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NEPA [National Environmental Policy Act] Materials from the Vice President March 16, 1993

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Katie

The Department of Justice will not seek rehearing en banc in the EDF v. Massey case, in which a panel of the D.C. Circuit Court of Appeals recently applied the National Environmental Policy Act to actions by the government in Antarctica. Upon review of the reasoning and holding of the Court, the Department has determined that rehearing is unnecessary. The narrow holding of the court--applying NEPA to actions of the government in Antarctica--is one with which the Administration agrees.

The Department expressly reserves judgment on the question of whether, or to what extent, NEPA should be applied extra-territorially in other situations. It remains the position of the Government that NEPA does not apply in situations in which the sovereign rights of another nation would be implicated. Application of the Act to the global commons, the oceans and space will be studied promptly by an interagency review panel presently in formation. That panel will submit a report and recommendations to the President within 60 days.

cc: Katie McGinty
Jack Quinn

NEPA ABROAD AND THE U.S. CONGRESS

Congress has introduced amendments for the past three Congressional sessions to apply NEPA to federal actions overseas. The wording of these amendments have varied slightly, but all of the bills would apply NEPA to federal actions anywhere in the world and to a wide range of global impacts. For example, Senate bills 1089 and 1278, introduced in the 101st and 102d Congressional sessions respectively, included the following language:

"[NEPA would apply to] major federal actions . . . including extraterritorial actions (other than those taken to protect the national security of the United States, votes in international conferences and organizations, actions taken in the course of an armed conflict, strategic intelligence actions, armament transfers, or judicial or administrative civil or criminal enforcement actions),"

"such regulations [to be issued by CEQ] shall assure compliance with the statutory requirements of this Act, including the requirement for full consideration of the cumulative environmental impacts of proposed major Federal actions on global climate change, depletion of the ozone layer, transboundary pollution, loss of biological diversity, and other international environmental impacts".

An example of legislation language in the House is contained H.R. 1113, introduced in the 101st Congress by Congressman Studds, which would have required CEQ to issue regulations to implement NEPA for actions outside of the jurisdiction of the United States, as well as issuing guidance on a number of global impacts such as climate change, loss of biological diversity, etc. While no specific exemptions were included in this bill, CEQ's regulations were to be consistent with the national security and foreign policy of the United States.

The bills were passed by the full House of Representatives twice, but were never voted out of the Senate.

The Congressional Committees with jurisdiction over NEPA (Senate Environment and Public Works and Merchant Marine and Fisheries Committee) are impatient and irritable about this issue. Year after year, the Reagan and Bush administrations opposed the provisions. Congressional members clearly believed that there was no good reason for the opposition, but rather that it was based on long-standing bureaucratic opposition within the agencies melded with ideological opposition to environmental protection.

At the request of Senator Lautenberg, GAO has begun an investigation to determine "how federal agencies have carried out the executive order . . . how well the executive order implements the policies and procedures of NEPA and to assess the benefits

and/or problems of applying the executive order to extraterritorial actions."¹ It is highly probable that they will find that the current situation does not adequately implement the NEPA, thus arming Congress with further evidence of the need to amend the Act.

Other Members of Congress, while not currently on the committees with NEPA oversight, have also expressed strong opposition to the idea that NEPA does not apply to overseas actions. For example, Congressman Dingell once said to a State Department spokesperson:

"If you are not covered, just tell me why you are not covered. Give me a specific statutory authority. You said [NEPA] doesn't cover what goes on in Nigeria or the United Kingdom or wherever else. Where is your exemption?"²

Members of Congress clearly expect that the Clinton/Gore administration will overturn the policies of the Reagan/Bush administrations regarding this issue, and not appeal EDF v. Massey. Congressman Studds, now Chair of the Merchant Marine and Fisheries Committee, has already stated that the case should not be appealed. In a letter dated February 18, 1993 to the Acting Attorney General, he wrote that:

"Within the House of Representatives, the Committee on Merchant Marine and Fisheries has exclusive legislative jurisdiction over NEPA. Since enactment of NEPA, the Committee has taken the position that NEPA applies to federal activities occurring outside the United States, including Antarctica. Because the Reagan and Bush Administrations did not share that view, I introduced legislation during the past two Congresses clarifying that NEPA applies to all federal projects no matter where they occur."

Congressman Studds has also indicated his intent to introduce an amendment applying NEPA to all actions abroad in the context of the EPA cabinet bill should an appeal be filed. The bill easily would pass the House of Representatives, and there is likely to be considerable support in the Senate for passage.

¹. Letter to CEQ from Peter Guerrero, Associate Director, Environmental Protection Issues, GAO, February 3, 1993.

². Administration of the National Environmental Policy Act," H.R. Rep. No. 92-316 (1972), p. 33.

agencies of the Federal Government shall" act on the premise that we face worldwide and long-range environmental problems. Foreign affairs agencies have resisted using EIA to implement this policy.

In some instances, the EIS procedures did facilitate recognition of international environmental impacts and measures to avoid those impacts. One good example is the Panama Canal Treaty. Panama is crucial to US foreign policy for its strategic canal; but the area also is crucial in preventing aftosa (hoof and moth disease) from spreading out of Latin America to Central and North America. NEPA litigation had required the Federal Highway Administration to consider these impacts before constructing missing links in the Pan American Highway.¹⁶ Sensitized to these concerns, the Panama Canal Treaties made provision for a Joint Commission, US-Panama, to cope with sanitary and environmental protection issues. The Department of State complied with NEPA and prepared a full EIS on the draft Panama Canal Treaties before they underwent Senate ratification. The (Acting) Secretary of State, Warren Christopher, acknowledged the valuable guidance NEPA provided:¹⁷

"Since Panama's unique geographic location makes it important to the environment of many nations, both the United States and Panama are conscious of the need to protect the environment and respond to the public health needs of the Canal Zone and the surrounding area. ... The National Environmental Policy Act has provided useful guidance in drafting the Panama Canal Treaties so as to avoid or mitigate the adverse environmental effects which might result from the implementation of the treaties. We recognized the importance of NEPA procedures in formulating environmentally sound policies as well as the value of public participation in the NEPA review process. The Final Environmental Impact Statement (EIS) on the Panama Canal Treaties, prepared in accordance with NEPA and issued on December 27th, discussed those issues which will be addressed by the Joint Environmental Commission. And, the public comments submitted regarding the draft EIS have been carefully considered and are reflected in the final statement. More specifically, the final Environmental Impact Statement discussed current and transitional steps needed to protect the Pipeline Road and other important forests areas. It also analyzes the need for a forestry management program and the dangers to flora, fauna and soils should the natural resources of the Canal Zone not be adequately protected."

The Secretary of State noted further that any new canal, sea level canal or new canal lanes would require a further EIS under NEPA.

Given the current foreign policy impasse over free elections in Panama and the dictatorship of General Manuel Antonio Noriega, the State Department is using the Panama Canal Treaties to assert US rights under international law. An investigation by the Organization of American States is now examining the violations of US treaty

fn 27. Acting SEcretary of State, "Statement on the Panama Canal Treaties and Environmental Protection," Hearings Before the Subcommittee on the Panam Canal, Committee on Merchant Marine and Fisheries, House of Representatives, 96th Congress, Serial No. 96-2, Part 2, pp. 1657-1659 (1979).

TESTIMONY OF
PROFESSOR NICHOLAS A. ROBINSON
A HEARING OF
THE SUBCOMMITTEE ON SUPERFUND,
OCEAN AND WATER PROTECTION
Of The
COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS
UNITED STATES SENATE
REGARDING
THE NATIONAL ENVIRONMENTAL POLICY ACT
On
June 1, 1989, 2:00 p.m.
Room 406
Dirksen Senate Office Building

STATEMENT EXPLAINING DECISION

NOT TO APPEAL ANTARCTICA CASE

**(For You To Give To Secretary
Warren Christopher and Tony Lake)**

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recovery. NOAA has recommended not appealing Massey and NOAA representatives have stated they have successfully implemented NEPA for deep seabed activities, even when protecting the location of particular sites to protect commercial interests.

The National Aeronautics and Space Administration has applied NEPA to proposed actions which would take place in the upper atmosphere or "outer space". For example, NASA prepared an environmental assessment on the Combined Release and Radiation Effects Satellite program, the Ulysses Mission, and on the Galileo Mission.

MEMORANDUM FOR THE VICE PRESIDENT

FROM KATIE MCGINTY

SUBJECT: Decision Memorandum on Appeal of Environmental Defense
Fund v. Massey

Purpose:

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. That decision -- by Judges Wald, Mikva and Edwards -- held 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. A decision on refiling must be made today (3-15-93).

Background:

On January 29, 1993, the U.S. Court of Appeals for the District of Columbia Circuit held in an 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.

NEPA mandates the preparation of environmental impact statements (EISs) for proposed major federal actions significantly affecting the quality of the human environment. Federal agencies can be enjoined from acting in the absence of adequate NEPA compliance. Injunctions are, however, rare.

The specific issue of NEPA's application to the Antarctic and the global commons was first addressed by the Department of State in 1970. In a legal memorandum prepared by the Office of Legal Advisor, the Department concluded that:

"The Act should be interpreted as applying to federal actions occurring in areas outside the jurisdiction of any other State (i.e. the high seas, Antarctica or outer space) [t]here is much history to suggest that the Congress had the oceans and their resources very much in mind"

The Department of Defense and the National Science Foundation similarly began their implementation of NEPA by interpreting it to apply to actions in areas not under the jurisdiction of another nation.

In 1978, however, a controversy arose over the potential application of NEPA to an action proposed by the EX-IM Bank to occur 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 if NEPA were fully to apply, President Carter determined that the Act did not apply. Instead, he issued Executive Order 12114 which delineates the responsibilities of 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.

Agencies' Views:

Given the narrow holding of this case, the Departments of Commerce, Agriculture, Interior, and EPA would not support an appeal. Because of broader dicta in the case, however, the Department of Defense, the Department of State, NASA, NRC, USTR, and DEA have recommended an appeal. The Department of State notes that it does support application of NEPA to Antarctica, but would prefer to accomplish that objective through legislation. State also recognizes the shortcomings of Executive Order 12114 in ensuring that environmental impacts are adequately assessed and would recommend that a new executive order be issued.

In personal communications, Acting Solicitor General William Bryson recommends that, if the Administration agrees with the holding of the case -- namely, that NEPA applies to federal actions in Antarctica -- then a petition for rehearing should not be filed.

Considerations:

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

First, while there is dicta in the opinion which extends beyond the narrow holding finding NEPA applicable to Antarctica, 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."

Second, the courts have been very sensitive to the relationship between NEPA and national security concerns. In *Greenpeace USA v. Stone*, for example, the court examined the application of NEPA to the removal of U.S. chemical munitions stored in the Federal Republic of Germany and transport of the munitions to Johnston Atoll across the oceans for subsequent destruction. In finding in favor of the government, the Court

stated that it "must" take into consideration the foreign policy implications of NEPA.

Third, even in the face of a clear violation of NEPA, the courts are careful to balance the NEPA violation "with the national well-being and security" before imposing an injunction. (Wisconsin v. Weinberger). In an early NEPA case involving underground nuclear testing in Alaska, the D.C. Court of Appeals determined that the testing was subject to NEPA, but based on the complexity of the issues surrounding the testing, and the time it would take to resolve them, found that a postponement of the testing would undermine national security and foreign policy interests and thus denied the injunction.

(Indeed, the incidence of injunction is rare. In 1987, for example, 69 lawsuits were filed and three injunctions were issued; in 1988, 91 lawsuits were filed and 7 injunctions issued; in 1989, 57 lawsuits were filed and 5 injunctions issued. In addition, by far the most frequent reason for injunction is that the agency has completely failed to perform an environmental assessment -- not that the Court has reviewed its assessment and found it inadequate.)

Fourth, NEPA would not require the disclosure of classified information. The availability of documents under NEPA is governed by the Freedom of Information Act. FOIA exempts matters which are --

- classified in the interest of national defense or foreign policy;
- specifically exempted from disclosure by another statute;
- privileged or confidential trade secrets and commercial or financial information;
- law enforcement information.

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. (Weinberger v. Catholic Action).

Fifth, as noted earlier, from its passage in 1969 until the late 1970s, the agencies understood NEPA to apply to Antarctica and the global commons, and apparently complied with NEPA without undue difficulty. NSF prepared EISs for at least two projects in Antarctica during the 1970's for example, and the Department of State prepared an EIS for the Convention for the Conservation of Antarctic Seals, and for the Convention on Conservation of Antarctic Marine Living Resources.

The National Oceanic and Atmospheric Administration currently applies NEPA both to its implementation of the Endangered Species Act in the high seas, and the issuance of licenses and permits for deep seabed mineral exploration and