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DEPARTMENT OF DEFENSE
OFFICE OF GENERAL COUNSEL
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February 24, 1993

Mr. Peter R. Steenland
Acting Deputy Assistant Attorney General
Department of Justice
Washington, D.C. 20530

Dear Mr. Steenland:

Thank you for your letter dated February 1, 1993, requesting the views of the Department of Defense concerning whether the United States should seek a rehearing of Environmental Defense Fund, Inc. v. Massey, No. 91-5278 (D.C. Cir. Jan 29, 1993). We agree the decision is extremely important and urge that a petition for rehearing be filed.

The decision is one of great concern to the Department because the reasoning adopted by the court in applying the National Environmental Policy Act (NEPA) to activities in Antarctica rejects a basic premise upon which our NEPA compliance program has been built--that we must comply with Executive Order 12114 and not NEPA requirements when evaluating departmental actions which may have significant effects outside the United States. This approach stands in sharp contrast to that taken in EDF--which can be read to require compliance with NEPA whenever a decision (as distinguished from the effects of the decision) is made in the U.S. or the effect is felt in an area subject to any measure of U.S. jurisdiction.

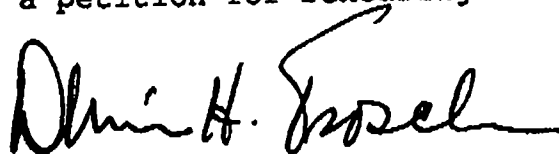
Since the E.O. was issued in 1979, when conducting such activities, we have performed environmental analyses that were neither designed nor intended to meet NEPA's procedural requirements as implemented by the Council on Environmental Quality. The court's new approach could, however, invite litigation directed at all of our continuing activities. The confusion and delay caused by such uncertainty could affect important ongoing activities, such as the assistance being given to the Russian Federation in their efforts to safely dismantle nuclear weapons.

In addition, the decision makes it difficult to prepare the necessary environmental analysis for those future departmental activities that will be conducted outside of the United States. Under the E.O. our responsibilities were clear; however, it is

now difficult to determine whether, for example, a multi-national training exercise directed by the department, conducted both on the high seas and in a host nation, triggers NEPA.

The inherent difficulty in analyzing the impact of the case is that it appears to be a departure from the Supreme Court's articulation in Foley Brothers, Inc. v. Filardo, 336 U.S. 281 (1949) that, absent a contrary intention expressed by Congress, legislation is meant to apply only within the territorial jurisdiction of the United States. Furthermore, the rationale cited for the departure--that either the presumption against extraterritoriality does not apply to effects in certain areas for which there are no competing claims of sovereignty, or the court was merely applying NEPA in a traditional manner to decisions made within the United States--are approaches that appear to conflict with previously decided cases. In particular, we have trouble reconciling the most closely analogous cases, which declined to apply NEPA to the high seas, (Greenpeace USA v. Stone, 748 F.Supp 749 (D. Hawaii 1990) and which have focused on where the effect will occur rather than where the decisions were made, (Greenpeace, NRDC v. NRC, 647 F.2d 1341 (D.C.Cir 1981)).

For these reasons we urge a petition for rehearing be filed at the earliest opportunity.



Dennis H. Trosch
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17 FEB 1993

Peter R. Steenland, Esq.
Acting Deputy Assistant Attorney General
U.S. Department of Justice
Environment and Natural Resources Division
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Dear Mr. Steenland:

Thank you for your February 1, 1993 letter requesting the views of the Department of the Army concerning whether the United States should seek further judicial review of Environmental Defense Fund, Inc. v. Massey, No. 91-5278 (D.C. Cir. Jan. 29, 1993) (EDF). As you know, the court ruled that the National Environmental Policy Act, 42 U.S.C. §§ 4321-47 (1988) (NEPA), is applicable to Federal actions occurring in Antarctica. The court's opinion contains several serious errors, and its reasoning, if applied to the Army's activities abroad, would have grave consequences for the Army's ability to accomplish its mission. The Army therefore strongly recommends that United States petition for a rehearing en banc.

The EDF court erred in at least three respects. First, it failed to apply controlling case law properly, creating chimerical exceptions to the presumption against extraterritoriality. Second, the court incorrectly construed NEPA by focusing on the locus of the government decisionmaking process, rather than on the location of actions implementing a decision. Finally, the court did not afford proper deference to Executive Order 12114.

The most striking aspect of EDF is its refusal to recognize the controlling nature of Equal Employment Opportunity Comm'n v. Arabian American Oil Co., 111 S. Ct. 1227 (1991) (Aramco). In Aramco, the Supreme Court reaffirmed "a long-standing principle of American law that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States." Id. at 1230 (quoting Foley Bros., Inc. v. Filardo, 336 U.S. 281, 285 (1949)). The Aramco Court plainly stated that the starting presumption for any law is that it does not apply extraterritorially. Congress may, of course, override this presumption by clearly expressing an intent that the law should apply beyond the United States. Congressional intent is found most readily in the words of the statute. See Ardestani v. Immigration and Naturalization Serv., 112 S. Ct. 515, 520 (1991).

Rather than examine NEPA's provisions to discern whether Congress had clearly articulated the intent to apply NEPA abroad,¹ the EDF court carved out "three general categories of cases for which the presumption against the extraterritorial application of statutes clearly does not apply." Slip op. at 6. First, the EDF court noted that the presumption does not apply when Congress states that a law should have effect beyond United States borders. This is not, as the court suggested, merely one example of when the presumption is inapplicable; Aramco makes clear that this is the only manner in which the presumption may be trumped. The EDF court fails to recognize this elemental holding of Aramco.

Second, the court stated that the presumption should not apply "where the failure to extend the scope of the statute to a foreign setting will result in adverse effects within the United States." Id. The presumption, however, applies in all cases unless Congress clearly evinces a contrary intent. In any event, this case offers the converse of that proposition: the presumption applies (or, more accurately, is not rebutted) when extending the statute's scope will result in adverse effects within the United States. The Executive Branch, through Executive Order 12114, has determined that it is not in the interests of the United States to apply NEPA abroad, including to activities in Antarctica.

The EDF court also concluded that the presumption does not apply "when the conduct regulated by the government occurs within the United States." This declaration adds nothing to the issue of extraterritorial application of law. Put another way, the court is stating that a law presumed to apply domestically regulates domestic conduct. Obviously, if the regulated conduct occurs in the United States, a court need not examine whether Congress clearly expressed an intent to apply the law abroad.

The EDF court's discussion of these "exceptions" is not supported by case law or common sense. The presumption against extraterritoriality is premised on a number of policy considerations. The benefit of the presumption would be destroyed if in each instance a court were permitted to look beyond congressional expression to ascertain

¹ As the United States brief explained, neither the language of NEPA nor its statutory history provides a clearly expressed congressional intent to extend NEPA's procedural requirements beyond the boundaries of the United States. Brief for the Appellees at 19-32.

whether the presumption's purposes are fulfilled. The presumption applies to all statutes, including NEPA, and is rebutted only when Congress clearly expresses a contrary intent. Aramco, 111 S. Ct. at 1230. The EDF court erred by never reaching the threshold issue of congressional expression.

The EDF court never reached that issue because it mischaracterized the conduct that NEPA is designed to regulate. According to the panel, NEPA's purpose is to influence the government's decisionmaking process. If, the court reasoned, the decisionmaking occurred in the United States, there is no issue as to extraterritoriality and NEPA controls the process.² Unfortunately, the EDF court confused the general purpose of NEPA and how NEPA operates to achieve that purpose.

NEPA is designed to ensure that Federal decisionmakers are aware of and consider the environmental effects of their actions. Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 349 (1989). To achieve this end, NEPA prescribes a process; generally, the decisionmaker either prepares an environmental assessment (EA) that concludes that the proposed action will result in insignificant impacts or prepares the more comprehensive environmental impact statement (EIS). In either case, the requirement for an EA or EIS arises only because of the possible effect of an action. NEPA's requirements are not triggered by a particular decision, but by the decision's possible effect on the environment. Accordingly, NEPA focuses on the location of environmental impacts, not on the site of the decisionmaking process. See, e.g., Lujan v. National Wildlife Fed'n, 110 S. Ct. 3177, 3187-89 (1990) (To have standing in a lawsuit challenging NEPA compliance, a plaintiff claiming injury from environmental damage must use the area affected by the challenged activity). See also Lujan v. Defenders of Wildlife, 112 S. Ct. 2130, 2142 & n.7 (1992) (noting that standing for NEPA challenge requires person to have concrete interests in or adjacent to the area to be affected by a proposed action).

When NEPA is viewed in this proper context, it is readily apparent that a decision concerning waste incineration at Antarctica does implicate the presumption against extraterritoriality. The environmental effects of

² Curiously, the court cited no case to bolster that proposition. Instead, the court relied upon a student comment. Slip op. at 8 (citing Mary A. McDougall, Comment, Extraterritoriality and the Endangered Species Act of 1973, 80 Geo. L. J. 435, 445 (1991)).

the action will occur in Antarctica, not in the United States. The EDF court erred in its interpretation of NEPA.

Finally, the EDF court also failed to afford proper deference to Executive Order 12114. The Executive Order limits NEPA's application to the United States and specifically excludes Antarctica from NEPA's provisions. Furthermore, the Executive Order "represents the United States government's exclusive and complete determination of the procedural and other actions to be taken by Federal agencies to further the purpose of [NEPA], with respect to the environment outside the United States, its territories and possessions." The court's holding blithely rejects this long-standing government policy without applying the analysis required by Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984).

Chevron dictates that when reviewing agency construction of a statute administered by that agency, a court must first decide "whether Congress has directly spoken to the precise question at issue." Id. at 842. If the statute does not expressly address or is ambiguous on the precise question, the court must determine whether the agency's construction "is based on a permissible construction of the statute." Id. at 843.

Chevron applies with equal force where a court must examine the legality of an Executive Order. The Constitution vests the President with the duty to execute faithfully the laws of the United States. U.S. Const. art. II, § 3. Obviously, the President is ultimately responsible for faithfully executing (to include administering) NEPA. A presidential construction of a statute is entitled to at least as much deference granted to a presidential subordinate's construction.³

³ The EDF court noted that prior to Executive Order 12114 the Council on Environmental Quality (CEQ) construed NEPA to apply to Federal activities in Antarctica. Slip op. at 16. The court then concluded that such an interpretation was reasonable. While that may be of academic interest, that is not the present United States policy, and that was therefore not the issue before the court. The Executive Order countermanded any contrary CEQ policy, and, as the United States brief stated, CEQ's official position is "that the Executive Order governs federal agency actions abroad[.]" Brief for the Appellees at 33. The court should have examined the reasonableness of the current policy. Moreover, the fact that the policy may have been modified is of little import. The Executive Branch has wide latitude to alter policies,

As the United States brief accurately stated, Congress did not speak directly as to the issue of NEPA's application beyond the borders of United States territory. The only question then remaining is whether Executive Order 12114 is a permissible construction of NEPA.⁴ Because, of course, the presumption against extraterritoriality has not been rebutted, the Executive Order is not only a permissible construction of NEPA, but it is the required interpretation, at least with respect to NEPA's procedural requirements.

The conclusion that the Executive Order is a reasonable reading of NEPA is fortified by congressional acquiescence. Although one must be chary when relying upon congressional silence, it is clear here that Congress was well aware of Executive Branch policy and chose not to disturb it. Indeed, recent attempts to expand NEPA's coverage have been unsuccessful. See H.R. 1271, 102d Cong., 2d Sess. (1992).

The decision has implications for Federal activities far beyond Antarctica. The EDF court held that NEPA governed waste incineration at Antarctica because the decisionmaking process occurred in the United States. The court also relied on the "fact" that the United States has "some real measure of legislative control" over Antarctica. Slip op. at 10.⁵ This rationale could be applied to virtually every activity the Army pursues abroad: major training exercises; restationing of troops and units; deployment and withdrawal of major weapons systems; and construction of facilities. The decisionmaking process for these activities takes place in the United States, and the activities generally occur on overseas military bases over which the Department of the Army exercises control. If the decision stands, these actions may be subject to

including constructions of statutes. See, e.g., Rust v. Sullivan, 111 S. Ct. 1759, 1768-69 (1991).

⁴ Although the Executive Order is based on "independent authority," it clearly operates as a construction of NEPA by limiting NEPA's applicability.

⁵ In reality, the United States is not, as the EDF court asserted, the predominate governmental authority in Antarctica. See generally Beattie v. United States, 756 F.2d 91, 106-09 (D.C. Cir. 1984) (Scalia, J., dissenting). The primary source of law in Antarctica is the Antarctica Treaty System, a body of laws and measures which are formulated and adopted by contracting parties to the Antarctica Treaty.

review in United States District Court. The effect of applying NEPA to such actions would seriously hamper the Army's ability to accomplish its mission.

Perhaps the starkest example involves the United States' assistance to the Russian Federation for the safe and secure dismantlement of nuclear weapons. Congress authorized the Department of Defense (DoD) to spend up to \$800 million of its appropriations to assist the former Soviet Union in, inter alia, the expeditious destruction of nuclear weapons. In accordance with an international agreement executed on October 5, 1992, the DoD agreed to provide the Ministry of Atomic Energy for the Russian Federation technical assistance for the design a storage facility for plutonium and enriched uranium derived from destroyed nuclear weapons. The DoD delegated responsibility for the provision of assistance to the Department of the Army. Much of the design work for this storage facility, which will be constructed in Russia, has taken place in the United States. Under the EDF court's reasoning, NEPA would be implicated. It would be ironic indeed if NEPA were invoked and jeopardized the destruction of the former Soviet Union's nuclear weapons.⁶

In conclusion, the Department of the Army strongly recommends that the United States seek further judicial review of EDF. Please do not hesitate to contact me, Roy Gardner, or Peter Murphy at (703) 693-3024 should you require additional information.

Sincerely,


Earl H. Stockdale
Deputy General Counsel
(Civil Works & Environment)

⁶ Of course, different foreign policy considerations, inter alia, distinguish assistance for a storage facility in Russia from actions in Antarctica. Still, the availability of numerous defenses is little comfort if EDF is permitted to stand.



DEPARTMENT OF THE NAVY
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17 February 1993

Mr. Peter R. Steenland
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Dear Mr. Steenland:

Thank you for soliciting our views on the recent decision in Environmental Defense Fund v. Massey, No. 91-5278 (D.C. Cir. January 29, 1993) (Massey). Although the Navy's involvement in Antarctica has been limited, this case presents a question of exceptional importance to us because of its potential impact on our operations overseas and afloat. Moreover, the decision conflicts with previous decisions of the Supreme Court and with the Court of Appeals for the Ninth Circuit and rests on misapprehension of the factual and legal constraints on overseas actions. Finally, the decision will be used against us in pending litigation over the stationing of a ship in Japan. Accordingly, we strongly urge that the Department of Justice submit a petition for a rehearing with a suggestion for hearing en banc.

The decision in Massey cannot be reconciled with recent decisions of the Supreme Court. The decision deftly sidesteps the Court's opinion in Equal Employment Opportunity Comm'n v. Arabian American Oil Co., 111 S. Ct. 1227 (1991) (Aramco) by reading it much too narrowly. The Court in Aramco proceeded from the premise that "It is a long-standing principle of American law 'that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States,'" and then searched for a clear expression of such intent in the statute. 111 S. Ct. at 1230 (quoting Foley Bros., Inc. v. Filardo, 336 U.S. 281, 285 (1949)). The Massey court takes this requirement for a clear expression of Congressional intent and relegates it to the level of one of several exceptions, any one of which is sufficient to avoid what the Supreme Court regards as a bedrock principle of American law. Unwilling to engage in a fruitless search for clear Congressional intent to regulate overseas in NEPA, the Massey court relies on another exception that it created on the basis of a general statement in a restatement without any direct support in case law. The circuit court created the exception by assuming that because the United States, as any sovereign nation, is competent under international law to regulate conduct occurring within its territorial limits, Congress must have determined that it wanted to regulate all conduct occurring within the United States, irrespective of foreign policy and national defense considerations or the extraterritorial situs of any harm that the legislation might address. In doing so, the Massey court turns the longstanding principle announce in Aramco on its head.

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The Massey decision also contradicts the thrust of Lujan v. National Wildlife Federation, 497 U.S. 871 (1990). In that case the Supreme Court held that failure of a plaintiff to show concrete injury associated with physical presence in the particular location where the real world impacts would occur made any dispute over failure to follow technical procedures unsuited for judicial review. 497 U.S. at 885-89. The Court held that, even if the procedural failings took place and even if the plaintiffs suffered the "sorts" of injuries within the zone of interests protected by NEPA, the injuries were not redressible because plaintiffs did not link their potential injuries to the situs of the environmental effects. Id. By so holding the Court not only clarified standing law, but also established that NEPA is ultimately concerned with the situs of the environmental impacts, not with mere failure to follow procedures. More recently, the Court reinforced this principle in Lujan v. Defenders of Wildlife, 112 S. Ct. 2130 (1992), where it held that it is the real world impacts of failure to follow the Endangered Species Act and similar statutes, not just generalized concern with failure to follow procedures, that makes judicial review appropriate. See 112 S. Ct. at 2142-43. The Court's rejection of generic injury and institutional standing in these two cases is inconsistent with the Massey court's view that the heart of NEPA is what happens inside the beltway.

The Massey decision would reverse these priorities. The Massey court avoids application of Aramco by stressing the importance of the situs of the procedural conduct it would subject to regulation under NEPA and implicitly rejects the importance of the situs where any actual impacts of statutory violations may arise. The Massey court bolsters its conclusion on extraterritoriality by citing the lack of judicial review of procedural failings under Executive Order 12114. Slip op. at 4. Thus Massey makes the location of any procedural failings more important than the location of impacts.

The decision in Massey is also flawed because it rests on misapprehension of the factual and legal context in which decisions concerning overseas actions are made. First, the court erred by wrongly concluding that the only actions regulated by NEPA would take place solely within the United States. See slip op. at 8. To the contrary, processes required by NEPA clearly will take place outside the United States. First, the Massey court assumed that, in the absence of territorial claims, the informed decision making that is at the heart of NEPA would be unilateral and would take place in the United States. See slip op. at 8. In fact, decisions with respect to Antarctica necessarily involve delicate diplomatic consultation that likely will occur in a number of locations outside the United States. Indeed, the court ignored the fact that it was only international cooperation that suspended the assertion of territorial claims by seven countries in Antarctica. See Antarctica Treaty, 12 U.S.T. 795 (December 1, 1959). Actions in even sovereignless areas must consider customary international law, multilateral conventions and diplomatic considerations.

Even the preliminary actions that support decision making and which are subject to NEPA regulations will take place, at least in part, outside the United States.

The scoping process, information-gathering, development of alternatives and review process necessary to produce an adequate environmental impact statement would each involve some action in the vicinity of the challenged action. Regulations implementing NEPA repeatedly require consultation with "local" agencies, consideration of local interests and gathering all available information. See 40 C.F.R. §§ 1501.7, 1502.15, 1502.16(c), 1502.19(a), 1502.22, 1503.1, 1506.6. It is difficult to imagine a major Federal action overseas where a significant amount of the NEPA effort would not take place outside the United States.

Second, the Massey court assumed that extraterritorial application of a U.S. statute to Antarctica entails no risk of diplomatic repercussions. The court assumed that, in the absence of territorial claims, the informed decision making that is at the heart of NEPA would be unilateral. See slip op. at 8. In fact, decisions with respect to Antarctica necessarily involve delicate diplomatic consultations. The court ignored the fact that it was only international cooperation that suspended the assertion of territorial claims by seven countries in Antarctica. See Antarctica Treaty, 12 U.S.T. 795 (December 1, 1959). NEPA imposes formal procedures, enforceable by injunction, that both as a practical matter and as a matter of regulation, deprive agencies of the flexibility necessary to react in a timely, effective way to the demands of diplomacy and foreign relations.

Third, the Massey court's assertions of legislative control are unpersuasive and conflict with case law. The court inexplicably equated the ability to conduct search and rescue with legislative control – a conclusion that, if it were true, would violate Article IV of the Antarctica Treaty.¹ The court then observed that the United States has control over research stations (assumed to be unilateral) and found therein legislative control. But this circumstance does little more than establish that the action is a Federal action – a prerequisite for NEPA. See 42 U.S.C. 4332(D). The ability to control day to day operations in our own facility does not mean that the United States has legislative control in any way that would determine whether the territory is

¹ The Antarctic Treaty provides in relevant part:

No acts or activities taking place while the present Treaty is in force shall constitute a basis for asserting, supporting or denying a claim to territorial sovereignty in Antarctica or create any rights of sovereignty in Antarctica.

sovereignless or a foreign country. See Meredith v. United States, 330 F.2d 9 (9th Cir. 1964) (grounds of an U.S. embassy are still a "foreign country" under the FTCA).

This case has special importance because of its potential impact far beyond Antarctica and NEPA. First, many of the steps in preparing an environmental impact statement not only would occur outside the United States, but would carry the potential for diplomatic conflict or at the very least require consultation. The potential for conflict can increase rapidly when multiple countries may be involved. NEPA depends for its effectiveness on its ability to generate political visibility for environmental issues. It does so by ensuring that decisions on environmental decisions involving the potential for significant environmental impacts are preceded by the gathering of vast amounts of information and its subsequent dissemination to the public. Many other countries, including democracies, do not handle information in this manner. Other countries may be willing to provide information to the United States, but would strongly resist sharing information with other countries for reasons totally unrelated to the environment. For example, vital U.S. actions that could be coordinated through quiet diplomacy even among potential rivals (for example, Greece and Turkey, Israel and Egypt) could be impossible if the United States is forced to comply with NEPA.

Second, the court's reasoning could apply to a number of other statutes that establish procedures that agencies must follow. For example, section 7(a)(2) of the Endangered Species Act requires consultation between Federal agencies and the Secretary of the Interior before proceeding with actions that could jeopardize the continued existence of endangered species. See 16 U.S.C. § 1536. This reasoning would, standing alone, vastly increase the responsibilities of the Navy and other services. The rationale of the Massey court is not limited to strictly procedural statutes like NEPA. It could also be applied to those procedural portions of more substantive statutes that occur in the United States.

The Navy is specially concerned with this opinion because, despite the court's protestations, the court's rationale is not limited to Antarctica and could be applied to operations on the high seas and in foreign countries necessary to the national defense. In seeking to limit the impact of the opinion, the court stressed the uniqueness of Antarctica, which like outer space, is not subject to territorial claims. Slip op. at 11. This reasoning would also apply to those areas of the high seas beyond any competent claims of national competence (i.e., outside 200 miles under the United Nations Convention on Law of the Sea, which the U.S. recognizes as reflecting international law respecting navigation and overflight). Indeed the court quotes favorably an anonymous State Department official that NEPA could be applied without problem to Antarctica, outer space and the high seas. Slip op. at 11. The result would be that the United States would be forced to comply with all the procedural provisions of NEPA for major Federal actions on the high seas. This would increase the burden already imposed by Executive Order 12114, and more importantly

would provide a cause of action that would allow various special interest groups to try to enjoin Navy activities with which they disagree.

Although Executive Order 12114 is designed to protect the environment, it acknowledges the President's responsibility for the foreign policy and national defense of the United States. It provides much greater flexibility than NEPA to permit rapid, effective action without the potential for the disruptive effect that the inevitable NEPA lawsuit would cause. For example, Executive Order 12114 provides exceptions for disaster and emergency relief actions, for actions when the national security is involved and for actions in the course of armed conflict. See Executive Order 12114 § 2-5. These provisions provide the President with the flexibility to act with dispatch in a situation as fluid as recently found in Somalia (which, lacking any real government, could be likened to the high seas or Antarctica) without the restrictions that NEPA compliance would entail.

The decision may also be applied to actions occurring in foreign countries. The Navy's experience with litigation of extraterritorial NEPA illustrates the problems that will arise if NEPA is applied outside the United States. Plaintiffs in NEPA Coalition v. Cheney, No. 91-1522 SHH (D.D.C. filed June 20, 1991) have already asserted that Massey requires application of NEPA to the Navy's decision to homeport the USS Independence in Japan. That suit challenges not only the strategic decision to locate an aircraft carrier in Japan, but also various other steps undertaken to support American forces - decisions which are made only after consultation between the governments. The case was filed in the United States only after the same plaintiffs were unsuccessful in obtaining relief from their own government in Japanese courts. Various discovery requests have imposed strains on diplomatic efforts and the case has been used to embarrass the Japanese government. Widespread application of NEPA overseas will make it significantly more difficult for diplomacy to proceed, even if any litigation brought in the United States is ultimately unsuccessful.

Finally, the effects of the decision are not allayed by the court's adoption of a standard that requires case-by-case weighing of foreign policy interests and the benefits of preparing an environmental impact statement. Slip op. at 15. The President's decisions on foreign policy and national defense operations overseas are often far too volatile to permit the analysis envisioned. The Supreme Court has recognized that such matters are reserved for the Executive Branch - not Congress or the courts. See Dames & Moore v. Regan, 453 U.S. 280, 292 (1981) (Matters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention); Harisiades v. Shaughnessy, 342 U.S. 580, 588-89 (1952) (Conduct of foreign relations is largely immune from judicial inquiry or interference). The President must have the freedom of action to discharge these responsibilities free from even the threat of litigation over compliance with all the procedural technicalities engrafted onto NEPA. In some instances, merely requiring an explanation of the foreign affairs impact may be sufficient to generate the harm. This is especially true

when trying to impose procedures based on our own domestic views on information availability, risk assessment and judicial institutions on foreign countries with different traditions.

In summary, this is a case where the circuit court has gone to considerable lengths to avoid clear law provided by the Supreme Court. The court has seriously misapprehended the manner that both overseas activities and NEPA procedures themselves are conducted. In the process, the court relied on an expansive rationale that can be limited only through repetitive litigation in circumstances where the threat of litigation itself will impose serious burdens on the foreign policy and military effectiveness of the United States. The full court should have the opportunity should to fully review this opinion before the United States has to bear the dramatic impacts it will entail.

Sincerely,

C. JOHN TURNQUIST
Assistant General Counsel
(Installations and Environment)

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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.



U.S. Department of Justice

Environment and Natural Resources Division

Office of the Assistant Attorney General

Washington, D.C. 20530

Telephone 202/514-2701
Fax 202/514-0557



TO:

Katie McGinty

FROM:

Myles Flint

NO. OF PAGES:
(INCLUDING
COVER PAGE)

4

TELEPHONE NO.:

FAX NO.:

456-2710

MESSAGE:

PLEASE NOTIFY SENDER IMMEDIATELY IF YOU HAVE ANY PROBLEMS
RECEIVING THESE PAGES.

514 4037



U.S. Department of Justice

Environment and Natural Resources Division

Office of the
Deputy Assistant Attorney General

3/2/93

Katie McLinty:

Here is a brief Talking Paper
we put together for your
use.

I will be out of the office
for an hour from 2 to 3 P.M.
If you have questions please
call Corale or Peter.

Hylas E. Fleeth

NEPA: WHY APPLYING A GOOD LAW DOMESTICALLY DOESN'T WORK ABROAD

Environmental Defense Fund v. Massey

D. C. Cir., January 29, 1993

1. The significance of the court's ruling. -- From the time of NEPA's enactment in 1969 until today, no court has held that NEPA applies to federal activities outside the territorial limits of the United States. In 1979, President Carter issued an Executive Order which details procedures federal agencies must follow in evaluating activities abroad that may have significant environmental impacts. Environmental review under this Order reflects the unique foreign policy concerns attendant to U.S. actions abroad. But the Executive Order creates no private right of action, and unlike the statute, there are exemptions for emergencies, national security and other pressing circumstances.

The court's ruling that NEPA applies to Antarctica is troubling primarily because of the reasoning used by the Court to reach that result. If the reasoning and logic of the decision is followed -- that applying NEPA to extraterritorial activities does not raise extraterritorial concerns because NEPA governs only decisionmaking in this country -- the consequence will be that NEPA should be applied to U.S. actions in foreign countries as well.

First, the ruling is significant because judges rather than the President would be the arbiter of environmental compliance by federal agencies acting abroad. Judicial review of agreements with host countries, discovery of foreign documents and injunctions will become as routine in the international context as they are in domestic NEPA litigation. Just as NEPA is used today by some as a weapon to oppose projects they disfavor, NEPA would be invoked by opponents of federal loan guarantees for agriculture in Russia or housing in Israel, opponents of bilateral disarmament activities with the former Soviet countries, or those concerned with particular trade and tariff policies as those policies might affect manufacturing nations. While the opinion recognizes that some "unique and delicate" foreign policy concerns might override an agency's duty under NEPA, we would be dependant upon a judge for that finding, and would have to subject these sensitive matters to judicial scrutiny in the first instance.

Second, if the court's reasoning is followed, important overseas initiatives would be delayed for the 12-18 months that it takes to prepare a draft EIS, conduct a hearing and obtain comments, and then issue a final EIS. It must be noted that unlike the Executive Order, there are no exceptions in the Act for emergencies, foreign policy crises, national security concerns and the like.

- Examples - Johnson at all case?
- Goldberg Japanese case?

Third, an obligation to apply NEPA abroad is likely to undermine our ability to build coalitions with other nations for activities that are important to our national security. If we tie our participation to compliance with NEPA, other countries are less likely to join in partnership with us. If our offers of assistance are accompanied by the likelihood of participating in that most American of activities -- the lawsuit, many nations are certain to decline our offers of assistance.

Fourth, 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 multi-lateral context, a ruling that our law will be applied to activities in their nations strikes exactly the wrong note.

2. Available options. -- The most legally defensible option is to seek rehearing en banc from the full court. The decision is flawed, does not follow recent Supreme Court precedent and is not likely to survive if the full court agrees to rehear the case. Even if we did not prevail on applying NEPA in Antarctica, there would be a good chance the court would not follow the panel's reasoning, thereby implicating NEPA's applicability everywhere. However, judicial success may be short-lived if Congress responds by enacting a sweeping version of an extraterritorial amendment to NEPA. The Departments of Defense, Army, Navy, Transportation, and the Interior, as well as NASA, NRC, USTR and DEA all recommend rehearing en banc.

Alternatively, we could decline to petition for rehearing on the ground that the Administration can live with the holding of the court. But, to assure those agencies who are concerned with application of NEPA to their activities in other sovereign nations, we would announce our intention to challenge the court's reasoning as inapplicable and flawed if carried beyond Antarctica, the oceans, and space. Thus, where we are presently asserting that NEPA has no application to the operation of three military bases in Japan, we would continue to press our existing arguments as far as necessary. This option has greater legal risks for federal agencies who believe NEPA compliance would create major foreign policy and national security concerns, but it does focus on the most pressing of concerns by those agencies that strongly advocate rehearing. If the present decision cannot be read narrowly, Commerce and Agriculture would join in recommending rehearing en banc. EPA adopts a narrow reading of the decision and recommends against further review.

Finally, we could acquiesce in both the ruling and the reasoning of the court, thereby agreeing to apply the Act in extraterritorial contexts. In light of his participation in the drafting and implementation of the Executive Order in the Carter Administration, we would respectfully suggest that the Secretary of State be consulted before any final decision is reached. Only the General Counsel of CEQ supports this position.

could they
live w/
this
application
in Antarctica

Why
not do
this way?

TO: Katie McGinty
FROM: Dinah Bear
DATE: March 3, 1993
RE: DOJ Memo on EDF v. Massey

A few additional comments on DOJ's memo which weren't directly addressed in the draft decision memo I just faxed over:

1. The memo states that NEPA does not accommodate emergencies, national security concerns and other pressing circumstances. In fact, the CEQ regulations implementing NEPA have long contained a provision providing for emergency situations. 40 CFR §1506.11. The provision has been used several dozen times, and has been challenged three times in court. The use of the provision has been upheld in court each time.

2. The memo also cites several situations involving foreign policy as examples in which NEPA could be used as a "weapon". You should be aware that since 1980, the Agency for International Development has operated under environmental procedures "intended to implement the requirements of NEPA". Those procedures include exemptions for: i) international disaster assistance; ii) other emergency circumstances, and iii) circumstances involving exceptional foreign policy sensitivities. The Administrator of AID (not the courts) make the determination that a proposed action fits within one of these categories, after consultation with CEQ. This provision was used for the proposed federal loan guarantees for housing to Israel (cited in the memo as an example of a problem action) and for emergency delivery of food supplies to Bosnia.

3. The memo states that Interior supports an appeal. I am informed that Interior's position is similar to Agriculture and NOAA in that they do not support an appeal as long as the case is interpreted to apply only to Antarctica.

4. Finally, DOJ's memo ends with a statement that only I support a position of acquiescing in both the ruling and the reasoning of the court. As you may have noted, in fact, my memo specifically states that in the absence of a political appointee at CEQ, we are not taking a policy position.

You should also know that the Supreme Court held in Weinberger v. Catholic Action of Hawaii that NEPA does not require the disclosure of otherwise classified information. In that case, the issue was whether nuclear weapons were being stored by the Navy in Hawaii. The Navy refused to confirm or deny; their position was upheld "due to national security reasons".

I am also including excerpts from some of the cases we discussed to give you a flavor of the courts' historical

avoidance of directly addressing this issue. In several other cases, the court said nothing at all of relevance but simply addressed the facts of the case. Please let me know if you want anything further in relationship to case law or background.

To: Dinah
From: Elisabeth Blaug
Subj: Cites from extraterritorial cases
Date: March 3, 1993

Greenpeace USA v. Stone, 748 F.Supp. 749 (D. Hawaii 1990) (held NEPA did not apply to the transport of chemical weapons stored in West Germany to Johnston Atoll for destruction).

This court is convinced that Congress intended to *encourage* federal agencies to consider the global impact of domestic actions and *may* have intended under certain circumstances for NEPA to apply extraterritorially.

At 759.

The court must emphasize that this decision is limited to the specific and unique facts which are presented here. In other circumstances, NEPA may require a federal agency to prepare an EIS for action taken abroad, especially where United States agency's action abroad has direct environmental impacts within this country, or where there has clearly been a total lack of environmental assessment by the federal agency or foreign country involved.

At 761.

National Org'n For Reform of Marijuana Laws (NORMI.) v. U.S., 452 F.Supp. 1226 (D.D.C. 1978) (Defendants, including State Department and AID, prepared EIS for the Mexican marijuana eradication program's impacts in the United States pursuant to NEPA; after the filing of plaintiff's lawsuit, defendants announced they were preparing an "environmental analysis" of the program's effects in Mexico).

In view of defendants' willingness to prepare an "environmental analysis" of the Mexico effects of United States support of that nation's narcotics eradication program, together with the EIS required by NEPA as to the impact of that program upon the United States, the Court need not reach the issue and need only assume without deciding, that NEPA is fully applicable to the Mexican herbicide spraying program.

Natural Resources Defense Council, Inc. v. Nuclear Regulatory Comm'n, 647 F.2d 1345, 11 ELR 20266 (D.C. Cir. 1981) (held NEPA did not apply to the NRC's decision to issue a nuclear export license for the exportation of nuclear reactor technology to the Philippines).

[NEPA]...looks toward cooperation, not unilateral action, in a manner consistent with our foreign policy. Moreover, if an EIS requirement attached to nuclear imports, there would be the spectre of litigation over the adequacy of the EIS, with delay the inevitable result.

I also note that the NEPA jurisprudence indicates that exclusively foreign impacts do not automatically invoke the statute's environmental obligations. I find only that NEPA does not apply to NRC nuclear export licensing decisions-and not necessarily that the EIS requirement is inapplicable to some other kind of major federal action abroad.

At 20279.

Sierra Club v. Adams, 578 F.2d 389, 8 ELR 20281 (D.C.Cir. 1978) (regarding construction of Darien Gap Highway in Panama and Columbia)

In its response, the Government stated that it never "questioned the applicability of NEPA to construction in Panama..." but it also intimated that this position might not apply to "purely local concerns..." Appellees took the position that NEPA does apply to the construction "whether the impact of such construction may occur in the United States, in the countries of Central America, or in both."

In view of the conclusions that we reach in this case, we need only assume, without deciding, that NEPA is fully applicable to construction in Panama. We leave resolution of this important issue to another day.

At 20283, n. 14.



Working for the Nature of Tomorrow.

NATIONAL WILDLIFE FEDERATION, 1400 Sixteenth Street, N.W., Washington, D.C. 20036-2266 (202) 797-6800

Office of the President
March 3, 1993

The President
The White House
1600 Pennsylvania Avenue
Washington, DC 20500

Dear Mr. President:

On behalf of the National Wildlife Federation, I am writing to encourage you to support a recent federal Appeals Court decision that could significantly affect the global environment. The Court's decision is consistent with an environmental objective that you supported during the Presidential campaign, and therefore should be allowed to stand.

Recently, the United States Court of Appeals for the District of Columbia Circuit ruled that the National Environmental Policy Act ("NEPA") applies to the decision of the National Science Foundation ("NSF") to incinerate wastes in Antarctica (Environmental Defense Fund v. Massey, decided January 29, 1993). As you know, NEPA requires every federal agency to prepare an environmental impact statement ("EIS") before undertaking "major federal actions" that may have a "significant impact on the quality of the human environment." This policy is intended to ensure that federal agencies assess potential impacts, and evaluate alternatives before making decisions. This process has proven to be effective in improving federal decision-making and reducing environmental damage here at home; but it has only sporadically been applied overseas where federal actions could have significant adverse impacts. You acknowledged the importance of broadening this requirement during the campaign, when you expressed your support for legislation applying NEPA to federal actions overseas.

It is our concern that several federal agencies are currently pressing for review of the Court's decision. Through the 1970's, NSF and other federal agencies complied with NEPA for their actions abroad, including projects in Antarctica, yet now officials within these agencies suggest that U.S. foreign policy will somehow be negatively affected if NEPA were to govern federal actions abroad. On the contrary, the Massey decision makes it clear that federal agencies would be relieved of complying with NEPA in circumstances where U.S. foreign policy interests outweigh the benefits of preparing an EIS.

March 3, 1993

Page 2

By directing the appropriate officials to support the Massey decision, you would make it clear that environmentally sound decision-making is now a part of U.S. foreign policy.

Thank you for your consideration of this matter.

Best personal regards.

Sincerely,

A handwritten signature in dark ink, reading "Jay D. Hair". The signature is written in a cursive style with a large, stylized initial "J".

JAY D. HAIR

NATIONAL SECURITY COUNCIL

WASHINGTON, D.C. 20506

1390

March 11, 1993

ACTION

MEMORANDUM FOR ANTHONY LAKE

FROM: EILEEN CLAUSSEN

SUBJECT: The National Environmental Policy Act (NEPA) and
Antarctica

The attached memorandum from Katie McGinty to the Vice President is the result of an interagency and non-government organization (NGO) consultation process that Katie and I have held jointly over the past two weeks. I believe that the proposed recommendation is the correct one -- that we not appeal the decision in Environmental Defense Fund (EDF) versus Massey, but interpret it narrowly so that it is not applicable to U.S. decisions in the sovereign territory of another nation. I have discussed this with Bob Bell and he agrees with this recommendation. I would appreciate it if you would concur.

RECOMMENDATION

That you concur with the recommendation that we not appeal the decision in EDF versus Massey.

Attachments

Tab I Memorandum to the Vice President
Tab A Memorandum to the President
Tab B Attachment

THE WHITE HOUSE

WASHINGTON

ACTION

MEMORANDUM FOR THE VICE PRESIDENT

FROM: KATIE MCGINTY *Kan*

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. Inasmuch as the Justice Department plans to file its petition on Monday, a decision is necessary immediately.

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)¹ 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. There has been disagreement within the federal government since NEPA's passage in 1969 as to whether NEPA applies to federal actions abroad. 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.

¹. 42 U.S.C. §4321 et seq.

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 in the case at issue.

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, there is dicta in the opinion which extends beyond Antarctica, and some agencies are concerned that language not essential to the Court's holding may be read by other courts to suggest their compliance with NEPA when acting on the high seas or within the sovereign territory of another nation.

No doubt plaintiffs in future cases will try to use the reasoning in EDF v. Massey to argue for NEPA's application to other U.S. actions overseas. But the fact remains that the precise holding in Massey is quite limited -- to Antarctica and certainly not to matters arising in the territory of other sovereign nations.

Campaign Statement

You should be aware that in the 1992 campaign, you indicated that you would "support legislation to apply the National Environmental Policy Act to federal actions overseas". The Bush administration opposed such legislation. This commitment was widely distributed among the environmental community. In a letter dated March 1, 1993, thirteen major environmental organizations urge that the administration not appeal this case, citing your campaign commitment.

Agencies' Views

Given the narrow holding of this case, the Departments of Commerce, Agriculture, Interior, EPA would support not appealing the case; other agencies, however, including DOD, NASA, NRC, USTR and DEA have recommended an appeal.

Congressional Committees

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. Passage of such legislation would deprive you of the opportunity to define through Executive Order environmental requirements for federal actions within the sovereign territory of another nation.

OPTIONS:

1. APPEAL THE CASE

Pro: would be popular choice of several 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;

would adopt Bush's policy;

would lock you into a position contrary to your campaign commitment;

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 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

NUMBER TWO - That the Department of Justice is directed not to file a petition for rehearing, but to distinguish this case from other cases (including the Navy's Japan case) in the future; concurrently, that the administration explore the possibility of defining environmental compliance obligations of federal agencies operating within the sovereign territory of another country through an executive order.

Concur

Anthony Lake

Do Not Concur



OFFICE OF THE VICE PRESIDENT

WASHINGTON

ACTION

MEMORANDUM FOR THE PRESIDENT

FROM: THE VICE PRESIDENT

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. Inasmuch as the Justice Department plans to file its petition on Monday, a decision is necessary immediately.

RECOMMENDATION

That the Department of Justice is directed not to file a petition for rehearing, but to distinguish this case from other cases (including the Navy's Japan case) in the future; concurrently, that the administration explore the possibility of defining environmental compliance obligations of federal agencies operating within the sovereign territory of another country through an executive order.

Approve _____ Disapprove _____

cc: Chief of Staff
Presidential Counsel

*Al - This is background stuff
on NEPA decision. We'll try to
reschedule. Katie*

**TALKING POINTS ON THE APPLICABILITY OF THE NATIONAL ENVIRONMENTAL
POLICY ACT TO ANTARCTICA AND THE GLOBAL COMMONS**

o o o The National Environmental Policy Act (NEPA) applies to federal actions in the Antarctic and in the global commons as a Matter of Law. Congressional history and the clear language of the statute support this proposition.

o o o The Departments of State and Defense and the National Science Foundation, among others, applied NEPA to federal actions in Antarctica and the global commons from 1970 to the issuance of EO 12114 in 1979. No particular problems were noted as a result of NEPA applied to these actions.

o o o NEPA can be applied to federal actions in Antarctica and in the global commons in a reasonable manner, without jeopardy to foreign policy or national security concerns. NEPA and the CEQ implementing regulations are flexible, and the courts have been deferential to the agencies in general and sensitive to foreign policy and national security concerns in particular.

o o o Application of NEPA to U.S. actions in the Antarctic is consistent with the international scheme for environmental protection in Antarctica, and with the application of other US law to Antarctica.

o o o Similarly, application of NEPA to the global commons is consistent with historical interpretations of NEPA, with the application of other environmental laws, and with international law.

o o o Agenda 21, the Action Plan developed at UNCED, supports the application of NEPA to Antarctica and the Global Commons.

o o o Public policy considerations weigh on the side of applying NEPA in the Antarctic and in the global commons

o o o Campaign commitments support the application of both NEPA and the Endangered Species Act to actions outside of the territory of the United States

o o o The environmental community will be highly critical of a decision to appeal EDF v. Massey.

o o o Congress is likely to reintroduce amendments to apply NEPA to all federal actions abroad if the administration appeals EDF v. Massey.

THE NATIONAL ENVIRONMENTAL POLICY ACT'S APPLICATION TO ANTARCTICA AND THE GLOBAL COMMONS

THE NATIONAL ENVIRONMENTAL POLICY ACT APPLIES TO FEDERAL ACTIONS
IN THE ANTARCTIC AND IN THE GLOBAL COMMONS AS A MATTER OF LAW

Congressional Intent

The National Environmental Policy Act (NEPA) requires federal agencies to prepare environmental impact statements for proposed "major Federal actions significantly affecting the quality of the human environment".¹ Nothing in NEPA's language restricts this requirement to federal actions taking place within the confines of U.S. territory. In fact, legislative history contains substantial evidence that Congress had the global environment in mind when they drafted NEPA. For example, the 1969 Congressional White Paper prepared in the process of developing the legislation that became NEPA stated that:

"[a]lthough the influence of U.S. policy will be limited outside its borders, the global character of ecological relationships must be the guide for domestic activities. Ecological considerations should be infused into all international relations."²

The House Merchant Marine and Fisheries Committee in a report on the proposed legislation observed that, "It is an unfortunate fact that many and perhaps most forms of environmental pollution cross international boundaries as easily as they cross state lines."³

Shortly after the law's passage, Congressional committee members who had been involved in NEPA's enactment stated that the EIS requirement was meant to apply to federal agency actions and wherever they took place. In responding to a suggestion made during an oversight hearing that perhaps NEPA did not apply fully to the international environmental effects of agency actions, a Merchant Marine and Fisheries Committee report contained the following admonition:

"Stated most charitably, the committee disagrees with this

¹. 42 U.S.C. §4332(2)(C).

². 115 Cong. Rec. 29,067.

³. H.R. 91-378 (1969).

interpretation of NEPA. The history of the Act makes it quite clear that the global effects of environmental decisions are inevitably a part of the decision-making process and must be considered in that context."⁴

When, in 1978, Congress was debating proposed legislation to exempt the Export-Import Bank from NEPA, Senator Muskie stated that he was amazed at:

"[b]ureaucratic descriptions of legislative intent 180 degrees opposite from what I know the actual legislative intent to have been. The thought never occurred to me that somewhere down the line nine years later the argument would be made that because major Federal actions impacting on areas outside the United States were not specifically referenced that, therefore, they were excluded."⁵

And recently, Congressman Studds, Chair of the committee with jurisdiction over NEPA in the House of Representatives, has written 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."⁶

Federal Agencies, Including the Department of Defense and the Department of State, Interpreted NEPA to Apply to Areas Outside the Jurisdiction of Another Nation During the 1970's.

The Council on Environmental Quality (CEQ), the agency which oversees the implementation of NEPA throughout the executive branch, has consistently maintained that NEPA applies to environmental impacts of federal actions in areas outside the jurisdiction of any country. The Council's 1973 Guidelines for

⁴. Administration of the National Environmental Policy Act, Merchant Marine and Fisheries Committee, H.R. Rep. No. 316, 92nd Cong., 1st Sess. 53 (1971).

⁵. Export-Import Bank Amendments of 1978: Hearings before the Subcommittee on Resource Protection of the Senate Committee on Environment and Public Works, 95th Cong., 2d Session (1978), p. 220. The bill was ultimately defeated.

⁶. Letter from Gerry E. Studds, Chairman, Committee on Merchant Marine and Fisheries, to the Honorable Stuart M. Gerson, Acting Attorney General, Department of Justice, February 18, 1993.

the preparation of environmental impact statements (EISs) required the assessment of both the national and "international environment"⁷, and all of CEQ's directives to the federal agencies interpreted NEPA to apply to U.S. actions taking place in Antarctica and the global commons.⁸

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 response to CEQ's initial guidelines for implementing the EIS requirement. In a legal memorandum prepared by the Office of Legal Advisor, the Department of State 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, and application of the Act to actions occurring outside the jurisdiction of any State, including the United States, would not conflict with the primary purpose underlying this venerable rule of interpretation [i.e., the Foley doctrine⁹] - to avoid ill-will and conflict between nations arising out of one nation's encroachments upon another's sovereignty. Furthermore, the Act's provisions . . . can be applied sensibly to many activities taking place beyond the territory of any nation. There are at least three such general areas: The high seas, outer space, and Antarctica."¹⁰ (emphasis added)

⁷. 40 C.F.R. §1500.8(a)(3)(i)(1973).

⁸. "Legal Advisory Committee Report to the President's Council on Environmental Quality", pp. 13-17 (December 1971); "Council Advisory Memorandum #3, NEPA's Global Perspective, March 13, 1975"; "Memorandum to Heads of Agencies: Application of the National Environmental Policy Act to Federal Activities Abroad", Charles Warren, Chairman, Council on Environmental Quality (January 19, 1978).

⁹. The "Foley doctrine" stands for the proposition that American law does not apply in another country, absent an express intent of Congress in the statute itself to the contrary. Foley Bros., Inc. v. Filardo, 336 U.S. 281 (1949).

¹⁰. Memorandum from Christian A. Herter, Jr., Special Assistant to the Secretary for Envir. Affairs, Bur. of Int' Scient. and Tech. Affairs, Dept. of State, to Russell Train, chairman, Council on Environmental Quality, on Department to State and AID Comments on Draft Guidelines Pertaining to P.L. 91-190, Section 102(2)(C), in Appendix to Hearings on the

The Department of Defense (DOD) began its implementation of NEPA by interpreting it to apply to actions in areas not under the jurisdiction of another nation. In its initial NEPA regulations published in 1971, and continuing throughout most of the decade, 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, contained the following provisions:

"Geographical location of actions.

(1) Environmental statements are required for actions . . . conducted anywhere in the world, except when conducted in, or party in, areas which are in or under the jurisdiction of a nation other than the United States. In these latter cases, the DOD component responsible for the action shall provide as the ASD (H & E) full particulars, a recommendation as to whether or not a statement should be prepared, reasons for the recommendation, and an assessment of the effect of a statement on U.S. foreign relations."¹¹

"Projects and continuing activities.

(v) Combat or combat-related activities in a combat zone, riot control activities, and other emergency activities do not require environmental statements. However, the intentional disposal of hazardous substances or of other materials in the oceans shall not be considered to be combat or combat-related activities."¹² (emphasis added)

The National Science Foundation also published procedures applying NEPA to proposed actions as they affect "both the national and international environment."¹³ Specifically, the NSF NEPA regulation published in 1974 stated that:

"As appropriate, NSF shall prepare program statements and statements on a group of interrelated projects. For instance, broad program statements will be required in order to assess the environmental effects of a number of individual actions on a given geographical area (e.g., the Antarctic), or environmental impacts that are generic or

Administration of the NEPA Before the Subcommittee on Fisheries and Wildlife Conservation of the House Committee on Merchant Marine and Fisheries, 91st Cong. 2d Sess. 546 (1970).

¹¹. 32 C.F.R. §214.5(b)(1)(1972).

¹². 32 C.F.R. §214.5(b)(v)(1972), cited in People of Enewetak v. Laird, 353 F.Supp. 811, 819 (D. Hawaii 1973).

¹³. 45 C.F.R. §640.5(b)(3)(1974).

common to a series of agency actions (e.g., maintenance or waste handling practices), or the overall impact of a large-scale program, project, or chain of contemplated projects."¹⁴

Virtually all early legal and academic commentary supported these interpretations of NEPA. While there was considerable disagreement as to whether NEPA applied to federal actions taking place within another country, legal analysis concluded that NEPA applied to actions occurring in the global commons¹⁵
Executive Order 12114

In 1978, the issue of NEPA's applicability to environmental impacts of federal actions in other countries was the subject of litigation, proposed rulemaking by CEQ, and a proposed Congressional amendment. However, the issue of whether NEPA applies to actions in Antarctica or in the global commons was not the subject of particular attention at the time.

On January 4, 1979, President Carter signed Executive Order 12114, "Environmental Effects Abroad of Major Federal Actions". The executive order was written to "further the purpose" of NEPA, although it is not based upon NEPA, as a matter of law. It does not create a cause of action in the courts.¹⁶ The Executive Order encompasses "major federal actions significantly affecting the environment of the global commons outside the jurisdiction of any nation (e.g., the oceans or Antarctica)". The two major differences between the application of NEPA and EO 12114 are the public involvement and judicial

¹⁴. National Science Foundation, Circular No. 909, Rev. No.2, §6(b)(3) (February 28, 1974); 45 C.F.R. §640.3(e) (1974, 1977).

¹⁵. See Committee on Environmental Law of the Section on International and Comparative Law of the American Bar Association, Opinion on the International Scope of NEPA (July 1971); Comment, "Renewed Controversy Over the International Reach of NEPA," 7 Env. L. Reporter 10205 (Nov. 1977). Memorandum for the Chairman from Gary Widman, CEQ General Counsel, March 13, 1975; Robinson, Nicholas, "Extraterritorial Environmental Protection Obligations of Foreign Affairs Agencies: the Unfulfilled Mandate of NEPA", Vol. 7 Intern. Law and Policies of Env. Protection 157 (1974).

¹⁶. EO 12114, Section 3-4.

enforcement. NEPA implementation includes both; EO 12114 involves neither.¹⁷

Although an executive order cannot constitutionally supplant the legal reach of a statute, due to the wording of EO 12114, the interagency tensions at the time, and the advent of the Reagan administration, many agencies took the position from the early 1980's onward that NEPA no longer applies to actions in the Antarctic and the global commons. However, neither the courts nor Congress did anything which would sustain the conclusion that the statute's reach had somehow been narrowed from its original scope in 1970.

THE NATIONAL ENVIRONMENTAL POLICY ACT CAN BE APPLIED TO FEDERAL ACTIONS IN ANTARCTICA AND IN THE GLOBAL COMMONS IN A REASONABLE MANNER, WITHOUT JEOPARDY TO FOREIGN POLICY OR NATIONAL SECURITY CONCERNS. THE STATUTE AND IMPLEMENTING REGULATIONS ARE FLEXIBLE, AND THE COURTS HAVE BEEN DEFERENTIAL TO THE AGENCIES IN GENERAL AND SENSITIVE TO FOREIGN POLICY AND NATIONAL SECURITY CONCERNS IN PARTICULAR.

NEPA sets forth a national policy in which environmental considerations are to be part of federal decisionmaking. NEPA directs the federal government to use all "practicable means, consistent with other essential considerations of national policy",¹⁸ and to implement the policies contained in the Act "to the fullest extent possible".¹⁹ Reflecting this intent to ensure consideration of the environment as one of a number of factors in decisionmaking, the procedural requirements of NEPA have been interpreted by both CEQ and the courts to allow for the flexibility necessary to integrate the NEPA process into agency efforts to achieve other important national objectives. }*

Freedom of Information Act Exemptions

NEPA provides for the availability of environmental documents pursuant to the requirements of the Freedom of

¹⁷. In fact, it was suggested that, "The result [of interagency disagreement] was the release of a patchwork Executive Order which seems unlikely to achieve the objectives of any of the principals. Given that the courts will likely factor the Executive Order very lightly, if at all, when next faced with the question of the international reach of NEPA, the Order has done little to clear the fog surrounding this important issue." "President Orders Environmental Review of International Actions", 9 Env'tl. L. Rep. 10,011 (January, 1979).

¹⁸. 42 U.S.C. §4331(b).

¹⁹. 42 U.S.C. §4332.

Information Act (FOIA). Thus, all of the exemptions available to agencies under FOIA are, by law, applicable to NEPA documentation. These exemptions include 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.²⁰

Classified Information

The CEQ regulations implementing NEPA provide that:

"Agency procedures may include specific criteria for providing limited exceptions to the provisions of these regulations for classified proposals. They are proposed actions which are specifically authorized under criteria established by an Executive Order or statute to be kept secret in the interest of national defense or foreign policy and are in fact properly classified pursuant to such Executive Order or statute. Environmental assessments and environmental impact statements which address classified proposals may be safeguarded and restricted from public dissemination in accordance with agencies' own regulations applicable to classified information. These documents may be organized so that classified portions can be included as annexes, in order that the unclassified portions can be made available to the public."²¹

The courts have been very sensitive to the relationship between NEPA and national security concerns. While not carving out a blanket "national security exemption", they have, when faced with specific cases, been mindful that, "The decisionmaking and public disclosure goals of §102(2)(C), though certainly compatible, are not necessarily coextensive."²² In Weinberger v. Catholic Action of Hawaii, the U.S. Supreme Court examined a situation involving the possible storage of nuclear weapons at military installations. The U.S. Navy argued that the preparation and circulation of an EIS examining the impacts of such storage would force the disclosure of whether nuclear

²⁰. 5 U.S.C. §552(b).

²¹. 40 C.F.R. §1507.3(c).

²². Weinberger v. Catholic Action of Hawaii/Peace Ed. Project, 454 U.S. 139 (1981).

weapons would in fact be stored at the facility. The Supreme Court found that:

"Due to national security reasons . . . the Navy can neither admit nor deny that it proposes to store nuclear weapons at West Loch. . . . Ultimately, whether or not the Navy has complied with NEPA "to the fullest extent possible" is beyond judicial scrutiny in this case. In other circumstances, we have held that 'public policy forbids the maintenance of any suit in a court of justice, the trial of which would inevitably lead to the disclosure of matters which the law itself regards as confidential and respecting which it will not allow the confidence to be violated.' [omitting cites] We confront a similar situation in the instant case."²³

Emergencies

The CEQ regulations provide that when emergency circumstances make it necessary to take an action with significant environmental impact without observing the provisions of these regulations, the agency may proceed with the required action. Agencies must consult with CEQ at the earliest possible time (but not necessarily before taking the action made necessary by the emergency), and CEQ works with the agencies on a case by case basis to determine appropriate alternative arrangements for compliance with NEPA.²⁴ Most recently, the use of this regulation was upheld for actions taken in support of Operation Desert Shield and Operation Desert Storm.²⁵

Timing

The CEQ regulations provide that the time periods normally required for interagency and public comment on draft and final EISs may be reduced "upon a showing by the lead agency of compelling reasons of national policy".²⁶ Other deviations from the normal 45 day comment period on a draft EIS and 30 day waiting period after publication of a final EIS are available if

²³. Id. at 146.

²⁴. 40 C.F.R. §1506.11.

²⁵. Valley Citizens for a Safe Environment v. Vest, 22 Env'tl. L. Rep. 20,335 (D. Mass. 1991).

²⁶. 40 C.F.R. §1506.10(d).

necessary to comply with other statutory requirements²⁷, or in the case of a supplemental EIS.²⁸

Foreign Policy Concerns and National Security Concerns

Since 1976, the Agency for International Development (A.I.D.) has carried out its mission activities in conjunction with NEPA regulations which include exemptions for international disaster assistance; other emergency circumstances, and circumstances involving exceptional foreign policy sensitivities.²⁹ These regulations were issued as a part of a settlement from a lawsuit filed against A.I.D. by environmental organizations.

When faced with NEPA cases involving foreign policy or national security concerns, courts have been deferential to federal agency, both in determining whether NEPA has been violated and in fashioning remedies. This is particularly true when the action at issue is outside of the territorial United States. Although no court has held that NEPA does not apply to federal actions outside of the United States, they have uniformly striven to be sensitive to these concerns in examining the particular situation at hand.

For example, when faced with the question of whether NEPA applied to the Nuclear Regulatory Commission's decision to issue a nuclear export license for nuclear reactor technology to the Philippines, the D.C. Court of Appeals stated that NEPA:

"looks toward cooperation, not unilateral action, in a manner consistent with our foreign policy. Moreover, if an EIS requirement attached to nuclear exports, there would be the spectre of litigation over the adequacy of the EIS, with delay the inevitable result. . . . I find only that NEPA does not apply to NRC nuclear export licensing decisions - and not necessarily that the EIS requirement is inapplicable to some other kind of major federal action abroad."³⁰
(emphasis added)

²⁷. 40 C.F.R. §1507.3(d)

²⁸. 40 C.F.R. §1502.9(c).

²⁹. 22 C.F.R. §216.2(b).

³⁰. Natural Resources Defense v. Nuclear Regulatory Commission, 647 F.2d 1345, 1366 (1981).

In Greenpeace USA v. Stone³¹, 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. The Army complied with NEPA for the destruction of the munitions on Johnston Island, a U.S. territory in the Pacific, and prepared environmental analysis pursuant to EO 12114 for analysis of environmental impacts of the transoceanic shipment of the munitions from the German port to Johnston Atoll. In reviewing the facts of the case, the court again demonstrated sensitivity to the foreign policy aspects of the scenario. The court stated that it "must" take into consideration the foreign policy implications of NEPA³² and found that:

"[t]he transoceanic movement of the munitions is a necessary consequence of the stockpile's removal from West Germany [and] implicates many of the same foreign policy concerns which affect the movement of the weapons through West Germany. . . ." ³³

Finally, it is important to note that even in the face of NEPA violations, courts will not issue injunctions as a matter of course, but rather balance the NEPA violation "with the national well-being and security".³⁴ 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 subsequent postponement of the testing would undermine national security and foreign policy interests and thus denied the injunction.³⁵

Similarly, in a case involving the Department of the Navy's Project ELF, an extremely low frequency submarine communications system, the Seventh Circuit Court of Appeals split on the

³¹. 748 F. Supp. 749 (D. Hawaii 1990).

³². Id. at 759 (emphasis in original).

³³. It is important to note that the court also stated that Executive Order 12114 could not "preempt application of NEPA to all federal actions taken outside the United States" (emphasis in original), but found that in this case, NEPA would not apply to the transoceanic routes because of the foreign policy considerations involved in the action. Id. at 763.

³⁴. Wisconsin v. Weinberger, 745 F.2d 412, 425 (7th Cir. 1984).

³⁵. The Committee for Nuclear Responsibility, Inc. v. Seaborg, 463 F.2d 783 (D.C. Cir. 1971).

question of whether the Navy was required to prepare a supplemental EIS. However, both the majority and dissent found that the lower court had erred in not balancing the equities of issuing an injunction with the program's "high priority for national defense". The court cited with approval an earlier case which stated that:

"When a court has found that a party is in violation of NEPA, the remedy should be shaped so as to fulfill the objectives of the statute as closely as possible, consistent with the broader public interest. . . . The court should tailor its relief to fit each particular case, balancing the environmental concerns of NEPA against the larger interests of society that might be adversely affected by an overly broad injunction".³⁶

The "Flint Ridge" Doctrine - Clear and Unavoidable Conflict

In Flint Ridge v. Scenic Rivers Association³⁷, the U.S. Supreme Court interpreted NEPA's mandate to comply with its requirements "to the fullest extent possible" to mean that an agency's responsibilities to fulfill the procedural requirements of NEPA would yield in cases of clear conflicting statutory requirements. In pertinent part, the Court stated that:

"NEPA's instruction that all federal agencies comply with the impact statement requirement - and with all the other requirements of §102 - 'to the fullest extent possible,' 42 U.S.C. §4332, is neither accidental nor hyperbolic. Rather, the phrase is a deliberate command that the duty NEPA imposes upon the agencies to consider environmental factors not be shunted aside in the bureaucratic shuffle. . . . Section 102 recognizes, however, that where a clear and unavoidable conflict exists, NEPA must give way. As we noted in United States v. SCRAP, 412 U.S. 669, 694 (1973), 'NEPA was not intended to repeal by implication any other statute.'³⁸

The "Rule of Reason

All NEPA cases are interpreted by the courts in light of the "rule of reason", a judicial device to ensure that common sense

³⁶. Wisconsin v. Weinberger, 745 F.2d at 426, citing Environmental Defense Fund v. Marsh, 651 F.2d 983, 1005-06 (1981).

³⁷. 426 U.S. 776 (1976).

³⁸. Id. at 787 (emphasis added).

and reason are not list in the rubric of regulation. The rule of reason has been cited in numerous NEPA cases, and is consistent with CEQ's³⁹ interpretation of NEPA in both regulations and guidance.

The Challenge of Standing

Recent court opinions have limited the ability of potential plaintiffs to bring NEPA lawsuits into court, particularly in cases where the area of interest is broad and geographically far away from plaintiffs' location and interests. In Lujan v. National Wildlife Federation,⁴⁰ the Court held that to demonstrate standing for purposes of NEPA⁴¹, plaintiff must identify some final agency action that affects him or her and must show that he or she has suffered a legal wrong because of the agency action or is adversely affected by that action within the meaning of a relevant statute. In that case, the Court found that the National Wildlife Federation had shown insufficient adverse harm in connection with their members' use of public lands in the vicinity of land that was the subject of Bureau of Land Management orders that would open public land to mining activities.

In Foundation on Economic Trends v. L yng⁴², the D.C. Court of Appeals found that plaintiffs had not sufficiently identified a final agency action which adversely affected them in relationship to the Department of Agriculture's germplasm preservation program.

Finally, in Lujan v. Defenders of Wildlife⁴³, the U.S. Supreme Court found plaintiffs lacked standing to challenge the Interior Department's regulation which limited consultation regarding endangered species to the United States and the high

³⁹. See, for example, preamble to amendment to 40 C.F.R. §1502.22, 51 Federal Register 15625 (1986); Trout Unlimited v. Morton, 509 F.2d 1276, 1283 9th Cir. 1974); Scientists' Institute for Public Information, Inc. v. Atomic Energy Commission, 481 F.2d 1079, 1092 (D.C. 1973), citing Calvert Cliffs Coordinating Committee v. Atomic Energy Commission, 499 F.2d 1109, 1114 (D.C. Cir. 1971).

⁴⁰. 110 S.Ct. 3177 (1990).

⁴¹. There is no private right of action for violations of NEPA; rather, plaintiffs bring suit under the Administrative Procedures Act.

⁴². 943 F.2d 79 (D.C. Cir. 1991).

⁴³. 112 S.Ct. 2130 (1992).

seas. The Court again stressed the need for plaintiffs to show a likely injury in fact traceable to the challenged action, and one which could be addressed through a judicial remedy. Here, the court found that plaintiffs' travels to study various endangered species in foreign countries was insufficient to establish standing in respect to the issue of Endangered Species Act requirements for overseas actions.

These judicial interpretations of standing are particularly telling in the context of potential NEPA litigation for activities on the high seas or outer space. While not inconceivable that individuals or an organization could show standing, NEPA lawsuits for actions in the global commons would certainly not be, as has been suggested, available to anyone who wanted to sue. In fact, proving standing for impacts in either outer space or on the high seas would be significant challenge for potential plaintiffs.

Deference to agencies, resulting in few injunctions

In all NEPA litigation, federal courts demonstrate a high degree of deference to the defendant agency's determination regarding the significance of the environmental impacts and the adequacy of the analysis of those impacts.⁴⁴ Given that deference and the increased compliance of most federal agencies with NEPA and the CEQ regulations, the government wins by far the majority of NEPA cases. Thus, for example, in 1987, 69 NEPA lawsuits were filed and three injunctions were issued; in 1988, 91 lawsuits were filed and 7 injunctions were issued, and in 1989, 57 lawsuits were filed and 5 injunctions were issued. By far the largest number of injunctions occur where an agency has not prepared any analysis under NEPA, as opposed to a determination that such analysis is inadequate.⁴⁵

APPLICATION OF NEPA TO ANTARCTICA IS CONSISTENT WITH THE INTERNATIONAL SCHEME FOR ENVIRONMENTAL PROTECTION IN ANTARCTICA, AND WITH THE APPLICATION OF OTHER US LAW TO ANTARCTICA.

Application of NEPA to U.S. activities in Antarctica is required, appropriate and consistent with other national and

⁴⁴. Depending upon the circuit and the precise nature of the claim, courts apply either an "arbitrary or capricious standard" or a standard of "reasonableness" to an agency's views and decisions. As the Supreme Court has noted, the differences in the two standards are difficult to discern. See Marsh v. Oregon Natural Resources Council, 490 U.S. 360 (1989)

⁴⁵. Cumulative NEPA Litigation Survey, 1970-1991, 23rd Annual Report of the Council on Environmental Quality, 1992, pp. 164-168.

international obligations. Antarctica, not technically part of the "global commons"⁴⁶, enjoys a unique legal status in which the sovereignty claims of all nations, including the United States, are suspended and the activities of all countries are governed by the Antarctic Treaty.⁴⁷ Within that context, the National Science Foundation (NSF) maintains several scientific research installations, manages the research program, plans logistics and operations support for the U.S. Antarctic research program, and oversees implementation of this support by a civilian contractor and by other government agencies (i.e., the Naval Support Force Antarctica and the U.S. Coast Guard).

The U.S. government maintains considerable legislative and legal authority over activities taking place in U.S. facilities at Antarctica. For example, NSF has promulgated regulations under the Antarctic Conservation Act, including enforcement procedures, which govern the impacts by U.S. citizens, including tourists, on native species of Antarctica or its environment, and controls access to "specially protected areas" and "sites of special scientific interest."⁴⁸ The Department of Commerce has promulgated regulations under the Antarctic Marine Living Resources Convention Act of 1984⁴⁹, implementing the Convention on the Conservation of the Antarctic Marine Living Resources. Those regulations make it unlawful for any person to engage in harvesting, possessing, transporting or importing of certain Antarctic marine living resources.⁵⁰ By its terms, the regulations apply to the activities of the U.S. Antarctic Research Program. Other environmental statutes which are applied in Antarctica include the MARPOL Protocol to prevent pollution

⁴⁶. While Antarctica is characterized in EO 12114 as part of the "global commons", the State Department's Office of Legal Advisor has since advised that this is incorrect and that Antarctica is juridically distinguishable from the commons. The National Science Foundation also maintains that Antarctica is distinct from the global commons. "U.S. Antarctic Program Environmental Protection Agenda," Division of Polar Programs, National Science Foundation (August 31, 1988), p. 19.

⁴⁷. Antarctic Treaty, signed in Washington, D.C., on December 1, 1959, T.I.A.S. No. 4780. The Treaty provides that no acts or activities taking place while the Treaty is in force shall constitute a basis for asserting, supporting or denying a claim to territorial sovereignty in Antarctica. Article IV.

⁴⁸. 45 C.F.R. §670.

⁴⁹. 16 U.S.C. §2431 et seq.

⁵⁰. 50 C.F.R. §380.

from ships⁵¹; the Endangered Species Act⁵², the Marine Mammal Protection Act⁵³, the Migratory Bird Treaty Act⁵⁴, and the National Historic Preservation Act⁵⁵. Legal provisions under these and other acts include the granting of jurisdiction of U.S. district courts over cases and controversies arising under certain laws in Antarctica⁵⁶, and the extension of jurisdiction over crimes committed in Antarctica⁵⁷. The United States even treats income earned by citizens in Antarctica as income earned in the United States, rather than a foreign country.⁵⁸

Application of NEPA is also completely consistent with the obligations recently undertaken by the United States through signing the Protocol on Environmental Protection to the Antarctic Treaty, which will enter into force after the 26 Consultative Parties have ratified it. Annex I of the Protocol sets forth requirements for environmental impact assessment which are consistent with NEPA. For reference, a comparison between the requirements of Annex I and NEPA is attached. (Attachment A).

Finally, as noted earlier, NSF, the Department of Defense and other agencies interpreted NEPA to apply to the Antarctica from NEPA's passage until the end of the 1970's. In fact, NSF prepared EISs for at least two projects in Antarctica during the 1970's, 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

⁵¹. 33 U.S.C. 1901 et seq. (1987).

⁵². 16 U.S.C. §1531 et seq.

⁵³. 16 U.S.C. §1361 et seq.

⁵⁴. 16 U.S.C. §703 et seq.

⁵⁵. 16 U.S.C. 470 et seq.

⁵⁶. 16 U.S.C. §2410.

⁵⁷. 18 U.S.C. §7(7); see also, 16 U.S.C. §1408.

⁵⁸. 26 U.S.C. §863(d)(2)(A). It is true that the United States is currently arguing in the U.S. Supreme Court that the Federal Tort Claims Act (FTCA) does not apply to U.S. nations in Antarctica. However, the legal issue raised in that case involves the waiver of sovereign immunity for liability issues, which raises different concerns than those presented by NEPA, and much of the argument revolves around choice-of-law and venue provisions specific to the FTCA. See U.S. and Petitioner's briefs in Smith v. United States, No. 91-1538.

Resources.⁵⁹ Given this history, it is difficult to understand NSF's claim that implementation of NEPA would seriously endanger the U.S. Antarctic research.

SIMILARLY, APPLICATION OF NEPA TO THE GLOBAL COMMONS IS CONSISTENT WITH HISTORICAL INTERPRETATION OF NEPA, WITH THE APPLICATION OF OTHER ENVIRONMENTAL LAWS, AND WITH INTERNATIONAL LAW

Domestic Law

The global commons are areas which are not under the dominion of any sovereign nation - the high seas and outer space. As noted earlier, all interpretations of NEPA prior to the issuance of EO 12114 conceded that NEPA applied to the global commons. There is virtually no evidence that this interpretation caused any difficulties for any federal agency programs, activities or policies, or caused any conflict with any other national or international law, policy or obligation.

The absence of sovereignty in these areas eliminates the difficulties which the Foley doctrine was designed to address. Those concerned with NEPA's applicability abroad often point to the Supreme Court's recent decision in EEOC v. Arabian American Oil Co.⁶⁰ In that case, the Supreme Court held that Title VII of the Civil Rights Act of 1964 does not apply to the employment practices of U.S. firms that employ American citizens abroad. The facts of the case involved private employment occurring in Saudi Arabia, and the rationale of the opinion focuses on the problems of American law operating in a foreign country - not in the global commons.⁶¹

The Reagan and Bush administrations, in general, took a conservative view of the extraterritorial application of U.S. environmental law. Under President Reagan, the U.S. Fish and Wildlife Service reversed its earlier position on the requirements of the Endangered Species Act for consultation regarding the impact of proposed federal actions overseas on endangered and threatened species. However, even the 1986 Reagan

⁵⁹. Dry Valley Drilling Project, 38 Federal Register 23488 (August 30, 1973); Ross Ice Shelf Project, 39 Federal Register 39934 (November 12, 1974); Antarctic Seals Convention, 39 Federal Register 30169 (August 21, 1974); Antarctic Marine Living Resources Convention, with Annex (1982).

⁶⁰. 111 S.Ct. 1227 (1991).

⁶¹. It may be worth noting that Congress explicitly overturned the Supreme Court's holding in this decision in the 1992 Civil Rights Act legislation.

regulations which provoked considerable litigation and public criticism retained the consultation requirement for actions on the high seas. The Endangered Species Act specifically prohibits any person subject to U.S. jurisdiction from "taking" a species "upon the high seas"⁶². Similarly, the Marine Mammal Protection Act prohibits the taking of marine mammals on the high seas⁶³. Both laws have considerably more substantive impact on federal activities and contain much more draconian provisions for enforcement than NEPA, yet neither the Defense Department nor other agencies have experienced notable difficulties in implementing these laws on the high seas.⁶⁴

Further, those agencies which continue to apply NEPA to their activities have not experienced undue difficulty. The National Oceanic and Atmospheric Administration applies NEPA to both its implementation of the Endangered Species Act in the high seas, and the issuance of licenses and permits for deep seabed mineral exploration and recovery.⁶⁵ NOAA has recommended not appealing EDF v. Massey and NOAA representatives have stated that 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 (NASA) has applied NEPA to several proposed actions which would take place in the upper atmosphere or "outer space".⁶⁶ For example, in 1985, NASA prepared an environmental assessment and finding of no significant impact for the Combined Release and Radiation Effects

⁶². 16 U.S.C. §1538.

⁶³. 16 U.S.C. §1372.

⁶⁴. In fact, the Endangered Species Act contains a specific exemption provision which can - but never has - been triggered at the request of the Secretary of Defense if he or she finds that such exemption is necessary for reasons of national security. 16 U.S.C. §1536(i).

⁶⁵. The issuance of any licenses or permit for exploration and commercial recovery of hard mineral resources in the deep seabed is deemed to be a major Federal action significantly affecting the quality of the human environment. 30 U.S.C. §1419(d).

⁶⁶. At present, there is no definitive boundary line between air and outer space. According to international customary law, outer space is the area in which artificial earth satellites move in durable orbit, and the area above this. Gorove, Pollution and Outer Space: A Legal Analysis and Appraisal, 5 NYU Journ. Int. Law & Pol. 53 (1972).

Satellite (CRRES) program.⁶⁷ The CRRES program involves the release of chemicals into the space environment to study the dynamic physical and chemical processes which are active in the upper atmosphere and space plasma environments. NASA prepared an EIS on the Ulysses Mission, an international cooperative mission between NASA and the European Space Agency to explore the sun and the heliosphere,⁶⁸ and on the Galileo Mission, to conduct comprehensive investigations of Jupiter's planetary system.⁶⁹

Treaty Obligations

The High Seas

The United States has not signed the United Nations Convention on the Law of the Sea (LOS)⁷⁰, but, with the exception of the deep seabed mining provisions, has generally recognized the LOS as representing international and customary law. President Reagan declared the establishment of the U.S. Exclusive Economic Zone extending to a distance of 200 nautical miles from the baseline of the territorial sea. In the accompanying Statement on U.S. Oceans Policy, the President announced that the United States was prepared to accept and act in accordance with the balance of interests related to traditional uses of the ocean, including high seas uses.⁷¹

Law involving uses of the high seas generally has revolved around the freedom of nations to conduct navigation, overflights, fishing, scientific research in the high seas. Additionally, the rights of nations to lay submarine cables and pipelines and to construct artificial islands, installations and structures were recognized in the LOS.⁷² None of these rights were impinged in any manner by the implementation of NEPA to U.S. activities in the high seas during the 1970's, nor would they be threatened by such compliance today. On the contrary, the LOS provides that nations have the "sovereign right to exploit their natural resources pursuant to their environmental policies and in accordance with their duty to protect and preserve the marine

⁶⁷. 50 Fed. Reg. 41,964 (1985).

⁶⁸. 54 Fed. Reg. 48,168 (1989).

⁶⁹. "Supplemental Draft EIS for the Galileo and Ulysses Missions", November 1987.

⁷⁰. United Nations Convention on the Law of the Sea, done at Montego Bay, Dec. 10, 1982, 21 I.L.M. 1261 (1982).

⁷¹. Proclamation No. 5030, 48 Fed. Reg. 10,605 (1983).

⁷². Articles 58 and 86.

environment."⁷³ More specifically, Section 4 of the LOS, "Monitoring and Environmental Assessment", provides that:

"When States have reasonable grounds for believing that planned activities under their jurisdiction or control may cause substantial pollution of or significant and harmful changes to the marine environment, they shall, as far as practicable, assess the potential effects of such activities on the marine environment and shall communicate reports of the results of such assessments at appropriate intervals to the competent international organizations, which should make them available to all States."⁷⁴

Further, nations have a duty to, as far as practicable, observe, measure, evaluate and analyze, by recognized scientific methods, the risks or effects of pollution on the marine environment. "In particular, States shall keep under surveillance the effects of any activities which they permit or in which they engage in order to determine whether these activities are likely to pollute the marine environment."⁷⁵

Outer Space

The Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies, requires States to prevent disruption of the existing balance of the celestial bodies' environments through adverse changes of harmful contamination.⁷⁶ Nothing in either that Treaty nor other international agreements applicable to U.S. activity in outer space⁷⁷ appears to conflict with the implementation of NEPA. In fact, one legal writer, in

⁷³. Article 193 (emphasis added).

⁷⁴. Articles 205 and 206.

⁷⁵. Article 204. Strictly speaking, these provisions do not apply to government vessels. However, LOS Article 236 provides that each State shall ensure, by the adoption of appropriate measures, that such vessels or aircraft act in a manner consistent with these provisions. At any rate, it is clear that the implementation of NEPA would be consistent with the direction of the pertinent LOS articles.

⁷⁶. Oct. 10, 1967, T.I.A.S. No. 6347, Article IX.

⁷⁷. For example, the Agreement on the Rescue of Astronauts, the Return of Astronauts, and the Return of Objects Launched into Outer Space, Apr. 27, 1968, T.I.A.S. No. 6599 and the Convention on International Liability for Damage Caused by Space Objects, Mar. 29, 1972, T.I.A.S. No. 7762.

analyzing various proposals to impose global environmental standards on activities in outer space, has written that:

"A more politically palatable approach would be to adopt the U.S. NEPA on an international scale, requiring each nation to publish, in connection with each launch, a study of the environmental effects of the mission on the Earth and space, including a statement of how the satellite will be prevented from becoming a hazard to space travel. It has been proposed that the United Nations establish a legal requirement for 'preliminary ecological assessment' of space operations. This would be no additional burden on the United States, where NEPA already requires evaluation of environmental impacts upon the 'global commons' of the high seas, Antarctica, and outer space. Federal agencies, including the Defense Department and NASA, must file environmental impact statements on . . . extraterrestrial activities of those agencies, such as the Space Shuttle." ⁷⁸

AGENDA 21, THE ACTION PLAN DEVELOPED AT THE UNITED NATIONS CONFERENCE ON ENVIRONMENT AND DEVELOPMENT, SUPPORTS THE APPLICATION OF NEPA TO ANTARCTICA AND THE GLOBAL COMMONS

While not hard law, Agenda 21 is indicative of the global consensus regarding environmental protection schemes. Application of NEPA to U.S. activities in the Antarctic and in the global commons is consistent with both the Rio Declaration and specific items in Agenda 21, including:

--- Ensuring the integration of economic, social and environmental considerations in decision-making at all levels and in all ministries; ⁷⁹

--- Ensuring access by the public to relevant information, facilitating the reception of public views, and allowing for effective participation; ⁸⁰

--- Adopting comprehensive analytical procedures for prior and simultaneous assessment of the impacts of decisions,

⁷⁸. Swenson, Major R., Pollution of the Extraterrestrial Environment, 25 Air Force L. Rev. 71, 85-86 [citations omitted] (1985).

⁷⁹. Activity 8.4(a). It is worth noting that yet another difference between NEPA and EO 12114 is that NEPA requires consideration of social and economic impacts and how they intertwine with environmental considerations. EO 12114 addresses only environmental impacts.

⁸⁰. Activity 8.4(f).

including the impacts within and among the economic, social and environmental spheres; these procedures should extend beyond the project level to policies and programs; analysis should also include assessment of costs, benefits and risks;⁸¹

--- Adopting flexible and integrative planning approaches that allow the consideration of multiple goals and enable adjustment of changing needs; integrative approaches at the ecosystem or watershed level can assist in this approach.⁸²

PUBLIC POLICY CONSIDERATIONS WEIGH ON THE SIDE OF APPLYING NEPA IN THE ANTARCTIC AND IN THE GLOBAL COMMONS

The Antarctic, the high seas and outer space are all remote and special ecosystems which need constant protection. Because of their very remoteness, environmental insults are less likely to be observed and addressed. However, the Antarctic environment has suffered from mankind's increasing presence on the continent, and, while the NSF has shown increasing awareness of the problem in the last few years, continual vigilance will be necessary to safeguard the continent's pristine nature.

Not a great deal is known about the impacts of U.S. military activities in the high seas⁸³. Certainly, during the 1970's when DOD acknowledged that NEPA applied to activities in these areas, no major controversies appeared to have ensued. And, in fact, the most serious environmental degradation in the oceans appears to be taking place in coastal waters or the Exclusive Economic Zone, not the high seas. Nonetheless, in the high seas, aircraft carriers refuel at sea, drop fuel before landing on carriers, and wash aircraft on board ship with attendant run-off. Missiles are fired; air emissions emitted; solid waste dumped at sea. Long distant transport of alien species within or among oceans has caused problems. The Navy has, at times, considered sea disposal for obsolete nuclear submarines containing significant levels of radioactivity, stimulating concern about long-term damage to marine ecosystems.

⁸¹. Activity 8.5(b). The NEPA regulations specifically require assessment of policies and programs; EO 12114 does not.

⁸². Activity 8.5(c). Again, the NEPA regulations stress cumulative impact assessment; EO 12114 does not.

⁸³. See excerpt, Norse, Dr. E., "Military use and immunity from public scrutiny" in Global Marine Biological Diversity Strategy, scheduled for release by Island Press, August, 1993. The Center for Marine Conservation, the World Conservation Union, World Wildlife Fund and the World Bank are sponsors of the development and publication of the strategy. The excerpt is included as Attachment B to this memorandum.

Even less is known about environmental insults to outer space; however, the need to know argues even more strongly from a policy perspective for application of NEPA. As stated by one author: "One thing is clear: in the campaign against pollution of the extraterrestrial environment, repairing damage to that environment is extremely difficult, if not impossible. The only reasonable alternative is prevention."⁸⁴

One important question remains. The agencies involved in these activities may state that they are willing to do everything that NEPA would require them to do for activities in Antarctica, the high seas, and outer space. In that case, the argument is made: why subject the agencies to any risk of litigation at all? Why not simply issue an amended or new executive order mandating the most important elements of the NEPA process, but shielding the agencies from the threat of any delay due to lawsuits?

Clearly, this course is one of several alternatives which must be examined - and, at first blush, it appears less threatening and more attractive than conceding the statutory reach of NEPA over these agencies' activities. At issue, however, is whether the agencies will be obligated to undertake the environmental impact assessment process as a matter of law or as a matter of policy.

There is little doubt that if this administration issues a new executive order, agencies will take their political cue and begin implementation with some vigor. However, the executive order provides neither permanence nor enforceability. When President Reagan's administration came into power, even the scant coverage of EO 12114 was at issue, with some suggesting that it should be rescinded, which would have eliminated all analysis of for any federal action taking place outside of the U.S. Clearly, a stronger executive order would be even more vulnerable to a change of policy direction.

On the other hand, should a successor administration be less inclined to make dramatic policy shifts, but also be less interested in environmental issues than the Clinton/Gore administration, the political motivation for complying with an executive order would drop tremendously. In the long run, only compliance under the law ensures continued motivation for environmental assessment.

Campaign commitment

⁸⁴. Op cit. at n. 76.

During the campaign, Governor Clinton provided the following statements to the League of Conservation Voter's Presidential Profiles questionnaire:

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

U.S. agencies should be required to protect listed species overseas, just as they are required to do so in this country."

Both answers are consistent with only one outcome regarding the appeal of EDF v. Massey: to let the holding stand.

Environmental Community

Thirteen major environmental organizations, many of whom actively supported the Clinton/Gore campaign, have written to the President urging that EDF v. Massey not be appealed⁸⁵. A decision to appeal this case will be interpreted as a retraction of a campaign commitment, and a foreshadowing of the administration's likely position on the issue of protection of endangered species abroad. Issuance of a new and improved executive order will not be viewed as an acceptable substitute for letting the law stand.

Congress

Members of Congress who have addressed the issue of NEPA abroad have repeatedly expressed dismay over past administration's narrow reading of the statute. Because of the Reagan and Bush administration's refusal to interpret NEPA to apply to overseas activities, amendments were introduced in the past three Congressional sessions to explicitly apply NEPA to all federal activities overseas, and to global environmental problems such as the loss of the ozone layer, climate change, and the loss of biological diversity.

Should the EDF v. Massey be appealed, it is highly likely that similar amendments to broaden NEPA's reach to all U.S. activities (not just those in Antarctica and in the global commons) will be reintroduced.

CONCLUSION

Federal agencies conceded that NEPA applied to U.S. activities in Antarctic and in the global commons during most of the 1970's, with virtually no discernable problems. Neither Congress nor the courts ever determined that this interpretation was incorrect; rather, all available evidence supports this

⁸⁵. The letter, dated March 1, 1993, is appended as Attachment C to this memorandum.

original interpretation. NEPA itself, CEQ implementing regulations, and applicable case law provides sufficient flexibility to meet exigencies, including foreign policy and national security concerns. Public policy interests weigh in favor of applying NEPA to federal activities in Antarctica and the global commons, and Clinton/Gore supporters and Congressional committees with jurisdiction over NEPA expect the administration to act according to campaign statements. For all of these reasons, the Department of Justice should be directed not to file a petition for rehearing in EDF v. Massey.

COMPARISON OF ENVIRONMENTAL IMPACT ASSESSMENT PROVISIONS IN NEPA/CEQ REGULATIONS AND THE ANTARCTIC PROTOCOL/ANNEX 1

PURPOSE/PRINCIPLES

NEPA: Basic national charter for protection of the environment. To ensure environmental information is available to public officials and citizens before decisions are made, and before actions are taken. The NEPA process is intended to help public officials make decisions based on an understanding of environmental impacts, and take actions that protect, restore and enhance the environment.

PROTOCOL: To ensure that the protection of the Antarctic environment and dependent and associated ecosystems are fundamental considerations in the planning and conduct of all activities in the Antarctic Treaty area. Accordingly, activities in Antarctica shall be planned and conducted on the basis of information sufficient to allow prior assessments of, and informed judgments about, their impacts on the Antarctic environment.

APPLICABILITY

NEPA: Applies to federal actions, including plans, policies, rules, regulations.

PROTOCOL: Applies to both governmental and non-governmental actions, including those pursuant to scientific research programs and tourism

SCOPING

NEPA: Provides for scoping process at an early stage in the process to identify significant environmental issues, and to deemphasize insignificant issues

PROTOCOL: Does not articulate scoping process (presumably because the Antarctic Treaty Parties recognized the particulars of EIA implementation would be drafted by each individual Party)

2-Part Process (EA/EIS-- IEE/CEE)

NEPA: Environmental Assessment (EA) prepared to determine whether federal action may have a significant impact on the environment; if so, then the more comprehensive Environmental Impact Statement (EIS) is required in both a draft and final form

PROTOCOL: Requires preparation of an Initial Environmental Evaluation (IEE) for any proposed action that may have at least a "minor or transitory" impact on the environment; if so, then preparation of a Comprehensive Environmental Evaluation (CEE) is required in both a draft and final form

THRESHOLD STANDARDS

NEPA: EA prepared to determine whether an action might have a significant impact on the environment; if there is a finding of no significant impact, the action may proceed, as no EIS is required

PROTOCOL: IEE to determine whether action may reasonably be expected to have a significant impact; if IEE indicates that the action is likely to have no more than a minor or transitory on the environment, then the activity may proceed, as no CEE is required

DOCUMENTATION

NEPA AND PROTOCOL: EIS and CEE to include, inter alia, a description of the proposed activity, including alternatives to that activity; a description of the character of the likely impacts of the proposed activity; consideration of indirect and cumulative impacts; identification of measures, including monitoring, to mitigate impacts and detect unforeseen impacts; identification of unavoidable impacts

PUBLIC INVOLVEMENT

NEPA: Requires public involvement in preparation of EA; requires public involvement for the preparation of draft and final EIS

PROTOCOL: Does not address public involvement in preparation of IEE; requires public involvement in preparation of draft and final CEE

CIRCULATION OF, COMMENT ON, DOCUMENTS

NEPA: Requires EA, draft and final EIS be made available to the public for comment. Final EIS must address comments received on draft EIS, and must be circulated for at least 45 days before the commencement of the proposed activity

PROTOCOL: Does not address circulation/comment regarding IEE; requires draft and final CEE be circulated to all Parties for comment, and at the same time forwarded to the Committee for Environmental Protection. Final CEE is to address and include or summarize comments received, and shall be circulated to all Parties at least 60 days before the commencement of the proposed activity

EMERGENCIES

NEPA: Where emergency circumstances make it necessary to take an action with significant environmental impacts without observing NEPA and CEQ regulations, then federal agency should consult with the Council on Environmental Quality about alternative arrangements. These arrangements would be limited to actions necessary to

control the immediate impact of the emergency

PROTOCOL: Provides exception to EIA process in cases of emergency relating to the safety of human life or of ships, aircraft or equipment and facilities of high value, or the protection of the environment. Immediate notification of activities undertaken in such circumstances is required, and subsequently a full explanation of those activities

LEGAL RECOURSE

NEPA: No criminal or civil penalties. Pursuant to tenets of administrative law, citizens may file lawsuits where agencies do not comply with NEPA and CEQ regulations

PROTOCOL: Obligates Parties to take appropriate measures within their competence, including the adoption of laws and regulations, administrative actions and enforcement measures, to ensure compliance with the Protocol and Annexes.

VICS MILITARY USE AND IMMUNITY FROM PUBLIC SCRUTINY

Despite increasing global awareness about the health of coastal and marine ecosystems, there is little available information about the effects of military activities on the sea. Military bases and weapons-producing facilities along coasts and in drainage basins generate large amounts of wastes, including some that are very hazardous, that can enter the sea accidentally or by design. The military has dumped everything from shipboard garbage to barrels of nerve gas and unexploded bombs into the sea, and the USA (Davis and VanDyke 1990) and Russia have viewed the sea as the logical place to sink decommissioned nuclear submarines or high-level nuclear wastes from the military. The former USSR used the Arctic island of Novaya Zemlya and the USA, Great Britain, and France have used Pacific atolls for testing nuclear weapons. Many countries use islands as naval bombing and shelling targets. Wars have littered some marine areas with ordinance and sunken vessels that can leak fuel for decades. And 1991 saw the first use of a new military tactic: the intentional release of some six million barrels of crude oil into the Persian/Arabian Gulf by Iraq.

It is difficult to gauge the magnitude of harm from these and other activities that have not yet come to light. Most have been exempt from environmental regulatory controls by law or common practice. Even nations with generally good environmental records tend to look the other way when actions are carried out under the cloak of "national security."

There are also less obvious effects of military activities, both negative and positive. One of the negative ones is the introduction of alien species. Wars create novel shipping corridors that are distinct from historical trade routes, or impose upon older routes much higher levels of transport activity. Not surprisingly, a large number of marine organisms are thought to have been newly introduced co-incidental to world wars. The Australian barnacle *Elminius modestus* appeared in England during World War II (Elton 1958). Two species of Philippine jellyfishes (Cuttress 1961) were carried to Hawaii (USA) during World War II. The Korean-Japanese shrimp *Palaemon macrodactylus* appeared in San Francisco Bay (USA) shortly after the Korean War (Newman 1963), and many more western and southwestern Pacific invertebrates appeared in California (USA) harbors during the Vietnam War (Carlton 1979).

"Normal" military activity can transport species as well. Noting the arrival of the rapacious blue crab (*Callinectes sapidus*) near Yokohama Naval Base (Japan), Sakai (1976) suggested that it might have come in the ballast tanks of submarines returning from the east coast of the USA.

On the other hand, military bases and target ranges are commonly closed to the public and therefore suffer far less disturbance than readily accessible areas. Areas up to many thousands of square kilometers where submarine detection devices or explosives sit on the seabed are usually closed to bottom trawling, thus providing refuge for demersal fishes and benthic communities. As a result, intertidal and sub-tidal areas of military reservations can

be far richer biologically than adjacent areas that endure commercial, subsistence, and sport collecting. Seabirds on many islands worldwide owe their nesting success to the bombs and shells that occasionally fall in their midst; the explosions, deadly as they and their chemical residues are, are far less disturbing than human visits.

Furthermore, commercial whaling in the Antarctic essentially ceased when whaling ships were diverted to military use during World War II, giving the great whales a brief respite before the killing resumed (Figure VI-1).

In addition, many of the most expensive research projects, including oceanographic studies of currents, mapping of undersea topography, and studies in the Arctic and Antarctic, would never have happened without the military's need for information during the Cold War. It is unfortunate that nations could justify these projects only under a military definition of national security, rather than for their contribution to management of marine resources, but the fact remains that research carried out or funded by the military has generated information of considerable importance to our understanding of life in the sea.

Increasing concern about marine pollution has increased pressure for military accountability (Davis 1990). Ideally, this could lead to diminished harm from military activities, while retaining the very real benefit of providing refuge from human predation.

Carlton, James T. (1979). *History, biogeography, and ecology of the introduced marine and estuarine invertebrates of the Pacific coast of North America*. Ph.D. dissertation, Ecology, University of California, Davis, California (USA).

Cutress, C.E. (1961). Introduced jellyfish in Hawaii, in M.S. Doty, *Acanthophora*, a possible invader of the marine flora of Hawaii. *Pacific Science* 15:547-552.

Davis, W.J. (1990). Global aspects of marine pollution policy: The need for a new international convention. *Marine Policy* 14(3):191-197.

Davis, W.J., and J.M. VanDyke (1990). Dumping of decommissioned nuclear submarines at sea: A technical and legal analysis. *Marine Policy* 14(6):467-476.

Elton, Charles S. (1958). *The Ecology of Invasions by Animals and Plants*. Methuen, London (UK).

Newman, W. (1963). On the introduction of an edible Oriental shrimp (Caridea, Palaemonidae) to San Francisco Bay. *Crustaceana* 5:119-132.

Sakai, T. (1976). Notes from the carcinological fauna of Japan (IV). *Researches on Crustacea* 7:29-40.

Center for Marine Conservation • Defenders of Wildlife
Environmental Defense Fund • Friends of the Earth
The Izaak Walton League • National Audubon Society
National Parks and Conservation Association
National Wildlife Federation • Natural Resources Defense Council
Sierra Club • Sierra Club Legal Defense Fund
The Wilderness Society • World Wildlife Fund

March 1, 1993

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

Dear Mr. President:

We are writing to urge you to support a recent federal Appeals Court decision that could substantially enhance protection of the global environment. Although this decision is consistent with an important environmental objective that you supported during the Presidential campaign, we understand that government officials in agencies where your sub-Cabinet level appointees are not yet fully in place are actively working to appeal the Court's ruling.

Specifically, in Environmental Defense Fund v. Massey (decided January 29, 1993), a unanimous panel of the United States Court of Appeals for the District of Columbia Circuit concluded that the National Environmental Policy Act ("NEPA") governs the decision of the National Science Foundation ("NSF") to incinerate wastes in Antarctica. NEPA requires every federal agency to evaluate the environmental consequences of its decisions by preparing an environmental impact statement ("EIS") before undertaking projects that may significantly impact the environment. That "look before you leap" approach may ultimately reduce pollution and other environmental damage from federal actions, thereby avoiding expensive clean-up costs.

During the campaign, you expressed your support for applying NEPA to federal actions overseas. Nevertheless, despite that statement and Vice-President Gore's longstanding interest in global environmental protection and particular legislative efforts to protect the Antarctic environment, several federal agencies are currently pressing for en banc review of the Court's decision. Officials within these agencies have apparently suggested that U.S. foreign policy would somehow be adversely affected if NEPA were to govern federal actions outside the United States. Yet, through the 1970's, NSF and other federal agencies complied with NEPA for their actions abroad, including projects in Antarctica, with no such impacts.

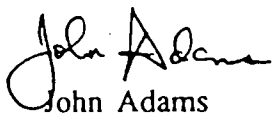
Accordingly, we urge you to direct the appropriate officials to support the Massey decision and not seek further review of it. Such action would signal a clear and very positive break from the environmental policies of the Reagan and Bush Administrations. Indeed, the

The President
March 1, 1993
Page 2

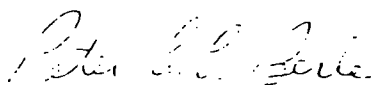
decision provides an excellent opportunity for you to ensure that NEPA requires all federal agencies to evaluate the environmental consequences of their projects, no matter where such actions occur.

Thank you for your consideration of this request.

Sincerely,



John Adams
Executive Director
Natural Resources Defense Council



Peter A.A. Berle
President
National Audubon Society



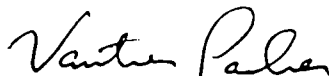
Kathryn S. Fuller
President
World Wildlife Fund



Fred Krupp
Executive Director
Environmental Defense Fund



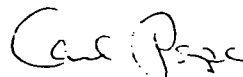
Roger McManus
President
Center for Marine Conservation



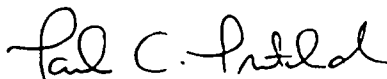
Vawter Parker
President
Sierra Club Legal Defense Fund



Jane Perkins
President
Friends of the Earth



Carl Pope
Executive Director
Sierra Club



Paul C. Pritchard
President
National Parks and Conservation Association



Rodger Schlickeisen
President
Defenders of Wildlife



Maitland Sharpe
Executive Director
The Izaak Walton League



Karin Sheldon
Vice President for Conservation
The Wilderness Society

CONCERNS ABOUT E.D.F. V. MASSEY

1. Ambiguity of Decision Will Create Confusion About Standard, Litigation, Delays in Implementing Programs, Higher Costs During A Period of a Shrinking Federal Budget, and Complicate Relations With Foreign Governments Particularly on Joint Projects
 - A. Although the court emphasizes that the decision applies only to "unique status of the Antarctica" (i.e. - no clash with laws of foreign sovereign) and to application of NEPA (pages 10 and 17), the opinion also states that the "procedural requirements" of NEPA imposed on Federal agencies is tantamount to activity confined to the U.S. which therefore does not raise the issue of extraterritoriality. (See pages 7-10.)
 - B. Environmental groups will be encouraged by the decision to sue Federal agencies funding projects overseas, resulting in delays and considerably higher costs due to inflation and disrupted schedules on multi-million dollar projects.
 - C. At times, litigation and confusion involving certain minor environmental issues may significantly interfere with or override critical U.S. national security and foreign policy goals.
 - D. The decision could result in stalling critical projects on U.S. domestic procedural grounds, when the substance of environmental concerns has been addressed through the application of foreign environmental requirements. Example: A \$266 million project funded by the Board for International Broadcasting to build a U.S. radio relay station in Israel has resulted in a cost of \$4 million dollars and several years delay in order to comply with elaborate local environmental standards.
- II. The Decision Could Give the Courts Too Large a Role in the Conduct of Foreign Policy, Notwithstanding Dicta at Page 14.
- III. In Accord With the Presumption Against Extraterritorial Application of U.S. Laws, the U.S. Congress or the Executive Branch Should Set Forth Explicit and Clear Guidelines for Federal Agencies on When and How to Apply NEPA and Other U.S. Environmental Laws to Federally-Funded Projects Overseas. (Standard too Vague: See page 14.)
 - A. Consideration should be given to allowing procedures for expeditious exemption of projects which substantially meet the intent of U.S. environmental laws when complying with the environmental laws of other nations.

-
- B. Consideration should also be given to allowing Executive Branch administrative determinations on exemptions when the national security and Foreign policy interests clearly override those of the environment, particularly when joint projects are involved.
-

NEPA

I. THE ISSUE

- o Ask for a re-hearing en banc (March 15)
- o holding - Antarctica/Global Commons
- o reasoning - potentially broader

II. THE PLAYERS

- o Commerce
 - o EPA
 - o Interior
 - o Agriculture
 - o Defense
 - o State
- _____ to re hear
- _____ " if can read narrowly,
- NO
- o rehearing
 - o NEPA re: Antarctica
 - o New E.O. re: Development projects abroad .
(Army Corps currently NO analysis)
(AID fully follows NEPA; foreign policy exception)

III. MY RECOMMENDATIONS

- o NOT to seek re-hearing
- o Direct agencies to issue regulations implementing NEPA in the global commons WITH a national security/foreign policy exemption
- o Issue new E.O. re: need for environmental review of actions in sovereign territory

IV. CONSIDERATIONS

- o We can continue to argue against full application to sovereign territories
 - o Japan case
- o If we do ask for re-hearing, we may lose control --

JW B. Fisher

strong pressure from committees w/ ????? to make NEPA apply fully

- o Our ability to carve out global commons lost
- o Standing threat of frivolous lawsuits diminished
- o International pressure / leadership we have been exerting re: public participation, information & accountability
 - o Congressional / Interest group pressure
 - o Campaign Statement
- o Antarctica protocol calls for public participation
- o Agency has never been restrained / enjoined or in any way lost on a challenge to an overseas action when has asserted claim of foreign policy / national security
- o Courts have recognized
 - o NEPA gives way to other pressing concerns
 - o Specifically, national security concerns have been recognized as demanding more flexible approach
 - o Persian Gulf War

→ *never been held to apply.*

→ ~~no~~ *exceptions in the statute.*



U.S. Department of Justice

Environment and Natural Resources Division

Office of the Assistant Attorney General

Washington, D.C. 20530

Telephone 202/514-2701
Fax 202/514-0557



TO: Katie McGinty

FROM: Myles Flint

NO. OF PAGES: 4
(INCLUDING
COVER PAGE)

TELEPHONE NO.:

FAX NO.: 456-2710

MESSAGE:

PLEASE NOTIFY SENDER IMMEDIATELY IF YOU HAVE ANY PROBLEMS
RECEIVING THESE PAGES.



U.S. Department of Justice

Environment and Natural Resources Division

Office of the
Deputy Assistant Attorney General

3/2/93

Katie McInty:

Here is a brief Talking paper
we put together for your
use.

I will be out of the office
for an hour from 2 to 3 P.M.
If you have questions please
call Carol or Peter.

Myra E. Fleeth

NEPA: WHY APPLYING A GOOD LAW DOMESTICALLY DOESN'T WORK ABROAD

Environmental Defense Fund v. Massey

D. C. Cir., January 29, 1993

1. The significance of the court's ruling. -- From the time of NEPA's enactment in 1969 until today, no court has held that NEPA applies to federal activities outside the territorial limits of the United States. In 1979, President Carter issued an Executive Order which details procedures federal agencies must follow in evaluating activities abroad that may have significant environmental impacts. Environmental review under this Order reflects the unique foreign policy concerns attendant to U.S. actions abroad. But the Executive Order creates no private right of action, and unlike the statute, there are exemptions for emergencies, national security and other pressing circumstances.

The court's ruling that NEPA applies to Antarctica is troubling primarily because of the reasoning used by the Court to reach that result. If the reasoning and logic of the decision is followed -- that applying NEPA to extraterritorial activities does not raise extraterritorial concerns because NEPA governs only decisionmaking in this country -- the consequence will be that NEPA should be applied to U.S. actions in foreign countries as well.

First, the ruling is significant because judges rather than the President would be the arbiter of environmental compliance by federal agencies acting abroad. Judicial review of agreements with host countries, discovery of foreign documents and injunctions will become as routine in the international context as they are in domestic NEPA litigation. Just as NEPA is used today by some as a weapon to oppose projects they disfavor, NEPA would be invoked by opponents of federal loan guarantees for agriculture in Russia or housing in Israel, opponents of bilateral disarmament activities with the former Soviet countries, or those concerned with particular trade and tariff policies as those policies might affect manufacturing nations. While the opinion recognizes that some "unique and delicate" foreign policy concerns might override an agency's duty under NEPA, we would be dependant upon a judge for that finding, and would have to subject these sensitive matters to judicial scrutiny in the first instance.

Second, if the court's reasoning is followed, important overseas initiatives would be delayed for the 12-18 months that it takes to prepare a draft EIS, conduct a hearing and obtain comments, and then issue a final EIS. It must be noted that unlike the Executive Order, there are no exceptions in the Act for emergencies, foreign policy crises, national security concerns and the like.

- Examples - Johnson atoll case?
- pending Japanese case?

Third, an obligation to apply NEPA abroad is likely to undermine our ability to build coalitions with other nations for activities that are important to our national security. If we tie our participation to compliance with NEPA, other countries are less likely to join in partnership with us. If our offers of assistance are accompanied by the likelihood of participating in that most American of activities -- the lawsuit, many nations are certain to decline our offers of assistance.

Fourth, 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 multi-lateral context, a ruling that our law will be applied to activities in their nations strikes exactly the wrong note.

2. Available options. -- The most legally defensible option is to seek rehearing en banc from the full court. The decision is flawed, does not follow recent Supreme Court precedent and is not likely to survive if the full court agrees to rehear the case. Even if we did not prevail on applying NEPA in Antarctica, there would be a good chance the court would not follow the panel's reasoning, thereby implicating NEPA's applicability everywhere. However, judicial success may be short-lived if Congress responds by enacting a sweeping version of an extraterritorial amendment to NEPA. The Departments of Defense, Army, Navy, Transportation, and the Interior, as well as NASA, NRC, USTR and DEA all recommend rehearing en banc.

Alternatively, we could decline to petition for rehearing on the ground that the Administration can live with the holding of the court. But, to assure those agencies who are concerned with application of NEPA to their activities in other sovereign nations, we would announce our intention to challenge the court's reasoning as inapplicable and flawed if carried beyond Antarctica, the oceans, and space. Thus, where we are presently asserting that NEPA has no application to the operation of three military bases in Japan, we would continue to press our existing arguments as far as necessary. This option has greater legal risks for federal agencies who believe NEPA compliance would create major foreign policy and national security concerns, but it does focus on the most pressing of concerns by those agencies that strongly advocate rehearing. If the present decision cannot be read narrowly, Commerce and Agriculture would join in recommending rehearing en banc. EPA adopts a narrow reading of the decision and recommends against further review.

Finally, we could acquiesce in both the ruling and the reasoning of the court, thereby agreeing to apply the Act in extraterritorial contexts. In light of his participation in the drafting and implementation of the Executive Order in the Carter Administration, we would respectfully suggest that the Secretary of State be consulted before any final decision is reached. Only the General Counsel of CEQ supports this position.

encl they
view
this
application
in context

Why
not
this way?

TO: Katie McGinty
FROM: Dinah Bear
DATE: March 3, 1993
RE: DOJ Memo on EDF v. Massey

A few additional comments on DOJ's memo which weren't directly addressed in the draft decision memo I just faxed over:

1. The memo states that NEPA does not accommodate emergencies, national security concerns and other pressing circumstances. In fact, the CEQ regulations implementing NEPA have long contained a provision providing for emergency situations. 40 CFR §1506.11. The provision has been used several dozen times, and has been challenged three times in court. The use of the provision has been upheld in court each time.

2. The memo also cites several situations involving foreign policy as examples in which NEPA could be used as a "weapon". You should be aware that since 1980, the Agency for International Development has operated under environmental procedures "intended to implement the requirements of NEPA". Those procedures include exemptions for: i) international disaster assistance; ii) other emergency circumstances, and iii) circumstances involving exceptional foreign policy sensitivities. The Administrator of AID (not the courts) make the determination that a proposed action fits within one of these categories, after consultation with CEQ. This provision was used for the proposed federal loan guarantees for housing to Israel (cited in the memo as an example of a problem action) and for emergency delivery of food supplies to Bosnia.

3. The memo states that Interior supports an appeal. I am informed that Interior's position is similar to Agriculture and NOAA in that they do not support an appeal as long as the case is interpreted to apply only to Antarctica.

4. Finally, DOJ's memo ends with a statement that only I support a position of acquiescing in both the ruling and the reasoning of the court. As you may have noted, in fact, my memo specifically states that in the absence of a political appointee at CEQ, we are not taking a policy position.

You should also know that the Supreme Court held in Weinberger v. Catholic Action of Hawaii that NEPA does not require the disclosure of otherwise classified information. In that case, the issue was whether nuclear weapons were being stored by the Navy in Hawaii. The Navy refused to confirm or deny; their position was upheld "due to national security reasons".

I am also including excerpts from some of the cases we discussed to give you a flavor of the courts' historical

avoidance of directly addressing this issue. In several other cases, the court said nothing at all of relevance but simply addressed the facts of the case. Please let me know if you want anything further in relationship to case law or background.

To: Dinah
From: Elisabeth Blaug
Subj: Cites from extraterritorial cases
Date: March 3, 1993

Greenpeace USA v. Stone, 748 F.Supp. 749 (D. Hawaii 1990) (held NEPA did not apply to the transport of chemical weapons stored in West Germany to Johnston Atoll for destruction).

This court is convinced that Congress intended to *encourage* federal agencies to consider the global impact of domestic actions and *may* have intended under certain circumstances for NEPA to apply extraterritorially.

At 759.

The court must emphasize that this decision is limited to the specific and unique facts which are presented here. In other circumstances, NEPA may require a federal agency to prepare an EIS for action taken abroad, especially where United States agency's action abroad has direct environmental impacts within this country, or where there has clearly been a total lack of environmental assessment by the federal agency or foreign country involved.

At 761.

National Org'n For Reform of Marijuana Laws (NORML) v. U.S., 452 F.Supp. 1226 (D.D.C. 1978) (Defendants, including State Department and AID, prepared EIS for the Mexican marijuana eradication program's impacts in the United States pursuant to NEPA; after the filing of plaintiff's lawsuit, defendants announced they were preparing an "environmental analysis" of the program's effects in Mexico).

In view of defendants' willingness to prepare an "environmental analysis" of the Mexico effects of United States support of that nation's narcotics eradication program, together with the EIS required by NEPA as to the impact of that program upon the United States, the Court need not reach the issue and need only assume without deciding, that NEPA is fully applicable to the Mexican herbicide spraying program.

Natural Resources Defense Council, Inc. v. Nuclear Regulatory Comm'n, 647 F.2d 1345, 11 ELR 20266 (D.C. Cir. 1981) (held NEPA did not apply to the NRC's decision to issue a nuclear export license for the exportation of nuclear reactor technology to the Philippines).

[NEPA]...looks toward cooperation, not unilateral action, in a manner consistent with our foreign policy. Moreover, if an EIS requirement attached to nuclear imports, there would be the spectre of litigation over the adequacy of the EIS, with delay the inevitable result.

I also note that the NEPA jurisprudence indicates that exclusively foreign impacts do not automatically invoke the statute's environmental obligations. I find only that NEPA does not apply to NRC nuclear export licensing decisions-and not necessarily that the EIS requirement is inapplicable to some other kind of major federal action abroad.

At 20279.

Sierra Club v. Adams, 578 F.2d 389, 8 ELR 20281 (D.C.Cir. 1978) (regarding construction of Darien Gap Highway in Panama and Columbia)

In its response, the Government stated that it never "questioned the applicability of NEPA to construction in Panama..." but it also intimated that this position might not apply to "purely local concerns..." Appellees took the position that NEPA does apply to the construction "whether the impact of such construction may occur in the United States, in the countries of Central America, or in both."

In view of the conclusions that we reach in this case, we need only assume, without deciding, that NEPA is fully applicable to construction in Panama. We leave resolution of this important issue to another day.

At 20283, n. 14.

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 _____



Working for the Nature of Tomorrow.

NATIONAL WILDLIFE FEDERATION, 1400 Sixteenth Street, N.W., Washington, D.C. 20036-2266 (202) 797-6800

Office of the President
March 3, 1993

The President
The White House
1600 Pennsylvania Avenue
Washington, DC 20500

Dear Mr. President:

On behalf of the National Wildlife Federation, I am writing to encourage you to support a recent federal Appeals Court decision that could significantly affect the global environment. The Court's decision is consistent with an environmental objective that you supported during the Presidential campaign, and therefore should be allowed to stand.

Recently, the United States Court of Appeals for the District of Columbia Circuit ruled that the National Environmental Policy Act ("NEPA") applies to the decision of the National Science Foundation ("NSF") to incinerate wastes in Antarctica (Environmental Defense Fund v. Massey, decided January 29, 1993). As you know, NEPA requires every federal agency to prepare an environmental impact statement ("EIS") before undertaking "major federal actions" that may have a "significant impact on the quality of the human environment." This policy is intended to ensure that federal agencies assess potential impacts, and evaluate alternatives before making decisions. This process has proven to be effective in improving federal decision-making and reducing environmental damage here at home; but it has only sporadically been applied overseas where federal actions could have significant adverse impacts. You acknowledged the importance of broadening this requirement during the campaign, when you expressed your support for legislation applying NEPA to federal actions overseas.

It is our concern that several federal agencies are currently pressing for review of the Court's decision. Through the 1970's, NSF and other federal agencies complied with NEPA for their actions abroad, including projects in Antarctica, yet now officials within these agencies suggest that U.S. foreign policy will somehow be negatively affected if NEPA were to govern federal actions abroad. On the contrary, the Massey decision makes it clear that federal agencies would be relieved of complying with NEPA in circumstances where U.S. foreign policy interests outweigh the benefits of preparing an EIS.

March 3, 1993

Page 2

By directing the appropriate officials to support the Massey decision, you would make it clear that environmentally sound decision-making is now a part of U.S. foreign policy.

Thank you for your consideration of this matter.

Best personal regards.

Sincerely,

A handwritten signature in dark ink, reading "Jay D. Hair". The signature is written in a cursive style with a large, stylized initial "J".

JAY D. HAIR

File - NEPA

DRAFT

DRAFT

MEMORANDUM FOR

Katie

TO: 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;

NATIONAL SECURITY COUNCIL
WASHINGTON, D.C. 20506

1390

March 11, 1993

ACTION

MEMORANDUM FOR ANTHONY LAKE

FROM: EILEEN CLAUSSEN

SUBJECT: The National Environmental Policy Act (NEPA) and
Antarctica

The attached memorandum from Katie McGinty to the Vice President is the result of an interagency and non-government organization (NGO) consultation process that Katie and I have held jointly over the past two weeks. I believe that the proposed recommendation is the correct one -- that we not appeal the decision in Environmental Defense Fund (EDF) versus Massey, but interpret it narrowly so that it is not applicable to U.S. decisions in the sovereign territory of another nation. I have discussed this with Bob Bell and he agrees with this recommendation. I would appreciate it if you would concur.

RECOMMENDATION

That you concur with the recommendation that we not appeal the decision in EDF versus Massey.

Attachments

Tab I Memorandum to the Vice President
Tab A Memorandum to the President
Tab B Attachment

THE WHITE HOUSE

WASHINGTON

ACTION

MEMORANDUM FOR THE VICE PRESIDENT

FROM: KATIE MCGINTY *Kan*

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. Inasmuch as the Justice Department plans to file its petition on Monday, a decision is necessary immediately.

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)¹ 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. There has been disagreement within the federal government since NEPA's passage in 1969 as to whether NEPA applies to federal actions abroad. 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.

¹. 42 U.S.C. §4321 et seq.

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 in the case at issue.

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, there is dicta in the opinion which extends beyond Antarctica, and some agencies are concerned that language not essential to the Court's holding may be read by other courts to suggest their compliance with NEPA when acting on the high seas or within the sovereign territory of another nation.

No doubt plaintiffs in future cases will try to use the reasoning in EDF v. Massey to argue for NEPA's application to other U.S. actions overseas. But the fact remains that the precise holding in Massey is quite limited -- to Antarctica and certainly not to matters arising in the territory of other sovereign nations.

Campaign Statement

You should be aware that in the 1992 campaign, you indicated that you would "support legislation to apply the National Environmental Policy Act to federal actions overseas". The Bush administration opposed such legislation. This commitment was widely distributed among the environmental community. In a letter dated March 1, 1993, thirteen major environmental organizations urge that the administration not appeal this case, citing your campaign commitment.

Agencies' Views

Given the narrow holding of this case, the Departments of Commerce, Agriculture, Interior, EPA would support not appealing the case; other agencies, however, including DOD, NASA, NRC, USTR and DEA have recommended an appeal.

Congressional Committees

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. Passage of such legislation would deprive you of the opportunity to define through Executive Order environmental requirements for federal actions within the sovereign territory of another nation.

OPTIONS:

1. APPEAL THE CASE

Pro: would be popular choice of several 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;

would adopt Bush's policy;

would lock you into a position contrary to your campaign commitment;

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 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

NUMBER TWO - That the Department of Justice is directed not to file a petition for rehearing, but to distinguish this case from other cases (including the Navy's Japan case) in the future; concurrently, that the administration explore the possibility of defining environmental compliance obligations of federal agencies operating within the sovereign territory of another country through an executive order.

Concur

Anthony Lake

Do Not Concur



OFFICE OF THE VICE PRESIDENT

WASHINGTON

ACTION

MEMORANDUM FOR THE PRESIDENT

FROM: THE VICE PRESIDENT

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. Inasmuch as the Justice Department plans to file its petition on Monday, a decision is necessary immediately.

RECOMMENDATION

That the Department of Justice is directed not to file a petition for rehearing, but to distinguish this case from other cases (including the Navy's Japan case) in the future; concurrently, that the administration explore the possibility of defining environmental compliance obligations of federal agencies operating within the sovereign territory of another country through an executive order.

Approve _____ Disapprove _____

cc: Chief of Staff
Presidential Counsel

① Legislation on the Hill

② AS.



EXECUTIVE OFFICE OF THE PRESIDENT
COUNCIL ON ENVIRONMENTAL QUALITY
WASHINGTON, D.C. 20503

February 23, 1993

Mr. William C. Bryson
Acting Solicitor General
Department of Justice, Room 5143
10th Street and Constitution Avenues, N.W.
Washington, D.C. 20530

RE: Environmental Defense Fund v. Massey
Decision on Petition For Rehearing

Dear Mr. Bryson:

On January 29, 1993, the United States Court of Appeals for the District of Columbia Circuit issued an opinion in the above-entitled case which found for the plaintiffs. The issue in the case is whether the National Environmental Policy Act (NEPA) applies to proposed federal actions in Antarctica; the particular action at issue was 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. In it, the three judge panel unanimously held that the presumption against the extraterritorial application of statutes did not apply to the case at bar, and remanded the case to the district court for a determination of whether the NSF actually failed to comply with NEPA, as alleged.

The Environment and Natural Resources Division has solicited the opinion of numerous agencies including NSF as to whether the United States should petition for rehearing of this case. The Environment Division has suggested that the rationale employed by the panel could be extended to apply NEPA in almost any extra-territorial context. While we think that some of the court's reasoning is uniquely applicable to Antarctica, we do agree that some of the rationale in the opinion has important implications for federal actions taken outside of the United States or Antarctica.

It is important to frame the context in which our comments are offered. CEQ promulgates the regulations which implement the procedural provisions of NEPA (40 C.F.R. §1500-1508), and serves as the administrative interpreter of the act. The U.S.

Supreme Court has articulated a standard of "substantial deference" to CEQ's interpretation of NEPA.¹ While CEQ does not have an appointee from the new administration and therefore is not taking a policy position on this issue, we offer the comments below from the agency's perspective of overseeing the NEPA process throughout the executive branch since NEPA's enactment into law in 1970.

Statutory Language and Legislative History

Congress did not specifically address the issue of whether the requirement to prepare a "detailed statement", now known as an environmental impact statement (EIS), applies to federal actions which occur outside of the jurisdiction of the United States. The statutory language speaks simply of "major Federal actions significantly affecting the quality of the human environment" and "the environmental impact of the proposed action".² The applicable legislative history does not indicate³ consideration of the issue by Congress prior to NEPA's passage, although shortly after the law's passage, certain Congressional committee members who had been involved in NEPA's enactment stated that the EIS requirement was meant to apply to extraterritorial actions and impacts. For example, a 1971 Merchant Marine and Fisheries Committee report observed that:

"Stated most charitably, the committee disagrees with this interpretation of NEPA [i.e., that it does not apply to federal actions abroad]. The history of the Act makes it quite clear that the global effects of environmental decisions are inevitably a part of the decision-making process and must be considered in that context."⁴ Some years later, in opposing a bill (S. 3077, 95th Cong.) to

¹. Robertson v. Methow Valley Citizens Council, 109 S.Ct. 1835, 1858 (1989); Marsh v. Oregon Natural Resources Council, 109 S.Ct. 1851, 1849 (1989); Sierra Club v. Andrus, 442 U.S. 347, 358 (1979); "As the EPA observed, the CEQ is the Executive Office charged with administration of the National Environmental Policy Act. . . . and [its] interpretation is entitled great weight", Warm Springs Task Force v. Gribble, 6 ERC 1745 (1974).

². 42 U.S.C. §4332(2)(C).

³. Comment, "NEPA's Role in Protecting the World Environment", 131 U. of Penn. L. Rev. 353 (1982), "Congress never fully considered the issue, so the statutory language and legislative history of the Act are inconclusive."

⁴. Administration of the National Environmental Policy Act, Merchant Marine and Fisheries Committee, H.R. Rep. No. 316, 92nd Cong., 1st Sess. 53 (1971).

exempt certain activities of the Export-Import Bank from NEPA, Senator Muskie stated that: "In my view, the intention of the National Environmental Policy Act and the environmental impact statement was to apply to major Federal actions wherever they impact within the United States or outside."⁵

Interpretations by Federal Agencies

The issue of NEPA's extraterritorial reach was first addressed by the Department of State in 1970 in response to CEQ's initial guidelines for implementing the EIS requirement. At that time, the Department of State interpreted the Act as applying to federal actions in Antarctica. In a legal memorandum prepared by the Office of Legal Advisor, the Department of State concluded that:

"Congress did not specifically consider this issue. 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) but should not be interpreted as applying to actions occurring within the jurisdiction of another State. However, the foreign affairs agencies should make such changes in their regulations, procedures, and policies as appropriate to accomplish the national policy declared in sec. 101 and the general objectives declared in subsection 102(2)(E) even in the case of actions occurring in another State in which

⁵ Senator Edmund Muskie, Export-Import Bank Amendments of 1978: Hearings before the Subcommittee on Resource Protection of the Senate Committee on Environment and Public Works, 95th Cong., 2d Session (1978), p. 220.

those agencies participate directly or indirectly."⁶
(emphasis added)

Between 1970 and 1979, the overriding characteristic of the position of the executive branch regarding the extraterritorial application of NEPA was inconsistency and conflict.⁷ While CEQ consistently maintained that NEPA applied to environmental impacts of federal actions "in the United States, in other countries, and in areas outside the jurisdiction of any country",⁸ several agencies opposed CEQ's position.⁹

⁶ Memorandum from Christian A. Herter, Jr., Special Assistant to the Secretary for Envir. Affairs, Bur. of Int' Scient. and Tech. Affairs, Dept. of State, to Russell Train, chairman, Council on Environmental Quality, on Department to State and AID Comments on Draft Guidelines Pertaining to P.L. 91-190, Section 102(2)(C), in Appendix to Hearings on the Administration of the NEPA Before the Subcommittee on Fisheries and Wildlife Conservation of the House Committee on Merchant Marine and Fisheries, 91st Cong. 2d Sess. 546 (1970).

Also note that NEPA §102(2)(E) referred to in the quotation was redesignated as NEPA §102(2)(F) and calls upon federal agencies to "recognize the worldwide and long-range character of environmental problems and, where consistent with the foreign policy of the United States, lend appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind's world environment. . . ." 42 U.S.C. §4332(2)(F).

⁷ In a Memorandum to the Heads of Agencies, CEQ Chairman Russell Peterson said that, "We have noted different interpretations and practices among several agencies on this issue, and consequently have seen impact statements filed which reflect varying degrees of consideration of the impacts abroad of U.S. actions (whether the actions are taken or the decisions made in the United States or abroad). "Memorandum to Head of Agencies on Applying the EIS Requirement to Environmental Impacts Abroad", Russell W. Peterson, Chairman, Council on Environmental Quality, September 24, 1976.

⁸ Id. See also, "Legal Advisory Committee Report to the President's Council on Environmental Quality", pp. 13-17, December, 1971; "Council Advisory Memorandum #3, NEPA's Global Perspective, March 13, 1975"; "Memorandum to Heads of Agencies: Application of the National Environmental Policy Act to Federal Activities Abroad", Charles Warren, Chairman, Council on Environmental Quality, January 19, 1978.

Agencies did prepare some EISS on extraterritorial actions, or federal actions with transboundary or extraterritorial impacts.¹⁰ In 1976, as the result of a litigation settlement, the Agency for International Development (AID) issued and implemented NEPA procedures which mandate analysis of environmental impacts within foreign countries.¹¹

Executive Order 12114

In 1978, the issue of NEPA's applicability to environmental impacts of federal actions abroad was addressed by President Carter in the context of a much-debated executive order. The issue was brought to a head by lawsuits brought against the Export-Import Bank and the State Department, by regulations proposed by CEQ to require agencies to prepare documents for federal actions with impacts in foreign nations, and by a proposed Congressional action.

On January 4, 1979, President Carter signed Executive Order 12114, "Environmental Effects Abroad of Major Federal Actions". The executive order was written to "further the purpose" of NEPA, although it is not based upon NEPA, as a matter of law. It does not create a cause of action in the courts.¹²

Under EO 12114, federal agencies are directed to publish implementing procedures, in consultation with CEQ and the Department of State. Included among the types of actions which require the preparation of environmental analysis under EO 12114 are:

⁹ See Comment, "Renewed Controversy Over the International Reach of NEPA," 7 Env. L. Reporter 10205 (Nov. 1977). Memorandum for the Chairman from Gary Widman, CEQ General Counsel, March 13, 1975; Robinson, Nicholas, "Extraterritorial Environmental Protection Obligations of Foreign Affairs Agencies: the Unfulfilled Mandate of NEPA", Vol. 7 Intern. Law and Policies of Env. Protection 157 (1974).

¹⁰ For example, an EIS on Construction of a Hydrocarbon Pipeline between Windsor, Ontario, and Detroit, Michigan, was filed by the Department of State in 1972 and in 1977, the Department of State filed draft and final EISS on the New Panama Canal Treaties. The Federal Maritime Commission prepared an EIS for a joint marketing agreement which examined impacts on inland waterways and ports in Europe; the National Oceanic and Atmospheric Administration prepared an EIS on its hurricane seeding program.

¹¹ 22 C.F.R. Part 216.

¹² EO 12114, Section 3-4.

"(a) major federal actions significantly affecting the environment of the global commons outside the jurisdiction of any nation (e.g., the oceans or **Antarctica**);" (emphasis added)

Antarctica Protocol and Environmental Impact Assessment Annex

The legal framework governing international activities in Antarctica was established by the Antarctic Treaty, which became operative in 1961. Growing international concern over the need for stronger measures for environmental protection in Antarctica led the Antarctic Treaty Parties to negotiate the Protocol on Environmental Protection to the Antarctic Treaty, which will enter into force after the 26 Consultative Parties have ratified the Protocol. The Protocol and its five accompanying Annexes provide a comprehensive agreement to regulate all activities in Antarctica which affect the environment.

Annex 1 on environmental impact assessment sets forth a process for the assessment of the environmental impacts of proposed governmental and private activities in Antarctica. The procedures under Annex 1 are comparable to those set forth in NEPA (although NEPA applies only to federal actions). The Annex requires preparation of an Initial Environmental Evaluation (IEE) for any proposed activity which may have at least a "minor or transitory" impact on the environment. The IEE, similar to the environmental assessment (EA) under NEPA, is to be prepared in sufficient detail to indicate whether the proposed activity will have more than a minor or transitory impact (or, in NEPA's case, a "significant" impact). If so, preparation of both a draft and final Comprehensive Environmental Evaluation (CEE) of the proposed action is required. The Annex does not address public involvement in the preparation of IEEs, which is required in the preparation of EAs pursuant to CEQ's regulations.¹³

Similar to the EIS pursuant to NEPA, the CEE is to include, *inter alia*: a complete description of the proposed activity, including alternatives to that activity; a description of the character of the likely impacts of the proposed activity, including consideration of indirect and cumulative impacts; and identification of mitigation and monitoring measures; and identification of unavoidable impacts of the proposed activity.

The EIA Annex sets forth public involvement requirements for the preparation of both a draft and final CEE, similar to the requirements for public participation in the NEPA process. The draft CEE must be made publicly available and is to be circulated to all Consultative Parties for comment, as well as forwarded to

¹³ 40 C.F.R. §1506.6.

the Committee for Environmental Protection. The final CEE, like an EIS, is to address and include/summarize comments received. The final CEE, including notice of any decisions relating to the CEE, must be circulated to all Parties at least 60 days before the commencement of the proposed activity in the Antarctic Treaty area, and made publicly available.

Finally, the EIA Annex, like NEPA and the CEQ regulations, has a provision for emergency situations. However, unlike the CEQ regulation requirements, no alternative arrangements are required to limit the immediate environmental impacts of those actions.

In sum, the main differences between NEPA and the EIA provisions of the Protocol Annex are: varying degrees of public involvement; different terminology in determining threshold level for the preparation of EIA documents (e.g., "minor or transitory impact" vs "significant impact"); varying requirements in emergency situations. None of the differences between the requirements under NEPA and those under the Protocol involve conflicting requirements that would preclude the use of NEPA as the domestic legal authority under which the environmental impact assessment provisions of the Protocol Annex could be implemented.

Congressional Action

Bills were introduced in both the House Merchant Marine and Fisheries Committee (H.R. 1113) and Senate Environment and Public Works Committee (S. 1089) in the 100th, 101st and 102nd Congressional sessions to extend NEPA to both extraterritorial actions and to consideration of such impacts as global climate change, depletion of the ozone layer, transboundary pollution, loss of biological diversity and other international environmental impacts. These provisions were opposed by the previous administration.

Since the Antarctica Protocol is not self-executing, legislation is required to carry out the terms of the Protocol and its annexes under U.S. law. In 1992, the Antarctic Policy Group (APG), comprised of federal agencies (including CEQ) involved in carrying out the U.S. national program in Antarctica, and working with the Subcommittee on Science (Committee on Science, Space, and Technology), drafted the Antarctic Environmental Protection Act of 1992. This bill provided that the National Science Foundation would have promulgated regulations necessary to implement the EIA provisions of the Protocol; the State Department would have similar responsibility for nongovernmental activities. The bill did not specify any authority or guidance (e.g. E.O. 12114 or NEPA) under which the EIA regulations would follow.

Also in 1992, the House Merchant Marine Committee Chairman Walter B. Jones introduced H.R. 5459, a competing bill that would have removed primary responsibility for administering the U.S. Antarctic program from NSF to the National Oceanic and Atmospheric Administration, and made NEPA applicable to federal activities in the Antarctic.

Neither of the above bills were fully considered in Congress. On February 18, 1993, the Subcommittee on Science introduced the Antarctic Environmental Protection Act of 1993 (HR 964), which is similar to the administration's bill in 1992.¹⁴ A primary difference is that this recently proposed bill specifically provides that it is the sole authority for conducting environmental analyses under the EIA provisions of the Protocol and Annex 1, superceding all other provisions of law relating to the EIA process. This removes any responsibility for NSF to comply with NEPA or E.O. 12114, thus precluding any authority or guidance for carrying out the EIA provisions of the Protocol and Annex. A hearing on this bill is set for Tuesday, February 23.

EDF v. Massey opinion

The Court of Appeals' analysis regarding the question of the extraterritoriality begins with an analysis of the presumption against extraterritorial application of a statute. In analyzing the presumption, the court determined that,

"[E]ven where the significant effects of the regulated conduct are felt outside U.S. borders, the statute itself does not present a problem of extraterritoriality, so long as the conduct which Congress seeks to regulate occurs largely within the United States." In the courts' view, the regulation of federal agencies' decisionmaking process does not raise extraterritoriality concerns, and thus, does not fall within the presumption.

To a large extent, the understanding of the Court's analysis depends upon one's understanding of NEPA, and its interpretation by the courts over the past 23 years. While Title I of NEPA sets forth a national environmental policy and, in doing so, enumerates substantive goals, the courts have long interpreted NEPA as been primarily a procedural statute.¹⁵ A court's review

¹⁴ The Subcommittee did not consult with the APG in drafting H.R. 964.

¹⁵ Robertson v. Methow Valley Citizens Council, 109 S.Ct. 1835 (1989); Marsh v. Oregon Natural Resources Council, 109 S.Ct. 1851 (1989); Metropolitan Edison Co. v. PANE, 460 U.S. 766 (1983); Vermont Yankee Nuclear Power Corp. v. Natural Resources

of an agency's decision focuses on whether the agency followed certain procedures to reach the agency decision -- not on whether the decision reached was the "correct" or environmentally preferable one. The CEQ regulations likewise mandate consideration of environmental impacts of proposed actions, but do not require that any particular decision be reached.

Many have been concerned that the application of NEPA to actions outside of the United States would create inherent conflicts with the conduct of foreign policy or the protection of national security interests. However, NEPA does not compel this result. The NEPA process, applied to federal actions abroad, would fall under the same rules as NEPA applied to federal actions within the United States. Thus, an agency proposing funding for an overseas action which would clearly have significant adverse environmental impacts, could analyze those impacts in an EIS and go forward with the action because it was consistent with the administration's policy. And if, the U.S. ultimately determined not to go forward with assistance for an action for environmental reasons, the host country would be entirely free to pursue the action through its own means. The Court of Appeals analogized the NEPA process to the Foreign Assistance Act of 1961 and the Nuclear Nonproliferation Act. Both of these laws require consideration of specific issues before extending assistance to foreign governments but do not impose substantive standards on actions taking place in other countries.

As the court points out, the unique jurisdictional status of Antarctica especially mitigates against any clash with foreign sovereigns. This was one of the factors upon which the Department of State relied in their initial determination that NEPA applies to federal actions in the Antarctica.¹⁶ The court's reasoning is consistent with the initial views of both the Council on Environmental Quality and the Department of State regarding application of NEPA to Antarctica.

In the opinion, the court analyzes the relationship between the procedural requirements of Section 102(2)(C) and possible foreign policy considerations. Citing both Section 102(2)(F) of NEPA and its earlier decision in NRDC v. NRC¹⁷, the court noted that, "the government may avoid the EIS requirement where U.S. foreign policy interests outweigh the benefits derived from preparing an EIS." The court also points out that where there is a "clear and unavoidable conflict" between the requirements of

Defense Council, Inc., 435 U.S. 519 (1978).

¹⁶. See Department of State Memorandum, n. 7 supra.

¹⁷. 647 F.2d 1345 (D.C. Cir. 1981).

NEPA and another statute, courts have excused compliance with NEPA.¹⁸ It is useful to note that the NEPA process also accommodates emergency situations,¹⁹ alternatives arrangements for supplementation of EIS(s),²⁰ and shortened time periods for reasons of compelling national policy.²¹

In short, we believe that the decision in EDF v. Massey is consistent with early interpretations of the statute, and that its implementation can be accomplished effectively. We also note that President Clinton stated during the campaign that he supported legislation to apply NEPA to federal actions abroad. We hope that these comments are helpful in dealing with the issue of whether to appeal the decision, and would be happy to be of any further assistance.

Sincerely,



Dinah Bear
General Counsel

cc: Kathleen McGinty, Director
Office of Environmental Policy

Eileen Claussen,
National Security Council

¹⁸. Flint Ridge Development Co. v. Scenic Rivers Association, 426 U.S. 776, 791 (1976).

¹⁹. 40 C.F.R. §1506.11 (emergency alternatives arrangements granted by CEQ upheld in Valley Citizens for a Safe Environment v. Vest, D. Mass. May 6, 1991, unpublished); National Audubon Society v. Hester, 801 F.2d 405 (D.C. Cir. 1986); Crosby v. Young, 512 F. Supp. 1363 (1981).

²⁰. 40 C.F.R. 1502.9(C).

²¹. 40 C.F.R. 1506.10(d).

NATIONAL SECURITY COUNCIL

WASHINGTON, D.C. 20506

March 11, 1993

ACTION

MEMORANDUM FOR ANTHONY LAKE

FROM: EILEEN CLAUSSEN

SUBJECT: The National Environmental Policy Act (NEPA) and
Antarctica

The attached memorandum from Katie McGinty to the Vice President is the result of an interagency and non-government organization (NGO) consultation process that Katie and I have held jointly over the past two weeks. I believe that the proposed recommendation is the correct one -- that we not appeal the decision in Environmental Defense Fund (EDF) versus Massey, but interpret it narrowly so that it is not applicable to U.S. decisions in the sovereign territory of another nation. I have discussed this with Bob Bell and he agrees with this recommendation. I would appreciate it if you would concur.

RECOMMENDATION

That you concur with the recommendation that we not appeal the decision in EDF versus Massey.

Attachments

Tab I	Memorandum to the Vice President
Tab A	Memorandum to the President
Tab B	Attachment

THE WHITE HOUSE

WASHINGTON

ACTION

MEMORANDUM FOR THE VICE PRESIDENT

FROM: KATIE MCGINTY *Kan*

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. Inasmuch as the Justice Department plans to file its petition on Monday, a decision is necessary immediately.

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)¹ 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. There has been disagreement within the federal government since NEPA's passage in 1969 as to whether NEPA applies to federal actions abroad. 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.

¹. 42 U.S.C. §4321 et seq.

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 in the case at issue.

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, there is dicta in the opinion which extends beyond Antarctica, and some agencies are concerned that language not essential to the Court's holding may be read by other courts to suggest their compliance with NEPA when acting on the high seas or within the sovereign territory of another nation.

No doubt plaintiffs in future cases will try to use the reasoning in EDF v. Massey to argue for NEPA's application to other U.S. actions overseas. But the fact remains that the precise holding in Massey is quite limited -- to Antarctica and certainly not to matters arising in the territory of other sovereign nations.

Campaign Statement

You should be aware that in the 1992 campaign, you indicated that you would "support legislation to apply the National Environmental Policy Act to federal actions overseas". The Bush administration opposed such legislation. This commitment was widely distributed among the environmental community. In a letter dated March 1, 1993, thirteen major environmental organizations urge that the administration not appeal this case, citing your campaign commitment.

Agencies' Views

Given the narrow holding of this case, the Departments of Commerce, Agriculture, Interior, EPA would support not appealing the case; other agencies, however, including DOD, NASA, NRC, USTR and DEA have recommended an appeal.

Congressional Committees

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. Passage of such legislation would deprive you of the opportunity to define through Executive Order environmental requirements for federal actions within the sovereign territory of another nation.

OPTIONS:

1. APPEAL THE CASE

Pro: would be popular choice of several 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;

would adopt Bush's policy;

would lock you into a position contrary to your campaign commitment;

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 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

NUMBER TWO - That the Department of Justice is directed not to file a petition for rehearing, but to distinguish this case from other cases (including the Navy's Japan case) in the future; concurrently, that the administration explore the possibility of defining environmental compliance obligations of federal agencies operating within the sovereign territory of another country through an executive order.

Concur

Anthony Lake

Do Not Concur



OFFICE OF THE VICE PRESIDENT
WASHINGTON

ACTION

MEMORANDUM FOR THE PRESIDENT

FROM: THE VICE PRESIDENT

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. Inasmuch as the Justice Department plans to file its petition on Monday, a decision is necessary immediately.

RECOMMENDATION

That the Department of Justice is directed not to file a petition for rehearing, but to distinguish this case from other cases (including the Navy's Japan case) in the future; concurrently, that the administration explore the possibility of defining environmental compliance obligations of federal agencies operating within the sovereign territory of another country through an executive order.

Approve _____

Disapprove _____

cc: Chief of Staff
Presidential Counsel

File - NEPA

DRAFT

DRAFT

MEMORANDUM FOR

TO: 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 _____



U.S. Department of Justice

Environment and Natural Resources Division

Office of the Assistant Attorney General

Washington, D.C. 20530

Telephone 202/514-2701
Fax 202/514-0557



TO: Katie McGinty

FROM: Myles Flint

NO. OF PAGES: 4
(INCLUDING
COVER PAGE)

TELEPHONE NO.:

FAX NO.: 456-2710

MESSAGE:

PLEASE NOTIFY SENDER IMMEDIATELY IF YOU HAVE ANY PROBLEMS
RECEIVING THESE PAGES.



U.S. Department of Justice

Environment and Natural Resources Division

Office of the
Deputy Assistant Attorney General

3/2/93

Katie McInty:

Here is a brief Talking paper
we put together for your
use.

I will be out of the office
for an hour from 2 to 3 P.M.
If you have questions please
call Corde or Peter.

Myra E. Flint

NEPA: WHY APPLYING A GOOD LAW DOMESTICALLY DOESN'T WORK ABROAD

Environmental Defense Fund v. Massey

D. C. Cir., January 29, 1993

1. The significance of the court's ruling. -- From the time of NEPA's enactment in 1969 until today, no court has held that NEPA applies to federal activities outside the territorial limits of the United States. In 1979, President Carter issued an Executive Order which details procedures federal agencies must follow in evaluating activities abroad that may have significant environmental impacts. Environmental review under this Order reflects the unique foreign policy concerns attendant to U.S. actions abroad. But the Executive Order creates no private right of action, and unlike the statute, there are exemptions for emergencies, national security and other pressing circumstances.

The court's ruling that NEPA applies to Antarctica is troubling primarily because of the reasoning used by the Court to reach that result. If the reasoning and logic of the decision is followed -- that applying NEPA to extraterritorial activities does not raise extraterritorial concerns because NEPA governs only decisionmaking in this country -- the consequence will be that NEPA should be applied to U.S. actions in foreign countries as well.

First, the ruling is significant because judges rather than the President would be the arbiter of environmental compliance by federal agencies acting abroad. Judicial review of agreements with host countries, discovery of foreign documents and injunctions will become as routine in the international context as they are in domestic NEPA litigation. Just as NEPA is used today by some as a weapon to oppose projects they disfavor, NEPA would be invoked by opponents of federal loan guarantees for agriculture in Russia or housing in Israel, opponents of bilateral disarmament activities with the former Soviet countries, or those concerned with particular trade and tariff policies as those policies might affect manufacturing nations. While the opinion recognizes that some "unique and delicate" foreign policy concerns might override an agency's duty under NEPA, we would be dependant upon a judge for that finding, and would have to subject these sensitive matters to judicial scrutiny in the first instance.

Second, if the court's reasoning is followed, important overseas initiatives would be delayed for the 12-18 months that it takes to prepare a draft EIS, conduct a hearing and obtain comments, and then issue a final EIS. It must be noted that unlike the Executive Order, there are no exceptions in the Act for emergencies, foreign policy crises, national security concerns and the like.

- Examples - Johnson atoll case?
- getting Japanese edel!

Third, an obligation to apply NEPA abroad is likely to undermine our ability to build coalitions with other nations for activities that are important to our national security. If we tie our participation to compliance with NEPA, other countries are less likely to join in partnership with us. If our offers of assistance are accompanied by the likelihood of participating in that most American of activities -- the lawsuit, many nations are certain to decline our offers of assistance.

Fourth, 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 multi-lateral context, a ruling that our law will be applied to activities in their nations strikes exactly the wrong note.

2. Available options. -- The most legally defensible option is to seek rehearing en banc from the full court. The decision is flawed, does not follow recent Supreme Court precedent and is not likely to survive if the full court agrees to rehear the case. Even if we did not prevail on applying NEPA in Antarctica, there would be a good chance the court would not follow the panel's reasoning, thereby implicating NEPA's applicability everywhere. However, judicial success may be short-lived if Congress responds by enacting a sweeping version of an extraterritorial amendment to NEPA. The Departments of Defense, Army, Navy, Transportation, and the Interior, as well as NASA, NRC, USTR and DEA all recommend rehearing en banc.

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in instruction

Alternatively, we could decline to petition for rehearing on the ground that the Administration can live with the holding of the court. But, to assure those agencies who are concerned with application of NEPA to their activities in other sovereign nations, we would announce our intention to challenge the court's reasoning as inapplicable and flawed if carried beyond Antarctica, the oceans, and space. Thus, where we are presently asserting that NEPA has no application to the operation of three military bases in Japan, we would continue to press our existing arguments as far as necessary. This option has greater legal risks for federal agencies who believe NEPA compliance would create major foreign policy and national security concerns, but it does focus on the most pressing of concerns by those agencies that strongly advocate rehearing. If the present decision cannot be read narrowly, Commerce and Agriculture would join in recommending rehearing en banc. EPA adopts a narrow reading of the decision and recommends against further review.

Why
not
this way?

Finally, we could acquiesce in both the ruling and the reasoning of the court, thereby agreeing to apply the Act in extraterritorial contexts. In light of his participation in the drafting and implementation of the Executive Order in the Carter Administration, we would respectfully suggest that the Secretary of State be consulted before any final decision is reached. Only the General Counsel of CEQ supports this position.

TO: Katie McGinty
FROM: Dinah Bear
DATE: March 3, 1993
RE: DOJ Memo on EDF v. Massey

A few additional comments on DOJ's memo which weren't directly addressed in the draft decision memo I just faxed over:

1. The memo states that NEPA does not accommodate emergencies, national security concerns and other pressing circumstances. In fact, the CEQ regulations implementing NEPA have long contained a provision providing for emergency situations. 40 CFR §1506.11. The provision has been used several dozen times, and has been challenged three times in court. The use of the provision has been upheld in court each time.

2. The memo also cites several situations involving foreign policy as examples in which NEPA could be used as a "weapon". You should be aware that since 1980, the Agency for International Development has operated under environmental procedures "intended to implement the requirements of NEPA". Those procedures include exemptions for: i) international disaster assistance; ii) other emergency circumstances, and iii) circumstances involving exceptional foreign policy sensitivities. The Administrator of AID (not the courts) make the determination that a proposed action fits within one of these categories, after consultation with CEQ. This provision was used for the proposed federal loan guarantees for housing to Israel (cited in the memo as an example of a problem action) and for emergency delivery of food supplies to Bosnia.

3. The memo states that Interior supports an appeal. I am informed that Interior's position is similar to Agriculture and NOAA in that they do not support an appeal as long as the case is interpreted to apply only to Antarctica.

4. Finally, DOJ's memo ends with a statement that only I support a position of acquiescing in both the ruling and the reasoning of the court. As you may have noted, in fact, my memo specifically states that in the absence of a political appointee at CEQ, we are not taking a policy position.

You should also know that the Supreme Court held in Weinberger v. Catholic Action of Hawaii that NEPA does not require the disclosure of otherwise classified information. In that case, the issue was whether nuclear weapons were being stored by the Navy in Hawaii. The Navy refused to confirm or deny; their position was upheld "due to national security reasons".

I am also including excerpts from some of the cases we discussed to give you a flavor of the courts' historical

avoidance of directly addressing this issue. In several other cases, the court said nothing at all of relevance but simply addressed the facts of the case. Please let me know if you want anything further in relationship to case law or background.

To: Dinah
From: Elisabeth Blaug
Subj: Cites from extraterritorial cases
Date: March 3, 1993

Greenpeace USA v. Stone, 748 F.Supp. 749 (D. Hawaii 1990) (held NEPA did not apply to the transport of chemical weapons stored in West Germany to Johnston Atoll for destruction).

This court is convinced that Congress intended to *encourage* federal agencies to consider the global impact of domestic actions and *may* have intended under certain circumstances for NEPA to apply extraterritorially.

At 759.

The court must emphasize that this decision is limited to the specific and unique facts which are presented here. In other circumstances, NEPA may require a federal agency to prepare an EIS for action taken abroad, especially where United States agency's action abroad has direct environmental impacts within this country, or where there has clearly been a total lack of environmental assessment by the federal agency or foreign country involved.

At 761.

National Org'n For Reform of Marijuana Laws (NORML.) v. U.S., 452 F.Supp. 1226 (D.D.C. 1978) (Defendants, including State Department and AID, prepared EIS for the Mexican marijuana eradication program's impacts in the United States pursuant to NEPA; after the filing of plaintiff's lawsuit, defendants announced they were preparing an "environmental analysis" of the program's effects in Mexico).

In view of defendants' willingness to prepare an "environmental analysis" of the Mexico effects of United States support of that nation's narcotics eradication program, together with the EIS required by NEPA as to the impact of that program upon the United States, the Court need not reach the issue and need only assume without deciding, that NEPA is fully applicable to the Mexican herbicide spraying program.

Natural Resources Defense Council, Inc. v. Nuclear Regulatory Comm'n, 647 F.2d 1345, 11 ELR 20266 (D.C. Cir. 1981) (held NEPA did not apply to the NRC's decision to issue a nuclear export license for the exportation of nuclear reactor technology to the Philippines).

[NEPA]...looks toward cooperation, not unilateral action, in a manner consistent with our foreign policy. Moreover, if an EIS requirement attached to nuclear imports, there would be the spectre of litigation over the adequacy of the EIS, with delay the inevitable result.

I also note that the NEPA jurisprudence indicates that exclusively foreign impacts do not automatically invoke the statute's environmental obligations. I find only that NEPA does not apply to NRC nuclear export licensing decisions-and not necessarily that the EIS requirement is inapplicable to some other kind of major federal action abroad.

At 20279.

Sierra Club v. Adams, 578 F.2d 389, 8 ELR 20281 (D.C.Cir. 1978) (regarding construction of Darien Gap Highway in Panama and Columbia)

In its response, the Government stated that it never "questioned the applicability of NEPA to construction in Panama..." but it also intimated that this position might not apply to "purely local concerns..." Appellees took the position that NEPA does apply to the construction "whether the impact of such construction may occur in the United States, in the countries of Central America, or in both."

In view of the conclusions that we reach in this case, we need only assume, without deciding, that NEPA is fully applicable to construction in Panama. We leave resolution of this important issue to another day.

At 20283, n. 14.



Working for the Nature of Tomorrow.

NATIONAL WILDLIFE FEDERATION, 1400 Sixteenth Street, N.W., Washington, D.C. 20036-2266 (202) 797-6800

Office of the President
March 3, 1993

The President
The White House
1600 Pennsylvania Avenue
Washington, DC 20500

Dear Mr. President:

On behalf of the National Wildlife Federation, I am writing to encourage you to support a recent federal Appeals Court decision that could significantly affect the global environment. The Court's decision is consistent with an environmental objective that you supported during the Presidential campaign, and therefore should be allowed to stand.

Recently, the United States Court of Appeals for the District of Columbia Circuit ruled that the National Environmental Policy Act ("NEPA") applies to the decision of the National Science Foundation ("NSF") to incinerate wastes in Antarctica (Environmental Defense Fund v. Massey, decided January 29, 1993). As you know, NEPA requires every federal agency to prepare an environmental impact statement ("EIS") before undertaking "major federal actions" that may have a "significant impact on the quality of the human environment." This policy is intended to ensure that federal agencies assess potential impacts, and evaluate alternatives before making decisions. This process has proven to be effective in improving federal decision-making and reducing environmental damage here at home; but it has only sporadically been applied overseas where federal actions could have significant adverse impacts. You acknowledged the importance of broadening this requirement during the campaign, when you expressed your support for legislation applying NEPA to federal actions overseas.

It is our concern that several federal agencies are currently pressing for review of the Court's decision. Through the 1970's, NSF and other federal agencies complied with NEPA for their actions abroad, including projects in Antarctica, yet now officials within these agencies suggest that U.S. foreign policy will somehow be negatively affected if NEPA were to govern federal actions abroad. On the contrary, the Massey decision makes it clear that federal agencies would be relieved of complying with NEPA in circumstances where U.S. foreign policy interests outweigh the benefits of preparing an EIS.

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By directing the appropriate officials to support the Massey decision, you would make it clear that environmentally sound decision-making is now a part of U.S. foreign policy.

Thank you for your consideration of this matter.

Best personal regards.

Sincerely,

A handwritten signature in black ink that reads "Jay D. Hair". The signature is written in a cursive style with a large, stylized "J" and "H".

JAY D. HAIR

NEPA

I. THE ISSUE

- o Ask for a re-hearing en banc (March 15)
- o holding - Antarctica/Global Commons
- o reasoning - potentially broader

II. THE PLAYERS

- o Commerce
 - o EPA
 - o Interior
 - o Agriculture
 - o Defense
 - o State
- NO
- if can read normally,
- o rehearing
 - o NEPA re: Antarctica
 - o New E.O. re: Development projects abroad
(Army Corps currently NO analysis)
(AID fully follows NEPA; foreign policy exception)

III. MY RECOMMENDATIONS

- o NOT to seek re-hearing
- o Direct agencies to issue regulations implementing NEPA in the global commons WITH a national security/foreign policy exemption
- o Issue new E.O. re: need for environmental review of actions in sovereign territory

IV. CONSIDERATIONS

- o We can continue to argue against full application to sovereign territories
 - o Japan case
- o If we do ask for re-hearing, we may lose control --

JW B. S. S. S. S.

strong pressure from committees w/ ????? to make NEPA apply fully

- o Our ability to carve out global commons lost
- o Standing threat of frivolous lawsuits diminished
- o International pressure / leadership we have been exerting re: public participation, information & accountability
 - o Congressional / Interest group pressure
 - o Campaign Statement
- o Antarctica protocol calls for public participation
- o Agency has never been restrained / enjoined or in any way lost on a challenge to an overseas action when has asserted claim of foreign policy / national security
- o Courts have recognized
 - o NEPA gives way to other pressing concerns
 - o Specifically, national security concerns have been recognized as demanding more flexible approach
 - o Persian Gulf War

→ *never been held to apply.*

→ *~~no~~ exceptions in the statute.*

CONCERNS ABOUT E.D.F. V. MASSEY

1. Ambiguity of Decision Will Create Confusion About Standard, Litigation, Delays in Implementing Programs, Higher Costs During A Period of a Shrinking Federal Budget, and Complicate Relations With Foreign Governments Particularly on Joint Projects
 - A. Although the court emphasizes that the decision applies only to "unique status of the Antarctica" (i.e. - no clash with laws of foreign sovereign) and to application of NEPA (pages 10 and 17), the opinion also states that the "procedural requirements" of NEPA imposed on Federal agencies is tantamount to activity confined to the U.S. which therefore does not raise the issue of extraterritoriality. (See pages 7-10.)
 - B. Environmental groups will be encouraged by the decision to sue Federal agencies funding projects overseas, resulting in delays and considerably higher costs due to inflation and disrupted schedules on multi-million dollar projects.
 - C. At times, litigation and confusion involving certain minor environmental issues may significantly interfere with or override critical U.S. national security and foreign policy goals.
 - D. The decision could result in stalling critical projects on U.S. domestic procedural grounds, when the substance of environmental concerns has been addressed through the application of foreign environmental requirements. Example: A \$266 million project funded by the Board for International Broadcasting to build a U.S. radio relay station in Israel has resulted in a cost of \$4 million dollars and several years delay in order to comply with elaborate local environmental standards.
- II. The Decision Could Give the Courts Too Large a Role in the Conduct of Foreign Policy, Notwithstanding Dicta at Page 14.
- III. In Accord With the Presumption Against Extraterritorial Application of U.S. Laws, the U.S. Congress or the Executive Branch Should Set Forth Explicit and Clear Guidelines for Federal Agencies on When and How to Apply NEPA and Other U.S. Environmental Laws to Federally-Funded Projects Overseas. (Standard too Vague: See page 14.)
 - A. Consideration should be given to allowing procedures for expeditious exemption of projects which substantially meet the intent of U.S. environmental laws when complying with the environmental laws of other nations.

- B. Consideration should also be given to allowing Executive Branch administrative determinations on exemptions when the national security and Foreign policy interests clearly override those of the environment, particularly when joint projects are involved.