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DoD [Department of Defense] - McNeil Letter to President Regarding EDF [Environmental Defense Fund] versus Massey - NEPA [National Environmental Policy Act]

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DEPARTMENT OF DEFENSE
OFFICE OF GENERAL COUNSEL
WASHINGTON, D.C. 20301-1600

TELECOPIER MEMORANDUM

DATE: 15 Mar 93

TIME: 1545

TO: Karie McGinty
(NAME)
White House, Director, Environmental Policy 202 456-2710
(OFFICE) (FAX NUMBER)

FROM: JACK McNeill 703-614-9789 (fax)
(NAME)
OSD General Counsel
(OFFICE)

We are submitting 3 pages, including this Telecopier Memorandum.

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at (703) 697-6028.

REMARKS: _____



THE DEPUTY SECRETARY OF DEFENSE

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WASHINGTON, D.C. 20301

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WHITE HOUSE LIAISON

15 MAR 1993

The President
The White House
Washington, D.C. 20500

Dear Mr. President:

As you know, the United States Court of Appeals for the District of Columbia Circuit in the Environmental Defense Fund (EDF) case has recently ruled that the National Environmental Policy Act (NEPA) applies, in certain circumstances, to decisions by U.S. government agencies to take actions outside the United States. I strongly urge you to direct the Department of Justice to seek a reversal of the EDF decision. This is not only an environmental decision, but also--and more fundamentally--one of the correct extraterritorial application of U.S. law and the resulting impact on Presidential decision-making.

Heretofore, NEPA has not been applied to activities outside the United States regardless of where the decision-making relating to those activities occurs. Such decision-making, for environmental purposes, has instead been regulated by E.O. 12114. The court, however, has now ruled that the normal presumption against extraterritorial application of statutes does not apply to NEPA where the agency decision-making "occurs primarily, if not exclusively, in the United States, and the alleged extraterritorial effect of the statute will be felt in . . . an area over which the United States has a great measure of legislative control." One significant consequence of the application of NEPA instead of E.O. 12114 is judicial review with the possibility of injunctive relief.

I am concerned about the implications of the court's ruling for DoD decisions within the United States affecting areas outside the United States where the United States arguably "has a great measure of legislative control." Such areas would include the high seas and U.S. military bases within foreign states. The court's ruling, if allowed to stand, would appear to severely limit the Executive's flexibility to make decisions with international implications and could subject DoD decision-making, including DoD's implementation of the President's directions, to court challenge. I am also concerned that the ruling may lead ultimately to the application of NEPA more generally, i.e., to decisions affecting areas where the United States has little or no legislative control. An additional concern is whether the D.C. Circuit will follow the same approach in determining the extraterritorial application of other statutes. We do not now know to what extent the court's ruling will increase NEPA's coverage, but we regard its potential for negative impact upon our foreign policy and national security interests to be very serious.

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Regardless of the merits of expanding NEPA's coverage for some types of activities, this is the wrong way to do it. E.O. 12114 was issued in 1979 by the Carter Administration only after careful consideration of the special problems involved in decision-making for extraterritorial activities and specific rejection of the result that the Court of Appeals now would impose. We should oppose such changes pending our own review of E.O. 12114, if such review is deemed necessary.

Respectfully yours,

William J. Perry