

# NOTES

## THE EXTRATERRITORIAL REACH OF NEPA'S EIS REQUIREMENT AFTER *ENVIRONMENTAL DEFENSE FUND v. MASSEY*

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## INTRODUCTION

The environmental consequences of one nation's actions are rarely confined within its borders.<sup>1</sup> The nuclear catastrophe in Chernobyl attests to the great dangers of modern society and to the necessity for environmental responsibility.<sup>2</sup> Even the most benevolent attempts to aid other nations may have harmful consequences.<sup>3</sup> A poignant example of development disaster is the Aswan Dam project in Egypt, funded by the Soviet Union.<sup>4</sup> Since the project began, disease rates for a serious blood disease caused by water parasites have skyrocketed among the farmers along the Upper Nile.<sup>5</sup>

To avoid potential environmental disasters, it is essential that the U.S. Government assess the impact its agencies' actions may have, both within and beyond this country's geographic borders. The Environmental Impact Statement (EIS) requirement<sup>6</sup> of the National Environmental Policy Act (NEPA)<sup>7</sup> is the most important provision of our nation's environmental policy.<sup>8</sup> Section 102(2)(C) of NEPA provides a general outline of an EIS.<sup>9</sup> An EIS must be prepared for

1. See generally Jeffrey B. Groy & Gail L. Wurtzler, *International Implication of United States Environmental Laws*, 8 NAT. RESOURCES & ENV'T 7 (1993) (discussing transnational scope of recent environmental disasters); Jonathan Turley, "When in Rome": *Multinational Misconduct and the Presumption Against Extraterritoriality*, 84 NW. U. L. REV. 598, 658-59 (1990) (noting recent disasters prompting more international perspective on environmental problems).

2. See Stephen L. Kass & Michael B. Gerard, *International Impact Assessment*, N.Y.L.J., Oct. 25, 1991, at 3 (noting how Chernobyl accident, which released radioactive cloud, prompted allegations by neighboring countries that Soviet Union violated binding principles of international law by failing to notify others of emergency).

3. See 124 CONG. REC. 11,804 (1978) (remarks by Charles Warren, Chairman, Council on Environmental Quality). For instance, following World War II, the United States introduced a program to improve conditions in the Ryukyu Islands. *Id.* The program attempted to provide better sanitary and dietary conditions in island schools. *Id.* These "improvements" led to a large outbreak of dysentery and to the spread of an eye disease that causes blindness. *Id.* In Indonesia, rice farmers used imported pesticide to kill insects harmful to the rice crop, *id.*, but the pesticide also killed the fish that farmers depended on to provide a cash crop, fertilize the rice paddies, control insects, and consume as an essential source of nutrition, *id.* In Brazil, a hydroelectric project caused unexpected environmental repercussions in the surrounding valley. *Id.* The ensuing cost to resettle farmers and control floods was over \$150 million. *Id.*

4. *Id.*

5. See *id.* (stating that infection within local farm population leapt from 5% to 65%).

6. 42 U.S.C. § 4332(2)(C) (1988).

7. The National Environmental Policy Act of 1969, Pub. L. No. 91-190, 83 Stat. 852 (1970) (codified at 42 U.S.C. §§ 4321-4370c (1988 & Supp. V 1993)).

8. See Amy J. Sauber, *The Application of NEPA to Nuclear Weapons Production, Storage, and Testing: Weinberger v. Catholic Action of Hawaii/Peace Education Project*, 11 B.C. ENV'T L. AFF. L. REV. 805, 813 (1984) (explaining provision's critical importance as enforcement mechanism for Act's policy).

9. 42 U.S.C. § 4332(2)(C)(i)-(v). Section 102(2)(C) of NEPA reads:

[A]ll agencies of the Federal Government shall include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

(i) the environmental impact of the proposed action,

“every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment.”<sup>10</sup> The required content of an EIS varies with each case,<sup>11</sup> but the purpose remains constant: to ensure reasoned decisions by noting adverse environmental impacts of, and considering alternatives to, any proposed major federal action.<sup>12</sup> The EIS requirement is important because it is the “action-forcing” provision<sup>13</sup> of an essentially procedural statute.<sup>14</sup>

This Note discusses the application of NEPA’s EIS requirement<sup>15</sup> outside of the United States. Recently, the U.S. Court of Appeals for the District of Columbia Circuit, in *Environmental Defense Fund v. Massey*,<sup>16</sup> considered whether NEPA’s EIS requirement applied to a National Science Foundation (NSF) plan to incinerate food wastes in Antarctica.<sup>17</sup> The court in *Massey* held that NEPA’s EIS requirement applied to federal actions in Antarctica.<sup>18</sup> *Massey* is significant

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- (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.

*Id.*

10. 42 U.S.C. § 4332(2)(C).

11. For a general discussion of the contents of an EIS, see ENVIRONMENTAL LAW HANDBOOK 452-53 (Government Institutes, 10th ed. 1989). See also David A. Wirth, in Keith Hight & George Kahale III, *International Decisions*, 87 AM. J. INT’L L. 626, 627 (1993) (discussing, based on regulations and case law, EIS content requirements).

12. See *Baltimore Gas & Elec. v. Natural Resources Defense Council*, 462 U.S. 87, 97 (1982) (requiring agencies under NEPA to take “hard look” at environmental consequences of any proposed major federal action).

13. 40 C.F.R. § 1502.1 (1992). Council on Environmental Quality (CEQ) regulations state that:

The primary purpose of an environmental impact statement is to serve as an action-forcing device to insure that the policies and goals defined in the Act are infused into the ongoing programs and actions of the Federal Government. It shall provide full and fair discussion of significant environmental impacts and shall inform decision makers and the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment. Agencies shall focus on significant environmental issues and alternatives . . . . An environmental impact statement is more than a disclosure document. It shall be used by Federal officials in conjunction with other relevant material to plan actions and make decisions.

*Id.*

14. See *Stryker’s Bay Neighborhood Council v. Karlen*, 444 U.S. 223, 227 (1980) (stating that NEPA’s mandate to agencies is essentially procedural); *Vermont Yankee Nuclear Power v. Natural Resources Defense Council*, 435 U.S. 519, 553 (1978) (noting that, because it creates no substantive rights, NEPA’s power comes from imposition on agencies of procedural duties designed to ensure environmental considerations are part of federal agency decision-making).

15. 42 U.S.C. § 4332(2)(C) (1988).

16. 986 F.2d 528 (D.C. Cir. 1993).

17. *Environmental Defense Fund v. Massey*, 986 F.2d 528, 530 (D.C. Cir. 1993).

18. *Id.* at 529.

because the court concluded that the presumption against extraterritorial application<sup>19</sup> of U.S. statutes did not apply.<sup>20</sup> The decision reversed the lower court's holding<sup>21</sup> and weakened the presumption that U.S. environmental laws do not apply extraterritorially.<sup>22</sup>

Part I of this Note presents a historical background, discussing the presumption against extraterritoriality, the National Environmental Policy Act, and case law interpreting NEPA's extraterritorial reach. Part II reviews the facts of *Massey* and the decision of the circuit court. Part III discusses the ramifications of *Massey* and suggests that the decision has limited precedential weight and thus fails to clarify an unsettled area of law. Although the decision applies NEPA extraterritorially, the reasoning in *Massey* provides future interpreters of the statute with two distinct and opposite paths of logic to apply to the "NEPA-abroad" dilemma. Part IV suggests recommendations for strengthening NEPA's EIS procedures around the world.

## I. HISTORICAL AND LEGAL BACKGROUND

### A. *The Presumption Against Extraterritoriality*

There exists a presumption against the extraterritorial application of U.S. laws. Generally, laws of the United States are applied only within the geographic boundaries of the country.<sup>23</sup> The U.S. Supreme Court discussed this standard in *Foley Bros. v. Filardo*,<sup>24</sup> which addressed the extraterritorial application of a law requiring overtime pay for employees working more than eight hours a day.<sup>25</sup> The plaintiff in the case, an American cook, sued Foley Bros., an

19. See *infra* Part I.A (examining presumption against extraterritoriality).

20. *Massey*, 986 F.2d at 532, 533; see *infra* notes 178-230 and accompanying text (discussing reasons court did not apply presumption against extraterritoriality).

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

22. See *infra* note 24 and accompanying text (discussing ruling in *Foley Bros. v. Filardo*, 336 U.S. 281 (1949), that U.S. legislation is presumed to preside only within U.S. boundaries); note 29 and accompanying text (discussing holding in *Equal Employment Opportunity Comm'n v. Arabian Am. Oil Co.*, 499 U.S. 244 (1991), that presumption against extraterritoriality is overcome by proof of congressional intent to apply statute abroad).

23. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 402(1) (1987):

- [A] state has jurisdiction to prescribe law with respect to
  - (a) conduct that, wholly or in substantial part, takes place within its territory;
  - (b) the status of persons, or interests in things, present within its territory;
  - (c) conduct outside its territory that has or is intended to have substantial effect within its territory.

*Id.*; see also Turley, *supra* note 1, at 599-600 (describing presumption against extraterritoriality and its use in interpreting ambiguous legislation).

24. 336 U.S. 281 (1949).

25. 40 U.S.C. §§ 324-325(a) (1940) (repealed 1962).

American company, for denying him overtime compensation for work he did at construction sites in Iran and Iraq.<sup>26</sup> The Court held that U.S. legislation applies only within U.S. territory, absent a contrary intent of Congress.<sup>27</sup> The underlying rationale of the *Foley* presumption involves recognizing the legislation's domestic character and thus avoiding international conflicts of law.<sup>28</sup>

Recently, the Supreme Court reaffirmed the *Foley* presumption in *Equal Employment Opportunity Commission v. Arabian American Oil Co. (Aramco)*.<sup>29</sup> The issue presented was whether Title VII<sup>30</sup> of the Civil Rights Act of 1964<sup>31</sup> applies extraterritorially.<sup>32</sup> The Court held that it does not.<sup>33</sup> To overcome the presumption against statutory extraterritoriality, the Court required proof of an affirmative congressional intent to apply the statute outside U.S. territory.<sup>34</sup> Again invoking a concern for conflicts of law, the Court in *Aramco* explained that the purpose of the presumption is "to protect against the unintended clashes between our laws and those of other nations which could result in international discord."<sup>35</sup> According to this view, imposing U.S. laws on other countries upsets comity and breeds resentment.<sup>36</sup> The Court in *Aramco* interpreted the *Foley* presumption to be an irrebuttable presumption against extraterritoriality.<sup>37</sup>

Interestingly, the presumption is not irrebuttable in all cases. Rather, courts have used different standards to interpret the extraterritorial scope of statutes, differentiating between market statutes (antitrust and securities) and non-market statutes (employment

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26. *Foley Bros. v. Filardo*, 336 U.S. 281, 283 (1949).

27. *Id.* at 285.

28. *See id.* at 285-86 (reasoning that Congress legislates domestic matters, not those of another sovereign country); *see also* Turley, *supra* note 1, at 656 (explaining rationale in *Foley* as based on Congress' desire to avoid international conflicts of law and to legislate domestic concerns).

29. 499 U.S. 244 (1991).

30. 42 U.S.C. §§ 2000e-2 to -3 (1988) (prohibiting discriminatory employment practices based on race, color, religion, sex, or national origin).

31. The Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified at 42 U.S.C. §§ 2000 to 2000h-6 (1988)).

32. *Equal Employment Opportunity Comm'n v. Arabian American Oil Co. (Aramco)*, 499 U.S. 244, 246-47 (1991). The case involved the alleged harassment based on religion and national origin of an American employee by an American corporation in Saudi Arabia. *Id.*

33. *Id.* (holding that Title VII does not apply outside United States to protect U.S. citizens who are employees of U.S. corporations).

34. *Id.* at 248.

35. *Id.*

36. *See* V. Rock Grundman, *The New Imperialism: The Extraterritorial Application of United States Law*, 14 INT'L LAW. 257, 258 (1980) (suggesting that exporting U.S. laws and regulations may be seen as moral or legal imperialism and, therefore, resented by international community).

37. *Aramco*, 499 U.S. at 248.

discrimination and environmental).<sup>38</sup> Starting with the presumption that in order for a statute to apply extraterritorially there must be clear evidence of congressional intent, courts have uniformly rejected extraterritorial application of non-market statutes.<sup>39</sup> Courts have, however, interpreted ambiguous market statutes with greater flexibility, allowing extraterritorial application of those that meet certain territorial effects or conduct requirements.<sup>40</sup>

### B. *The National Environmental Policy Act*

NEPA lacks the clear statement of congressional intention required to apply statutes outside the United States.<sup>41</sup> Moreover, NEPA's statutory language, legislative history, and administrative and executive interpretations are considered largely inconclusive on the issue of extraterritorial application.<sup>42</sup>

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38. See Turley, *supra* note 1, at 599-601 (arguing that market and non-market statutes receive disparate treatment from judiciary, encouraging extraterritorial application of former and discouraging that of latter).

39. See Turley, *supra* note 1, at 617-34 (citing *Benz v. Compania Naviera Hiclaso, S.A.*, 353 U.S. 138, 146 (1957) (limiting extraterritorial application of U.S. law pertaining to foreign vessels that dock in American ports); *Foley Bros. v. Filardo*, 336 U.S. 281, 286 (1949) (holding that extraterritorial application requires clear expression of congressional intent); *Boueslan v. Aramco*, 857 F.2d 1014, 1020-21 (1988) (rejecting extraterritorial application of laws forbidding racial discrimination), *aff'd on reh'g*, 892 F.2d 1271 (5th Cir. 1990); *Natural Resources Defense Council v. Nuclear Regulatory Comm'n*, 647 F.2d 1345, 1348-49 (D.C. Cir. 1981) (preventing extraterritorial application of Nuclear Non-Proliferation Act of 1978); *Cleary v. United States Lines*, 555 F. Supp. 1251, 1263 (D.N.J. 1983), *aff'd*, 728 F.2d 607 (3d Cir. 1984) (declining extraterritorial application of laws against age discrimination); *Air Line Dispatching Ass'n v. National Mediation Bd.*, 189 F.2d 685, 690-91 (D.C. Cir.) (stating that legislation is ordinarily to be given only domestic application), *cert. denied*, 342 U.S. 849 (1951)).

40. See, e.g., *United States v. Sisal Sales Corp.*, 274 U.S. 268, 276 (1927) (holding that conspiracies furthered by agreements within United States, but operating in foreign countries, are subject to U.S. laws); *United States v. Pacific & Arctic Ry. & Navigation Co.*, 228 U.S. 87, 106 (1913) (noting that strict territorial approach would leave many foreign corporations unregulated by either United States or foreign jurisdictions); *Bersch v. Diexel Firestone, Inc.*, 519 F.2d 974, 1000 (2d Cir.) (ruling that securities violations having direct and foreseeable effects on U.S. markets could be applied extraterritorially), *cert. denied*, 423 U.S. 1018 (1975); *Schoenbaum v. Firstbrook*, 405 F.2d 200, 206 (2d Cir.) (holding that securities violations could be found in extraterritorial sale of shares), *rev'd on other grounds*, 405 F.2d 215 (2d Cir. 1968) (*en banc*), *cert. denied*, 395 U.S. 906 (1969); *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 443 (2d Cir. 1945) (stating that extraterritorial application is permissible where defendants intend market effects); see also Turley, *supra* note 1, at 608-17 (discussing cases allowing extraterritorial application of market statutes).

41. Compare NEPA, 42 U.S.C. §§ 4321-4370(c) (1988 & Supp. V 1993) (overlooking statement of extraterritorial application of NEPA) with 33 U.S.C. § 1902(a)(1) (1988) (applying Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from Ships to U.S. ship "wherever located"). The latter provision evinced a clear congressional intent to apply the statute to U.S. ships beyond U.S. territory.

42. See, e.g., Turley, *supra* note 1, at 628-29 (noting that broad language of NEPA has not overcome presumption against extraterritoriality); George H. Keller, Note, *Greenpeace v. Stone: The Comprehensive Environmental Impact Statement and the Extraterritorial Reach of the NEPA*, 14 U. HAW. L. REV. 751, 768-71 (1992) (noting how vagueness of language, legislative history, and interpretive regulations of NEPA lead to difficulties in determining congressional intent

### 1. *Statutory language*

The broad and wide-reaching language of NEPA has led some to conclude that the text evinces a congressional intent to apply the statute beyond the territorial borders of the United States.<sup>43</sup> Others argue that the language merely sets forth boilerplate generalities.<sup>44</sup> The statute's sweeping stated purpose is "[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."<sup>45</sup>

Section 101 of NEPA is the congressional declaration of the national environmental policy.<sup>46</sup> In it, the 91st Congress, "recognizing the profound impact of man's activity on the interrelations of all components of the natural environment, . . . [and] the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man,"<sup>47</sup> declared it the Federal Government's policy "to use all practicable means and measures, . . . to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony."<sup>48</sup> The nonrestrictive language of NEPA suggests a global purpose.<sup>49</sup>

In the EIS provision,<sup>50</sup> section 102(2)(C), Congress called on "all agencies of the Federal Government"<sup>51</sup> to prepare an EIS for "major Federal actions significantly affecting the quality of the human environment."<sup>52</sup> There are several federal agencies whose activities

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regarding extraterritorial application); Comment, *NEPA's Role in Protecting the World Environment*, 131 U. PA. L. REV. 353, 360-64 (1982) (commenting on NEPA's inconclusive legislative history).

43. See David Young, *The Applications of Environmental Impact Statements to United States Participation in Multinational Development Projects*, 8 AM. U. J. INT'L L. & POL'Y 309, 316-17 (1992) (arguing that NEPA's language implies extraterritorial application).

44. See generally Comment, *The Scope of the National Environmental Policy Act: Should the 102(2)(C) Impact Statement Provision Be Applicable to a Federal Agency's Activities Having Environmental Consequences Within Another Sovereign's Jurisdiction?*, 5 SYRACUSE J. INT'L L. & COM. 317 (1978) (arguing that general language of NEPA cannot be interpreted to extend to extraterritorial application).

45. 42 U.S.C. § 4321 (1988).

46. *Id.* § 4331.

47. *Id.* § 4331(a).

48. *Id.*

49. See *supra* note 43.

50. 42 U.S.C. § 4332(2)(C).

51. *Id.* § 4332(2).

52. *Id.* § 4332(2)(C).

are largely international,<sup>53</sup> yet no language in the statute provides that the EIS requirement does not apply to the international activities of these agencies.<sup>54</sup> Section 102(2)(F) further requires all 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."<sup>55</sup>

## 2. *Legislative history*

Significant commentary on the nation's environmental policy began with a Joint House-Senate Colloquium to Discuss a National Policy for the Environment, the highlights of which were presented in the *Congressional White Paper on a National Policy for the Environment*.<sup>56</sup> The *White Paper* addressed international aspects of environmental management, and in particular recognized the pressing need to consider the environmental effects of foreign aid and development projects.<sup>57</sup> Included in the *White Paper* as a summary of the colloquium's sentiment was a quotation by Dr. Dillon Ripley: "[T]o speak about environmental quality without at least referring to the fact of the international components and consequences of even our activity as Americans . . . appears to me to be somewhat shortsighted."<sup>58</sup> The final section of the *White Paper* suggested language for a statement of policy outlining Congress' intent to consider the environment in a "worldwide context."<sup>59</sup> The *White Paper* further stressed that a national environmental policy should be based on its

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53. See Gary M. Ernsdorff, *The Agency for International Development and NEPA: A Duty Unfulfilled*, 67 WASH. L. REV. 133, 152 n.136 (1992) (listing federal agencies of international character, including Agency for International Development, Nuclear Regulatory Commission, Export-Import Bank, Central Intelligence Agency, Department of Agriculture, Department of Commerce, Department of Defense, Department of State, and Federal Highway Administration) (citing 124 CONG. REC. 11,803 (1978)).

54. See ENVIRONMENTAL LAW HANDBOOK, *supra* note 11, at 465-66 (asserting that nothing in NEPA's EIS requirement subjects agencies with international responsibilities to standards different from other agencies).

55. 42 U.S.C. § 4332(2)(F).

56. Senate Comm. on Interior and Insular Affairs and House Comm. on Science and Astronautics, 90th Cong., 2d Sess., *Congressional White Paper on a National Policy for the Environment* (July 17, 1968), reprinted in 115 CONG. REC. 29,078-82 (1969).

57. *Id.* at 29,079.

58. *Id.* at 29,080; see also Nicholas C. Yost, *NEPA: A System That Works—Everywhere*, 8 ENVTL. F. 28, 28 (1991) ("The wisdom of [NEPA's] proposition does not lose its force at the water's edge.").

59. 115 CONG. REC. at 29,081-82.



effect on global ecological relationships.<sup>60</sup>

Another helpful explanation of the substance of the Act, as agreed on by both Houses, can be found in the Conference Report on NEPA.<sup>61</sup> During Senate consideration of the report, Senator Jackson emphasized the vast importance of NEPA.<sup>62</sup> In his prefatory comments, Senator Jackson brought particular attention to an amendment he sponsored, section 102(2)(F).<sup>63</sup> The Section-by-Section Analysis of the report specifically addressed section 102(2)(F) and interpreted it as mandating international responsibility for federal agency actions, in light of the fact that their environmental impact frequently reaches beyond lines on a map.<sup>64</sup> The purpose of the section, according to Senator Jackson, is to authorize federal agencies to cooperate internationally in managing global environmental problems.<sup>65</sup>

Further clarification of NEPA's extraterritorial applicability came in 1970 from oversight hearings held on agency compliance with NEPA.<sup>66</sup> The State Department interpreted NEPA's EIS provision as limited to actions within the United States, and therefore not applicable to the State Department's foreign aid programs.<sup>67</sup> The congressional subcommittee firmly rejected this view and determined that the State Department's interpretation of NEPA was contrary to the language and intent of the statute: "Stated most charitably, the Committee disagrees with this 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."<sup>68</sup> The subcommittee concluded that section 102(2)(C) of NEPA requires an environmental assessment

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60. *Id.* at 29,082 ("[T]he global character of ecological relationships must be the guide for domestic activities. Ecological considerations should be infused into all international relations.").

61. H.R. REP. NO. 765, 91st Cong., 1st Sess. 7-12 (1969), *reprinted in* 1969 U.S.C.A.N. 2767.

62. S. REP. NO. 91-296, 91st Cong., 1st Sess. 21, *reprinted in* 115 CONG. REC. 40,416 (1969) (stating that NEPA "is the most important and far-reaching environmental-conservation measure ever acted upon by the Congress").

63. *Id.*

64. *Id.* at 40,420. Specifically, the Analysis stated: "In recognition of the fact that environmental problems are not confined by political boundaries, all agencies of the Federal Government which have international responsibilities are authorized and directed to lend support to appropriate international efforts to anticipate and prevent a decline in the quality of the worldwide environment." *Id.*

65. *Id.* at 40,417 ("We must seek solutions to environmental problems on an international level because they are international in origin and scope. The earth is a common resource, and cooperative effort will be necessary to protect it.").

66. HOUSE COMM. ON MERCHANT MARINE AND FISHERIES, ADMINISTRATION OF THE NATIONAL ENVIRONMENTAL POLICY ACT, H.R. REP. NO. 92-316, 92d Cong., 1st Sess. (1971).

67. *Id.* at 32.

68. *Id.* at 33.

of federal agencies' foreign projects.<sup>69</sup>

### 3. *Administrative interpretation*

The Council on Environmental Quality (CEQ) was created by Title II of the National Environmental Policy Act.<sup>70</sup> Until abolished in 1993,<sup>71</sup> the CEQ was responsible for overseeing the achievement of goals set forth in our national environmental policy, including gathering information and advising the President on environmental issues.<sup>72</sup> In 1976, in accordance with the CEQ's mandate to make policy recommendations,<sup>73</sup> the Chairman of the CEQ issued a memorandum on the extraterritorial application of NEPA's EIS provision.<sup>74</sup> The memorandum defines the "human environment" language of section 102(2)(C) to include not only the United States, but also other nations and territories.<sup>75</sup> The memorandum concludes with a clear mandate to apply NEPA's EIS requirement to all federal actions significantly affecting the environment anywhere on the globe.<sup>76</sup>

In 1977, President Carter issued Executive Order 11,991.<sup>77</sup> The Executive Order amended the responsibilities of the CEQ to include issuing regulations to federal agencies for implementing NEPA's procedural provisions.<sup>78</sup> Accordingly, the CEQ promulgated regulations to implement NEPA's EIS requirement.<sup>79</sup> The Executive Order also required all federal agencies to comply with the CEQ regula-

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69. *Id.*

70. 42 U.S.C. § 4344(3) (1988).

71. *See* 139 CONG. REC. H10,382 (daily ed. Nov. 20, 1993).

72. 42 U.S.C. § 4344. Section 204 of NEPA details the duties and functions of the CEQ.  
*Id.*

73. 42 U.S.C. § 4344(8).

74. Russel W. Peterson, Memorandum on Application of the EIS Requirement to Environmental Impacts Abroad of Major Federal Actions (Sept. 24, 1976), 42 Fed. Reg. 61,068, 61,068 (1977) [hereinafter CEQ Memorandum].

75. *Id.*

76. *Id.* at 61,069. The memorandum concludes:

In summary, the Council believes that the impact statement requirement in § 102(2)(C) of NEPA applies to all significant effects of proposed federal actions on the quality of the human environment—in the United States, in other countries, and in areas outside the jurisdiction of any country. Accordingly, agency officials responsible for analyzing the potential environmental effects of proposed actions should fully assess the potential impacts outside the United States, as well as those within it; if any of these potential impacts are likely to be significant, an impact statement should be prepared.

*Id.*

77. Exec. Order No. 11,991, 3 C.F.R. 123 (1978), *reprinted in* 42 U.S.C. § 4321 (1988) (amending Exec. Order No. 11,514).

78. *Id.* § 1.

79. Council on Environmental Quality, 40 C.F.R. § 1500.1(a) (1993).

tions.<sup>80</sup> In *Andrus v. Sierra Club*,<sup>81</sup> the Supreme Court affirmed the CEQ's authority to interpret NEPA and issue regulations on the implementation of NEPA's procedural provision by holding that the CEQ's interpretation of NEPA should be given substantial deference.<sup>82</sup> The Court characterized Executive Order 11,991 as a "detailed and comprehensive process, ordered by the President, of transforming advisory guidelines into mandatory regulations applicable to all federal agencies."<sup>83</sup>

#### 4. *Executive interpretation*

In reaction to the 1976 CEQ memorandum, some federal agencies objected on foreign policy grounds to applying NEPA's EIS requirements to their international activities.<sup>84</sup> Attempting to clarify NEPA's interpretation, President Carter issued Executive Order 12,114 in January of 1979.<sup>85</sup> The Order was intended to direct agency NEPA procedures with respect to the international environmental effects of major federal actions,<sup>86</sup> but has been largely ineffectual.<sup>87</sup>

Executive Order 12,114 was based on a compromise between the CEQ and federal agencies with international responsibilities,<sup>88</sup> and was intended to further environmental objectives consistent with the

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80. Exec. Order No. 11,991, *supra* note 77, at 124.

81. 442 U.S. 347 (1979). The plaintiffs involved in *Andrus* were three environmental organizations who alleged that proposed budget cuts for the National Wildlife Refuge System were major federal actions significantly affecting the quality of the human environment and, therefore, required preparation of an EIS. *Andrus v. Sierra Club*, 442 U.S. 347, 352-53 (1979). The issue in the case was whether NEPA requires federal agencies to prepare an EIS for appropriation requests. *Id.* at 348-49. The Court, relying on CEQ's interpretive regulations, 40 C.F.R. § 1506.8(a), held that NEPA does not require an EIS for an appropriation request, because it is neither a proposal for legislation nor a proposal for major federal action. *Id.* at 355, 361, 364-65.

82. *Id.* at 357-58.

83. *Id.* at 358.

84. ENVIRONMENTAL LAW HANDBOOK, *supra* note 11, at 466.

85. Exec. Order No. 12,114, 3 C.F.R. 356 (1980), *reprinted in* 42 U.S.C. § 4321 (1988).

86. *Id.* § 1. In pertinent part, § 1 reads:

[T]his Order furthers the purpose of the National Environmental Policy Act, . . . consistent with the foreign policy and national security policy of the United States, and represents the United States government's exclusive and complete determination of the procedural and other actions to be taken by Federal agencies . . . with respect to the environment outside the United States, its territories and possessions.

*Id.*

87. See Glenn Pincus, Comment, *The "NEPA-Abroad" Controversy: Unresolved by an Executive Order*, 30 BUFF. L. REV. 611, 658-62 (1981) (discussing Executive Order 12,114's numerous shortcomings); see also ENVIRONMENTAL LAW HANDBOOK, *supra* note 11, at 466-67 (explaining three reasons for minimal effects of Executive Order 12,114: "(1) excepted actions far outnumber the actions to which the order's prescriptions are applicable; (2) even those agency actions to which the order does apply are not judicially reviewable; and (3) the Reagan administration has demonstrated little interest in enforcing its provisions").

88. ENVIRONMENTAL LAW HANDBOOK, *supra* note 11, at 466.

foreign policy and national security policy of the United States.<sup>89</sup> The Order requires agencies to consider the environment outside the United States, but does so in a manner quite different from that set forth in NEPA.<sup>90</sup> While NEPA's section 102(2)(C) requires an EIS for every major federal action,<sup>91</sup> Executive Order 12,114 separates major federal actions into four categories<sup>92</sup> and details three types of documents.<sup>93</sup> The type of document prepared depends on the category of action being taken.<sup>94</sup>

Unfortunately, the Order is ineffective in several respects. First, it is riddled with specific exceptions,<sup>95</sup> as well as numerous opportuni-

89. Exec. Order No. 12,114, *supra* note 85, at 356.

90. *Compare* Exec. Order No. 12,114, *supra* note 85, § 2, at 356 with 42 U.S.C. § 4332(2)(c) (1988).

91. *See supra* note 9 (setting out EIS requirement).

92. Exec. Order No. 12,114, *supra* note 85, at 356. The four categories are:

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

(b) major Federal actions significantly affecting the environment of a foreign nation not participating with the United States and not otherwise involved in the action;

(c) major Federal actions significantly affecting the environment of a foreign nation which provide to that nation:

(1) a product, or physical project producing a principal product or an emission or effluent, which is prohibited or strictly regulated by Federal law in the United States because its toxic effects on the environment create a serious public health risk; or

(2) a physical project which in the United States is prohibited or strictly regulated by Federal law to protect the environment against radioactive substances.

(d) major Federal actions outside the United States, its territories and possessions which significantly affect natural or ecological resources of global importance designated for protection . . . .

*Id.*

93. Exec. Order No. 12,114, *supra* note 85, § 2-4(a), at 356. The three documents are:

(i) environmental impact statements (including generic, program and specific statements);

(ii) bilateral or multilateral environmental studies, relevant or related to the proposed action, by the United States and one or more foreign nations, or by an international body or organization in which the United States is a member or participant; or

(iii) concise reviews of the environmental issues involved, including environmental assessments, summary environmental analyses or other appropriate documents.

*Id.*

94. Exec. Order 12,114, *supra* note 85, § 2-4(b), at 356. Executive Order 12,114 requires the following documentation:

(i) for effects described in Section 2-3(a), an environmental impact statement described in Section 2-4(a)(i);

(ii) for effects described in Section 2-3(b), a document described in Section 2-4(a)(ii) or (iii), as determined by the agency;

(iii) for effects described in Section 2-3(c), a document described in Section 2-4(a)(ii) or (iii), as determined by the agency;

(iv) for effects described in Section 2-3(d), a document described in Section 2-4(a)(i), (ii) or (iii), as determined by the agency.

*Id.*

95. *See* Exec. Order 12,114, *supra* note 85, § 2-5(a), at 356 (listing numerous exempted actions). Executive Order 12,114 specifically exempts actions not having a significant environmental effect; actions taken by the President; actions involving the national security, an armed conflict, intelligence activities and arms transfers, export approvals, and certain actions

ties for discretionary exemptions<sup>96</sup> and modifications.<sup>97</sup> Second, enforcement capabilities are weak because the Order only sets internal agency procedures, and explicitly cannot be enforced through a private cause of action.<sup>98</sup> Third, the source of the Order's authority is questionable. Because the Order was issued based on authority independent of NEPA,<sup>99</sup> and was not meant to invalidate any existing regulations,<sup>100</sup> it actually did very little to clarify the scope of NEPA's extraterritorial application.<sup>101</sup>

### C. Case Law

To date, despite heavy litigation,<sup>102</sup> judicial interpretation of the EIS requirement has failed to clarify NEPA's extraterritorial reach.<sup>103</sup> No case has given a definitive holding on NEPA's general applicability outside of the United States. In circumstances where NEPA has been applied beyond U.S. borders, the unique facts of the case have dictated such a conclusion.<sup>104</sup> Several cases illustrate this point.

*Sierra Club v. Adams*<sup>105</sup> addressed NEPA's international application to the U.S. Department of Transportation's role in the construction

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relating to nuclear activities; votes and other participation in international organizations and conferences; and disaster and emergency relief action. *Id.*

96. See Exec. Order 12,114, *supra* note 85, § 2-5(c), at 356 (permitting agency exemptions under special circumstances for emergency situations and for sensitive foreign policy or national security circumstances).

97. See Exec. Order 12,114, *supra* note 85, § 2-5(b), at 356 (listing many discretionary changes to Order's mandated procedure).

98. Exec. Order 12,114, *supra* note 85, § 3-1, at 356.

99. Exec. Order 12,114, *supra* note 85, § 1, at 356.

100. Exec. Order 12,114, *supra* note 85, § 2-4(c), at 356.

101. See Pincus, *supra* note 87, at 661-62 (discussing Executive Order 12,114's failure to eliminate executive branch's multifarious stances on implementation of NEPA's procedural provisions and NEPA's foreign applicability).

102. See, e.g., *Wilderness Soc'y v. Morton*, 463 F.2d 1261 (D.C. Cir. 1972) (per curiam) (confronting questions of NEPA's extraterritorial application in regard to trans-Alaska pipeline and acknowledging that NEPA applies to federal activity in Trust Territory); *Environmental Defense Fund v. United States Agency for Int'l Development*, [1976] 6 *Envl. L. Rep.* (Envtl. L. Inst.) 20,121 (D.D.C. Dec. 5, 1975) (agreeing before trial, Agency for International Development acknowledged EIS should be performed for its international pest management program); *Sierra Club v. Atomic Energy Comm'n*, [1974] 4 *Envl. L. Rep.* (Envtl. L. Inst.) 20,685 (D.D.C. Aug. 3, 1974) (admitting, before trial, Atomic Energy Commission acknowledged that exporting nuclear plants and fuels requires NEPA EIS); *Saipan ex rel. Guerrero v. United States Dep't of Interior*, 356 F. Supp. 645 (D. Haw. 1973) (dismissing attempt to stop construction of hotel on public land in Saipan), *aff'd as 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) (considering NEPA's application to Pacific Island Territories), *cited in Keller*, *supra* note 42, at 774-77.

103. See Keller, *supra* note 42, at 774-80, 799 (concluding that cases give scant guidance and narrowly limited holdings).

104. See Groy & Wurtzler, *supra* note 1, at 9, 55 (noting limited scope of NEPA-abroad decisions).

105. 578 F.2d 389 (D.C. Cir. 1978).

of the Darien Gap portion of the Pan American Highway.<sup>106</sup> The plaintiffs sued the Department of Transportation and the Federal Highway Administration for their failure to comply with NEPA's EIS requirement.<sup>107</sup> The district court ordered the Government to file an adequate EIS.<sup>108</sup> In a subsequent proceeding, the plaintiffs challenged the adequacy of the final EIS.<sup>109</sup> The district court held that the EIS remained deficient in its treatment of three issues: (1) the transmission of foot and mouth disease, (2) the impact on native Cuna and Choco Indians in the area, and (3) the discussion of alternative routes for the highway.<sup>110</sup>

On appeal, the circuit court reversed the district court's holding, and found the final EIS to be adequate in the three areas of concern.<sup>111</sup> The court's analysis focused on the project's ramifications within the United States.<sup>112</sup> First, the court discussed foot and mouth disease only in the context of its possible spread into the United States.<sup>113</sup> Second, the court determined that the Government's final EIS included a "reasonable discussion" of the alternatives to the highway, which was all that was necessary.<sup>114</sup> Third, the court also found the discussion of the project's impact on the native population to be adequate.<sup>115</sup> While admitting that the project would disrupt the native population, the court determined that NEPA's requirements were met, so long as the agency was presented with and considered the issue.<sup>116</sup>

The court took supplemental briefs on the issue of NEPA's applicability to construction in Panama,<sup>117</sup> but directly addressed the issue only in a footnote.<sup>118</sup> While conceding NEPA's applicability to the project, the Government suggested that NEPA might not apply to effects of strictly local concern.<sup>119</sup> The Sierra Club, in contrast, argued that NEPA applied to the project wherever the effects

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106. *Sierra Club v. Adams*, 578 F.2d 389, 390 (D.C. Cir. 1978). The Pan American Highway is a road system connecting the Western Hemisphere from Alaska to Chile. *Id.* The last section to be completed was the Darien Gap Highway, connecting Panama and Columbia. *Id.*

107. *Sierra Club v. Coleman*, 405 F. Supp. 53, 54 (D.D.C. 1975).

108. *Id.* at 56-57.

109. *Sierra Club v. Coleman*, 421 F. Supp. 63, 65 (D.D.C. 1976).

110. *Id.* at 65-67.

111. *Adams*, 578 F.2d at 393-96.

112. *Id.*

113. *Id.* at 394-95.

114. *Id.* at 395-96.

115. *Id.* at 396.

116. *Id.*

117. *Id.*

118. *Id.* at 391-92 n.14.

119. *Id.*

occurred.<sup>120</sup> The court failed to resolve the issue. Instead, it assumed, without deciding, that NEPA applied to the construction project in Panama.<sup>121</sup>

In *National Organization for the Reform of Marijuana Laws (NORML) v. United States Department of State*,<sup>122</sup> a federal district court considered whether an EIS was required for U.S. participation in a herbicide spraying program in Mexico.<sup>123</sup> The case involved U.S. assistance to a Mexican narcotics eradication program involving spraying chemicals on marijuana and poppy fields in Mexico.<sup>124</sup> The Government agreed to prepare an EIS on the effects of the spraying program in the United States, but was willing to prepare only an "environmental analysis" of the program's effects in Mexico.<sup>125</sup> NORML, however, sought a positive judicial ruling that NEPA applied to the entire program.<sup>126</sup>

The court held that U.S. participation in the program constituted a major federal action significantly affecting the quality of the human environment, and was subject to NEPA's section 102(2)(C) requirements.<sup>127</sup> As was true in *Sierra Club v. Adams*,<sup>128</sup> the court in *NORML* assumed, without deciding, NEPA's applicability,<sup>129</sup> based on the effects of the program within the United States.<sup>130</sup> The court left open the question of NEPA's applicability to all aspects of the spraying program, being satisfied with the Government's plan to prepare an EIS for the U.S. effects and an "environmental analysis" for the Mexican effects.<sup>131</sup>

A more definitive holding came in *Natural Resources Defense Council v. Nuclear Regulatory Commission (NRDC v. NRC)*,<sup>132</sup> where the court addressed the extent to which NEPA requires consideration of the

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120. *Id.*

121. *Id.* Although the court left the issue unresolved, it did direct attention to several sources for further guidance: 42 U.S.C. §§ 4321, 4331(a), 4331(b)(1)-(2), 4331(c), 4332(2)(A), 4332(2)(C), 4332(2)(F); 40 C.F.R. § 1500.8(a)(3)(i); CEQ Memorandum, *supra* note 74; Note, *The Extraterritorial Scope of NEPA's Environmental Impact Statement Requirement*, 74 MICH. L. REV. 349, 365-71 (1975) [hereinafter *Extraterritorial Scope of NEPA*] (discussing NEPA's legislative history); *Other Countries' Environments*, WASH. POST, Jan. 30, 1978, at A22 (addressing Carter Administration's handling of environmental regulation of U.S. exports).

122. 452 F. Supp. 1226 (D.D.C. 1978).

123. *National Org. for the Reform of Marijuana Laws (NORML) v. United States Dep't of State*, 452 F. Supp. 1226, 1228 (D.D.C. 1978).

124. *Id.* at 1231.

125. *Id.* at 1232.

126. *Id.*

127. *Id.*

128. *Sierra Club v. Adams*, 578 F.2d 389, 391-92 n.14 (D.C. Cir. 1978).

129. *NORML*, 452 F. Supp. at 1232-33.

130. *Id.*

131. *Id.*

132. 647 F.2d 1345 (D.C. Cir. 1981).

effects within the recipient foreign country of NRC's nuclear reactor export licensing.<sup>133</sup> That case involved the government of the Philippines' efforts to acquire its first nuclear generator.<sup>134</sup> Westinghouse, which had entered into an arrangement to sell generator components to the Phillipine's National Power Corporation,<sup>135</sup> filed an export licensing application<sup>136</sup> and, despite concerns regarding the suitability of the site,<sup>137</sup> NRC issued the license.<sup>138</sup> In its licensing decision, the NRC interpreted NEPA to require consideration of environmental effects only in the United States and the global commons, not in the Philippines.<sup>139</sup> The court in *NRDC v. NRC* reviewed NRC's export license approval, issued without consideration of environmental impacts on the recipient country.<sup>140</sup> The court acknowledged that many courts have faced the NEPA-abroad question, yet none have completely settled it.<sup>141</sup>

In a narrow holding, the court refused to impose NEPA's EIS requirements on nuclear export decisions when the impact occurs solely within a foreign country.<sup>142</sup> This decision was based on two factors that distinguished the case from prior decisions involving NEPA's extraterritorial application.<sup>143</sup> First, the court relied on the presumption against extraterritoriality, such that, lacking an express congressional mandate, NEPA does not apply extraterritorially.<sup>144</sup> Second, the court emphasized the particularly sensitive relationship that nuclear exports bear to foreign relations.<sup>145</sup> Restricting its decision to the unique facts of the case, the court specifically left open the question of NEPA's applicability "to some other kind of major federal action abroad."<sup>146</sup>

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133. *Natural Resources Defense Council v. Nuclear Regulatory Comm'n*, 647 F.2d 1345, 1366 (D.C. Cir. 1981).

134. *Id.* at 1351.

135. *Id.*

136. *Id.*

137. *Id.* The construction site was in a seismically active area, close to two U.S. military bases. *Id.*

138. *Id.* at 1352.

139. *Id.* at 1353.

140. *Id.* at 1346.

141. *Id.* at 1355.

142. *Id.* at 1366.

143. *Id.* at 1367-68. The court noted that the courts in both *NORML* and *Sierra Club v. Adams* assumed, without specifically deciding, that NEPA applied because of effects within the United States. *Id.* The two factors that differentiate *NRDC v. NRC* from those cases are the sensitive foreign policy element and the fact that the only environmental considerations at issue were within a foreign country. *Id.*

144. *Id.* at 1364, 1366-67.

145. *Id.* at 1358.

146. *Id.* at 1366.



*Greenpeace USA v. Stone*<sup>147</sup> was a similarly fact-specific decision. Pursuant to an agreement between President Reagan and West German Chancellor Kohl, the U.S. Army was to ship chemical weapons from West Germany to Johnston Atoll, a U.S. territory in the Pacific.<sup>148</sup> Although environmental impact statements were prepared for separate legs of the shipment, Greenpeace challenged the lack of a comprehensive EIS and requested that the shipment be enjoined.<sup>149</sup>

Regarding NEPA's applicability to the movement of weapons within Germany, the court held that NEPA did not apply,<sup>150</sup> relying on the same two factors used in *NRDC v. NRC*.<sup>151</sup> First, absent an express congressional mandate, NEPA does not apply within a foreign country.<sup>152</sup> Second, the court emphasized the sensitive foreign policy implications involved in interfering with an agreement between the leaders of two nations.<sup>153</sup> The court emphasized that its holding was limited to the unique factual scenario.<sup>154</sup> Further, the court suggested that:

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.<sup>155</sup>

The preceding line of cases reveals two arms of judicial precedent on the issue of NEPA's extraterritorial application. First, *Sierra Club v. Adams* and *NORML* had in common that the effects of the challenged projects were not exclusively outside the United States.<sup>156</sup> Neither court resolved the issue of NEPA's applicability to projects with strictly international environmental effects.<sup>157</sup> Both courts

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147. 748 F. Supp. 749 (D. Haw. 1990).

148. *Greenpeace USA v. Stone*, 748 F. Supp. 749, 752 (D. Haw. 1990).

149. *Id.* at 753-54.

150. *Id.* at 761.

151. *Id.* at 760 (citing *Natural Resources Defense Council v. Nuclear Regulatory Comm'n*, 647 F.2d 1345 (D.C. Cir. 1981)).

152. *Id.* at 761.

153. *Id.*

154. *Id.*

155. *Id.*

156. See *Sierra Club v. Adams*, 578 F.2d 389, 394 (D.C. Cir. 1978) (focusing discussion of construction project's effects on potential spread of disease into United States); *National Org. for The Reform of Marijuana Laws (NORML) v. United States Dep't of State*, 452 F. Supp. 1226, 1232 (D.D.C. 1978) (discussing spraying project's health consequences in United States of contaminated marijuana).

157. See *supra* notes 119, 131 and accompanying text (acknowledging that NEPA may not apply to effects that are completely outside United States).

instead assumed, without deciding, that NEPA applied to the projects.<sup>158</sup> This assumption indicates that NEPA applies extraterritorially only where an action abroad has an environmental effect within the United States.<sup>159</sup> This "effects" approach has previously been reserved for deciding whether ambiguous market statutes apply extraterritorially.<sup>160</sup> *Sierra Club v. Adams* and *NORML* indicate an expansion of the effects test approach to non-market statutes as well. Alternatively, *NRDC v. NRC* and *Greenpeace USA v. Stone* are cases in which exclusively foreign effects precluded NEPA's extraterritorial application, based on the presumption against extraterritoriality and overriding foreign policy considerations.<sup>161</sup>

## II. THE CASE: *ENVIRONMENTAL DEFENSE FUND V. MASSEY*

### A. *The Facts*

The dispute in *Environmental Defense Fund v. Massey* arose out of the National Science Foundation's (NSF) plan to operate a permanent waste incinerator at its McMurdo Station in Antarctica.<sup>162</sup> The litigation began in June 1991, when the Environmental Defense Fund (EDF) sought a preliminary injunction to prevent NSF from proceeding with the plan.<sup>163</sup> EDF sought to stop the use of an interim incinerator and to prevent the use of a permanent incinerator at McMurdo Station because of expected toxic pollution.<sup>164</sup> NSF had prepared an environmental assessment, but EDF challenged the incineration plan based on NSF's failure to comply with the EIS requirements of NEPA.<sup>165</sup> NSF moved to dismiss the case for lack of subject matter jurisdiction, asserting that NEPA does not apply to federal actions abroad.<sup>166</sup>

In its decision, the district court addressed the issue in less than a page of reasoning, concluding that NEPA does not apply

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158. See *supra* notes 121, 129 and accompanying text (emphasizing that neither court determined whether NEPA applies to effects entirely outside United States).

159. See *supra* notes 112-13, 129-30, 156 and accompanying text (discussing NEPA's application where significant effects of agency action occur within United States).

160. See Turley, *supra* note 1, at 611 (stating that courts have used far-reaching "intended effects" test where defendant intended market effects).

161. See *supra* notes 144-45, 151-54 and accompanying text (raising reasons why NEPA may not apply extraterritorially).

162. *Environmental Defense Fund v. Massey*, 772 F. Supp. 1296, 1296-97 (D.D.C. 1991), *rev'd*, 986 F.2d 528 (D.C. Cir. 1993).

163. *Id.*

164. *Id.* at 1297.

165. *Id.*

166. *Id.*

extraterritorially.<sup>167</sup> In so holding, the district court blindly adhered to the Supreme Court's recent decision in *Aramco* that U.S. legislation is territorially confined, absent a showing that Congress clearly expressed an intention that the challenged measure apply extraterritorially.<sup>168</sup>

In its attempt to determine Congress' intent, the district court in *Massey* refused to examine NEPA's legislative history.<sup>169</sup> The court acknowledged the broad language of the statute, yet resisted finding that Congress' deliberate choice of broad language indicated an extraterritorial intent.<sup>170</sup> Basing its decision on *Aramco*, the district court held that NEPA does not apply to a federal agency's decision to construct and operate garbage incinerators in Antarctica.<sup>171</sup> Consequently, the district court dismissed the action for lack of subject matter jurisdiction.<sup>172</sup>

Apparently troubled by its own decision, the district court commented in a footnote that many of the problems presented by the case could have been avoided if NSF had complied with NEPA.<sup>173</sup> In the final section of the opinion, the district court also expressed its "concern[] with the manner in which NSF undertook the Environmental Impact Assessment," stating that, if the Court did assert subject matter jurisdiction, a different outcome might follow.<sup>174</sup> Indeed, the outcome ultimately was different, as the district court's holding was reversed on appeal.<sup>175</sup>

### B. *The Decision on Appeal*

In January 1993, the U.S. Court of Appeals for the District of Columbia Circuit reversed the district court and held that NEPA's EIS provision applied to NSF's decision to build waste incinerators at McMurdo Station.<sup>176</sup> The court held that "the presumption against extraterritoriality does not apply to this case."<sup>177</sup>

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167. *Id.*

168. Equal Employment Opportunity Comm'n v. Arabian Am. Oil Co. (*Aramco*), 499 U.S. 244, 248 (1991); *see supra* notes 29-40 and accompanying text (explaining *Aramco's* interpretation of *Foley* as irrebuttable presumption against extraterritoriality).

169. *Massey*, 772 F. Supp. at 1297 (maintaining that, because Congress failed to explicitly apply NEPA extraterritorially, court did not need to examine legislative record for congressional intent).

170. *Id.*

171. *Id.* at 1298.

172. *Id.*

173. *Id.* at 1298 n.1.

174. *Id.* at 1298.

175. *See Environmental Defense Fund v. Massey*, 986 F.2d 528 (D.C. Cir. 1993) (holding that presumption against extraterritorial application of NEPA does not apply).

176. *Id.*

177. *Id.* at 533.

1. *The presumption against extraterritoriality is not applicable*

The circuit court provided two rationales for its conclusion that the application of NEPA to NSF's Antarctica waste incineration plans is not covered by the presumption against extraterritoriality.<sup>178</sup> First, NEPA regulates the procedure of federal agency decision-making, a predominately domestic activity.<sup>179</sup> Second, the effects of the regulated conduct are felt in Antarctica, a continent considered a "global common" with unique characteristics.<sup>180</sup>

The circuit court began its analysis with a discussion of the presumption against extraterritorial application.<sup>181</sup> The court delineated three definite exceptions to the presumption: (1) where Congress clearly expressed its intention to apply the statute beyond the United States borders, (2) where neglecting to apply the statute extraterritorially would have harmful effects inside the United States, and (3) where the statute regulates conduct that occurs within the United States.<sup>182</sup> The circuit court in *Massey* criticized the district court for not conducting a closer examination of the extraterritoriality issue.<sup>183</sup>

Pursuant to its critical analysis of the district court's decision, the circuit court examined the conduct regulated by NEPA, the unique status of Antarctica, the foreign policy considerations under NEPA, and finally, NEPA's statutory language and subsequent interpretation.<sup>184</sup> According to the circuit court, Congress had the authority to enact NEPA because the provisions regulate domestic decision-making processes.<sup>185</sup> In deciding that NEPA does not present a question of extraterritoriality, the circuit court focused on the domestic<sup>186</sup> and procedural<sup>187</sup> nature of the statute.<sup>188</sup> The

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178. *Id.* at 532.

179. *Id.* at 529.

180. *Id.*

181. *Id.* at 530-32.

182. *Id.* at 531-32.

183. *See id.* at 532 (noting particularly that district court failed to characterize location of conduct regulated by NEPA and assess potential for conflict of laws problem).

184. *Id.* at 529-37.

185. *See id.* at 532 ("By enacting NEPA, Congress exercised its statutory authority to determine the factors an agency must consider when exercising its discretion, and created a process whereby American officials, while acting within the United States, can reach enlightened policy decisions by taking into account environmental effects.").

186. *Id.*; *see also* Mary A. McDougall, Comment, *Extraterritoriality and the Endangered Species Act of 1973*, 80 GEO. L.J. 435, 445 (1991) (reasoning that because agency decision-making occurs within United States, it is domestic activity), *cited in Massey*, 986 F.2d at 532.

187. *See Massey*, 986 F.2d at 532. The court explained: "NEPA, unlike many environmental statutes, does not dictate agency policy or determine the fate of contemplated action. . . . NEPA simply mandates a particular process that must be followed by a federal agency before taking

court cited cases interpreting NEPA as a procedural statute.<sup>189</sup>

The circuit court analogized NEPA to other statutes that focus on federal decision-making and do not command specific results outside the United States,<sup>190</sup> such as the Foreign Assistance Act of 1961<sup>191</sup> and the Nuclear Nonproliferation Act.<sup>192</sup> Both statutes require the Government to consider the degree to which other countries cooperate with U.S. policy goals,<sup>193</sup> namely the integration of women into the economy<sup>194</sup> and the nonproliferation of nuclear weapons.<sup>195</sup>

Focusing on NEPA's domestic character, the court rejected the contention that NEPA would present a choice of law problem or a conflict with another sovereign's laws.<sup>196</sup> Summarizing its holding, the circuit court stated that because "NEPA is designed to regulate conduct occurring within the territory of the United States, and imposes no substantive requirements which could be interpreted to govern conduct abroad, the presumption against extraterritoriality does not apply to this case."<sup>197</sup> The case was thus distinct from

action significantly affecting the human environment." *Id.*; see also *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350-51 (1989) ("Although these procedures are almost certain to affect the agency's substantive decision, it is now well settled that NEPA itself does not mandate particular results, but simply prescribes the necessary process. . . . NEPA merely prohibits uninformed—rather than unwise—agency action."); *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 371 (1989) ("NEPA does not work by mandating that agencies achieve particular substantive environmental results."); *Strycker's Bay Neighborhood Council v. Karlen, Inc.*, 444 U.S. 223, 227-28 (1980) (holding that NEPA requires no more than consideration of environmental consequences of federal agency decisions); *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519, 558 (1978) ("NEPA does set forth significant substantive goals for the Nation, but its mandate to the agencies is essentially procedural . . . to insure a fully informed and well-considered decision. . . ."); *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21 (1976) (indicating that court's role in evaluating NEPA compliance is not to judge substance of agency's decisions, but to confirm agency has taken "hard look" at environmental effects); *Yost*, *supra* note 58, at 29 ("NEPA is not a law that says 'no.' It is not a command-and-control statute of the sort that might properly be said to infringe on other nations' sovereignty by telling them what to do.").

188. *Massey*, 986 F.2d at 532.

189. *Id.* at 530-32 (citing *Robertson*, 490 U.S. 332; *Strycker's Bay*, 444 U.S. 223).

190. *Id.* at 533. According to the court: "Just as these statutes fall short of prescribing action in foreign jurisdictions, and are instead directed at the regulation of agency decision-making, NEPA also creates no substantive environmental standards and simply prescribes by statute the factors an agency must consider when exercising its discretionary authority." *Id.*

191. 22 U.S.C. §§ 2151(k), 2218(c) (1988).

192. *Id.* §§ 3201-82; 42 U.S.C. §§ 2156, 2157 (1988).

193. 22 U.S.C. §§ 2151(k), 2218(c) (requiring Agency for International Development to factor into development assistance decisions extent to which women are integrated into economy and possibility of assistance supporting democracy); *id.* §§ 3201-82; 42 U.S.C. §§ 2156, 2157 (requiring Nuclear Regulatory Commission to factor into nuclear export licensing decisions extent of cooperation with U.S. nonproliferation goals).

194. 22 U.S.C. §§ 2151(k), 2218(c).

195. *Id.* §§ 3201-82; 42 U.S.C. §§ 2156, 2157.

196. *Massey*, 986 F.2d at 533.

197. *Id.*

those involving Title VII of the Civil Rights Act<sup>198</sup> and the Federal Tort Claims Act (FTCA),<sup>199</sup> which have been held to apply only within the United States based on the presumption against extraterritoriality.<sup>200</sup>

## 2. *The unique status of Antarctica*

The circuit court next supported its decision that the presumption against extraterritoriality did not apply by addressing Antarctica's unique legal status.<sup>201</sup> Citing *Aramco*, the circuit court in *Massey* emphasized the importance of determining whether Congress intended to apply the statute to regions over which the United States exercises some financial or legislative control.<sup>202</sup> The court also cited two cases, *Sierra Club v. Adams* and *Enewetak v. Laird*,<sup>203</sup> in which courts relied on such a showing to hold that the presumption against extraterritoriality was overcome and NEPA did in fact apply.<sup>204</sup>

Antarctica is unique because it is the only sovereignless continent.<sup>205</sup> Members of the international community have agreed not to assert claim to the territory.<sup>206</sup> Concerning Antarctica's legal status, the question arises whether Antarctica is a foreign country or part of the global commons.<sup>207</sup> This determination has yet to be settled by the courts.<sup>208</sup> The legal status of Antarctica is often

198. 42 U.S.C. §§ 2000e to 2000e-17 (1988) (prohibiting discriminatory employment practices based on race, color, religion, sex, or national origin).

199. 28 U.S.C. § 1346(b) (1988) (waiving sovereign immunity and allowing United States to be sued for tort claims).

200. See *Equal Employment Opportunity Comm'n v. Arabian Am. Oil Co. (Aramco)*, 499 U.S. 244, 252 (1991) (holding that if Congress intended Title VII to apply extraterritorially, it would have addressed subject of foreign law and procedure conflicts); *Smith v. United States*, 932 F.2d 791, 793 (9th Cir. 1991) (holding that FTCA was not intended to apply extraterritorially).

201. *Massey*, 986 F.2d at 533.

202. See *id.* ("Thus, where the U.S. has some real measure of legislative control over the region at issue, the presumption against extraterritoriality is much weaker." (citing *Aramco*, 499 U.S. at 248)).

203. 353 F. Supp. 811, 819 (D. Haw. 1973) (upholding NEPA's application to trust territory of Pacific islands where Government planned to conduct simulated nuclear testing).

204. *Massey*, 986 F.2d at 533; see also *Natural Resources Defense Council v. Nuclear Regulatory Comm'n*, 647 F.2d 1345, 1367 (D.C. Cir. 1981) (distinguishing case from *Wilderness Society v. Morton*, 463 F.2d 1261 (D.C. Cir. 1972): "A significant substantive difference between our case and *Wilderness Society* was the ongoing control exercised by the United States with respect to the [trans-Alaskan] pipeline.").

205. *Massey*, 986 F.2d at 529.

206. *Id.*; see *Antarctica Treaty*, 12 U.S.T. 794 (Dec. 1, 1959).

207. See generally Colin Deihl, *Antarctica: An International Laboratory*, 18 B.C. ENVTL. AFF. L. REV. 423, 430-32, 433-37 (1991) (discussing Antarctica's scientific and global significance and its legal regime).

208. Compare *Smith v. United States*, 932 F.2d 791 (9th Cir. 1991) (holding FTCA does not apply to claims occurring in Antarctica, as Antarctica is foreign country within meaning of FTCA) with *Beattie v. United States*, 756 F.2d 91, 91 (D.C. Cir. 1984) (holding FTCA does apply to claims arising in Antarctica, as Antarctica is not foreign country within meaning of FTCA).

analogized to outer space.<sup>209</sup> The court in *Massey* concluded that Antarctica is part of the “global commons” and is not a foreign country.<sup>210</sup> The court asserted that the United States exercises significant legislative control over Antarctica, including control of all air transportation to Antarctica, all search and rescue operations there, and the presence of McMurdo Station and other American research installations established under United States Antarctica Program.<sup>211</sup> Thus, the court reasoned that “[t]his legislative control, taken together with the status of Antarctica as a sovereignless continent, compels the conclusion that the presumption against extraterritoriality is particularly inappropriate under the circumstances presented in this case.”<sup>212</sup> The circuit court found that this conclusion circumvented the problem created when U.S. laws conflict with laws of another sovereign nation because Antarctica is not subject to the sovereign rule of any other nation.<sup>213</sup>

### 3. *Foreign policy considerations*

The circuit court then reviewed the foreign policy ramifications of NEPA’s extraterritorial application. The NSF acknowledged that policies regarding Antarctica did not present a conflict of laws between the United States and a foreign sovereign.<sup>214</sup> The NSF did assert, however, that compliance with NEPA would hinder cooperation with other nations concerning Antarctica and that, therefore, the presumption against extraterritoriality remained an appropriate restraint on NEPA’s application in Antarctica.<sup>215</sup> NSF objected to being subjected to NEPA’s EIS requirements on two grounds.<sup>216</sup> First, preparation of an EIS and the risk of a NEPA injunction would hamper the ability of the United States to work in conjunction with

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209. *Beattie*, 756 F.2d at 93-94, 98-99 (discussing nature of Antarctica and analogizing it to outer space).

210. *Massey*, 986 F.2d at 529; see also *id.* at 533-34 (reiterating Antarctica’s status as country not foreign to United States).

211. *Id.* at 534; see also *Beattie*, 756 F.2d at 93, in which the court noted:

The United States currently operates four active year-round stations, several summer camps, and numerous temporary tent cities in Antarctica. McMurdo Base is America’s largest station, with a summer population in excess of 850 persons and a winter population of about 92. It consists of approximately 130 buildings. McMurdo Station has been assigned a zip code by the United States Postal Service.

*Id.* (footnotes omitted).

212. *Massey*, 986 F.2d at 534.

213. *Id.* (asserting that exercise of jurisdiction in global commons, of which Antarctica is part, does not conflict with any other nation’s sovereignty).

214. *Id.*

215. *Id.*

216. *Id.*

other countries in Antarctica.<sup>217</sup> Second, NEPA requirements would be incompatible with requirements under the Protocol on Environmental Protection to the Antarctic Treaty.<sup>218</sup> The court rejected the NSF's foreign policy arguments,<sup>219</sup> citing other decisions involving nuclear exports and national security to illustrate that when U.S. foreign policy interests outweigh the benefits obtained from preparation of an EIS, the EIS requirement may be avoided.<sup>220</sup> The court concluded, however, that forcing NSF to comply with NEPA in Antarctica would not threaten U.S. foreign policy, unless a "unique and delicate" foreign policy interest is involved.<sup>221</sup>

#### 4. *Statutory interpretation*

Finally, the court in *Massey* examined the plain language of NEPA and its subsequent interpretation.<sup>222</sup> The court read the text of section 102(2)(C), the EIS provision, as applicable to NSF's plan of action in Antarctica.<sup>223</sup> Attacking NSF's limited view of the EIS requirement, the court insisted that section 102(2)(C) clearly extends beyond U.S. borders.<sup>224</sup>

The court also took issue with NSF's argument that section 102(2)(F)<sup>225</sup> is NEPA's sole command for agencies engaging in

217. *Id.*

218. *Id.* (arguing that, if adopted, Antarctic Treaty would conflict with agency decision-making under NEPA) (citing Protocol on Environmental Protection to the Antarctic Treaty, 30 I.L.M. 1461 (1991)).

219. *Id.* at 534-35. The court was unpersuaded by both of NSF's arguments. First, the Protocol has not been ratified by the United States, so concern over potential conflict with congressional procedural requirements is unnecessary. *Id.* Additionally, the requirements of the two regulatory schemes are similar and are easily complied with simultaneously making the argument that their incompatibility would result in international discord moot. *Id.* at 535. Second, and "[m]ore importantly, [the court is] not convinced that NSF's ability to cooperate with other nations in Antarctica in accordance with U.S. foreign policy will be hampered by NEPA injunctions." *Id.*

220. *Id.* at 535 (citing Natural Resources Defense Council v. Nuclear Regulatory Comm'n, 647 F.2d 1345, 1348 (D.C. Cir. 1981) (interpreting NEPA to exclude cases of nuclear exports); Committee for Nuclear Responsibility v. Seaborg, 463 F.2d 796, 798 (D.C. Cir. 1972) (refusing to enjoin underground nuclear testing due to possible adverse effects on national security and foreign policy)).

221. *Id.*

222. *See id.* at 536 (citing City of Los Angeles v. National Highway Traffic Safety Admin., 912 F.2d 478, 491 (D.C. Cir. 1990) (noting that explicit purpose of NEPA is to take account of crises that are present and pending not only in this country but in whole world); *Enewetak v. Laird*, 353 F. Supp. 811, 816 (D. Haw. 1973) (noting that broad language of statute is clear indication of conscious effort not to restrict NEPA's applicability)); *id.* ("[T]he sweep of NEPA is extraordinarily broad, compelling consideration of any and all types of environmental impact of federal action." (quoting Calvert Cliffs' Coordinating Comm. v. United States Atomic Energy Comm'n, 449 F.2d 1109, 1122 (D.C. Cir. 1971))).

223. *Id.* at 535-36.

224. *Id.* at 536 ("Clearly, Congress painted with a far greater brush than NSF is willing to apply.").

225. 42 U.S.C. § 4332(2)(F) (1988).



international activities.<sup>226</sup> Rather, all federal agencies must comply with section 102<sup>227</sup> and all its subsections.<sup>228</sup> Federal agencies accordingly have a duty to prepare an EIS on major activities and to consider the environmental impacts in a global sense.<sup>229</sup>

Unfortunately, the court in *Massey* concluded its decision with a limiting statement:

We find it important to note, however, that we 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.<sup>230</sup>

### III. ANALYSIS

#### A. *Clear Holding, Unclear Reasoning May Limit Precedential Weight*

The court in *Environmental Defense Fund v. Massey* clearly held that the presumption against extraterritoriality does not apply to NSF's efforts to avoid preparing an EIS in Antarctica.<sup>231</sup> The particular rationale by which the court arrived at its conclusion, however, is unclear.<sup>232</sup> Is it NEPA's essentially procedural and domestic nature, or Antarctica's status as an "international anomaly," which warrants dispensing with the presumption against extraterritoriality?

When faced with the NEPA-abroad question in future cases, courts will be able to cite *Massey* to support two different propositions. Relying on the court's determination that NEPA only guides the domestic decision-making process of federal agencies,<sup>233</sup> courts may hold that NEPA applies to all federal agency decisions, regardless of the presumption against extraterritoriality and the location of the

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226. See *Massey*, 986 F.2d at 536 (concluding that NSF's reading ignores interrelationship between statute's sections and subsections).

227. 42 U.S.C. § 4332(2) (detailing nine subsections applicable to federal agencies).

228. *Massey*, 986 F.2d at 536 (stating that compliance with § 102(2)(F) does not substitute for compliance with § 102(2)(C)).

229. See *id.* (recognizing that compliance with § 102(2)(C), which requires an EIS, does not relieve agencies of their global duties); see also *Extraterritorial Scope of NEPA*, *supra* note 121, at 361-62 (arguing that §§ 102(2)(C) and 102(2)(F) should be read together). But see *Kass & Gerard*, *supra* note 2, at 29 (noting debate surrounding reading of two sections).

230. *Massey*, 986 F.2d at 537.

231. See *id.* at 533 (holding NEPA's applicability to apply exclusively to conduct occurring within United States); see also *supra* notes 178-230 and accompanying text (discussing reasons court in *Massey* did not apply presumption against extraterritoriality).

232. See *Wirth*, *supra* note 11, at 633-35 (discussing various potential interpretations of *Massey*).

233. See *supra* notes 183-96 and accompanying text (characterizing NEPA as domestic, procedural statute).

activity's effects. This interpretation focuses on the conduct to be regulated and the environmentally conscious decisions of the agencies, rather than the extraterritoriality of the projects. Traditionally, such conduct tests have been reserved for market cases.<sup>234</sup> Liberalization of the strict presumption against an extraterritoriality would be a significant step towards recognizing the transnational character of environmental problems.<sup>235</sup> On the other hand, courts may conclude that *Massey's* international application of NEPA is restricted solely to Antarctica,<sup>236</sup> and that *Massey* carries no weight anywhere else in the world.<sup>237</sup> In either case, *Massey* decided NEPA must yield when outweighed by foreign policy considerations.<sup>238</sup>

*NEPA Coalition of Japan v. Aspin*,<sup>239</sup> which was decided after *Massey*, sheds light on how *Massey* may be interpreted. The case involved preparation of an EIS for U.S. military installations in Japan.<sup>240</sup> The plaintiffs contended that *Massey* dictated that NEPA applied overseas.<sup>241</sup> The court, however, rejected that argument and espoused the presumption against extraterritoriality, concluding that NEPA did not apply.<sup>242</sup> The court distinguished the facts of *Massey*, pointing out that the court in *Massey* viewed Antarctica as analogous to outer space, not a foreign sovereign country.<sup>243</sup> The court found that a military base in Japan warrants a different analysis from a research facility in Antarctica,<sup>244</sup> especially given the sensitive treaty and foreign policy considerations involved.<sup>245</sup> The court determined that preparation of an EIS would potentially upset the existing treaty relationship.<sup>246</sup>

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234. See Turley, *supra* note 1, at 614-17 (describing conduct test for extraterritoriality in securities regulation cases).

235. See Turley, *supra* note 1, at 656-67 (tracing transnational expansion of judicial and legislative perspective in antitrust, securities, and employment cases).

236. See *Massey*, 986 F.2d at 537 (limiting its holding to NEPA compliance failures in Antarctica).

237. See *supra* text accompanying note 230 (leaving unresolved questions of applicability of NEPA to foreign sovereigns).

238. See *Massey*, 986 F.2d at 535 (citing line of cases refusing to issue injunctions under NEPA when there is conflict between enforcement and foreign policy considerations).

239. 837 F. Supp. 466 (D.D.C. 1993).

240. *NEPA Coalition of Japan v. Aspin*, 837 F. Supp. 466, 466-67 (D.D.C. 1993).

241. *Id.* at 467.

242. *Id.* at 467-68.

243. *Id.* at 467 (concluding that *Massey* does not control in case of internationally recognized foreign sovereign).

244. *Id.*

245. *Id.* (citing Treaty of Mutual Cooperation and Security, Jan. 19, 1960, U.S.-Japan, 11 U.S.T. 1633, 1634 (securing Japanese use of some U.S. bases); Status of Forces Agreement, Feb. 28, 1952, U.S.-Japan, 3 U.S.T. 3342, 3353 (noting that treaty provisions also provide for subcommittee to address environmental concerns)).

246. See *NEPA Coalition of Japan*, 837 F. Supp. at 467.

*NEPA Coalition of Japan* is not necessarily inconsistent with *Massey*. Rather, the court utilized the foreign policy exception<sup>247</sup> implicit in the *Massey* decision.<sup>248</sup> The court in *NEPA Coalition of Japan* concluded that the presumption against extraterritoriality applied with particular force because the case involved a foreign sovereign where treaty relationships and foreign policy concerns existed.<sup>249</sup>

### B. Benefits of an International NEPA

Despite the contrary determination of some courts, consistent application of NEPA to the international activities of federal agencies is beneficial to the United States for two reasons. First, compliance with NEPA requirements abroad will help protect the United States from the creation of, and liability for, international disasters.<sup>250</sup> One basis for liability for environmental damage can be found in principle 21 of The Stockholm Declaration on the Human Environment.<sup>251</sup> Second, the United States' international reputation will be improved by taking a leadership role in protection of the global environment.<sup>252</sup> Why should the United States have one environmental standard for actions it takes within its borders, and a lesser standard for actions it takes elsewhere?

NEPA's enactment in 1969 heralded a new era in international environmental protection. Other nations have followed suit with similar legislation of their own.<sup>253</sup> The United Nations,<sup>254</sup> the

247. *Id.* at 468.

248. *See Massey*, 986 F.2d at 535 (noting NEPA should not be applied where conflict exists with foreign policy); *see also* Wirth, *supra* note 11, at 633-34 (discussing *Massey's* treatment of extraterritorial application of NEPA when foreign policy considerations are involved).

249. *See NEPA Coalition of Japan*, 837 F. Supp. at 467-68 (noting hesitance to apply NEPA when treaty relationships are likely to be affected).

250. *See* Turley, *supra* note 1, at 640-42 (noting serious environmental impacts of transnational activities).

251. *Report of the United Nations Conference on the Human Environment*, at 3, 5, U.N. Doc. A/CONF.48/14/Rev.1 (1973), reprinted in 11 I.L.M. 1416, 1420 (1972):

States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other states or of areas beyond the limits of national jurisdiction.

*Id.*

252. *See* Denise E. Antolini, *Extending NEPA Is in Our National Interest*, 8 ENVTL. F., Nov./Dec. 1991, at 26, 27 ("The extraterritorial application of NEPA would strengthen, not cripple, the United States' political and moral force by eliminating the double standard that honesty is warranted at home, but not abroad.").

253. *See* Michelle B. Nowlin, *What's Good for the Goose Is Good for the Gander: A Plea for Congress to Amend the National Environmental Policy Act to Apply to the Extraterritorial Actions of the Federal Government*, 2 DUKE ENVTL. L. & POL'Y F. 122, 138 (1991-92) (recognizing that NEPA is used as model by 87 other nations and most multinational development banks for developing similar environmental impact assessment legislation); *see also id.* at 137 n.140 (citing collection of

European Community,<sup>255</sup> and the World Bank<sup>256</sup> have all adopted environmental impact assessment agreements.<sup>257</sup> The next step for the United States is to legitimize and foster environmental protection legislation worldwide.<sup>258</sup>

#### IV. RECOMMENDATIONS

In light of NEPA's inconsistent international application, Congress must amend the National Environmental Policy Act. After the Supreme Court's decision in *Aramco* that Title VII of the Civil Rights Act did not apply extraterritorially,<sup>259</sup> Congress amended Title VII with an amendment entitled "Protection of Extraterritorial Employment."<sup>260</sup> Similarly, Congress should now amend NEPA to apply extraterritorially.<sup>261</sup>

Congress has introduced amendments to internationalize NEPA, but none have been passed into law. In January 1991, Representative Bill Bradley (D-N.J.) and Senator Frank R. Lautenberg (D-N.J.) co-sponsored S. 1278,<sup>262</sup> a bill that would have amended NEPA to clarify its application not only to federal actions within the United States, but to all federal actions.<sup>263</sup> While NEPA already provides

international environmental assessment laws).

254. See *id.* at 122 (citing UNITED NATIONS CONFERENCE ON ENVIRONMENTAL IMPACT ASSESSMENT IN A TRANSBOUNDARY CONTEXT, Feb. 25, 1991, 30 I.L.M. 800 [hereinafter ESPOO CONVENTION]).

255. COUNCIL DIRECTIVE ON THE ASSESSMENT OF THE EFFECTS OF CERTAIN PUBLIC AND PRIVATE PROJECTS ON THE ENVIRONMENT, U.N. Doc. 85/337/EEC (1985), 1985 O.J. (L 175) 40 [hereinafter EC DIRECTIVE]; see *infra* notes 278-82 (discussing exemption provisions of EC Directive).

256. WORLD BANK OPERATIONAL DIRECTIVE 4.01 [hereinafter OPERATIONAL DIRECTIVE 4.01]; see *infra* note 283 (noting specific directive governing World Bank).

257. See generally Kass & Gerrard, *supra* note 2, at 28-29 (discussing international environmental assessment compacts).

258. See Nowlin, *supra* note 253, at 138 (urging strengthening of U.S. commitment to international environmental protection for purpose of encouraging similar development in international community); see also Joan R. Goldfarb, *Extraterritorial Compliance with NEPA Amid the Current Wave of Environmental Alarm*, 18 B.C. ENVTL. AFF. L. REV. 543, 557 (1991) (arguing that international recognition of environmental concerns mandates NEPA's extraterritorial application).

259. Equal Employment Opportunity Comm'n v. Arabian Am. Oil Co., 499 U.S. 244, 258 (1991) (holding that argument in favor of application is "insufficiently weighty" to overcome presumption against extraterritoriality).

260. Civil Rights Act of 1991, Pub. L. No. 102-166, § 109(a), 105 Stat. 1071, 1077 (amending 42 U.S.C. § 2000e). See generally Jacqueline E. Bailey, Note, *Title VII Protections Do Not Extend to Americans Working Overseas: EEOC v. Arabian American Oil Co.*, 111 S. Ct. 1227 (1991), 5 TRANSNAT'L LAW. 417, 442-44 (1992) (discussing amendment to Title VII that extends definition of employee to American workers abroad).

261. See generally Nowlin, *supra* note 253 (arguing for amendment of NEPA).

262. See 137 CONG. REC. S7633 (daily ed. June 12, 1991) (statement of Rep. Bradley) (co-sponsoring Environmental Assessment, Closure, and Health Act of 1991).

263. S. 1278, 102d Cong., 1st Sess. § 1(b)(1). The bill would have amended § 102(2)(C) of NEPA, 42 U.S.C. § 4332(2)(C), so that an environmental impact statement would be required

flexibility for foreign policy concerns,<sup>264</sup> the proposed amendment in S. 1278 included six specific situations exempted from the EIS requirement: “[actions] 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.”<sup>265</sup> In addition, S. 1278 contemplated a case-by-case review by the President to exempt from the EIS requirement a federal agency’s extraterritorial actions, if there existed a compelling interest to do so.<sup>266</sup> Despite the fact that S. 1278 should have quelled any foreign policy concerns with its extensive list of exceptional circumstances,<sup>267</sup> the proposed bill never made it out of committee.

The most recent attempt to amend NEPA to clarify its application to extraterritorial federal actions is H.R. 3219.<sup>268</sup> The amendment proposes to add “extraterritorial major federal actions significantly affecting the environment” to the category of activities requiring detailed environmental impact statements.<sup>269</sup> In defining an extraterritorial major federal action, the proposed bill provides for the same exemptions found in S. 1278.<sup>270</sup> H.R. 3219 specifically subjects trade agreements to EIS requirements.<sup>271</sup> This most recent proposed amendment would also overturn part of Executive Order 12,114,<sup>272</sup> as it affords judicial relief for failure by the President to

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for major federal actions, “including extraterritorial actions.” *Id.*

264. See 42 U.S.C. § 4331(b) (1988) (encouraging application of NEPA in all situations where it is “consistent with other essential considerations of national policy”); see also *id.* § 4334 (stating that compliance with NEPA is not required where inconsistent with other statutory obligations of agencies).

265. S. 1278, *supra* note 263, § 1(b)(1).

266. S. 1278, *supra* note 263, § 1(b)(6).

267. See S. REP. NO. 180, 102d Cong., 1st Sess. 4 (1991) (noting approximately 20 circumstances to which proposed act would take exception).

268. H.R. 3219, 103d Cong., 1st Sess. (1993).

269. See *id.* § 1(c)(2) (expanding scope of EIS requirements to international situations).

270. *Id.* For purposes of H.R. 3219, an extraterritorial major federal action:

(A) includes any major Federal action in the United States that has effects outside the United States; and

(B) does not include any Federal action 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.

*Id.*

271. *Id.* § 1(c). This provision likely stems from recent debate over NAFTA’s subjection to NEPA’s EIS requirement. See *Public Citizen v. Office of U.S. Trade Representative*, 822 F. Supp. 21 (D.D.C.), *rev’d*, 5 F.3d 549, 551 (D.C. Cir. 1993) (reversing decision requiring EIS for NAFTA because court held there is no final action until President submits agreement to Congress), *cert. denied*, 114 S. Ct. 685 (1994).

272. See *supra* notes 85-101 and accompanying text (discussing Executive Order 12,114).

comply, which can be pursued by any agency aware of noncompliance.<sup>273</sup>

It is imperative that Congress recognize the United States' obligation to maintain the environmental sanctity of the earth's common environment.<sup>274</sup> This duty is easily compatible with foreign policy considerations, as evidenced by three major environmental impact assessment agreements.<sup>275</sup> First, in 1991, United Nations members concluded the Espoo Convention on Environmental Impact Assessment in a Transboundary Context.<sup>276</sup> The Espoo Convention requires signatories engaging in activities with transboundary effects to notify affected nations and permit them to participate in the environmental impact assessment.<sup>277</sup>

Second, in 1985, the European Communities adopted a Council Directive<sup>278</sup> that requires member nations to make environmental assessments of all major projects likely to have significant environmental impacts.<sup>279</sup> Factors for which environmental impacts must be assessed are: humans, flora and fauna, soil, water, air, climate, and the landscape; the interaction between the prior factors; and material assets and cultural heritage.<sup>280</sup> The only exemption from the assessment requirement is for projects relating to national defense.<sup>281</sup> The procedure for information-sharing and assessment<sup>282</sup>

273. See H.R. 3219, *supra* note 268, § 1(c) (noting amendment that allows for judiciary to take enforcement action when President is in noncompliance).

274. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAWS OF THE UNITED STATES, *supra* note 23, § 601(1)(b). According to the Restatement:

A state is obligated to take such measures as may be necessary, to the extent practicable under the circumstances, to ensure that activities within its jurisdiction or control are conducted so as not to cause significant injury to the environment of another state or areas beyond the limits of national jurisdiction.

*Id.*

275. See *supra* notes 254-57 and accompanying text (noting that United Nations, World Bank, and European Community have all formulated assessment agreements).

276. ESPOO CONVENTION, *supra* note 254.

277. See ESPOO CONVENTION, *supra* note 254, art. III(1) (indicating that notification should be given no later than time when country's own public is informed).

278. EC DIRECTIVE, *supra* note 255. See generally Louis L. Bono, *The Implementation of the EC Directive on Environmental Impact Assessments with the English Planning System: A Refinement of the NEPA Process*, 9 PACE ENVTL. L. REV. 155 (1991).

279. EC DIRECTIVE, *supra* note 255, art. I(1).

280. EC DIRECTIVE, *supra* note 255, art. III.

281. EC DIRECTIVE, *supra* note 255, art. I(4). This exemption provision is simpler, yet more restrictive, than that of any proposed amendments to NEPA. See *supra* note 267 and accompanying text (describing recent exemptions proposed to amend NEPA for extraterritorial application).

282. The directive provides:

Where a Member State is aware that a project is likely to have significant effects on the environment in another Member State or where a Member State likely to be significantly affected so requests, the Member State in whose territory the project is intended to be carried out shall forward the information gathered pursuant to Article

is a paradigm of cooperation, and should be adopted by the United States to achieve the dual goal of environmental responsibility and international comity.

Third, World Bank Operational Directive 4.01 requires environmental assessments for all development projects that may have significant environmental impacts.<sup>283</sup> The United States and other countries place international pressure on the World Bank to improve its environmental standards.<sup>284</sup> Specifically, the United States passed legislation encouraging sustainable development in multilateral development bank projects.<sup>285</sup> One provision forbids the United States' Executive Directors of the multilateral development banks to vote for a proposed action that would have a significant environmental impact, absent a proper assessment of the project.<sup>286</sup>

This Note recommends that Congress amend NEPA to apply extraterritorially, following the example of the United Nations, the European Community, and the World Bank. The court in *Massey* projected such a role for NEPA, likening the statute to "the myriad of laws directing federal decision-makers to consider particular factors before extending aid or engaging in certain types of trade."<sup>287</sup> The exemptions to NEPA's extraterritorial application should be reduced to one exemption for national security purposes.<sup>288</sup> This exemption finds its basis in the *Massey* opinion holding that NEPA's EIS requirement must yield to U.S. foreign policy interests.<sup>289</sup> Concurrently, the United States should continue to work toward negotiating multilateral agreements governing procedures for full environmental

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5 to the other Member State at the same time as it makes it available to its own nationals. Such information shall serve as a basis for any consultations necessary in the framework of the bilateral relations between two Member States on a reciprocal and equivalent basis.

EC DIRECTIVE, *supra* note 255, art. VII.

283. OPERATIONAL DIRECTIVE 4.01, *supra* note 256; *see also* Young, *supra* note 43, at 327-28 (describing World Bank Operational Directive 4.01 and its proposal to assess all projects for environmental impact); Brian B.A. McAllister, *The United Nations Conference on Environment and Development: An Opportunity to Forge a New Unity in the Work of the World Bank Among Human Rights, the Environment, and Sustainable Development*, 16 HASTINGS INT'L & COMP. L. REV. 689, 703-05 (1993) (discussing contents and effectiveness of World Bank Operational Directive 4.01).

284. *See* McAllister, *supra* note 283, at 740-43 (discussing national efforts to pressure World Bank into raising standards of environmental protection and human rights).

285. 22 U.S.C. §§ 262m to 262m-5 (1988); *see also* McAllister, *supra* note 283, at 742 (discussing effects of the International Development and Finance Act of 1989, Pub. L. No. 101-240, 103 Stat. 2492).

286. 22 U.S.C. § 262m-7(a).

287. *Environmental Defense Fund v. Massey*, 986 F.2d 528, 533 (D.C. Cir. 1993).

288. *See* EC DIRECTIVE, *supra* note 255, art. I (exempting only those projects serving national defense purposes).

289. *Massey*, 986 F.2d at 535.

assessment and disclosure.<sup>290</sup>

#### CONCLUSION

As the latest in a muddled line of cases interpreting the extraterritorial reach of NEPA's EIS requirement, *Massey* has the potential to support future extension of NEPA to all federal agency action abroad. Whether that potential will be realized is yet to be seen. Certainly, *Massey* attests to the need to clarify NEPA's extraterritorial reach. Congress should activate legislation amending NEPA. NEPA's international evolution is natural and necessary to foster the United States' role as the world leader in preventive environmental protection legislation.

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290. See Grundman, *supra* note 36, at 258-59 (discussing alternatives to imperialistic exportation of U.S. laws).