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Subseries:

OA/ID Number: 2572
FolderID:

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Memo for President and Vice President from Katie McGinty - NEPA [National Environmental Policy Act] - Extraterritoriality - March 2, 1993

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THE WHITE HOUSE

WASHINGTON

March 2, 1993

MEMORANDUM FOR THE PRESIDENT AND THE VICE PRESIDENT

FROM: KATIE MCGINTY

SUBJECT: EXTRATERRITORIAL APPLICATION OF NEPA IN LIGHT OF
EDF V. MASSEY

Recommended Action

I recommend a two-part strategy for addressing this issue: that DOJ seek rehearing en banc of the recent D.C. circuit court decision regarding the extra-territorial application of NEPA; and that the White House issue a statement committing to a revision of the relevant Executive Order to ensure that a process similar to that required by NEPA be applied to all actions affecting the global commons.

Background

From the time of NEPA's enactment in 1969 until now, no court has held that NEPA applies to federal activities outside the U.S. In 1979, President Carter issued an Executive Order detailing procedures federal agencies must follow in evaluating activities abroad that may have significant environmental impacts, with exemptions for emergencies, national security and other pressing circumstances.

On January 29, 1993, the D.C. circuit court ruled in the case of Environmental Defense Fund v. Massey that NEPA applies to federal activities in Antarctica. DOJ believes that this ruling is troubling because if the reasoning used by the Court is followed -- that applying NEPA to extraterritorial activities does not raise extraterritorial concerns because NEPA governs only decision making in this country -- the consequence would be that NEPA should be applied to all U.S. actions in foreign countries as well as in the global commons.

In other words, the holding of the court is sufficiently narrow to apply NEPA to federal activities in Antarctica. However, the broader language of the reasoning of the court as described above is problematical.

There is also a potentially volatile political issue here. When asked, as part of the League of Conservation Voters 1992

Presidential Profiles, whether your administration would "issue new regulations to restore the full protection from harmful agency action for species overseas," candidate Clinton responded, "I support legislation to apply the National Environmental Policy Act to federal actions overseas.

Where the Agencies Stand

Most agencies (i.e., Defense, Army, Navy, DOT, DOI, NASA, USTR and DEA) firmly support the option of seeking rehearing en banc. Those against appealing the decision seem to be focused on the narrow holding rather than the broader language of the decision. EPA adopts the narrow reading of the decision and recommends against further review. Agriculture and Commerce believe that, if the decision cannot be read narrowly, we should seek rehearing. Only CEQ recommends that we acquiesce in both the ruling and the reasoning of the court, thereby agreeing to apply the Act in extraterritorial contexts.

Reasoning Behind Recommended Actions

1. NEPA should not apply to actions taken in foreign countries as well as in the global commons.
 - o Judges, rather than the President, would be the arbiter of federal agencies acting abroad.
 - + judicial review, injunctions and discovery in an international context would be as common as domestic NEPA litigation
 - + NEPA likely would be invoked by opponents of various foreign policies, such as federal loan guarantees for Russian agriculture or Israeli housing
 - o Overseas initiatives would be delayed for the 12-18 months required to prepare a draft EIS, conduct a hearing and obtain comments, and then issue a final EIS (unlike the Executive Order, there are no exceptions in the Act for emergencies, foreign policy crises, national security concerns, etc.).
 - o An obligation to apply NEPA abroad could undermine our ability to build coalitions with other nations for activities important to our national security.
 - o To the extent that our ability to enlist other nations in making environmental progress on a global scale

requires us to work cooperatively and in a multilateral context, a ruling that our law will be applied to activities in their nations strikes exactly the wrong note.

2. Requesting a statement of clarification from the court that NEPA only applies to the global commons and not to other sovereign nations, rather than of seeking rehearing en banc, is risky.
 - o While this option focuses on the most pressing concern, DOJ believes it has significant legal risks for federal agencies who believe NEPA compliance would create major foreign policy and national security concerns.
3. Seeking to appeal the ruling in apparent contradiction to a campaign promise will likely generate some political reaction; however, steps can be taken to mitigate the impact.
 - o A statement from the White House should be issued affirming support for applying NEPA to federal activities in the global commons (but not in foreign countries) and committing the President to revising the Executive Order regarding NEPA to implement this policy.
 - o By meeting the issue head-on with support for Antarctica and other issues, the political outrage should be kept to a minimum.

THE WHITE HOUSE

WASHINGTON

March 15, 1993

MEMORANDUM FOR THE PRESIDENT

FROM: THE VICE PRESIDENT

SUBJECT: APPEAL OF EDF v. MASSEY

I. ACTION-FORCING EVENT:

A decision on whether to file a petition for rehearing of the case must be made today (3-15-93).

II. BACKGROUND/ANALYSIS:

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 holding that the National Environmental Policy Act (NEPA) applies to the National Science Foundation's proposed incineration of wastes from McMurdo Sound research facility in Antarctica. NEPA mandates the preparation of environmental impact statements (EIS's) for proposed major federal actions significantly affecting the quality of the human environment.

From its passage in 1969 until the late 1970s, the agencies interpreted NEPA to apply to their activities in Antarctica and in the global commons (i.e. the high seas and outer space). The legislative history of the Act strongly supports this construction. Moreover, the plain language of the Act encompasses the quality of the human environment, generally. There is no language indicating that the Congress was concerned only with environmental impacts within the United States.

In 1978, however, a dispute arose over the extraterritorial application of NEPA to actions within the sovereign territory of another nation. Because of the potential for interference in the conduct of foreign policy and concerns over the potential encroachment of another nation's sovereignty, President Carter determined that the Act did not apply. Instead, he issued Executive Order 12114 delineating the responsibilities of the federal agencies in assessing the environmental impact of their actions outside the territory of the United States. Although the dispute leading to the issuance of the executive order did not involve NEPA's application to the global commons and Antarctica, the order as written also expressly covers our actions in those geographical regions as well. The Court's holding in Massey was a rejection of this policy, at least with respect to its

application in Antarctica.

A. VIEWS OF THE AGENCIES

1. NSF -- Argues that compliance with NEPA will interfere with scientific research; recommends petition for re-hearing.

2. NOAA -- Complies with NEPA in activities on the high seas and in Antarctica without interference in research; recommends against petition for re-hearing.

3. EPA -- recommends against petition.

4. INTERIOR/AGRICULTURE -- given that the holding of the case is applicable only to Antarctica, recommends against petition for rehearing.

5. DEFENSE/NASA/NRC/USTR/DEA -- concerned that broader dicta in the case will be read to extend the holding of the case beyond Antarctica to our actions on the high seas (which could, for example, interfere with Navy maneuvers and operations) and to our actions within the sovereign territory of another nation. In the latter case, interference in the conduct of foreign affairs and risks to national security are feared if suits are brought under NEPA challenging -- and potentially enjoining -- significant federal actions. Harrassment suits are feared.

6. STATE -- also concerned about broader application of dicta in the case. Agrees, however, that NEPA should apply to our actions in Antarctica but recommends that we pursue that objective through legislation. Also recognizes weakness of E.O. 12114 in ensuring that environmental impacts are adequately assessed and therefore further recommends that a new E.O. be issued.

7. JUSTICE -- in a personal communication on 3-14-93, Attorney General Reno indicated to me that she is quite comfortable in not asking for a rehearing of the case. (Prior to General Reno's swearing on 3-12-93, lawyers handling the case at Justice had recommended that a petition be filed. However, the Acting Solicitor General in a meeting on 3-13-93 indicated that, if there is agreement with the holding of the case -- namely, that NEPA applies to Antarctica -- he would counsel against filing a petition. Nevertheless, you should be aware that in deciding not to file a petition, the dicta in the case will remain and will no doubt be used by plaintiffs until a case squarely addresses and resolves the question of NEPA's application to our actions in the sovereign territory of another country. (Such a case is now pending and our argument has been that NEPA does not apply.)).

B. CONSIDERATIONS:

1. National Security:

The concerns raised by those agencies seeking a rehearing are not lightly to be dismissed. In assessing the gravity of those concerns in this instance, however, the following factors should also be borne in mind:

a. While there is dicta in the opinion which extends beyond the narrow holding of the case, the court expressly stated 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."

b. The courts have been very sensitive to the relationship between NEPA and national security concerns. In no instance has NEPA been used to enjoin a federal action abroad when national security concerns have been raised. Indeed, even with regard to actions in the U.S. where there is no question that NEPA applies, the Courts have held that the Act gives way in the face of national security concerns. (Most recently, the court held in favor of the Air Force when planes violating noise restriction limits had to be landed in Massachusetts during the Persian Gulf War).

c. The availability of documents under NEPA is governed by the Freedom of Information Act. Classified information is therefore exempt from disclosure under the Act. Moreover, the Supreme Court has held that NEPA compliance is beyond judicial scrutiny when information critical to the national security would have to be revealed in trying the case.

d. As noted, for the first decade of its existence, NEPA was understood to apply to actions on the high seas. Thus DOD's NEPA regulations for the Office of the Secretary of Defense, the Military Departments, the Joint Chiefs of Staff, Unified and Specified commands, and Defense Agencies for most of the decade clearly specified that "Environmental statements are required for actions ... conducted anywhere in the world, except when conducted in, or partly in, areas which are in or under the jurisdiction of a nation other than the United States."

2. Other:

a. Your campaign statement: During the campaign, you provided the following statement to the league of Conservation Voter's:

"I support legislation to apply the National Environmental Policy Act to federal actions overseas."

b. Environmental community: Thirteen major environmental organizations have written you urging that the decision not be appealed. This is a major priority for them; there will be strong negative reaction to a petition for rehearing.

c. Congress: Legislation has repeatedly been introduced to apply NEPA to all federal actions overseas -- whether occurring in Antarctica, the global commons, or within the sovereign territory of another nation. Appeal of this case would likely trigger the reintroduction of that legislation. This will likely complicate efforts to pass the Department of Environment bill which may well be used as a vehicle. Moreover, passage of such legislation will take from you the discretion to decide, and to implement through a new executive order, the nature and extent of required federal environmental assessments for actions taken within the sovereign territory of another nation.

III. RECOMMENDATION: That the Department of Justice is directed not to file a petition for rehearing. Further, that the Department is instructed to distinguish this case from any pending or future cases involving the application of NEPA to actions anywhere outside the territory of the United States except Antarctica. Finally, that an interagency process is initiated to review policy with regard to the application of NEPA to the global commons and to the sovereign territory of another country, and that recommendations be developed in that process regarding possible application of NEPA, or alternatively, the development of a new executive order, in order to delineate environmental requirements in each of these areas.

IV. DECISION

☐ Approve ☐ Approve as Amended ☐ Reject ☐ No Action