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Gearan Comments on Draft Memo to President - NEPA [National Environmental Policy Act] - March
3, 1993

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File - NEPA

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MEMORANDUM FOR

Katie
The President
The Vice President

FROM: Kathleen McGinty

DATE: March 3, 1993

SUBJECT:

DECISION MEMORANDUM ON APPEAL OF ENVIRONMENTAL DEFENSE FUND
V. MASSEY

The issue is whether to petition for a rehearing in EDF v. Massey, a recent decision by the U.S. Court of Appeals for the District of Columbia Circuit. The decision held, for the first time, that the National Environmental Policy Act (NEPA) applies to the National Science Foundation's proposed incineration of wastes from McMurdo Station research facility in Antarctica.

Background

On January 29, 1993, the U.S. Court of Appeals for the District of Columbia Circuit held in a unanimous opinion that the National Environmental Policy Act (NEPA) applies to the proposed incineration of wastes from McMurdo Station research facility which is operated by the National Science Foundation (NSF) in Antarctica. This is the first case to deal with the applicability of NEPA to Antarctica.

The National Environmental Policy Act mandates the preparation of environmental impact statements (EISs) for proposed major federal actions significantly affecting the quality of the human environment. NEPA requires environmental analysis of the proposed action, alternatives to the proposed action, and public involvement. Federal agencies can be enjoined from acting in the absence of adequate NEPA compliance. There has been disagreement within the federal government since NEPA's passage in 1969 as to whether NEPA applies to federal actions abroad. The Council on Environmental Quality, which oversees the act, generally has supported its application to overseas activities. Shortly after NEPA's passage, the Department of State interpreted it to apply to the global commons, including Antarctica, but later reversed its position to advocate its application only within the confines of U.S. territory. Until the present case, courts have avoided a direct holding on the issue of whether NEPA applies to any actions outside of the jurisdiction of the U.S.

¹. 42 U.S.C. §4321 et seq.

In 1978, President Carter issued Executive Order 12114 which requires agencies to prepare environmental analyses in certain circumstances, including actions taking place in the global commons. Thus, since 1978, the position of the executive branch has been that NEPA does not apply to federal actions in Antarctica. It is that position which was overturned here.

EDF v. Massey Decision

In the opinion at issue, the Court of Appeals held that the usual presumption against the extraterritorial application of statutes in the absence of a clear expression of Congressional intent was not applicable to the case at bar for several reasons. First, Antarctica has a unique jurisdictional status as the only continent which is not subject to the sovereign rule of any nation; hence, it is considered to be a "global common". Thus, one of the primary concerns underlying the presumption against the extraterritorial application of a statute - that is, the concern about impinging on another sovereign's authority, is not applicable in the EDF v. Massey scenario. Second, the court noted that the conduct to be regulated in this case involved U.S. decisionmaking within the U.S. Third, the court pointed out that NEPA, unlike many environmental statutes, does not dictate agency policy or decisionmaking. The court analogized NEPA to the Foreign Assistance Act which requires the Agency for International Development to consider such factors as democracy and women's issues before approving development assistance.

Impact of EDF v. Massey

The Court of Appeals specifically noted that:

"[W]e do not decide today how NEPA might apply to actions in a case involving an actual foreign sovereign or how other U.S. statutes might apply to Antarctica. We only hold that the alleged failure of NSF to comply with NEPA before resuming incineration in Antarctica does not implicate the presumption against extraterritoriality."

Thus, the immediate impact of the case involves only NSF's incineration activities in the Antarctica. However, if the holding stands, NSF's other activities and possibly other federal actions in Antarctica would likely be considered subject to NEPA.

The question of concern to many federal agencies is how broadly the opinion will be read by other courts in other cases. There is currently a lawsuit brought by Japanese plaintiffs against the U.S. Navy for alleged lack of compliance with NEPA for on-going activities in several U.S. bases in Japan.

There is little question that plaintiffs in this case and future cases will try to use the reasoning in EDF v. Massey to

argue for NEPA's application to other U.S. actions overseas. However, the EDF decision can be distinguished in several important ways. Most importantly, in the case involving naval activities in Japan, the actions are taking place in Japan's territory, and the location of those activities are Japan's decision. Further, in the Japan case, the situation involves defense and foreign policy considerations which are areas in which courts are traditionally deferential to the executive branch. Additionally, the U.S. is a signatory to the recently negotiated Protocol on Environmental Protection to the Antarctic Treaty, which includes specific environmental impact assessment obligations consistent with NEPA requirements.

Campaign Statement

You should be aware that in the 1992 League of Conservation Voters Presidential profiles, there is a statement that you would "support legislation to apply the National Environmental Policy Act to federal actions overseas". The Bush administration opposed such legislation. This statement was reprinted in an environmental journal article, and has been widely distributed among the environmental community.

Agencies' Views

The issue of NEPA's application to federal actions abroad is a long-standing and hotly contested issue within the executive branch. Wholesale application of NEPA to overseas activities has traditionally been opposed by all federal agencies except CEQ and, at times, EPA. However, given the more narrow holding of this case, the Departments of Commerce, Agriculture, Interior, EPA would support not appealing the case; other agencies, including DOD, NASA, NRC, USTR and DEA have recommended an appeal.

Other Views

In a letter dated March 1, 1993, thirteen major environmental organizations urge that the administration not appeal this case, citing your campaign commitment.

OPTIONS:

1. APPEAL THE CASE

Pro: would be popular choice of many agencies;

if successful, would be the best guarantee against the decision being used as a precedent in future cases;

Con: given the narrow holding of the decision, runs risk of being reaffirmed or broadened if rehearing is granted;

2. DO NOT APPEAL THE CASE BUT CONTINUE TO ARGUE AGAINST NEPA'S APPLICATION TO SUCH ACTIVITIES AS THE NAVY'S OPERATIONS IN JAPAN

Pro: would recognize the unique legal status of the Antarctica and set it apart from other situations;

would be consistent with your environmental policies;

would not appear to conflict with other foreign policy concerns;

would give the administration an opportunity to define its environmental expectations of federal agencies abroad through an executive order;

Con: could be hard to distinguish from other global commons cases, (for example, the oceans). While NOAA does not appear to have a problem with this, the Department of the Navy does have objections to the extension of NEPA into the oceans;

3. DO NOT APPEAL THIS CASE AND REVERSE THE GOVERNMENT'S POSITION IN OTHER CASES, SUCH AS THE NAVY'S ACTIVITIES IN JAPAN

Pro: would be viewed by environmentalists as significant, positive step;

could eliminate future legislative battles;

Con: fails to recognize distinctions between Antarctica situation and actions in control of other sovereigns;

could increase costs and delays in overseas activities;

Recommendation: ^{Not} Number two - that the Department of Justice is directed to file a petition for rehearing, but distinguishes this case from other cases (including the Navy's Japan case) in the future; concurrently, that the administration explore the possibility of better addressing this issue through an executive order.

Concur _____

Do Not Concur _____