WAGING PEACE SERIES

As far as is known, the term “Waging Peace” originated with Warren Wells, late husband of Ethel Wells of Santa Barbara, in a letter to President Eisenhower. It was a long-standing practice of Mr. Wells to keep in close touch with key national figures and give them his views on peace issues as well as other vital matters. This series is dedicated both as a memorial to him and in gratitude to Mrs. Wells for her continued efforts in this cause.

Just as peace is more than the absence of war, waging peace is more than supporting arms reductions. In addition, it embraces positive steps toward genuine harmony. In this series the Foundation publishes and distributes short booklets stressing ideas for attaining peace. Concepts expressed will include views of many authorities, and will not necessarily be those of the Foundation.

Suggestions for topics and your reactions to this issue are welcome. Booklets in this series are available from the Nuclear Age Peace Foundation.

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CHALLENGING THE NUCLEAR ADDICTION
CITIZEN PARTICIPATION IN ENVIRONMENTAL REVIEW OF NUCLEAR WEAPONS PRODUCTION

by
John Burroughs and Andrew Lichterman

Booklet 33
WAGING PEACE SERIES

Nuclear Age Peace Foundation
CHALLENGING THE NUCLEAR ADDICTION

Citizen Participation In Environmental Review of Nuclear Weapons Production
by John Burroughs and Andrew Lichterman

The United States Department of Energy (DOE) is now conducting environmental review of proposed reconfiguration and modernization of the nuclear weapons complex, a network of aging industrial facilities spread across 12 states whose legacy of radioactive and toxic contamination poses severe and continuing threats to public safety and health. DOE’s initial planning assumes a complex capable of continued design, testing, and production of nuclear weapons. That assumption has since been challenged by an outpouring of public opposition and dramatic changes in global conditions and U.S. policy. At preliminary public hearings in 1991 concerning the proper scope of review — the issues and alternatives to be considered — hundreds of citizens across the country demanded that the DOE assess a possible non-nuclear future. Further opportunities for citizens to voice their views include public hearings on the draft environmental impact statement, now scheduled for late 1993 or early 1994.

A transition to a non-nuclear future is made a realistic prospect by three developments that postdate initiation of environmental review: 1) arms reductions initiatives and agreements that if ratified and implemented will reduce the size of the U.S. arsenal to 3500 strategic warheads and 5000 stored or deployed tactical warheads by 2003, 2) the Bush Administration’s confirmation that the United States will not produce more weapons-grade plutonium and uranium; and 3) the Nuclear Testing Moratorium Act, which halts testing until July 1993, limits underground nuclear explosions to 15 “safety” tests conducted by 1996, and prohibits testing after 1996 unless a foreign state tests.

In a path to a non-nuclear future, production at existing facilities would be ended, and no new facilities to perform production operations now executed at Rocky Flats, Colorado, and other sites would be required. Pending its eventual elimination, maintenance of a small arsenal could be handled on a vastly reduced scale. Further, the Nevada Test Site and other facilities would be closed and dedicated to cleanup, and design operations at the Los Alamos and Livermore weapons laboratories terminated. In this future, the laboratories and the DOE would be limited to the (monumental) tasks of cleanup of contaminated facilities, dismantlement of warheads, storage and disposition of nuclear materials, maintenance of a much reduced arsenal, and technical support of disarmament verification and

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non-proliferation.

Despite the dramatic changes in U.S. policy and global conditions since review began, and pervasive citizen demands that the DOE seriously consider a non-nuclear future, indications to date are that the DOE continues to focus on a weapons design and production mission and is planning construction of new facilities. Failure to assess the environmental impacts of a non-nuclear future would be a tragic failure of national vision.

The Department of Energy administers one of the largest concentrations of scientific and engineering talent and facilities on the planet. The long-range environmental review the Department is now undertaking provides the nation with an unprecedented opportunity to examine what it is doing with a substantial portion of its resources and its best-trained people. It also provides an unusual chance to consider carefully the full environmental and health impacts of alternative future paths for management of the United States nuclear arsenal. We find ourselves in our current predicament — inheritors of a nuclear weapons production complex which is obsolete and dangerous, which has contaminated the land and poisoned our people — in large part because that complex was built piecemeal, to serve the exigencies of a crisis-laden era, with most decisions made in secret, without national debate. That same predicament now confronts the peoples of the former Soviet Union, perhaps in a still more virulent form. As the United States, like the former Soviet republics, seeks to rebuild its society in the aftermath of the Cold War, we cannot afford to ignore this chance to examine the widest possible range of policy options, including those which may only be achievable over a half-century or more.

DOE itself admits that the “modernization” of its weapons plants will take at least two decades. If a new nuclear weapons complex indeed is built at the cost of many billions of dollars, it will remain a major presence in our society for decades thereafter. It will produce more nuclear bombs and more toxic and nuclear waste, and its scientists and engineers (some of our most skilled and educated children and grandchildren) will spend their energies designing weapons of mass destruction we cannot yet imagine. Against this entirely foreseeable (and indeed, if the only alternatives considered involve continued nuclear weapons design and production, unavoidable) background, a sixty-year planning horizon would seem to be a minimum. A planning process of this temporal scope for our central institutions for the design and production of weapons of mass destruction simply must consider alternatives in which nuclear weapons design and production are eliminated altogether. Can we truly not imagine a world in which, for example, a comprehensive test ban and a ban on the production of new nuclear weapons, or indeed global elimination of nuclear arsenals, have been achieved by a half-century hence?

This article makes the case that the National Environmental Policy Act (NEPA) requires the DOE to consider the environmental impacts of an alternative future in which nuclear weapons design, testing and production is ended. We also describe the NEPA process and suggest how citizens can participate in environmental review to help foster genuine public debate concerning plans to make nuclear weapons for decades to come.

The National Environmental Policy Act

NEPA’s central provision is that all agencies of the federal government 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 by the responsible official on:

(i) the environmental impact of the proposed action,
(ii) any adverse environmental impacts which cannot be avoided should the proposal be implemented,
(iii) alternatives to the proposed action,
(iv) the relationship between local short-term uses of man’s environment and the maintenance and enhancement of long-term productivity, and
(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

To prepare an environmental impact statement, the agency first determines the statement’s scope, the range of issues and alternatives to be considered. Second, the agency prepares and publishes a draft environmental impact statement. The agency then is required to afford the public and other agencies the opportunity to comment, in writing and at public hearings, on the adequacy of the statement in describing impacts of and alternatives to the proposed action. Third, the agency prepares and releases the final environmental impact statement, and explains its decision about the proposed action in another document, the record of decision. The latter document shows how the analysis of environmental impacts and alternatives was factored into the decision and balanced against other, non-environmental, considerations (e.g., the reasons the action is undertaken).

Citizens dissatisfied with the environmental impact statement may be able to compel preparation of a modified or new statement through civil lawsuits. In addition, they may be able to persuade a court to delay the proposed action pending completion of the new or modified statement. NEPA does not, however, empower a court to stop a project on the sole
ground that adverse environmental impacts outweigh the benefits of the project. NEPA's principal enforceable requirements are procedural. A federal agency pursuing or approving a project must demonstrate, before there has been an irrevocable commitment of resources, that it has properly considered environmental impacts of the project and an appropriate range of alternatives, and that it has provided the public and other federal, state, and local government agencies the legally mandated opportunities to review and comment upon its project proposal and the environmental impact statement which supports it.

NEPA therefore does not affect the substantive standards with which agencies must comply (though standards are set pursuant to other statutes). It does not stop environmentally dangerous projects. But, in principle at least, it does require environmentally informed decision-making by agencies. And, it does authorize and encourage citizens to participate in that process. Unfortunately, due to its procedural nature, NEPA can amount, if not used properly, to a series of hoops through which the government jumps before it does what it wants to do. To avoid this, citizens must seize the opportunity to participate to ensure that the decision is not made by a narrow group of people: the government agency and the particular interests it serves, regulates, and employs (in the DOE's case, the military and military-industrial contractors).

The main NEPA process through which citizens participate in environmental review of major federal projects — the formulation of environmental impact statements including through public hearings — helps citizens force the government to do two things which governments all too often are reluctant to do. First, the process requires the government to create forums in which citizens can express their views about federal actions. In addition to providing a natural focus for public opposition to a project, the hearings are certified news events, a critical factor in a polity dominated by a relatively small number of mass media outlets. Second, the process can be used to force the government to release information in its possession about the health and environmental effects of its activities, and even to do additional research about the potential effects of controversial technologies or development strategies.

In a society blinded by a ceaseless blizzard of information fragments, and where the government agencies formally responsible for protecting public health and the natural world (usually conceived narrowly as "resources", e.g. fisheries, timber-producing forests, or tourist-attracting scenic wilderness parks) are chronically understaffed and overwhelmed, the mere fact of sustained and in-depth attention to an ill-conceived proposal may be enough to stop it. Citizen activists sometimes can modify or stop a project by bringing information about environmental impacts produced in NEPA review to the attention of a state or federal environmental agency charged with protecting a "resource" the project might damage. That agency might then criticize the project sponsor's characterization of potential environmental effects, and might even oppose the project itself.10

San Francisco Bay Area anti-nuclear activists have made good use of NEPA's citizen participation provisions. For example, in public hearings on the adequacy of a draft environmental impact statement, scores of citizens raised serious questions about a planned incinerator to burn radioactive and toxic wastes at the nuclear weapons design laboratory in Livermore. The incinerator was never built. Again, in opposing the proposed homeporting of a nuclear-capable battleship (the U.S.S. Missouri and supporting fleet) in the Bay, activists used the information-forcing aspect of NEPA and the Freedom of Information Act (basing their information requests on documents produced in the NEPA process) to obtain documents suggesting that the environmental impacts of the project might be more severe than the initial draft environmental impact statement had indicated. The information thus produced was made available (through incorporation in the NEPA administrative record and transmission of particularly important documents to interested agencies) to state and federal regulators and the Congressional committees responsible for funding the project. The proposal to base the battleship in the Bay was ultimately withdrawn.11

Thus while NEPA does not directly and substantively regulate environmentally hazardous projects, it can serve as a vehicle for compelling release of critical information and focussing public pressure and media attention. The result of citizen participation in NEPA-mandated procedures can be to stop or modify such projects.

Environmental Review of Reconfiguration

The Department of Energy's environmental review of reconfiguration began in early 1991, and during that year public testimony was taken in thirteen states and the District of Columbia concerning the proposed scope of review. Release of a draft environmental impact statement and public hearings concerning its adequacy are anticipated in late 1993 or early 1994, with release of a final statement and record of decision to follow in late 1994.

The process so far has been remarkable. At scoping hearings held near nuclear weapons facilities around the United States, scores and, in some locations, hundreds of citizens voiced their views. DOE officials sat silently for the most part, listening to the testimony and limiting their remarks to occasional questions aimed at clarifying testimony or eliciting further information. The testimony ranged from well-informed discussion of particular
environmental hazards posed by a nuclear weapons facility to impassioned
genral denunciation of further nuclear weapons design and production.

Through well-coordinated outreach and publicity efforts, citizen
groups around the country utilized the scoping process to create, in effect, a
"national referendum" on the future of the nuclear weapons complex. In
Livermore, California, for example, public response was so great that the DOE
was forced to add a second day to the public hearing. A total of 139 speakers,
representing a broad range of ages, professions and backgrounds, presented
16 and 1/2 hours of testimony; only one speaker favored continuation of current
U.S. nuclear weapons policy. At the Los Alamos, New Mexico hearings
(where a second day also had to be added), a coalition of Chicano and Native
American groups at one point "took over" and conducted a mock trial of
the DOE.

A major theme which emerged in the course of the hearings is that
unless the DOE alters the scope of review and considers reconfiguration
alternatives in which weapons design, testing and production are discontnued,
its monumental environmental review will be only a paper exercise.
It will not serve its legally mandated purpose of providing citizens and
decisionmakers with the information about environmental impacts of
nuclear weapons production, past, present, and anticipated, needed to
make intelligent decisions on these momentous issues.

NEPA requires the inclusion in environmental impact statements of
detailed discussion of "alternatives to the proposed action." As the Council
on Environmental Quality, an advisory body established by NEPA, stated in
its guidelines to NEPA implementation, identification of alternatives
is the heart of the environmental impact statement. [The statement] should present the impacts of the proposal and the
alternatives in comparative form, thus sharply defining the issues
and providing a clear basis for choice among options by the
decisionmaker and the public. Agencies must:

(a) Rigorously explore and objectively evaluate all reasonable
alternatives, and for alternatives which were eliminated from
detailed study, briefly discuss the reasons for their having been
eliminated.

(b) Devote substantial treatment to each alternative considered
in detail including the proposed action so that reviewers may
evaluate their comparative merits.

(c) Include reasonable alternatives not within the jurisdiction of

the lead agency.15

The key word here is "reasonable." As the courts have held in
interpreting NEPA, agencies need not consider alternatives which are
remote, speculative, infeasible, uncommon or unknown, or whose environ-
mental effects are not ascertainable. In particular, they need not consider
alternatives which would require improbable, wholesale reversal of well-
established policies and statutes, or whose availability to meet the needs
driving the proposed action is uncertain within the time frame in which the
action is to function. But, the fact that implementation of an alternative
depends on legislative or administrative action outside the purview of the
agency undertaking review does not, standing alone, bar its consideration,
certainly not where it represents a developed policy option under study in
governmental circles. The point is to enable reasoned choice, not only by the
agency conducting review, but also by other concerned decisionmakers,
including other agencies, the President, and Congress.

Measured against these standards, the announced scope of envi-
ronmental review of reconfiguration is too narrow because alternatives set out
in the notice of intent to prepare an environmental impact statement do not
include reconfiguration under conditions of a halt to design, testing, and
production of new weapons.17 The exclusion of a no testing alternative has
since been rendered obsolete by U.S. law requiring an end to testing after 1996
if no foreign state tests. The exclusion of the broader path of halting all
activity related to new weapons — design and production as well as testing — is unacceptable for the reason articulated by the Council on Environmental
Quality and the courts as the basis for consideration of alternatives: it prevents
meaningful, comparative evaluation of the environmental effects of contin-
uing on the present path of design, testing and production of nuclear
weapons.19

The DOE has not yet articulated its rationale for the exclusion of a
no-production path form consideration, but its preliminary position is indi-
cated by the notice of intent to prepare an environmental impact statement.
The notice announces that the statement will not address issues "outside the
control of DOE," including the "need for nuclear weapons, or impacts of their
use," or "actions of the President, Congress, Department of Defense, or other
(non-DOE) Federal agencies."20 Pursuant to the Atomic Energy Act,21 the
DOE's responsibility is to supply nuclear weapons as demanded by the
Department of Defense, and ultimately Congress and the President. The
DOE appears to maintain that the need for nuclear weapons and specifically
the need for design, testing, and production of new weapons is a matter outside
its statutory responsibility and therefore not subject to environmental review.

Yet, as explained above, NEPA requires agencies to consider reason-
able alternatives, including those not within their jurisdiction. Whether an alternative is outside an agency’s control is one of the factors that bears upon its reasonableness for purposes of environmental review, but taken alone is not conclusive. What the DOE’s restricted view of alternatives reflects is a commitment to its mission of developing and producing nuclear weapons. Thus the DOE’s reconfiguration study designated as the basis for environmental review states:

As long as nuclear weapons remain a central part of the United States national security policy, a vigorous RD&T program will be needed to maintain confidence in the nuclear weapons program and the deterrent stockpile.22

It is of course true that this position is a policy well-entrenched and strongly held within sectors of the executive branch, notably the Department of Energy and its weapons laboratories. As a policy that the United States has pursued for decades and may continue to pursue, it merits consideration in environmental review as one possible future. However, the purpose of environmental review is to support informed decisionmaking, not only by the agency involved, but by Congress and the President as well. Even if the Department of Energy holds to its position that “the need for nuclear weapons, or impacts of their use” is beyond the scope of environmental review, it still must address the environmental consequences of the various missions it may be called on to perform. A mission vastly different than that performed by the DOE during the Cold War is now being widely discussed. For example, a former Secretary of Defense and other well known analysts have stated that no further modernization of the U.S. arsenal is needed and that it should be reduced to a size of several hundred warheads or less — a number well below the 3500 strategic warheads set by the still to be ratified START II agreement.23

Surely one factor relevant to determining the size and nature of the arsenal should be the environmental impacts of designing, testing, and producing the weapons. But if the DOE, even in the course of complex-wide review, insists upon ignoring the possibility of foregoing future design and manufacture of nuclear weapons, a critical opportunity for assessing those impacts will be lost. Presuming that the Department’s only foreseeable future for the next 60 years or more will be some variation on the nuclear weapons design and production theme — a stockpile slightly larger or smaller, a generation more or less of “modernized” missiles and warheads — will leave the public and the political branches of our government ill-informed and ill-prepared to debate issues of the utmost importance: whether the staggering environmental, health, and social effects of the long commitment to nuclear weapons are justified by whatever usefulness those weapons are believed to have when brandished in the international arena.

Conclusion: Environmental Review in the Aftermath of the Cold War

U.S. deployment of nuclear weapons historically has been justified as necessary to maintain a nuclear threat, including threats of first use and first strike as well as retaliatory second use, against the Soviet Union. It must be emphasized that the deployment was intended not only to deter Soviet nuclear attack, but also to “contain” feared Soviet conventional aggression by threat of first use and first strike. Now, however, as recognized by the 1991 Bush Administration arms reduction initiative, conventional aggression or nuclear attack by the Soviet successor states have become highly improbable.

In addition and importantly, it has become increasingly clear that continued nuclear weapons development seriously erodes the non-proliferation regime. One of the primary rationales offered for a comprehensive test ban — to whose achievement the United States is now committed by the Nuclear Testing Moratorium Act — is that it would bolster the non-proliferation regime established by the Nuclear Non-Proliferation Treaty. The logic is that the nuclear powers cannot consistently both develop their nuclear arsenals through testing and call upon or require non-nuclear powers to forgo acquiring nuclear weapons.24 Indeed, the Non-Proliferation Treaty, reflecting this logic, commits the United States and other nuclear-armed states to negotiate nuclear disarmament in good faith. The particular insistence of the non-nuclear states on negotiation of a test ban if the non-proliferation regime is to survive is based on intense opposition to further development of weapons they are barred from acquiring while the treaty is in force.

In this changed international context, it is imperative to reevaluate — within and without environmental review — the effect of continued nuclear weapons design, testing, and production on the risk of nuclear war. These activities are carried out primarily to create a highly sophisticated nuclear arsenal that enables threats of first use and first strike aimed at achieving geopolitical leverage. Such an arsenal is not necessary to maintenance of a threat of second use. As contrasted with a posture of minimal, retaliatory deterrence, based on threat of second use, a posture that includes first use and first strike threats significantly increases the chances of nuclear war. Moreover, unceasing development of the U.S. arsenal encourages other states to acquire the weapons and undermines strengthening of international enforcement of the non-proliferation regime, thus heightening the risk of nuclear conflict in the Middle East, South Asia, or elsewhere.

Paradoxically, courts might not require that DOE’s environmental review encompass the effect of design and production of nuclear weapons on
the risk of war that would be catastrophic for humanity and the global environment. Equally paradoxically, in a legal process courts likely will not mandate consideration of the growing international consensus that use of nuclear weapons is illegal, or what to many seems an inescapable truth: deployment of nuclear weapons, especially weapons designed for first use and first strike, is incompatible with a rational, law-governed global order that provides a minimum of security to the earth and its inhabitants. Those are, however, considerations that citizens should keep in mind as they demand that the DOE do what NEPA requires: full environmental evaluation of an alternative reconfiguration of the weapons complex under conditions of a permanent halt to testing, design, and production of nuclear weapons.

Postscript: How To Get Involved

To learn how to participate in public hearings and submit written comments concerning DOE's environmental review of reconfiguration, contact groups involved in monitoring the weapons complex, including:

Military Production Network
218 D St., S.E.
Washington, D.C. 20003
(202) 544-8166

Western States Legal Foundation
1440 Broadway, Suite 500
Oakland, CA 94612
(510) 839-5877

or contact the Department of Energy at one of its regional offices or at:

Office of Weapons Complex Reconfiguration
DP-40
Department of Energy
1000 Independence Avenue, S.W.
Washington, DC 20585

Release of the draft environmental impact statement is now anticipated for late 1993 or early 1994. The schedule and locations for public hearings on its adequacy have not yet been set.

ENDNOTES

1. Facilities that handle and store nuclear materials and warheads include the Hanford Nuclear Reservation, Washington state; the Idaho National Engineering Laboratory; the Lawrence Livermore National Laboratory, California; the Nevada Test Site; the Los Alamos National Laboratory, New Mexico; the Rocky Flats Plant, Colorado; the Pantex Plant, Texas; the Oak Ridge Y-12 Plant, Tennessee; and the Savannah River Plant, Georgia. The Fernald Plant in Ohio, a uranium processing facility, is now closed and undergoing decommissioning and cleanup. Facilities that manufacture non-nuclear components of nuclear weapons include the Pinellas Plant, Florida, the Mound Plant, Ohio, and the Kansas City Plant, Missouri and are slated for consolidation. The DOE has removed the non-nuclear facilities from the purview of environmental review of reconfiguration.


4. The term “safety tests” is really a misnomer. The tests assess the performance of the weapon, e.g., the size of the yield, after the safety feature has been added, not whether the safety feature functions to prevent accidental explosion. A handful of “reliability” tests are also permitted by the law. However, after more than nine hundred tests, no serious questions remain concerning whether warheads explode; the issue again is the size of the yield and other performance characteristics. The law allows but does not require the “safety” and “reliability” tests if the President meets certain conditions. It would be desirable for the Clinton Administration to decline to conduct any further tests. The tests are irrelevant both to safety and to maintenance of an arsenal for true deterrence, i.e., threatened second use aimed only at preventing first use by another state. Precise information about performance is unnecessary for purposes of true deterrence.


6. For assessments of environmental and public health threats posed by the complex, see Office of Technology Assessment, Complex Cleanup: The
13. While courts have the final word on proper implementation of NEPA, the Supreme Court has declared that the Council on Environmental Quality’s guidelines are entitled to “substantial deference.” See Andrus v. Sierra Club, 442 U.S. 347, 358 (1979).

15. id.


17. Other options that should be addressed include permanent bans on production of weapons-grade uranium and plutonium (now halted pursuant to declaration of the Bush Administration), and tritium (halted de facto but large-scale production planned).

18. Whether a court, after the massive review process is completed, would require the DOE to revise an environmental impact statement that failed to address a no-production alternative is uncertain. Although NEPA’s legislative history and policy, as well as important early cases, favor comprehensive review of alternatives, courts subsequently have taken a more restrictive view of NEPA’s mandate, especially during the Reagan-Bush years. The unreliability of courts as an ally makes it imperative for citizens to bridge the gap between NEPA’s purposes and narrow agency interpretation by participating in hearings and other forums provided by NEPA. By identifying the range of alternatives truly at issue, citizens can at least initiate the sort of public examination of environmental consequences which under NEPA the government itself should provide. Such participation also builds the strongest possible administrative record should litigation eventually be pursued.

19. The rationale should be advanced in the draft statement. Response to public comments, if only to explain why they are rejected, is part of the NEPA process. See 40 CFR § 1503.4. Also, the DOE can and should change its position regarding scope before preparing and releasing the draft in light of “significant new circumstances” such as the U.S.-Soviet reciprocal arms reduction initiatives. See 40 CFR § 1501.7(c).


24. See Testimony of William E. Colby, Director of Central Intelligence (1973-1976), October 9, 1990, before the Committee on Governmental Affairs, U.S. Senate.


AUTHORS

John Burroughs and Andrew Lichterman are staff attorneys for Western States Legal Foundation, a non-profit public interest organization based in Oakland, California that represents peace and environmental activists with an emphasis on nuclear issues. Mr. Burroughs’ 1991 Ph.D. dissertation at U.C. Berkeley examines the international law framework for nuclear weapons policy. Mr. Lichterman is an assistant professor of law at the John F. Kennedy University School of Law in Walnut Creek, California. An earlier version of this paper was presented at the April 1991 University of California at Irvine International Conference on the Environmental Consequences of Nuclear Development.