Land & Water Law Review

Volume 29 | Issue 2 Article 7

1994

International Environmental Law - The Presumption against Extraterritorial Application of the National Environmental Policy Act: Has the Iron Curtain Been Lifted - Environmental Defense Fund v. Massey

Robert Quan Lee

INTERNATIONAL ENVIRONMENTAL LAW—The Presumption Against Extraterritorial Application of the National Environmental Policy Act: Has the Iron Curtain Been Lifted? *Environmental Defense Fund v. Massey*, 986 F.2d 528 (D.C. Cir. 1993).

The National Science Foundation (NSF) operates the McMurdo Station research facility in Antarctica to promote U.S. scientific and technological research.[1] Over the years, NSF has incinerated food-related waste at McMurdo Station in an open landfill.[2] Due to environmental and health concerns, NSF ceased the open landfill burning for a brief period, but subsequently resumed the practice in an *interim* incinerator.[3]

On May 10, 1991, the Environmental Defense Fund (EDF) filed a complaint for declaratory judgment and injunctive relief against NSF in the United States District Court for the District of Columbia.[4] EDF argued that NSF had not prepared an environmental impact statement (EIS) for the incineration activities at McMurdo Station. Therefore, NSF had violated the National Environmental Policy Act (NEPA),[5] regulations of the Council on Environmental Quality (CEQ),[6] and Executive Order 12,114 (E.O.).[7] On June 28, 1991, EDF moved for a preliminary injunction to enjoin NSF from incinerating waste at McMurdo Station after October 1, 1991.[8] On July 22, 1991,

---

1. Environmental Defense Fund v. Massey, 986 F.2d 528, 529 (D.C. Cir. 1993). Under the auspices of the United States Antarctica Program, McMurdo Station is one of three year-round installations that the United States has established in Antarctica. All three facilities are under the exclusive control of NSF and serve as platforms or logistic centers for U.S. scientific and technological research. McMurdo station, the largest of the three installations, comprises more than 100 buildings and a summer population of approximately 1200. *Id.*

2. *Id.*

3. *Id.* In early 1991, NSF decided to improve its environmental practices in Antarctica by halting the incineration of food waste in the open landfill by October 1991. After discovering asbestos in the landfill, however, NSF decided to cease open burning even earlier and to develop quickly an alternative plan for disposal of its food waste. NSF stored the waste at McMurdo Station from February 1991 to July 1991, but subsequently decided to resume incineration in an "interim incinerator" until a state-of-the-art incinerator could be delivered to McMurdo Station. *Id.* at 529-30.

4. Brief for the Appellees at 14, Environmental Defense Fund, Inc. v. Massey, 986 F.2d 528 (D.C. Cir. 1993) (No. 91-5278) [hereinafter Brief for Appellees].

5. 42 U.S.C. §§ 4321-4370a (1988 & Supp. III 1991). Section 102(2)(C) of NEPA requires "all federal agencies" to prepare an Environmental Impact Statement (EIS) in connection with any proposal for a "major action significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C).

6. 40 C.F.R. §§ 1500-1508 (1993). *See also infra* notes 64-66 and accompanying text.

7. 44 Fed. Reg. 1957 (1979), *reprinted in* 42 U.S.C. § 4321 (1988). *See also infra* notes 69-72 and accompanying text.

8. Environmental Defense Fund v. Massey, 772 F. Supp. 1296, 1297 (D. D.C. 1991), *rev'd*, 986 F.2d 528 (D.C. Cir. 1993).

NSF filed a motion to dismiss. NSF contended that the district court lacked subject matter jurisdiction because NEPA does not apply extraterritorially[9] and because E.O. 12,114 does not create a cause of action.[10]

The federal district court denied EDF's motion for a preliminary injunction and granted NSF's motion to dismiss.[11] The federal district court held that NEPA does not apply extraterritorially.[12] EDF appealed to the United States Court of Appeals for the District of Columbia,[13] which reversed the federal district court's decision.[14] The court of appeals held that NEPA's environmental impact statement requirement applied to the National Science Foundation's actions in Antarctica.[15]

This holding takes a significant step toward removing the presumption against extraterritorial application of NEPA. With the exception of cases involving activities in Canada and U.S. trust territories,[16] no federal court has held that NEPA applies extraterritorially.[17] Further, in determining the extraterritorial application of U.S. laws, the courts traditionally have recognized a presumption against extraterritoriality.[18] Absent clear evidence of congressional intent to apply a statute extraterritorially, U.S. laws do not apply abroad.[19]

---

9. Extraterritoriality is a jurisdictional concept concerning the authority of a nation to adjudicate the rights of particular parties and to establish the norms of conduct applicable to events or persons outside its borders. *Massey*, 986 F.2d at 530.

10. Environmental Defense Fund v. Massey, 772 F. Supp. 1296, 1297 (D. D.C. 1991), *rev'd*, 986 F.2d 528 (D.C. Cir. 1993). NSF filed a motion to dismiss and a motion opposing EDF's motion for a preliminary injunction.

11. *Massey*, 772 F. Supp. at 1296.

12. *Id.* at 1298. In addition to its holding that NEPA does not apply extraterritorially, the court also held that Executive Order 12,114 does not provide for a private cause of action. *Id.*

13. Brief for Appellees, *supra* note 4, at 2. Notice of appeal was filed on September 3, 1991. *Id.*

14. *Massey*, 986 F.2d 528 (D.C. Cir. 1993). The court of appeals reversed and remanded to the district court for a determination of whether the environmental analyses performed by NSF, prior to its decision to resume incineration, failed to comply with section 102(2)(C) of NEPA. *Id.* at 537.

15. *Id.* at 528. The court of appeals concluded that: (1) presumption against extraterritorial application of statutes does not apply where conduct regulated by statute occurs primarily, if not exclusively, in the United States; (2) the alleged extraterritorial effect of statute will be felt in Antarctica, a sovereignless region; and (3) NEPA's environmental impact statement requirements applied to NSF's plans to incinerate food wastes in Antarctica. *Id.*

16. A trust territory is a "territory or colony placed under the administration of a country by the United Nations." BLACK'S LAW DICTIONARY 1515 (6th ed. 1990).

17. Federal courts actually have extended NEPA's operation to Canada and U.S. trust territories, but have only assumed NEPA's extraterritorial application in foreign countries without deciding on the issue. *See infra* notes 80-89 and accompanying text.

18. *See supra* note 9.

19. American Banana Co. v. United Fruit Co., 213 U.S. 347 (1909) (refusing to apply U.S. antitrust laws extraterritorially); Foley Bros. v. Filardo, 336 U.S. 281 (1949) (declining to give extraterritorial effect to a U.S. labor statute).

In fact, the United States Supreme Court recently reaffirmed this strict concept of statutory construction.[20]

The court of appeals' holding in *Massey* suggests that both the presumption against U.S. statutes' extraterritorial application and the U.S. Supreme Court's practice of adhering to this presumption are antiquated views. Although the result of this case suggests that the presumption against NEPA's extraterritorial application may have been removed, other courts may interpret its narrow holding as strictly limited to its facts. This casenote will argue that NEPA should apply to all U.S. agency activities conducted overseas.

First, this casenote will examine the issues concerning the extension of domestic law abroad. Second, it will provide a general overview of NEPA and discuss the difficulty of interpreting NEPA's language. Third, the casenote will consider the differing views regarding NEPA's extraterritorial application. Fourth, the casenote will examine the federal judicial involvement with NEPA's extraterritorial application. Fifth, it will explain the court of appeals' analysis in applying NEPA to federal agency actions in Antarctica. The casenote further will address the court's failure, in its narrow holding, to render a decision that clearly extends NEPA's application to all federal activities abroad. Finally, this casenote will demonstrate that, despite the concerns raised by the *Massey* court's narrow holding, the combination of certain federal judicial decisions, legislative movement, and sociopolitical policy considerations favors the extraterritorial application of NEPA to all federal agency activities conducted overseas.

BACKGROUND

Extending Domestic Law Abroad

Presumption Against Extraterritoriality

When deciding whether a statute applies extraterritorially, federal courts traditionally apply a presumption against extraterritoriality.[21] In general, a statute may not be imposed beyond U.S. territorial borders.[22] However, a statute may apply extraterritorially under certain circumstances. When deter-

20. *See infra* notes 119-121 and accompanying text.

21. *See infra* notes 119 and 128 and accompanying text.

22. More specifically, the rules of the United States statutory law, whether prescribed by federal or state authority, apply only to conduct occurring within, or having effect within, the territory of the United States. RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 402 (1987).

mining whether the presumption applies, federal courts have relied on *United States v. Bowman.*[23]

Bases for Extraterritorial Application

Generally, there are three situations where the presumption against extraterritoriality does not apply.[24] First, for a federal statute to apply beyond United States borders, express congressional intent must clearly exist.[25] Second, the presumption against extraterritoriality usually does not apply where failure to extend a U.S. statute extraterritorially will result in adverse effects within the United States.[26] Third, the presumption is inapplicable when the regulated conduct occurs within U.S. borders.[27]

Furthermore, the *Restatement (Third) of Foreign Relations* asserts that, if a country has a basis for jurisdiction, the exercise of extraterritorial jurisdiction must be reasonable.[28] The reasonableness test takes into account several factors: the nature of the activity, the extent of each country's interest, the expectation of jurisdiction, the customs and traditions of international law, and the likelihood of conflict.[29] Additionally, if a U.S. statute conflicts with a foreign country's law, or if distance from a foreign country makes enforcement difficult, the courts may find that foreign policy concerns override the United States' interest.[30] Generally, United States courts attempt to balance

---

23. 260 U.S. 94 (1922). The United States Supreme Court applied extraterritorially a statute providing criminal punishments for acts directly injuring the government. Although the United States Supreme Court applied a U.S. statute extraterritorially, it distinguished between criminal statutes which protect the peace and order of a community and statutes whose goals transcend local boundaries, such as those protecting the government from harm. The Court asserted that a statute designed primarily to deter harm against the government requires no express language to apply extraterritorially because it is not limited to protecting a geographic area and because the evils it punishes may be as likely to occur outside the country's territory as inside. However, the Court stipulated that it would presume against extraterritoriality if the statute is designed only to ensure a community's peace and order. *Id.* at 98-101.

24. The *Restatement (Third) of Foreign Relations* suggests that there generally are five situations in which a country has jurisdiction to impose laws that have international effect:

(1) When the conduct takes place, wholly or in substantial part, within the country;
(2) when the conduct affects the status of persons or things in the country (geographic principle);
(3) when the conduct, although taking place outside the country, affects the country itself (objective territorial principle);
(4) when the conduct involves the state's nationals (nationality principle); and
(5) when the conduct affects the state's national security (protective principle).

RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 402 (1987).

25. *Massey*, 986 F.2d at 531.

26. *Id.*

27. *Id.*

28. RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 403(1) (1987).

29. *Id.* § 403(2).

30. *See e.g.*, Timberlane Lumber Co. v. Bank of Am. Nat'l Trust & Sav. Ass'n, 549 F.2d 597, 614 (9th Cir. 1976).

these factors to determine whether a federal statute may apply extraterritorially.[31]

National Environmental Policy Act

Because of growing environmental concern, Congress enacted federal environmental statutes to alleviate environmental problems in the United States. These pollution and environmental laws include the National Environmental Policy Act of 1969.[32] As the language in the congressional declaration of purpose indicates,[33] NEPA declares a mandate so pervasive[34] that it sometimes has been regarded as a promulgation of environmental rights.[35] To ensure that the government adopts a systematic, interdisciplinary approach to project planning, section 102(2)(C),[36] the "major action-forcing provision" of NEPA,[37] requires all federal agencies to prepare an environmental impact statement for all major actions with significant environmental effects.

Section 102(2)(C) of NEPA mandates that an EIS addresses five areas,[38] including the project's adverse effects, methods of mitigating potential dam-

---

31. *E.g.*, American Banana Co. v. United Fruit Co., 213 U.S. 347 (1909); United States v. Baker, 609 F.2d 134 (5th Cir. 1980); United States v. Egan, 501 F. Supp. 1252 (S.D.N.Y. 1980); Star-Kist Foods v. P.J. Rhodes & Co., 769 F.2d 1393 (9th Cir. 1985); United States v. Peterson, 812 F.2d 486 (9th Cir. 1987).

32. 42 U.S.C. §§ 4321-4370a (1988 & Supp. III 1991).

33. 42 U.S.C. § 4321 (1988). The purposes of NEPA are:

> [t]o declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality.

Id.

34. Comment, *NEPA's Role in Protecting the World Environment*, 131 U. PA. L. REV. 353, 354 (1982).

35. *See, e.g.*, Hanks & Hanks, *An Environmental Bill of Rights: The Citizen Suit and the National Environmental Policy Act of 1969*, 24 RUTGERS L. REV. 230, 269 (1970).

36. 42 U.S.C. § 4332 (2)(C) (1988 & Supp. III 1991). This section requires that "all agencies of the Federal Government shall . . . include in every recommendation or report on . . . major Federal actions significantly affecting the quality of the human environment . . . [an EIS]."

37. *See supra* note 34, at 355.

38. An environmental impact statement addresses:

> (i) the environmental impact of the proposed action,
> (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
> (iii) alternatives to the proposed action,
> (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
> (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

42 U.S.C. § 4332(2)(C).

age, and less destructive alternatives.[39] The information compiled in the EIS must be augmented by consultations with other agencies[40] and comments offered by the public.[41] Thus, the EIS is a *procedural* requirement designed to ensure fully informed decision-making.[42]

Interpreting NEPA

To determine whether NEPA applies extraterritorially, the traditional rule for statutory interpretation is observed. The first step in interpreting NEPA involves an examination of the statutory language.[43] Because it refers to both domestic and international activities, the statutory language of NEPA is ambiguous regarding extraterritorial application.[44] If the language is unclear with respect to extraterritorial application, then a search of the legislative history may be helpful. However, NEPA's modest legislative history provides little assistance concerning the statute's extraterritorial operation.[45] As a result, the courts, the federal administrative agencies responsible for implementing NEPA, and the executive branch have expressed divergent perceptions regarding NEPA's extraterritorial application.[46] The statutory interpretations submitted by these entities are helpful in determining whether NEPA applies extraterritorially.

Statutory Language

The language of NEPA refers to both the United States and the world,[47] thus it is unclear whether the EIS requirement applies extraterritorially. However, some provisions are only domestic in breadth. For instance, one purpose of the statute is to declare a *national* policy that enriches the understanding of the ecological systems and natural resources important to our *nation*.[48] Another goal is to ensure that nature can fulfill the needs of all *Americans*.[49] Further, Congress proclaims a policy of

39. 42 U.S.C. § 4332(2)(C) (1988 & Supp. III 1991).
40. *Id.*
41. CEQ Guidelines, 40 C.F.R. § 1503.1(a)(3)-(4) (1993).
42. Weinberger v. Catholic Action of Hawaii/Peace Educ. Project, 454 U.S. 139, 142-43 (1981).
43. Joan R. Goldfarb, *Extraterritorial Compliance with NEPA Amid the Current Wave of Environmental Alarm*, 18 B.C. ENVTL. AFF. L. REV. 543, 553 (1991).
44. *See infra* notes 47-57 and accompanying text.
45. *See infra* notes 58-59 and accompanying text.
46. Goldfarb, *supra* note 43, at 553.
47. 42 U.S.C. §§ 4321-4332 (1988 & Supp. III 1991).
48. 42 U.S.C. § 4321.
49. *Id.* § 4331(a).

using means consistent with *national* policy considerations to assure for all *Americans* safe surroundings and to preserve the important aspects of our *national* heritage.[50]

Other NEPA provisions express concerns about environmental problems throughout the world. Some of NEPA's objectives include encouraging productive and enjoyable harmony between *man* and the environment and stimulating the health and welfare of *man*.[51] The statute's policies recognize the potential impact of *man's* activities on the natural environment and the importance of restoring and maintaining environmental quality for the welfare and development of *man*.[52] Furthermore, the Act recognizes a need to create and maintain certain conditions under which *man* and nature can exist in harmony[53] and to maintain, *wherever possible*, an environment which supports diversity.[54] In addition, *each person* should enjoy a healthy environment, and *each person* has a responsibility to contribute to the enhancement of the environment.[55]

Additional sections add weight to the expressed global language. Section 102(2)(C), which creates the EIS requirement, contains references to global concerns.[56] Furthermore, section 102(2)(F) of NEPA explicitly addresses international activities, directing federal agencies to cooperate with other countries in protecting the global environment.[57]

As the preceding discussion illustrates, NEPA's language is unclear with respect to extraterritorial application. The statute refers to both domestic and global concerns. To determine more precisely

---

50. *Id.* § 4331(b).
51. 42 U.S.C. § 4321 (1988).
52. *Id.* § 4331(a).
53. *Id.*
54. *Id.* § 4331(b)(4).
55. *Id.* § 4331(c).
56. 42 U.S.C. § 4332(2)(C) (1988 & Supp. III 1991). An EIS is required for *every* major Federal action significantly affecting the quality of the *human* environment. *Id.* (emphasis added). An EIS also must address "*any* adverse environmental effects," "the relationship between local short-term uses of *man's* environment and the maintenance and enhancement of *long-term productivity*," and "*any* irreversible and irretrievable commitments of resources." *Id.* at (ii)-(v) (emphasis added).
57. *Id.* § 4332(2)(F). The section commands all 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. *Id.* (emphasis added).

whether Congress intended for the statute's EIS requirement to apply extraterritorially, the statute's legislative history must be examined.

Legislative History

Congress did not engage in lengthy debate when it drafted NEPA.[58] Congress briefly considered the extraterritorial application of NEPA.[59] Like the statutory language, the legislative history is ambiguous on the issue of whether the statute's EIS requirement applies to federal actions abroad. Therefore, an examination of executive interpretation of NEPA's extraterritorial application may provide additional insight.

Executive Interpretation

Two agencies, the Department of State and the Council on Environmental Quality, have considered whether NEPA has extraterritorial effect. Each agency reached a different conclusion. Although the State Department recognized the importance of observing NEPA when possible,[60] the agency has continued to insist that foreign policy factors warrant primary consideration.[61] The State Department has ex-

58. A joint House-Senate colloquium for deliberation of environmental policy created NEPA. A congressional white paper on a national policy for the environment outlined the debates and conclusions of the colloquium. Both houses then independently reported their own versions of the statute and appointed members to participate in a conference to draft the compromise bill, NEPA. *See Joint House-Senate Colloquium to Discuss a National Policy for the Environment: Hearing Before the Comm. on Interior and Insular Affairs, U.S. Senate, and the Committee on Science and Astronautics, U.S. House of Representatives*, 90th Cong., 2d Sess. 87-127; Congressional White Paper on a National Policy for the Environment, 115 CONG. REC. 29,078 (1969) [hereinafter White Paper]; RICHARD A. LIROFF. A NATIONAL POLICY FOR THE ENVIRONMENT: NEPA AND ITS AFTERMATH 34-35 (1976).

59. "Implicit . . . is the understanding that the international implications of our current activities will also be considered, inseparable as they are from the purely national consequences of our actions." H. REP. NO. 378, 91st Cong., 1st Sess. 9, *reprinted in* 1969 U.S.C.C.A.N 2751, 2759. Further, a congressional white paper on a national policy for the environment suggests an "urgent necessity of taking into account major environmental influences of foreign economic assistance and other international developments." The White Paper also adopted the basic principle that the world environment is interrelated: "Organic nature is such a complex, dynamic, and interacting, balanced and interrelated system that change in one component entails change in the rest of the system." White Paper, *supra* note 58, at 29,079.

60. The State Department articulated in a 1969 letter to Congress the impossibility of separating the national condition from the international condition when trying to protect the human environment. Letter to Senator Henry M. Jackson, Chairman, Comm. on Interior and Insular Affairs, from William B. Macomber, Jr., Assistant Secretary for Congressional Relations, Department of State (Apri. 21, 1969), in *Hearing Before the Comm. on Interior and Insular Affairs on S. 1075, S. 237, and S. 1752*, 91st Cong., 1st Sess. 8-9 (1969).

61. *See* Department of State Regulations for Implementing the National Environmental Policy Act, 22 C.F.R. § 161.7(d) (1993).

empted specific activities from compliance with NEPA.[62] The State Department's reluctance to apply NEPA to foreign projects engaged in by the United States results from the Department's concerns about infringing upon foreign governments' sovereignty.[63]

The CEQ, however, maintained that NEPA applies extraterritorially.[64] In 1978, the CEQ issued a memorandum and draft provisions for applying NEPA extraterritorially.[65] In general, the guidelines specified that agencies must comply with NEPA if their project directly affects the environment of either the United States, the global commons, or Antarctica.[66] The State Department and other agencies opposed these guidelines.[67] Ultimately, the CEQ was forced to retreat from its position.[68]

To clarify the scope of NEPA's international reach, President Carter issued an executive order in 1979.[69] Executive Order 12,114 provides that NEPA applies extraterritorially if the action affects the global commons, exposes a foreign country to toxic or radioactive emissions, or affects resources of global concern.[70] In addition, the Executive Order strives to resolve the State Department's concerns by exempting from NEPA compliance various activities: intelligence activities, arms transfers, export licenses, votes in international organizations, and emergency relief ac-

---

62. *Id.* Section 161.7(d) exempts from NEPA compliance: (1) actions taken in emergency circumstances and disaster and emergency relief activities; (2) mandatory actions required under international agreement or treaty, or by decisions of international authorities; (3) payment of contributions to an international organization, of which the United States is a member, or which is not for the purpose to carry out a project which would affect the environment; and (4) participation in, or contribution to, international organizations where the United States cannot unilaterally control such expenditures. *Id.*

63. *See* In re Babcock & Wilcox, 5 N.R.C. 1332, 1334, 1344 (1977). The State Department fears that imposing U.S. laws on projects undertaken by foreign governments would breach the traditional principles of international comity and fairness, and therefore could strain foreign relations.

64. Goldfarb, *supra* note 43, at 565.

65. *Council on Environmental Quality Memorandum to Agency Heads on Overseas Application of NEPA Regulations* (1978), *reprinted in* 8 Env't Rep. (BNA) 1493 (1978) [hereinafter CEQ Memorandum]; *Council on Environmental Quality Draft Regulations on Applying NEPA to Significant Foreign Environmental Effects* (1978), *reprinted in* 8 Env't Rep. (BNA) 1495 (1978).

66. *Id.* If the projects affect only the environment of a foreign country, agencies would be required to prepare a foreign environmental statement, a less detailed and shorter version of NEPA's EIS. The foreign environmental statement would require only three elements: (1) a statement of purpose and need; (2) a discussion of alternatives to the proposed action; and (3) a succinct description of the area to be affected.

67. Goldfarb, *supra* note 43, at 566.

68. Sue D. Sheridan, Note, *The Extraterritorial Application of NEPA Under Executive Order 12,114*, 13 VAND. J. TRANSNAT'L L. 173, 201-02 (1980).

69. Exec. Order No. 12,114, 44 Fed. Reg. 1957 (1979), *reprinted in* 42 U.S.C. § 4321 (1988) [hereinafter cited as E.O. 12,114].

70. *Id.* § 2-3, 44 Fed. Reg. at 1957-58, *reprinted in* 42 U.S.C. § 4321 (1988).

tions.[71] The order also permits federal agencies to modify the EIS requirements in consideration of other nations' sovereignty, potential adverse effects on foreign relations, diplomatic factors, international commercial competition, national security, difficulty of obtaining information, and inability of the agency to affect the decision.[72]

As shown, the executive branch also has offered interpretations of NEPA. However, the issue of whether NEPA operates abroad remains unclear. Therefore, judicial interpretations must be examined.

Judicial Interpretation

The judiciary has addressed the issue of NEPA's extraterritorial application.[73] Initially, the courts extended NEPA's reach to projects affecting Canada[74] and within United States trust territories.[75] In the later cases, the courts generally presumed that NEPA applied extraterritorially.[76] Two exceptions to this presumption involve exporting nuclear technology.[77]

In 1972 in *Wilderness Society v. Morton*, the District of Columbia Circuit Court of Appeals concluded that NEPA was broad enough to require an EIS on the trans-Alaska pipeline's potential impact on the Canadian environment.[78] The District Court for the District of Hawaii also extended NEPA to federal agency activities in U.S. trust territories.[79]

---

71. *Id.* § 2-5(a), 44 Fed. Reg. at 1959, *reprinted in* 42 U.S.C. § 4321 (1988); *see also* Goldfarb, *supra* note 43, at 566.

72. *Id.*

73. *See, e.g.*, Natural Resources Defense Council v. Nuclear Regulatory Comm'n, 647 F.2d 1345 (D.C. Cir. 1981); Sierra Club v. Adams, 578 F.2d 389 (D.C. Cir. 1978); Wilderness Soc'y v. Morton, 463 F.2d 1261 (D.C. Cir. 1972); National Org. for the Reform of Marijuana Laws (NORML) v. United States Dep't of State, 452 F. Supp. 1226 (D. D.C. 1978); Environmental Defense Fund v. United States Agency for Int'l Dev., 6 Envtl. L. Rep. (Envtl. L. Inst.) 20,121 (D. D.C. 1975); Saipan v. United States Dep't of Interior, 356 F. Supp. 645 (D. Haw. 1973), *modified*, 502 F.2d 90 (9th Cir. 1974), *cert. denied*, 420 U.S. 1003 (1975); Enewetak v. Laird, 353 F. Supp. 811 (D. Haw. 1973).

74. Wilderness Soc'y v. Morton, 463 F.2d 1261, 1262-63 (D.C. Cir. 1972).

75. Saipan v. United States Dep't of Interior, 356 F. Supp. 645, 649-50 (D. Haw. 1973), *modified*, 502 F.2d 90 (9th Cir. 1974), *cert. denied*, 420 U.S. 1003 (1975); Enewetak v. Laird, 353 F. Supp. 811, 819 (D. Haw. 1973).

76. Sierra Club v. Adams, 578 F.2d at 391 n.14; National Org. for the Reform of Marijuana Laws (NORML) v. United States Dep't of State, 452 F. Supp. 1226, 1233 (D. D.C. 1978); Environmental Defense Fund, Inc. v. United States Agency for Int'l Dev., 6 Envtl. L. Rep. (Envtl. L. Inst.) 20,121 (D. D.C. 1975).

77. Natural Resources Defense Council v. Nuclear Regulatory Comm'n, 647 F.2d at 1365-68; *see also* In re Babcock & Wilcox, 5 N.R.C. 1332, 1337 (1977).

78. 463 F.2d 1261, 1262 (D.C. Cir. 1972).

79. Saipan v. United States Dep't of Interior, 356 F. Supp. 645, 649-50 (D. Haw. 1973), *modified*, 502 F.2d 90 (9th Cir. 1974), *cert. denied*, 420 U.S. 1003 (1975) (applying NEPA's requirements to a federal government's proposal to construct a hotel in Saipan); Enewetak v. Laird, 353

In later cases, both the District Court and the Court of Appeals for the District of Columbia presumed extraterritorial application of NEPA. In *Sierra Club v. Adams*, the Department of Transportation proposed to construct the Darien Gap Highway in Panama and Colombia.[80] Although the department had already prepared an environmental impact statement, the respondents argued that the EIS was deficient.[81] The District of Columbia circuit court assumed without deciding that the agency must comply with NEPA and complete an EIS.[82]

In *National Organization for the Reform of Marijuana Laws (NORML) v. United States Department of State*, the federal District Court for the District of Columbia also assumed that NEPA may be extended to extraterritorial activities.[83] The State Department was assisting Mexico in a project to spray herbicides on marijuana and poppy plants in Mexico.[84] The court concluded that the undertaking was a major federal action under NEPA[85] and assumed that NEPA applied to projects in Mexico.[86]

The court in *Environmental Defense Fund v. United States Agency for International Development* also assumed that NEPA applies extraterritorially.[87] There the Agency for International Development stipulated that it would complete an EIS for its proposed project to spray pesticides in twenty developing countries.[88] In approving the consent decree, the court did not decide whether NEPA applied extraterritorially.[89]

Despite the trend to apply NEPA extraterritorially or assume that NEPA applies extraterritorially, several rulings have refused to apply NEPA abroad. In *In re Babcock & Wilcox*, the Nuclear Regulatory Commission

---

F. Supp. 811, 819 (D. Haw. 1973) (assuming that the statute's broad sweep extended to activities anywhere in the world).

80. 578 F.2d 389, 390 (D.C. Cir. 1978). *See also* Sierra Club v. Coleman, 405 F. Supp. 53 (D. D.C. 1975) (granting a preliminary injunction forbidding further construction of the highway until completion of a detailed EIS consistent with NEPA requirements); Sierra Club v. Coleman, 421 F. Supp. 63 (D. D.C. 1976) (extending the preliminary injunction until the EIS addressed sufficiently the effects on the spread of aftosa, the effects on the lives of the Cuna and Choco Indians, and the possible alternatives).

81. 578 F.2d at 390-91.

82. "[W]e need only assume, without deciding, that NEPA is fully applicable to construction in Panama. We leave resolution of this important issue to another day." *Id.* at 392 n.14.

83. 452 F. Supp. 1226 (D. D.C. 1978).

84. *Id.* at 1228.

85. *Id.* at 1232.

86. Without deciding, the court observed: "[I]n view of defendants' willingness to prepare an 'environmental analysis' . . . the Court need not reach the issue and need only assume without deciding, that NEPA is fully applicable to the Mexican herbicide spraying program." *Id.* at 1233.

87. 6 Envtl. L. Rep. (Envtl. L. Inst.) 20,121 (D. D.C. 1975).

88. *Id.*

89. *Id.*

(NRC) concluded, after an administrative hearing, that it need not complete a site-specific EIS before issuing to a private corporation a license to sell nuclear reactor components to West Germany.[90] Similarly, in *Natural Resources Defense Council (NRDC) v. Nuclear Regulatory Commission*, the Court of Appeals for the District of Columbia Circuit declined to apply NEPA extraterritorially.[91] The NRDC contested the NRC's authority to approve applications to ship nuclear reactors to the Philippines.[92] The court of appeals decided that NEPA did not apply.[93] The court agreed with the NRC that NEPA merely requires cooperation with other countries in preserving the world environment.[94] Further, the court distinguished *Wilderness Society v. Morton,*[95] *Enewetak v. Laird,*[96] and *Sierra Club v. Adams*[97] for three reasons. First, *Morton* pertained to a project over which a federal agency would exercise ongoing control, whereas *NRDC* involved exporting nuclear reactors, a one-time undertaking.[98] Second, *Enewetak* involved a United States trust territory, which posed no foreign policy conflict, whereas requiring an EIS to grant permits for nuclear reactor exports could create serious conflicts with foreign policy.[99] Finally, an EIS was required in *Adams* because livestock in the United States could ultimately be affected. The *NRDC* court found no direct domestic impact from exporting nuclear reactors.[100]

More recently, the District Court for the District of Hawaii, in *Greenpeace U.S.A. v. Stone*, refused to apply NEPA extraterritorially to the transfer of munitions through West Germany.[101] Although the United States Army had prepared three EIS's, Greenpeace sought a preliminary injunction to stop the shipment.[102] Greenpeace contended that the Army had failed to comply with NEPA because the EIS's did not consider the effects of trans-

90. 5 N.R.C. 1332, 1336 (1977). The NRC asserted that NEPA's only clear expression of extraterritorial application is section 102(2)(C), which requires *cooperation* with other countries when consistent with United States foreign policy. The NRC reasoned that, by isolating its reference to foreign activities in NEPA, Congress must have intended to exempt foreign activities from the EIS requirement. *Id.* at 1338-39.

91. 647 F.2d 1345 (D.C. Cir. 1981).

92. *Id.* at 1348.

93. *Id.* at 1365-68.

94. *Id.* at 1366.

95. 463 F.2d 1261 (D.C. Cir. 1972).

96. 353 F. Supp. 811 (D. Haw. 1973).

97. 578 F.2d 389 (D.C. Cir. 1978).

98. 647 F.2d at 1367-68.

99. *Id.* at 1368.

100. *Id.*

101. 748 F. Supp. 749 (D. Haw. 1990). The Reagan Administration had agreed with Chancellor Kohl of the Federal Republic of Germany (West Germany) to remove chemical munitions from West Germany. *Id.* at 752.

102. *Id.* at 754.

porting the munitions through West Germany.[103] The court refused to grant an injunction, holding that NEPA did not apply to "joint actions taken on foreign soil based on an agreement made between the President and a foreign head of state."[104] However, the court was careful to limit its holding to the specific facts of the case.[105]

Despite their apparent differences, there are some similarities in the NEPA cases.[106] Although unable to find clear congressional intent, the courts generally have assumed that NEPA applies extraterritorially.[107] Further, if the agency exercises ongoing control over a project, the court will mandate compliance with NEPA.[108] If the activity potentially has a direct impact on the United States environment, the court will require the agency to comply with NEPA.[109] On the other hand, if the agency action involves permitting sales of nuclear reactor parts, a delicate national security matter, the potency of the assumption that NEPA applies probably will be diminished.[110] Both *Babcock* and *NRDC* cases, in which the assumption of extraterritorial application did not prevail, involved permitting sales of nuclear reactor parts. Finally, where foreign relations concerns exist, the courts have tried to balance foreign policy interests with the need to apply NEPA extraterritorially.[111]

The most recent litigation over NEPA's extraterritorial effect involves two cases. In *Public Citizen v. United States Trade Representative*, the Court of Appeals for the District of Columbia Circuit reversed the lower district court's holding[112] that NEPA applied to the negotiation of the North American Free Trade Agreement (NAFTA).[113] The court ruled that the administration did not need to prepare an environmental impact statement for the trade pact.[114] The court reasoned that NAFTA was a presidential, rather than an agency, "action" and therefore was not subject to suits by private groups.[115]

---

103. *Id.* at 758.
104. *Id.* at 757.
105. *Id.* at 759, 761.
106. Goldfarb, *supra* note 43, at 563.
107. *Id.* at 563-64.
108. *Id.* at 564.
109. *Id.*
110. *Id.*
111. *Id.*
112. Public Citizen v. United States Trade Representative, 882 F. Supp. 21 (D. D.C. 1993), *rev'd*, 5 F.3d 549 (D.C. Cir. 1993), *cert. denied*, 114 S.Ct. 685 (1994).
113. 5 F.3d 549 (D.C. Cir. 1993), *cert. denied*, 114 S.Ct. 685 (1994).
114. *Id.*
115. *Id.* at 553.

In *NEPA Coalition of Japan v. Aspin*, the District Court for the District of Columbia held that NEPA did not apply to U.S. military installations in Japan.[116] The court ruled that the Department of Defense was not required to prepare an EIS for the military bases.[117] The court decided that foreign policy interests and treaty concerns outweigh benefits of preparing an EIS.[118]

Finally, in non-NEPA cases in 1991 and again in 1993, the U.S. Supreme Court maintained the presumption against extraterritorial application of U.S. statutes.[119] In both these cases the Supreme Court reaffirmed the long-standing principle from *Foley Brothers v. Filardo*[120] that "legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States."[121] These cases set the backdrop for the *Massey* decision.

PRINCIPAL CASE

In *Environmental Defense Fund v. Massey*, the Court of Appeals for the District of Columbia Circuit considered whether NEPA's environmental impact statement requirement applies to the National Science Foundation's incineration activities in Antarctica.[122] The court of appeals determined whether the presumption against extraterritoriality applied to NSF's decision to incinerate waste in Antarctica and whether Antarctica, with its unique sovereignless status, presented foreign policy conflicts.[123] The court held that NEPA does apply to the agency's activities in Antarctica[124] and that the case presented no issue of extraterritoriality.[125]

---

116. 837 F.Supp. 466 (D. D.C. 1993).

117. *Id.* at 468.

118. *Id.*

119. Equal Employment Opportunity Comm'n v. Arabian American Oil Co., 499 U.S. 244 (1991) (finding no clear congressional intent to extend Title VII of the Civil Rights Act of 1964 abroad, the Court ruled that the statute did not apply extraterritorially to allegedly discriminatory conduct against U.S. citizens employed abroad by a Delaware corporation doing business in Saudi Arabia); Smith v. United States, 499 U.S. 160 (1993) (finding no evidence of congressional intent to apply the Federal Tort Claims Act extraterritorially, the Court held that the statute did not apply to acts or omissions of the federal government in Antarctica).

120. 336 U.S. 281 (1949).

121. *Id.* at 285.

122. 986 F.2d 528 (D.C. Cir. 1993).

123. *Id.* at 529.

124. *Id.*

125. *Id.* at 532.

The court of appeals began by explaining the long-held presumption against extraterritoriality. The court referred to the doctrine set out by the *Restatement (Third) of Foreign Relations*[126] and echoed by the U.S. Supreme Court's assertion that the primary purpose of this presumption against extraterritoriality is "to protect against the unintended clashes between our laws and those of other nations which could result in international discord."[127] The court then addressed several Supreme Court cases[128] where the Court reaffirmed the extraterritoriality principle and refused to apply federal statutes beyond United States borders.

Then the court of appeals described three general categories of cases where the presumption against extraterritorial application does not apply. First, the presumption does not apply where there is an "affirmative intention of the Congress clearly expressed" to extend the scope of a statute to activities occurring within other sovereign nations.[129] Second, the presumption generally is not applicable "where the failure to extend the scope of the statute to a foreign setting will result in adverse effects within the United States."[130] Finally, the presumption against extraterritoriality does not apply when the "conduct regulated by the government occurs within the United States."[131]

The court of appeals then addressed the district court's error in ignoring these "well-established exceptions" to the presumption against extraterritoriality.[132] The court declared that the district court had erroneously bypassed the threshold question of whether applying NEPA to NSF's decision to incinerate food-related waste actually presented an extraterritoriality problem.[133] First, the lower court failed to consider

126. *See supra* note 22.

127. 986 F.2d at 530 (quoting Equal Employment Opportunity Comm'n v. Arabian American Oil Co., 499 U.S. 244, 248 (1991)).

128. 986 F.2d at 530-31 (citing American Banana Co. v. United Fruit Co., 213 U.S. 347 (1909) (U.S. corporation violated United States antitrust laws by inducing a foreign government to take actions within its own territory which were adverse to plaintiff's business); Foley Bros. v. Filardo, 336 U.S. 281 (1949) (involving the Eight Hour Law, a labor statute, and its application abroad); Equal Employment Opportunity Comm'n v. Arabian American Oil Co., 499 U.S. 244 (1991) (involving Title VII of the Civil Rights Act of 1964, and its application in Saudi Arabia)).

129. 986 F.2d at 531.

130. *Id.*

131. *Id.* Even where the significant effects of the regulated conduct are felt outside United States borders, the statute itself does not present an extraterritoriality problem, so long as the conduct which Congress seeks to regulate occurs largely *within* the United States. *Id.*

132. *Id.* at 532.

133. *Id.* The circuit court criticized the district court apparently for implementing the presumption against extraterritoriality without scrutinizing the facts.

whether the statute "seeks to regulate conduct in the United States or in another sovereign country."[134] Second, the district court refused to consider whether NEPA would create potential "clashes between our laws and those of other nations" if it were applied to the decision-making of federal agencies regarding proposed actions in Antarctica.[135]

The court of appeals then addressed these two issues. The court explained that NEPA is designed to control the decision-making process of federal agencies. But, NEPA does not dictate agency policy or any particular result. In other words, NEPA "is designed to control the decision-making process of U.S. federal agencies, not the substance of agency decisions."[136] The court pointed out that NEPA simply "mandates a particular process" that must be followed before an agency may take action significantly affecting the human environment.[137] Thus, NEPA imposes no substantive requirements which could be interpreted to govern conduct abroad.[138]

Further, the court stated that the decision-making processes of federal agencies occur almost exclusively within this country.[139] The court pointed out that Congress enacted NEPA to "determine the factors an agency must consider . . . and created a process whereby American officials, while acting within the United States, can reach enlightened policy decisions" by taking into account environmental effects.[140] Thus, NEPA's environmental impact statement requirement is entirely domestic.[141]

The court concluded that the presumption against extraterritoriality is inapplicable to the question of whether NEPA applies to NSF's activities in Antarctica.[142] The court determined that the decision-making processes of federal agencies take place almost exclusively within the territory of the United States and NEPA imposes no substantive obligations governing conduct abroad. The court drew additional support for this conclusion from the unique status of Antarctica.[143]

---

134. *Id.*
135. *Id.*
136. *Id.*
137. *Id.*
138. *Id.* at 533. The court observed that, because NEPA does not regulate substantively, it would never involve "choice of law" dilemmas. *Id.*
139. *Id.* at 532.
140. *Id.*
141. *Id.*
142. *Id.*
143. *Id.* at 533.

The court explained that, where the United States has some real measure of legislative control over the region, the presumption against extraterritoriality is much weaker.[144] The court asserted that the United States indeed exercises some degree of control over Antarctica.[145] Moreover, where there is no potential for conflict between U.S. laws and those of other nations, the presumption against extraterritoriality applies with "significantly less force."[146]

The court also explained that Antarctica "is not a foreign country," but rather a continent that is "most frequently analogized to outer space."[147] Antarctica's unique status as part of the global commons[148] makes the presumption against extraterritoriality inapplicable in this case.[149] The court of appeals concluded that, where the United States exercises a great measure of legislative control in a sovereignless region like Antarctica, the presumption against extraterritoriality is inappropriate.[150]

The court also rejected the National Science Foundation's foreign policy arguments.[151] NSF argued that the EIS requirement would interfere with U.S. efforts to work cooperatively with other nations toward solutions to environmental problems in Antarctica.[152] NSF contended that joint research and cooperative environmental assessment would be "placed at risk of NEPA injunctions, making the United States a doubtful partner for future international cooperation in Antarctica."[153] In rejecting NSF's foreign policy arguments, the court relied on its decision in *NRDC v.*

144. *Id.* (citing Sierra Club v. Adams, 578 F.2d 389 (D.C. Cir. 1978) (presuming NEPA to be applicable to highway construction in a foreign country where the United States had two-thirds of the ongoing financial responsibility and control over the highway construction); Enewetak v. Laird, 353 F. Supp. 811 (D. Haw. 1973) (applying NEPA to the United States trust territories in the Pacific).

145. The United States controls all air transportation to Antarctica and conducts all search and rescue operations there. Moreover, the United States has exclusive control over McMurdo Station and the other research installations established there by the United States Antarctica Program. 986 F.2d at 534.

146. *Id.* at 533.

147. *Id.*

148. The court pointed out that those intimately involved in managing U.S. foreign policy generally view the global commons to include Antarctica. *Id.* at 534.

149. *Id.* at 533 (citing Beattie v. United States, 756 F.2d 91 (D.C. Cir. 1984) (in a Federal Tort Claims Act (FTCA) suit, Antarctica's status as a global commons led the court to conclude that the presumption against extraterritoriality should not apply to cases arising in Antarctica). *But cf.* Smith v. United States, 932 F.2d 791 (9th Cir. 1991) (finding no clear congressional intent to have FTCA apply extraterritorially).

150. *Id.* at 534.

151. Brief for the Appellees, *supra* note 4, at 43.

152. *Id.*

153. *Id.*

NRC, where it held that, if the EIS requirement proves to be incompatible with section 102(2)(F), federal agencies may not be enjoined to prepare an EIS.[154] Here, the *Massey* court reasoned that the government may avoid the EIS requirement where U.S. foreign policy interests outweigh the benefits to be derived from preparing an EIS.[155] However, since NEPA does not impose substantive requirements, U.S. foreign policy interests in Antarctica will rarely be threatened by applying the statue.[156] Thus, the court concluded that NSF's efforts to cooperate with foreign governments regarding environmental practices in Antarctica would not be frustrated if NSF were forced to comply with NEPA.[157]

Finally, the court found NSF's plain language interpretation of NEPA unpersuasive.[158] The court decided that NEPA terms such as *"man and his environment," "biosphere"*, and *"in the world as a whole"*[159] suggest that Congress "painted with a far greater brush" than NSF was willing to concede.[160] The court further noted the Council on Environmental Quality's[161] initial conclusion that NEPA applies to federal agency actions in Antarctica.[162] As a result, the circuit court concluded that the presumption against extraterritoriality should not operate in this particular case. Thus, NEPA applies to NSF's incineration activities in Antarctica.[163]

ANALYSIS

In *Environmental Defense Fund v. Massey*,[164] the Court of Appeals for the District of Columbia Circuit ruled out the presumption against extraterritoriality in cases involving NEPA's application to federal activities in Antarctica. The court correctly concluded that NEPA regulates the decision-making processes of NSF, which occur primarily within the United States. Therefore, the presumption against extraterritoriality is

154. 647 F.2d 1345, 1366 (D.C. Cir. 1981).

155. 986 F.2d at 535.

156. *Id.* (citing Flint Ridge Dev. Co. v. Scenic Rivers Ass'n, 486 U.S. 776, 791 (1976)).

157. *Id.*

158. NSF contended that the thrust of section 102(2)(C) is domestic in breadth, because it requires federal agencies to seek the views of state and local agencies on an EIS, but not of foreign governments. Brief for the Appellees at 21.

159. *See supra* notes 51-55 and accompanying text.

160. 986 F.2d at 536.

161. *See supra* notes 64-68 and accompanying text.

162. 986 F.2d at 536.

163. *Id.*

164. 986 F.2d 528 (D.C. Cir. 1993).

inapplicable. The court also properly decided that Antarctica's unique and sovereignless status allows for extraterritorial application of NEPA. Furthermore, the court correctly determined that foreign policy repercussions resulting from the application of the EIS requirement would be minimal. Finally, the court's interpretation of the statutory language as global in scope and its concurrence with CEQ's broad interpretation of NEPA are appropriate.

However, as a result of the *Massey* court's narrow holding, ambiguity regarding NEPA's extraterritorial application remains. The court limited its holding by cautioning that it did not decide whether NEPA may apply to actions in a foreign sovereign nation.[165] Thus, this narrow holding sustains interpretation problems when considering NEPA's extraterritorial application in other situations.

Even so, the *Massey* decision serves as a stepping stone toward NEPA's application in foreign countries. First, the *Massey* court found express global language in NEPA.[166] The court decided that language such as *"man and his environment," "biosphere,"* and *"in the world as a whole"* implies extraterritorial application.[167] Thus, the court's construction of the statutory language indicates that NEPA expresses broad extraterritorial intentions.

Second, a concern with the conflict-of-laws dilemma generally has been the basis for applying the presumption against extraterritoriality. The *Massey* court determined that NEPA regulates federal agencies' decision-making processes, which occur almost exclusively in the United States.[168] The court concluded that the presumption against extraterritoriality does not apply to NEPA because the regulated conduct occurs almost exclusively in the United States. Thus, a conflict-of-laws dilemma does not exist.

Third, the *Massey* court concluded that, where the United States exercises some real measure of legislative control, the presumption against extraterritoriality applies with "significantly less force."[169] In this increasingly interdependent world, the United States, the only remaining superpower, is the leader of the international community. This was illus-

165. *Id.* at 537. The court also warned that it did not determine whether other U.S. statutes may apply to Antarctica. *Id.*

166. *See supra* notes 158-62 and accompanying text.

167. *Id.*

168. *See supra* notes 136-41 and accompanying text.

169. *See supra* notes 144-46 and accompanying text.

trated by its leadership in recent United Nations-sanctioned activities in the Persian Gulf and Somalia. Further, the United States is a prominent member of numerous international organizations, such as the United Nations and the International Monetary Fund. Through these organizations, the United States exercises a certain degree of control over the global community. Such influence and control exerted by the United States may not necessarily be legislative. However, they do achieve similar economic, political, and enforcement goals. Thus, the United States, as a matter of fact, does exercise some real measure of control over the international community.

Several other factors suggest that NEPA should apply to all federal agency actions outside the United States. Despite the U.S. Supreme Court's affirmance of the presumption against extraterritoriality, the federal judiciary generally has applied NEPA extraterritorially. A number of courts have suggested that NEPA may apply to certain federal activities conducted extraterritorially, but have ruled on the specific facts that NEPA did not apply abroad in those cases.[170] Other courts have assumed, without deciding, that NEPA applies to government actions outside the United States.[171] Further, the two recent cases involving NAFTA and U.S. military installations in Japan do not suggest a divergence from this judicial trend.[172] The NAFTA case is distinguishable because the action involved was presidential, and not agency-related.[173] The case concerning U.S. military bases in Japan is an exception.[174] Because military matters involve sensitive national security concerns, foreign policy interests and treaty arrangements may prevail over the benefits of preparing an EIS.[175]

Additionally, NEPA should be applied extraterritorially to deter conduct abroad that has deleterious effects within the United States. The global environment comprises all states. Activity in one country ultimately affects the environment of another.[176] Although an EIS preparation is pro-

170. *See, e.g.*, NRDC v. NRC, 647 F.2d 1345 (D.C. Cir. 1981); Greenpeace USA v. Stone, 748 F. Supp. 749 (D. Haw. 1990).

171. *See, e.g.*, Sierra Club v. Adams, 578 F.2d 389 (D.C. Cir. 1978); National Org. for the Reform of Marijuana Laws (NORML) v. United States Dep't of State, 452 F. Supp. 1226 (D. D.C. 1978).

172. Public Citizen v. United States Trade Representative, 5 F.3d 549 (D.C. Cir. 1993); NEPA Coalition of Japan v. Aspin, 837 F.Supp. 466 (D. D.C. 1993).

173. 5 F.3d at 553.

174. 837 F.Supp. 466 (D. D.C. 1993).

175. *Id.* at 468.

176. Because the globe is integrated environmentally, activities conducted abroad "boomerangs" back to the U.S. George D. Appelbaum, Comment, *Controlling the Environmental Hazards of International Development*, 5 ECOLOGY L.Q. 321, 353 (1976).

cedural in nature, requiring an agency in advance to realize the likely environmental consequences of its foreign activities may ultimately deter potentially harmful conduct. Thus, requiring an EIS for projects abroad could prevent harmful environmental effects within the United States.

Further, there is evidence of legislative intent to cooperate with other sovereigns in matters regarding the environment. The language of NEPA refers to global concerns, therefore reflecting congressional intent to apply NEPA extraterritorially.[177] Other recent legislative activity also suggests that Congress intends to encourage more international cooperation to protect the global environment.[178]

Finally, policy considerations support extraterritorial application of NEPA. As environmental problems increase throughout the world, the *Massey* decision should be construed broadly in future cases to help protect our fragile environment. Limiting NEPA's scope to U.S. borders vitiates the statute's ultimate objective—safeguarding the environment. Requiring an EIS review for projects abroad has great potential for protecting the globe from further environmental harm. Additionally, applying NEPA extraterritorially places the United States in good standing within the international community. EIS evaluations of projects abroad improve federal programs and international assistance projects, educate other countries of the impact of American actions abroad, and enhance America's diplomatic relations.

In summary, the presumption against extraterritoriality is inapposite to NEPA. First, there is express language to apply NEPA extraterritorially. Second, the EIS review protects the United States from environmental harm. Third, as the *Massey* court has pointed out, conduct regulated by NEPA occurs primarily in the United States and generally does not create foreign policy concerns. Finally, sociopolitical policy considerations mandate extraterritorial application of NEPA.

---

177. There exists a current House bill to amend NEPA in order to require the application of the statute to extraterritorial actions of the federal government. *See* H.R. 3219, 103d Cong., 1st Sess. (1993).

178. A joint resolution was introduced providing for the United States to assume a strong leadership role in implementing the decisions made at the Earth Summit by cooperating with other countries to protect the global environment. *See* S.J. Res. 69, 103d Cong., 1st Sess. (1993); H.R.J. Res. 166, 103d Cong., 1st Sess. (1993). Additionally, a bill to establish the Department of the Environment was introduced, to include such objective as to encourage the Secretary of the proposed Department of the Environment to assist the Secretary of State in participating in international environmental protection agreements and organizations. *See* S. 171, 103d Cong., 1st Sess. (1993); H.R. 109, 103d Cong., 1st Sess. (1993).

CONCLUSION

The Court of Appeals for the District of Columbia Circuit in *Environmental Defense Fund v. Massey* properly held that NEPA applies to the National Science Foundation's actions in Antarctica. Through this decision, the court has made significant inroads toward removing the presumption against NEPA's extraterritorial application. The ruling has opened the door for extending the scope of NEPA outside the United States. Three factors clearly warrant extraterritorial application of NEPA. First, there is express language directing extraterritorial application. Second, extraterritorial application of NEPA protects the United States from harmful environmental effects. Third, NEPA's regulation of a domestic decision-making process generally does not present foreign policy problems.

As the world confronts mounting environmental problems, the presumption against extraterritoriality as applied to NEPA should become an artifact of the past, while the extraterritorial application of environmental statutes such as NEPA becomes a reality of the future. Despite *Massey's* narrow holding, a broad interpretation of the decision by other courts could aid an American effort to lead an increasingly interdependent world in preserving our globe's fragile environment.

ROBERT QUAN LEE