedied at the incineration facilities which the Army will operate in the future.<sup>260</sup>

The court should, however, distinguish the recent cases from the *Chemical Weapons Working Group* case when handling the plaintiffs' claim that an SEIS is required due to new information that has become available regarding alternative technologies.<sup>261</sup> In *Chemical Weapons Working Group*, the court rejected the plaintiffs' claim that information regarding alternative technologies required an SEIS, deferring to the Army's conclusion that alternative technologies were too immature and would take years to implement.<sup>262</sup> In the recent cases, the fact that the Army has chosen to use alternative technologies at four of the storage sites shows that there are viable alternatives which can be used instead of incineration.<sup>263</sup> Even applying a limited standard of review, and deferring to the discretion of the Army, the court should not dismiss the plaintiffs' argument that an SEIS is required to evaluate the use of alternative technologies at the sites that are set to use incineration.<sup>264</sup> In the previous *Chemical Weapons Working Group* case, the court held that the Army had the discretion to make the final decision as to whether new information was substantial enough to require an SEIS.<sup>265</sup> By completing a site-specific SEIS and choosing to use alternative technologies at four sites, the Army arguably acknowledges that the information about alternative technologies is substantial enough to merit completion of an SEIS.<sup>266</sup>

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<sup>257</sup> *Id.*

<sup>258</sup> *See id.*; CWWG Complaint at 25–26; Families Concerned Complaint at 173–83.

<sup>259</sup> *See Chem. Weapons Working Group*, 935 F. Supp. at 1218.

<sup>260</sup> *See id.*

<sup>261</sup> *See id.* at 1219.

<sup>262</sup> *See id.* at 1214, 1219.

<sup>263</sup> *See* CWWG Complaint at 17.

<sup>264</sup> *Chem. Weapons Working Group*, 935 F. Supp. at 1219; *See* CWWG Complaint at 20, 29; Families Concerned Complaint at 153.

<sup>265</sup> *See Chem. Weapons Working Group*, 935 F. Supp. at 1219.

<sup>266</sup> *See* CWWG Complaint at 17.

### E. *Will NEPA Be Able to Stop the Incineration?*

The court should find that the Army has violated NEPA by failing to complete an SEIS for the incineration program, as well as a site-specific SEIS for Alabama, Arkansas, Oregon, and Utah. The court should grant the relief sought by the plaintiffs and enjoin the Army from any activities taken in furtherance of the incineration program until an SEIS is completed.

Even if the court agrees with the plaintiffs, however, NEPA may be unsuccessful in permanently stopping the incineration of chemical weapons. NEPA may require the defendants to prepare an SEIS for the incineration program, but it does not require them to reach any specific decision about how to proceed with destroying the weapons.<sup>267</sup> Even though NEPA may require the Army to complete an SEIS that identifies alternative technologies, the Army is not required to choose any particular alternative, even if one is better for the environment.<sup>268</sup> Ultimately, the court's role in these cases will be limited to looking at whether or not the Army has followed the procedural requirements established by NEPA.<sup>269</sup> Once it is determined that the Army has fully complied with NEPA and that environmental concerns have played a part in the decisionmaking process, NEPA does not require that the Army choose an alternative means of disposal.<sup>270</sup>

On the other hand, requiring the Army to complete an SEIS for the incineration program will ensure that environmental concerns play a part in its decision to continue pursuing the use of incineration at four of the sites.<sup>271</sup> If it is required to prepare an SEIS that will be disclosed to the public, the Army may become more conscious of the environmental impacts of its decision.<sup>272</sup> The completion of an SEIS will raise public awareness of the environmental consequences of the incineration program. If the SEIS discloses that there actually are alternative technologies that would involve fewer negative environ-

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<sup>267</sup> See *Wisconsin v. Weinberger*, 745 F.2d 412, 416 (7th Cir. 1984).

<sup>268</sup> See *id.*; Koplow, *supra* note 10, at 485.

<sup>269</sup> See *Strycker's Bay Neighborhood Council v. Karlen*, 444 U.S. 223, 227-28 (1980); *Vt. Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 558 (1978); *Weinberger*, 745 F.2d at 416.

<sup>270</sup> See *Strycker's Bay Neighborhood Council*, 444 U.S. at 227-28; *Vt. Yankee Nuclear Power Corp.*, 435 U.S. at 558; *Weinberger*, 745 F.2d at 416.

<sup>271</sup> See *Weinberger v. Catholic Action of Haw./Peace Educ. Project*, 454 U.S. 139, 143 (1981).

<sup>272</sup> See *id.*



mental consequences, the Army may be persuaded to choose one of those alternatives rather than face public criticism.

### CONCLUSION

The Army's decision to use incineration to dispose of the U.S. chemical weapons stockpile has proven to be very controversial. It is clear that the chemical weapons must be destroyed, but opponents argue that an alternative method should be used because of the dangers that incineration poses to human health and the environment. A balance needs to be struck between the Army's need to destroy the weapons and the concerns of those living near the sites. This balance will only be achieved with the help of the judiciary. Opponents to incineration have turned to the courts, asking that the incineration be halted because the Army has allegedly violated NEPA.

The court in these cases should find that the Army has violated NEPA by failing to prepare an SEIS for the incineration program as a whole and for the four sites that are still set to use incineration. The court should find that an SEIS was required to take into account new information regarding alternative technologies and problems at the operational incinerators, as well as changes that have been made to the incineration program. The court should not defer to the Army's decision that an SEIS was not necessary because this decision was arbitrary, capricious, and an abuse of discretion. In addition, the claims raised by the plaintiffs in these two recent cases are distinguishable from the claims raised in *Chemical Weapons Working Group* and therefore should not be dismissed by relying on this precedent.

Even if the plaintiffs are successful in these two cases, NEPA will not require that the Army choose an alternative method of disposal. By completing an SEIS, however, the Army would be required to look at the environmental impacts of its decision and to inform the public about alternative technologies that may be better for the environment. The hope is that the Army will use the SEIS process to identify the method of disposal that will have the least negative environmental impacts while remaining viable in all other respects. If it fails to do so, the SEIS will provide communities with the information that they need in order to hold the Army accountable. If the Army chooses not to select the most environmentally safe disposal method, it is important that the public uses the information contained in the SEIS to pressure the Army to change its decision. Otherwise, the people living in the four communities set to use incineration will bear the consequences of disposing of a national burden.