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Subgroup/Office of Origin: Council on Environmental Quality
Series/Staff Member: Kathleen (Katie) McGinty
Subseries:

OA/ID Number: 2572
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Folder Title:
NEPA [National Environmental Policy Act] - Memos to President and Vice President Regarding Appeal of EDF [Environmental Defense Fund] Versus Massey March 11, 1993

Stack:	Row:	Section:	Shelf:	Position:
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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

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MEMORANDUM FOR THE PRESIDENT

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Purpose

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RECOMMENDATION

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Approve _____

Disapprove _____

cc: Chief of Staff
Presidential Counsel

NATIONAL SECURITY COUNCIL

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RECOMMENDATION

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

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Approve _____

Disapprove _____

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