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Brief of Appellee, Environmental Friends, Inc.: Fourth Annual Pace National Environmental Moot Court Competition

University of Tennessee College of Law

No. 91-27

IN THE
UNITED STATES COURT OF APPEALS
TWELFTH CIRCUIT

SECRETARY, DEPARTMENT OF DEFENSE,
Appellant,

v.

ENVIRONMENTAL FRIENDS, INC.,
and DEFENSE CONTRACTORS ASSOCIATION,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

BRIEF OF APPELLEE, ENVIRONMENTAL FRIENDS, INC.*

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* The winning briefs published in this issue are reprinted in their original form. No revisions have been made by the editorial staff of the *Pace Environmental Law Review*.

QUESTIONS PRESENTED

(1) Whether Environmental Friends, a worldwide environmental organization has standing to challenge the Department's cleanup project for the Venice, Italy, missile site based on the Department's failure to comply with procedural mandates of the National Environmental Policy Act?

(2) Whether the National Environmental Policy Act, which mandates that federal agencies consider the environmental impacts of their major actions, applies to a project of the Department of Defense in a foreign country, thereby preventing significant and long-range environmental degradation as intended by the Act?

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The opinion of the District Court for the Eastern District of Virginia in *Environmental Friends, Inc. v. Secretary, Department of Defense*, No. 91-453 (E.D. Va. Sept. 30, 1991).

STATEMENT OF THE CASE

In September of 1990, the U.S. Army announced its intent to use Biocore, a genetically engineered microorganism, to cleanup the missile fuel contamination at a missile base located just outside of Venice, Italy. (R. 3-4). This substance was developed and tested in the Army's laboratories and controlled greenhouse, but has yet to be used in any viable, natural ecosystem. (R.3) After limited testing, the Army asserts that Biocore eats missile fuel, multiplying in the soil until its sustenance is depleted. (R.3) The Army theorizes that at that point the organisms will die for lack of nourishment and cease

to further invade the environment. (R.3) However, none of their hypotheses have been aired in the public forum and the Army never provided developmental information or environmental documentation of its experiments until questioned during congressional hearings. (R.3-4) To date there has been no analysis of Biocore's potential effects on this particular site. (R.3-4)

The Army intends to apply this organism to the missile base as the test case for its program to cleanup contaminated military bases located in foreign countries. (R.3) This particular base has been used exclusively by the United States Army since the 1950s. (R.2) Originally housing a variety of live ordnance, since 1969 it has been used primarily for storage. (R.2) Although the site may eventually be returned to the control of the Italian government, there are no definite plans to that effect at this time. (R.2) The site is in close proximity to Venice, a heavily populated, architecturally unique, and culturally priceless city situated in a picturesque environment. (R.2-4) Furthermore, the area surrounding Venice and the missile site serves as an aesthetic and recreational resource for the inhabitants of the area, as well as numerous tourists from all over the world. (R.4) The extensive floodplains in this area, many associated with the Alpine tributaries leading to the Gulf of Venice, give the city its particular flavor. This scenario creates a particular problem with regard to the Army's use of Biocore. (R.4) The missile fuel contaminant which sustains the organism washes with the soil in heavy rain, and presumably also with flood water. This creates the potential for tremendous damage to an immense area should Biocore's biological activity be uncontainable and extend beyond the boundaries of the site itself. (R.3)

When the Army announced that it would be testing Biocore at the Venice, Italy, missile site, a document surfaced which had been completed in March 1990, entitled "Summary Environmental Analysis of the Venice, Italy, Missile Site Clean-up." The twenty-page document is the only information that has been provided for a project which proposes to introduce into the environment an untried, artificially engineered microorganism. (R.4) The document devotes only six pages to

the development and limited testing of Biocore, with no analysis of its potential impact in actual use at this particular site. (R.3-4) The only other documentation produced by the army is an environmental assessment and a "finding of no significant impact" completed on Biocore's laboratory development. (R.4) Recognizing the potential for disaster and the imminent threat to the environment, Environmental Friends filed suit to ensure that the Department of Defense complies with its affirmative duty to complete an adequate environmental assessment as mandated by the National Environmental Policy Act ("NEPA"). (R.4)

At trial, His Honor Judge Romulus N. Remus of the United States District Court for the Eastern District of Virginia granted judgment in favor of the plaintiffs, Environmental Friends, Inc. and Defense Contractors Association. The defendant, the Department of Defense ("DOD"), was ordered to comply with the procedural mandates of NEPA before undertaking the cleanup project at the Venice, Italy, missile site. (R.8) The DOD's motion for summary judgment was denied and the plaintiffs were found to have standing to challenge the Department's action. (R.5-6) In addition, the court found that the procedural mandates of NEPA do apply extraterritorially to the DOD's project at the Venice, Italy, missile site. (R.6-7) The defendant subsequently filed a notice of appeal to the United States Circuit Court of Appeals for the Twelfth Circuit.

SUMMARY OF THE ARGUMENT

The lower court was correct in determining both that Environmental Friends has standing to bring this case and that NEPA applies to the DOD action at the Venice, Italy, missile site. These issues will be approached in that order. However, before proceeding with the standing analysis, it is important to point out the posture of that aspect of this case. The lower court decision in favor of standing for Environmental Friends was predicated on a motion for summary judgment by the DOD. Therefore, Environmental Friends must aver specific facts showing that each requirement of standing is fulfilled.

This burden has been more than adequately met.

Standing to bring a case must first meet the constitutional requirements that a plaintiff suffer injury-in-fact, which is fairly traceable to the defendant's action and redressable by the relief requested. Additionally, the Administrative Procedures Act ("APA") requires a suit challenging an agency decision to show that the injury caused thereby is the result of final agency action and is within the meaning of the statute. Environmental Friends has specifically fulfilled each criterion.

For an association to have standing to bring suit, it must establish that individual members have standing to sue in their own right, that the interests being protected are germane to the organization's purpose, and that individual participation by the members is not required. Since the substantive merits of this case go to the actions of the Army and not any individual member, the latter will clearly have no individual contribution. In addition, the stated purpose of Environmental Friends to recognize and respect the complexities of the environment goes to the heart of the interests at stake in this case. Environmental Friends is requesting that the consequences be considered before a purely experimental, artificially engineered organism is released into the environment.

Environmental Friends has also established that some individual members have standing in their own right. In addition, the specific facts which have been averred are sufficient to withstand summary judgment. The affiants herein have all alleged threatened injury to their economic, recreational, and aesthetic interests. These include potential loss of income as well as loss of lifelong investment in a home. These are the traditional, time-honored interests for standing. Moreover, the recreational and aesthetic injuries that these affiants will inevitably suffer also support the organizations' standing to bring this suit. The affiants have detailed the exact discrete locations where they live, work, and play, and wherein their injuries would occur.

Failure of the Army to comply with NEPA and consider the complexities of the ecosystem in which Biocore will be released is the direct cause of the threatened injuries. If the mandates of NEPA are fulfilled, the potential threat will be

redressed by the assessment required thereunder. The Army's failure to comply with NEPA is evidenced by not one, but three, final agency actions which are each adequate to establish standing.

The Army's failure to do an EIS is a final agency action. In addition, the "Summary Environmental Analysis of the Venice, Italy, Missile Site Clean-up" ("Summary Analysis") is a final action because it is the Army's final, definitive statement on the impacts of the project, not just a preliminary step. Finally, the Army's announcement of its plan to use Biocore, in addition to allocating money and personnel for the project, represents a firm commitment. Review at this time would in no way disrupt any ongoing processes. Clearly, denial of review would work considerable harm because the only step left is implementation, after which it will be too late to avoid the repercussions.

The injuries which Environmental Friends is seeking to prevent are unarguably "within the meaning of the statute." This is the "zone of interest" requirement, and it is uncontestable that preventing environmental injury is within the "zone of interest" of a statute whose very purpose is to prevent environmental degradation.

NEPA provides that federal agencies must consider the environmental impacts of their major actions, notwithstanding the extraterritoriality of those impacts. Congress has the inherent authority to do this because it can regulate the conduct of United States citizens outside of the national borders. NEPA's worldwide scope is evidenced in its own language, the history of the Act, and its subsequent interpretations, by the agencies themselves and the other branches, including the courts.

The language of NEPA interwoven throughout the Act reflects Congressional intent for NEPA to apply extraterritorially. The Declaration of Purpose, the policy statements, and the action-forcing provisions of NEPA all demonstrate Congressional intent to apply the statute in every location. The total structure of the Act indicates that NEPA is to apply outside the borders of the United States when there are countervailing policies implicated.

The legislative history preceding the statute and providing the impetus for its passage reflects attention on the worldwide character of environmental needs. Congressional hearings after passage of NEPA further instruct on the application of the law beyond the borders of the United States. Furthermore, subsequent related legislation, such as the Base Closure Act, implicitly recognizes NEPA' extension to foreign locations. Indeed, recent proposals to centralize agency environmental functions specifically clarify the extraterritorial reach of NEPA in order to eliminate confusion in that regard.

Beyond these clear indications from Congress itself, the interpretations of other agencies and other branches, including the courts, have comported with the understanding that NEPA's reach is extraterritorial. The agency charged with the administration of NEPA, the Council on Environmental Quality, declares that NEPA applies outside the boundaries of the United States. Numerous other agencies of the federal government have followed suit, despite DOD's steadfast refusal to comply by promulgating the necessary regulation. The Executive Branch also recognizes that NEPA applies extraterritorially to the fullest extent possible where not in conflict with countervailing diplomatic and security policies.

Finally, courts facing the issue of NEPA's extraterritorial application have consistently recognized that the Act should apply to actions outside the territorial boundaries of the United States when the goals of NEPA are not countermanded by other national goals. Extraterritorial application of NEPA is particularly strengthened where American citizens could face environmental injuries in foreign jurisdictions.

For these reasons, as further elaborated below, this Court should affirm the lower court's decision that Environmental Friends does have standing to bring this cause and NEPA does apply to the DOD's cleanup action at the Venice, Italy, missile site.

ARGUMENT

I. ENVIRONMENTAL FRIENDS HAS STANDING TO CHALLENGE THE DEPARTMENT OF DEFENSE'S

CLEANUP PROJECT FOR THE VENICE, ITALY, MISSILE SITE BASED ON THE DEPARTMENT'S FAILURE TO COMPLY WITH THE PROCEDURAL MANDATES OF NEPA.

For purposes of establishing standing in a case predicated upon the National Environmental Policy Act, 42 U.S.C. §§ 4321-370 (1988), a plaintiff must address two tiers of analysis. First, the requirements of article III of the United States Constitution must be met. U.S. Const. art. III, § 2. Secondly, the statutorily mandated requirements of section 702 of the Administrative Procedures Act, 5 U.S.C. § 702 (1988), must be met. *Lujan v. National Wildlife Federation*, 110 S. Ct. 3177, 3185-86 (1990). These latter requirements apply because NEPA has no separate procedural component and therefore falls within the review provisions of the APA. *Lujan*, 110 S. Ct. at 3185; *Scherr v. Volpe*, 336 F. Supp. 882, 884 (W.D.Ct. Wis. 1971). It is clear from a review of these requirements, and their application to the facts of the instant case, that Environmental Friends has fulfilled all the requisites for standing to challenge the Department of Defense plan for clean-up at the Venice, Italy, missile site.

Although the elements of the constitutional and statutory standing criteria can be separately articulated and listed, the fact is that they are not altogether separate conceptually. The constitutional standing criteria have been characterized by the United States Supreme Court as the "irreducible minimum." *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 472 (1982). Therefore, the statutory standing criteria are in some sense "in addition" to those required by the Constitution when the action challenged is that of an administrative agency. However, some aspects of the analysis are the same whether done under the strictures of article III, or the mandates of the APA. *Compare Competitive Enter. Inst. v. National Highway Traffic Safety Admin.*, 901 F.2d 107 (D.C. Cir. 1990) (analyzing injury under a constitutional standing analysis) *with Lujan*, 110 S. Ct. at 3187-89 (analyzing injury under an APA standing analysis). Therefore, to the extent that the criteria overlap, they will be

discussed together, with digression as required where they diverge.

Three elements must be fulfilled in order to establish standing under article III: "(1) injury-in-fact, (2) [which is] fairly traceable to the challenged action, and (3) likely to be redressed by a favorable decision." *Foundation on Economic Trends v. Lyng*, 943 F.2d 79, 83 (D.C. Cir. 1991) (citing *Valley Forge*, 454 U.S. at 472). Furthermore, when judicial review is sought under the APA, the plaintiff must meet the requirements of section 702 which mandates that "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of the statute, is entitled to judicial review thereof." 5 U.S.C. § 702 (1988).

In the following discussion, the "person suffering legal wrong, adverse affect or aggrievement" criteria will be incorporated with the discussion of the constitutional injury-in-fact criteria. The "agency action" criteria, will be discussed in conjunction with the constitutional requirement that the injury be" fairly traceable to the challenged action" and "redressable by a favorable decision." Finally, "injury within the meaning of the statute," the so-called "zone of interest" test, will be addressed separately. Environmental Friends has alleged facts which fulfill each of the constitutional and statutory requirements for standing. In addition, the plaintiff's averments are the specific facts required to withstand the defendant's motion for summary judgment.

A. *Environmental Friends has established standing to bring suit on behalf of its members for threatened, imminent injuries to their interests occasioned by the Army's failure to comply with NEPA.*

1. Environmental Friends can bring suit on behalf of its members because some individual members have standing to sue in their own right, their individual participation is not required, and the organization's purpose is germane to the interests it

is seeking to protect.

Under the first element of constitutional standing, an alleged injury must have been, or will be, personally suffered by some individual. *Valley Forge*, 454 U.S. at 472. This latter requirement raises the issue of "associational" standing by which an organization stands in the place of its members and brings suit on their behalf. An organization can bring such a challenge if "(a) its members would have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organizations purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977).

Approaching these factors in reverse order, neither Environmental Friends' claim that the Army must comply with NEPA nor the requested relief—that they do so, requires the individual participation of any members in the lawsuit. There is no need in this case for individualized proof. *See Hunt*, 432 U.S. at 344. Nor is there any need for individual member contribution or individual assessment. *See Center for Auto Safety v. National Highway Traffic Safety Admin.*, 793 F.2d 1322, 1329 n.44 (D.C. Cir. 1986). The determination of whether the Army has adequately considered the environmental consequences of its remedial project is dependant upon the Army's actions and choices. The members of Environmental Friends will have no individual contribution to the substantive merits of that determination.

In addition, the second requirement for associational standing is met by Environmental Friends because the interests which the organization is attempting to protect via this suit are most germane to the organization's purpose. Environmental Friends is a worldwide organization whose stated goals are " 'respect for the environment and acknowledgment of how little we understand its complexities.' " (R.5, quoting the President of Environmental Friends). Moreover, 70% of the 7500 member responding to a 1989 questionnaire from the organization indicated that military toxics are "high" or "very high" concerns. (R.5)

Surely fostering respect for the environment and its complexities is germane to litigation asserting that those complexities be considered and respected by complying with NEPA to adequately determine if and/or how the release of the genetically engineered microorganism will affect the environment of the site and its surroundings. Indeed, the claim brought by Environmental Friends is additionally of great moment to the large majority of members who have an expressed interest in the problems of military toxics. *See Humane Soc'y of the United States v. Hodel*, 840 F.2d 45, 53-59 (D.C. Cir. 1988). This nexus not only meets, but exceeds the "mere pertinence" required between the subject of the litigation and the organizations' purpose. *Humane Soc'y*, 840 F.2d at 58.

Lastly, there is the first prong of associational standing: the members must have standing to sue in their own right. *Hunt*, 432 U.S. at 343. Unlike the other two requirements, this one cannot be addressed independently of the remainder of the injury analysis. For Environmental Friends to have standing to sue on behalf of its members, those members must be threatened with injury and thereby have standing to sue in their own right. *Competitive Enter. Inst. v. National Highway Traffic Safety Admin.*, 901 F.2d 107, 112 (D.C. Cir. 1991). In other words, the question now becomes whether the members of Environmental Friends who supplied the affidavits in support of this action have alleged specific facts supporting injuries to their interests. The answer is a resounding yes! These individuals have alleged specific injuries to their economic, recreational and aesthetic interests because of the Army's failure to comply with NEPA.

2. The economic, recreational, and aesthetic injuries threatening the affiants meet the injury requirements of both the constitution and the APA and are supported by the specific facts required to withstand summary judgment.

To meet the injury requirements of the Constitution and the APA, an injury need not have already occurred, it can be threatened. *Valley Forge*, 454 U.S. at 472. Therefore, the fact

that the Army has not actually applied the Biocore does not defeat this claim. As one court has noted, "[t]he need to fully assess potential harm *before* a project is undertaken is a major justification for the broad test courts have laid down for NEPA standing." *City of Los Angeles v. National Highway Traffic Safety Admin.*, 912 F.2d 478, 492 (D.C. Cir. 1990) (emphasis in original). Environmental Friends can bring this challenge now, when the harm is threatened and imminent. An individual is not required to sit patiently and watch impending doom approach without challenging the very cause of that catastrophe before it occurs.

In addition, the injury suffered by the individual members must be "distinct and palpable." *Worth v. Seldin*, 422 U.S. 490, 501 (1975). In this regard, injury to an ideological interest is not sufficient to establish standing, *e.g.*, *Sierra Club v. Morton*, 405 U.S. 727, 739 (1972) (general interest in conservation is not enough), nor is injury to an abstract interest, *e.g.*, *Diamond v. Charles*, 476 U.S. 54, 6667 (1986) (doctor's abstract concern with medical practice standards insufficient). However, the injuries alleged by the individual members of Environmental Friends who supplied affidavits in this cause are not abstract or merely ideological. They are the kinds of "palpable and distinct" injuries which have been recognized repeatedly as establishing a justiciable injury.

Affiants Dorothy and David Downs, Equalia Emelia and Franco Francisco have alleged specific facts showing threatened injury to their recreational and aesthetic interests. All of these affiants use and enjoy the specific environs of the missile site. The Downs regularly hike in the immediate area of the site, often along the border fence itself. (R.4) Ms. Emelia lives only one-half mile from the site, (R.4), and her lifelong recreational use and aesthetic enjoyment of the environs of her home are threatened. Mr. Francisco travels annually to this unique and irreplaceable location for vacation. (R.4) *See Defenders of Wildlife v. Hodel*, 851 F.2d 1035, 1040 (8th Cir. 1988) (those who travel to areas where endangered species are threatened have standing to challenge actions causing such harm). Threats to these types of injuries have long been held sufficient to establish injury. *See, e.g., Sierra Club v. Morton*,

405 U.S. 727, 735 (1972); *Public Interest Research v. Powell Duffryn Terminals, Inc.*, 913 F.2d 64, 71 (3d Cir. 1990).

In addition, all of these affiants have alleged specific injury to their economic interests, the interests traditionally deemed to establish standing. *See Sierra Club*, 405 U.S. at 733-34. The Downs are free-lance photographers who live a part of each year within four miles of the missile site. (R.4) Additionally, a portion of their income is dependent upon pictures taken in the immediate vicinity and adjacent small towns. (R.4) This income would be severely decreased, if not altogether eliminated, should the area become unfit for humans or otherwise impaired by the release of Biocore. Similarly, Ms. Emelia could conceivably lose the use of her home and her lifelong investment therein. And, "persons who own property in, or merely reside near, an area threatened by environmental injury have an interest sufficient to support standing . . . ." *Goos v. Interstate Commerce Comm'n*, 911 F.2d 1283, 1290 (8th Cir. 1990). Finally, Mr. Francisco's economic interests are implicated because degradation of the site's environment would preclude his annual visits, necessitating he go elsewhere at perhaps greater expense. *See, e.g., Harris v. City of Zion*, 927 F.2d 1401, 1406 (7th Cir. 1991) (willingness to incur "tangible, albeit small cost" will support standing); *Center for Auto Safety v. National Highway Traffic Safety Admin.*, 793 F.2d 1322 (D.C. Cir 1986) (an "identifiable trifle" can support the constitutional minimum for standing).

Not only do the injuries these affiants face support standing to bring this suit in their own right, the affidavits also set forth facts specific enough to withstand the DOD's motion for summary judgment. In *Lujan v. National Wildlife Federation*, 110 S. Ct. 3177 (1990), the United State Supreme Court rejected standing for the plaintiff organization because its individual members did not aver specific facts to support injury. The court stated therein that "Rule 56(e) is assuredly not satisfied by averments which state only that one of respondent's members uses unspecified portions of an immense tract of territory, on some portion of which mining activity has occurred or probably will occur by virtue of some government action." *Id.* at 3189. The situation in the present case is diametrically

opposed to that of the National Wildlife Federation in *Lujan*.

There is no immense tract of land in this case, just the missile site and its immediate environs. While heavy rain or flooding could spread Biocore over a vast area, Environmental Friends does not predicate standing on that potential disaster. The injuries threatening the affiants would occur within four miles of the missile site itself, the area which would be most directly affected should Biocore prove uncontainable to the site itself. The affiants have alleged facts showing the specific areas which they use. Injury-in fact is established by the serious environmental impacts which will be overlooked should the Army fail to comply with NEPA. *See City of Davis v. Coleman*, 521 F.2d 661, 670 (9th Cir. 1975.) The instant case deals with individuals who live, work, and play in the shadow of a potential environmental disaster. Standing herein is not based on "general allegations," but rather the specific facts required to successfully answer the DOD's motion for summary judgment.

B. *Environmental Friends has established that the threatened injuries it seeks to protect are fairly traceable to the Department of Defense's failure to comply with the procedures of NEPA, a failure evidenced by three specific final agency actions and redressable by simple compliance with the statute.*

The second element of constitutional standing requires that the threatened injury to a plaintiff be "fairly traceable to the challenged action." *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 472 (1982). Moreover, when an action of a government agency is challenged under the APA, that action must be a "final agency action for which there is no other adequate remedy in a court." 5 U.S.C. § 704 (1988). This requisite has been interpreted to mean that the plaintiff must be able to point to a particular, discrete agency action which causes the injuries. *Lujan v. National Wildlife Federation*, 110 S. Ct. 3177, 3187 (1990). Combined in a single "rule," the plaintiff must show that a specific final agency action is the source of

the threatened injury.

NEPA is a procedural statute designed to ensure that agencies consider the environmental consequences of their actions and take steps to minimize environmental harm to the extent possible. *City of Los Angeles v. National Highway Traffic Safety Admin.*, 912 F.2d 478, 492 (D.C. Cir 1990); *City of Davis v. Coleman*, 521 F.2d 661, 670-71, 670 n.12 (9th Cir. 1975). The Army intends to apply Biocore to the Venice, Italy, missile site without complying with those procedures. The Army thereby risks causing tremendous harm because Biocore's impact on a natural ecosystem is virtually unknown. That harm is traceable to the Army's refusal to comply with NEPA. If NEPA's procedures do not apply now, before the organism is released, the opportunity to asses Biocore's potential effects before any damage is done will be lost. Compliance with NEPA would ensure that the environmental effects of releasing Biocore at this particular site would be considered.

Environmental Friends can identify three particular final agency actions which are the source of the injuries in this case: (1) the failure of the Army to do an EIS, (2) the completion of the "Summary Environmental Analysis of the Venice, Italy, Missile Site Clean-up" (R.3-4), and (3) the announcement by the Army that it will use Biocore on this site, coupled with the affirmative activities initiated to complete that task. (R.3-4) Any one of these actions is a specific final action subject to review under the APA. In addition, they are sufficient to withstand a motion for summary judgement.

Agency action can be inaction or failure to act. *Sierra Club v. Thomas*, 828 F.2d 783, 793 (D.C. Cir. 1981). Thus, the failure of the Army to comply with NEPA's procedural requirements is a final action. The effects of this inaction are identical to those of an expressed denial to comply with the statute. *See Her Majesty, the Queen in Right of Ontario v. United States Envtl. Protection Agency*, 912 F.2d 1525, 1531 (D.C. Cir. 1990). One court recently indicated that failure to do an EIS could not be reviewed as final action when the organization claims injury only to its informational interests. *Foundation on Economic Trends v. Lyng*, 943 F.2d 79, 87 (D.C. Cir 1991). However, the holding therein was specifically

limited to those particular facts. *Id.* This is *not* the situation with respect to Environmental Friends, whose standing to bring this action is predicated upon the threatened injury to its individual member affiants' economic, recreational, and aesthetic interests. The effect of the Army's failure to act here is as loud and clear as if they had shouted, "We will not do it!" That failure is reviewable as final agency action.

Alternatively, the "Summary Environmental Analysis of the Venice, Italy, Missile Site Cleanup" ("Summary Analysis") prepared by the Army in March 1990 (R.3) is reviewable as a specific final agency action. This document discusses only the laboratory development and controlled greenhouse testing of Biocore (R.3), but not its impact on the particular site. It is, nevertheless, the Army's definitive statement on the environmental impacts of the project and, as such, is reviewable at this time. *See Her Majesty*, 912 F.2d at 1531 (finality is determined by the definitiveness of the agency's position); *Friedman Bros. Inv. Co. v. Lewis*, 676 F.2d 1217, 1319 (9th Cir. 1982) (despite no final commitment of money for construction of bus depot, the "agency has spoken its last word on the project's environmental impact").

The Summary Analysis is not a preliminary report; the Army has no intention of engaging in any further environmental assessment. *See Tennessee v. Herrington*, 626 F. Supp. 1345, 1354 (M.D. Tenn. 1986) (recommendation to build facility is final, not preliminary, although further action would be required to complete construction plans). Neither the Summary Analysis nor the environmental assessment and "finding of no significant impact," completed on Biocore's laboratory development (R.4), address use of the organism at this specific site, considering its particular characteristics. (R.3-4) Since the limited information in this report does not comport with the requirements for adequate environmental analysis, *see* 42 U.S.C. § 4332(2)(c) (1988), and constitutes the Army's final word on the use of Biocore at the site, it is reviewable at this time.

Finally, in September of 1990, the Army formally announced in congressional hearings that it does intend to use Biocore at the Venice, Italy, site. (R.3-4) Furthermore, the

project is included in the Army's fiscal planning for 1992, and $500,000 has been set aside to fund the project. (R.5-6) The individuals who will complete this task have been advised it will commence in the summer of 1992. (R.6) Together these activities indicate the Army's firm commitment to the project. The Court is not being asked to resolve a dispute on some hypothetical proposal. The Army fully intends to go through with this activity with no further assessment. Review at this time will not disrupt any agency decision-making process. *See American Dairy of Evansville, Inc. v. Bergland*, 627 F.2d 1252, 1260 (D.C. Cir. 1980) (review is appropriate when it will not disrupt agency processes and rights and obligations have been determined by the action).

The fact that the Army does not consider its decision "final" until travel orders have been issued to the individuals who will go to Italy (R.5-6) is immaterial. An agency's internal characterization of its actions are not conclusive for determining finality. *See Pennzoil Co. v. Federal Energy Reg. Comm'n*, 645 F.2d 394, 399 (5th Cir. 1981) (agency characterization not decisive, though it is evidence). Judicial review is appropriate now, before an irrevocable step is taken. Furthermore, denial of review at this time would work considerable hardship on the plaintiffs since once those travel orders are issued and Biocore is applied, the damage will be done and the benefits of adequate environmental assessment would be moot. *See Abbott Laboratories v. Gardner*, 387 U.S. 136, 152 (1967).

It is clear that the injuries which threaten Environmental Friends directly result from the Army's failure to comply with the mandate of NEPA. In addition, compliance would adequately address those injuries. Environmental Friends requests that the environmental effects of this project be considered and not summarily overlooked. That is the mandate of NEPA. 42 U.S.C. § 4332(2)(C) (1988). Compliance with NEPA's procedures would obviously redress this injury and provide an adequate basis for consideration of the environmental impacts of the Army's project.

C. *The injuries which Environmental Friends seeks to prevent in this action are "within the meaning of the statute" because they are the very interests which NEPA was designed to protect.*

The final requirement for judicial review of agency action is that the injury suffered be "within the meaning of the relevant statute." 5 U.S.C. § 702 (1988). This has come to be called the "zone of interests" test. *Lujan v. National Wildlife Federation*, 110 S. Ct. 3177, 3187 (1990). To fulfill this requirement, Environmental Friends must show that the injuries fall within the " 'zone of interests' sought to be protected by the statutory provision whose violation forms the legal basis of [the] complaint." *Id.* at 3186. There is no doubt that NEPA was specifically designed to protect the types of economic, recreational and aesthetic interests which have been demonstrated by Environmental Friends and its affiants. *E.g.*, *id.* at 3187 (finding that the affiants alleged recreational injuries, if properly established in the context of a summary judgment, would be within NEPA's "zone of interest"). This is the whole point of its design to "eliminate damage to the environment and biosphere and stimulate the health and welfare of man. . . ." 42 U.S.C. § 4321 (1988).

II. NEPA ADDRESSES THE PREVENTION OF ENVIRONMENTAL DEGRADATION BY MANDATING THAT FEDERAL AGENCIES CONSIDER THE ENVIRONMENTAL EFFECTS OF MAJOR FEDERAL ACTIONS WITH SIGNIFICANT IMPACTS, NOTWITHSTANDING THEIR EXTRATERRITORIAL LOCATION.

A. *Congress Has The Inherent Authority To Apply The Procedural Mandates Of NEPA Beyond the Boundaries of the United States.*

The United States is not constrained by international law when policing the conduct of United States citizens in foreign countries as long as there is no infringement upon another nation's sovereignty, its citizens' rights, or the president's for-

eign policy power. *See generally Steele v. Bulova*, 344 U.S. 280, 285-286 (1952); The Extraterritorial Scope of NEPA's Environmental Impact Statement Requirement, 74 Mich. L. Rev. 349 (1975). The government's authority to regulate compliance with extraterritorial implications is further strengthened and encouraged if such activity will have domestic effects or will threaten national security or government functions. *See generally* Restatement (Third) of Foreign Relations Law of the U.S. §§ 402(1)(c) (1987).

Consistent with the foregoing principles, NEPA does not regulate individual conduct of "civilian" residents, nor the activities or rights of other nations, but rather it regulates only the activities of the United States federal government. *See* 42 U.S.C. § 4331(b) (1988); 42 U.S.C. § 4332(2)(C) (1988). The requirements are designed to ensure that agencies are informed about the environmental ramifications of their activities. All decisions affecting the use of Biocore will be made by federal agency officials within the territorial boundaries of the United States. *See* Restatement (Third) of Foreign Relations Law of the U.S. §§ 402(1)(c) (1987). The DOD has already decided to apply Biocore to facilitate cleanup of the missile site. (R.3-4) Environmental Friends is advocating that NEPA applies simply to ensure that the appellant makes an enlightened decision based on an adequate environmental assessment.

B. *NEPA Demonstrates Congressional Intent for the Mandatory Procedures of the Act To Apply Extraterritorially.*

Congressional intent to apply an act extraterritorially may be demonstrated in two ways: (1) Congress may speak directly on the issue using explicit language, or (2) an examination of the Act's structure and legislative history may reveal Congress's inherent purpose. *See Defenders of Wildlife v. Lujan*, 911 Fed.2d 117 (8th Cir. 1990); *Chevron USA v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Clear and unambiguous intent does not depend on "[w]hether a particular phrase in the statutory text standing alone resolves

the matter." *K-Mart Corporation v. Cartier, Inc.*, 486 U.S. 281 (1988). But rather, courts are required to examine "the language and design of the statute as a whole." *Id.*; *Davis v. Michigan Dept. of Treasury*, 109 S. Ct. 1500, 1504 (1989).

NEPA's "Congressional Declaration of Purpose" specifically enumerates the general thrust of the Act and clearly asserts that it is "[t]o declare a national policy which will . . . promote efforts which will prevent or eliminate damage to the environment and *biosphere* and stimulate the health and welfare of man." 42 U.S.C. § 4321 (1988) (emphasis added). "Biosphere" is defined as "[t]he part of the earth, its waters, and atmosphere where organisms can live." *Webster's II New Riverside Dictionary* 73 (1984). Therefore, the purpose is to "prevent or eliminate damage" to the part of the earth inhabited by organisms, not just the part of the earth labeled the United States. Additionally, the term "man" connotes an intent to protect the health and welfare of all peoples, regardless of their citizenry. The word "man" has been used for centuries to indicate all of humanity.

Furthermore, the "Declaration of National Environmental Policy," which is codified in section 101 of NEPA, conveys Congress' purpose and the policy of the federal government:

> The Congress recognizing the profound impact of *man's activities* on interrelations of *all components of the natural environment* . . . declares that it is the continuing policy of the Federal Government, . . . to use all practicable means . . . to create and maintain conditions *under which man and nature* can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.

42 U.S.C. § 4321(a) (1988) (emphasis added). This all inclusive and expansive language indicates that Congress intended for NEPA to be applied to prevent environmental degradation worldwide.

Congress decided to take an active role in promoting worldwide environmental preservation and preventing environmental degradation. Through NEPA, it established a comprehensive regulatory scheme to ensure cooperation with for-

eign countries, facilitate environmental awareness, and govern all major federal actions affecting the "human environment." 42 U.S.C. § 4332(2)(C) (1988). Although the phrase "human environment," as used in section 102(2)(C), indicates the humanly subjective focus Congress intended environmental preservation to receive, it certainly places no geographical boundary upon the extension of the Act. *Id. See* Hearings on S. 1075, and S. 10752 before the Senate Committee on Interior and Insular Affairs, 91st Cong., 1st sess., 118 (1969). The provisions of section 102(2) indicate that the Act was designed so that all the sections supplement and enhance one another. Their structure and flavor verify the inference that Congress intends all agencies of the federal government to consider the international scope of environmental problems.

Further evidence of Congress' intent is readily found elsewhere in the statute. For example, section 102(2)(F) plainly states that all federal agencies "*shall* . . . recognize the *worldwide* and long-range character of environmental problems and, lend support to initiatives, resolutions, and programs designed to *maximize international cooperation* in anticipating and preventing a decline in the quality of mankind's world environment . . . ." 42 U.S.C. § 4332(2)(F) (1988) (emphasis added). These phrases, like the policy statement, are clear and unambiguous in their directive. Use of the word "shall" in statutory language is considered mandatory. *Anderson v. Yung Kau*, 329 U.S. 482, 485 (1947). No qualifications are placed upon the Act which exempt certain agencies based upon their departmental branch or locus operandi. Congress fully intended for federal agencies to disregard their physical location and focus on worldwide environmental preservation.

Clearly, although Congress did not specifically enumerate its concern for worldwide environmental degradation in each provision, there is no doubt that Congress intended it to receive attention. Congress predicated the mandate of section 102 with "all agencies of the Federal Government *shall* . . . ." 42 U.S.C. § 4332 (1977) (emphasis added), indicating that all the provisions are supplementary and not mutually exclusive. This includes section 102(2)(F) which requires environmental attention on a worldwide sphere. *See* 42 U.S.C. § 4332(2)(F)

(1988).

In fact, Congress uses few words in NEPA which could indicate that a geographical limitation is to be placed upon the act. Such words as "Americans" and "nation" provide a slender reed upon which to base the argument that NEPA is not to be applied extraterritorially. *See* 42 U.S.C. § 4331(b) (1988). The use of these few restrictive words are not persuasive enough to refute the basic flavor, structure and message of the Act when considered in its entirety. *See K-Mart Corporation*, 486 U.S. 281 (1988). Although the Act does detail some goals which obviously would only be pertinent to preserving resources within the United States. *E.g.*, 42 U.S.C. § 4331(b)(4) (1988) (mandatory preservation of historical and cultural aspects of our national heritage), these directives do not abrogate the overall scheme of the Act, but rather detail some of the specific concerns which Congress intended to be addressed.

In no part of the Act is NEPA's application specifically limited. *See* 42 U.S.C. § 4321 (1988). To infer that because the Act is the United States' "national" policy it cannot be used to address the impacts of our actions on other countries abrogates the structure of the entire Act. *See generally* Pincas, *The "NEPA-Abroad" Controversy: Unresolved by an Executive Order*, 30 Buff. L. Rev. 611, 621 n.51 (1981). Such concerns provided the impetus for promulgating a law to prevent environmental degradation and "create and maintain" conditions conducive to man and nature's harmonic coexistence.

C. *The legislative history of NEPA, both before and after the Act's passage, indicates it is intended to have an extraterritorial extension.*

In the 1960s Congress entertained various approaches to ensure a comprehensive environmental policy—but none proved adequate to overcome all hurdles. Then, in 1968, a House Committee and a Senate Committee decided to come together to promulgate a working environmental management and policy structure. The House Committee on Science and Astronautics and the Senate Committee on Interior and Insu-

lar Affairs convened, and in what is termed the Joint Colloquium was born. *See* House Comm. on Science and Astronautics and Senate Comm. on Interior and Insular Affairs, 90th Cong., 2nd sess., Congressional White Paper on a National Policy for the Environment 15 (Comm. Print 1968).

Each committee issued a report before convening at the colloquium. The Senate report stated:

> The United States, as the greatest user of natural resources and manipulator of nature in all history, has a large and obvious stake in the protection and wise management of man-environment relationships everywhere. . . . Effective international environmental control would . . . be in the interest of the United States, and could hardly be prejudicial to the legitimate interest of any nation.

Special Report to the Senate Committee on Interior and Insular Affairs, 90th Cong., 2nd sess., 13, A National Policy for the Environment (1968). By the same token, the House Committee's report stated: "[e]nvironmental management will often transcend national borders." Subcomm. on Science, Research, and Development of House Comm. on Science and Astronautics, Managing the Environment, 90th Cong., 2nd sess., 16 (Comm. Print 1968). The latter also specifically endorsed a national policy that would consider "worldwide effects" and facilitate international cooperation. *Id.* at 7.

The Joint Colloquium then issued a congressional *White Paper*, summarizing the outcome of the proceedings and suggesting the statement of national policy on the environment should be as follows: "It is the policy of the United States that: environmental quality and productivity should be considered in a worldwide context, extending in time from the present to the long term future." House Comm. on Science and Astronautics and Senate Comm. on Interior and Insular Affairs, 90th Cong., 2nd sess., Congressional White Paper on a National Policy for the Environment (Comm. 1968) at 15. The Joint Colloquium and its Congressional White Paper led directly to the promulgation of NEPA.

Just like legislative history preceding the Act's passage,

the subsequent legislative history demonstrates that NEPA is to apply to actions outside of the boundaries of this country. *See Defenders of Wildlife v. Lujan*, 911 F.2d 117 (8th Cir. 1990) (legislative history subsequent to passage is examined in determining congressional intent to apply Endangered Species Act extraterritorially). In House Oversight Hearings shortly after the passage of NEPA, Congress demonstrated its intention to exact compliance with NEPA in both the domestic and the foreign arenas. *See generally* Administration of the National Environmental Policy Act Hearing before the Committee on Merchant Marine and Fisheries. House of Representatives Report No. 92-316, Part 1, 92d Cong., 1st Sess., 1971 ("Oversight Hearings"). Among other things, the Oversight Hearings considered a theory proposed by the State Department that environmental impacts within a foreign boundary are not subject to the Act. In support the Department offered a legal memorandum which proposed that legislation of the United States generally does not apply within the jurisdiction of a foreign state. *Id.* Congress responded with an outright rejection of this assumption, declaring that "[t]he history of the Act makes it quite clear that the global affects of all environmental decisions . . . must be considered." Oversight Hearings Part 1, at 33. In sum, federal agencies are to apply the NEPA mandates to every major federal action significantly affecting the environment, including those which effect areas entirely outside the United States.

Congressional intent is further evidenced in Senate Resolution 49, a policy for encouraging international treaties in which member states are required to prepare an EIS addressing internal and external effects, including those which affect only the territory of another nation. S. Res. 49, 95th Cong., 1st Sess. (1978). This resolution demonstrates that Congress intends for the EIS to be required in actions involving impacts solely within a foreign jurisdiction. The Senate would hardly propose that the United States seek treaties requiring other nations to consider environmental impacts if it did not expect its own government to do so.

Congress additionally demonstrates its understanding that NEPA applies to actions outside the boundaries of the

United States in the Base Closure Act. Base Closure Act 100 Pub. Law 526, 102 Statutes 2623 (1988). This statute recognizes that United States military installations abroad are subject to NEPA, by modifying the environmental duties thereunder to a limited degree. *Id.* Congress would not have suspended the Department's duties if it did not recognize that NEPA applies in the first instance. While the statute recognizes that domestic base closures and foreign closures will have different evaluation requirements in terms of the socio-economic effects, there is no such distinction made as regards the environmental analysis.

Finally, Congress recently demonstrated again that NEPA is to apply to extraterritorial actions. Major consolidation of the various environmental agencies, proposed just last year, includes a clarification that NEPA requires an environmental statement to be prepared whether the impact occurs within the boundaries of the United States or not. House of Representatives 3475 § 505, 102nd Cong., 1st sess. (1990). In the same spirit as the framers of NEPA, the proponents of this Act recognize that the environmental mandate applies to extraterritorial action of the federal government as long as it is consistent with other goals of this nation. *Id.*

Compliance with NEPA for the Biocore cleanup project at the Venice missile site in no way conflicts with any other goals of the DOD. In fact, since this action may well be the prototype for cleanup at other military sites in Europe and around the world, the goals of the DOD would be decidedly furthered by assuring all nations involved that the United States is sincere about its own commitment to environmental protection. Congress intended for extraterritorial actions to be governed by NEPA in 1969 and this purpose is even more evident in light of subsequent congressional history.

D. *Executive Agencies and Executive Order 12114 Recognize That When Consistent With Other Important National Goals, NEPA Applies to Federal Actions.*

Executive agencies have provided statements that reflect

their understanding that NEPA applies to foreign impacts. Most persuasive are the Council on Environmental Qualities' regulations which declare that NEPA applies to actions outside the territorial boundaries of the United States. 40 C.F.R. 1500 (1988). The Council is the primary agency designated to interpret and evaluate the legislation. 42 U.S.C. §§ 4341-347 (1988). The Council, following Congress' purpose, explained NEPA's extraterritorial applications abroad, stating that the "human environment . . . is not limited to the United States but includes other countries . . . The Act contains no express or implied geographic limitations of environmental impact in the United States or any other area." Council on Environmental Quality Memorandum of the Application of the EIS Requirement to Environmental Impacts Abroad of Major Federal Actions, September 24, 1974, reprinted in 42 Fed. Reg. 61068 (1977). While some agencies promulgated regulations evaluating NEPA's concerns abroad in accordance with the Council on Environmental Quality guidelines, others did not or at least not completely. *See generally* Mich. L. Rev. 349, 350 n.74 1975 (outlining selected agencies positions and subsequent actions). The State Department recanted from its original rejection of NEPA obligations when it established internal regulations. 37 Fed. Reg. 19167-68 (1972). However, the Department of Defense continues to resist the full demands of NEPA and was a major player in the compromise resolution provided by Executive Order 12114 ("Order"), a Presidential directive to limit consideration of environmental factors. Exec. Order No. 12114, 3 C.F.R. 356 (1980).

The executive order purports to be issued by the independent authority of the President, although the source of that authority remains unclear. *See id.* at 1-1. The Order claims to further the policy of NEPA, as well as other environmental legislation, but is deeply concerned with the foreign relations and security posture of this nation, a strong indication that those functions provided a source for the Order. *See id.* at 1-1 and 2-5 (enumerating the President's integral diplomatic and defense prerogatives as completely exempt). It is clear that the White House saw the preeminent function of Executive Order 12114 as defining the interests in foreign af-

fairs and national security that must be pursued in conjunction with the pursuit of environmental interests. Thus, the Order is the sole interpretation of the United States environmental obligations with respect to government activities abroad, when those activities are primarily related to diplomatic or security objectives of the nation. The objective here is environmental consideration, and there are neither overriding diplomatic nor security considerations in cleanup of an obsolete military site.

E. *After considering the language and purpose of NEPA, its legislative history and its interpretation by other branches and agencies, courts which have considered NEPA's extraterritorial extension have concluded that the Act may properly apply outside of the United States.*

NEPA has been held to apply to major actions of federal agencies which have significant impacts on a foreign nation, if those actions also result in environmental impacts in the United States. *Sierra Club v. Adams*, 578 F.2d 38 (D.C. Cir. 1978). The court found that the Federal Highway Administration's funding of the Pan American Highway in Panama and Columbia would engender impacts in those nations which could in turn increase the likelihood of disease in domestic cattle. *Id.* Likewise, in Italy, the army endangers the health of its own soldiers by using an unreliable cleanup method. This danger reaches to those who will apply the Biocore to the site as well as those responsible for maintenance in the future. These United States soldiers obviously deserve the same consideration as domestic cattle.

In another case the court considered NEPA in the context of the United States' participation in herbicide spraying entirely within the borders of Mexico. *See National Organization for Reform of Marijuana Laws v. United States*, 452 F. Supp. 1221 (D.D.C. 1978). The court therein found the United States' participation to fall within the meaning of section 102(2)(C) of NEPA, even though the program took place solely within the territory of another nation. *Id.* Because the

government agreed to prepare an EIS for any effects which could reach the United States, the court did not have to actually decide whether an EIS was required for extraterritorial effects. *Id.* Nonetheless, in approval of the settlement which had been reached, the court was willing to assume that NEPA did apply to an action solely within Mexico. *Id.* This decision illustrates that NEPA does apply outside the United States especially where the dangers primarily confronting foreign jurisdictions could also be detrimental to American citizens. Under this analysis, the Army's plan to use an unproven microorganism is subject to NEPA because, while primarily affecting Italy, the use also threatens United States personnel on the site as well as Environmental Friends members.

The problem of conflicting congressional goals arose in a case which considered whether to apply NEPA to an action involving a proposed nuclear reactor license in the Philippines. *Natural Resources Defense Council v. Nuclear Regulatory Commission*, 647 F.2d 1345 (D.C. Cir. 1981). The court weighed the environmental demands of NEPA against the nonproliferation goals of the Atomic Energy Act and the Nuclear Nonproliferation Act. *See id.* at 1357. The court performed a balancing test between the Commission's claim that the license was a part of the "common defense in security" and the environmental mandates embodied in NEPA. *See id.* Both the plurality and concurring opinions recognized that NEPA's directives apply to the Commission's actions whether or not an EIS was required. *See id.* at 1387 (concurring opinion of Robinson, judge) ("NRC should remain cognizant of this responsibility," and footnote 163 referring to support in plurality opinion). However, because Congress has provided explicit directives in the Atomic Energy Act and Nuclear Nonproliferation Act, the court found that the environmental effects of licensing must not prevent the issuance of that license. *Id.* at 1366. The court recognized that section 102(2)(F) of NEPA provides that consistency with foreign policy is an appropriation. *See id.* There are no opposing congressional purposes or any detrimental foreign policy considerations which are inimical to applying NEPA's procedures at the Venice, Italy, missile site.

Finally, the District Court of Hawaii has also recognized that NEPA's procedural requirements and other foreign policy goals must be weighed in a balancing test to determine whether to require an EIS extraterritorially. *Greenpeace USA v. Stone*, 748 F. Supp. 749, 754 (D. Ct. Haw. 1990). This balancing test is not a contravention of NEPA but rather one of the alternatives provided within the statute itself. *Id.* at 760; *see* 42 U.S.C. § 4332(2)(F) (1988). NEPA should apply to all actions, including those entirely outside of the United States, when the statute's mandate is consistent with other goals. Since foreign policy or security goals are not obstructed, the Army should be compelled to act in accordance with law. NEPA applies to extraterritorial action where it is not in conflict with other policies. Because the Venice site presents no opposing considerations of this type NEPA applies.

CONCLUSION

For the foregoing reasons, Environmental Friends, Inc. requests that the decision of the District Court for the Eastern Section of Virginia be affirmed.

Respectfully submitted,

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