

- ²⁰ National Wildlife Federation v. Burford, 676 F.Supp. at 279.
- ²¹ National Wildlife Federation, 835 F.2d at 327.
- ²² Lujan, 110 S.Ct. 3177, 3185-86.
- ²³ Binder, at 176.
- ²⁴ Lujan, 110 S.Ct. at 3189.
- ²⁵ *Id.* at 3189-90.
- ²⁶ *Id.*
- ²⁷ Sheldon, p.10557.
- ²⁸ 2 Villanova Env'tl. L. J. 227, 242 (1991).
- ²⁹ See Wilderness Society v. Griles, 824 F.2d 4 (D.C.Cir.1987); NRDC v. Burford, 716 F.Supp. 632 (D.D.C. 1988); Idaho Conservation League v. Mumma, (D. Mont. July 8, 1990).
- ³⁰ Sheldon, p.10557.
- ³¹ 2 Villanova Env'tl. L. J. 227-28, 242-43 (1991).
- ³² Lujan, 110 S.Ct. at 3194-95.
- ³³ 2 Villanova Env'tl. L. J. at 245.
- ³⁴ See Abbott Laboratories v. Gardner, 387 U.S. 136 (1967); Columbia Broadcasting System, Inc. v. United States, 316 U.S. 407, 416 (1942).
- ³⁵ 2 Villanova Env'tl. L. J. at 249.
- ³⁶ *Id.* at 248.
- ³⁷ 917 F.2d 15 (9th Cir. 1990).
- ³⁸ *Id.* at 16-17. See also Greenpeace USA v. Stone, 748 F.Supp. 749 (D. Haw. 1990); Public Interest Research Group of New Jersey, Inc. v. Powell Duffryn Terminals, Inc., 913 F.2d 64 (3d Cir. 1990).
- ³⁹ *Id.* at 250-51.



NEPA'S APPLICABILITY OVERSEAS: FEDERAL ACCOUNTABILITY IN THE INTERNATIONAL ARENA

by Dawn Andrews

Congress enacted the National Environmental Policy Act¹ (NEPA) in 1969 in response to a national outcry of environmental awareness and concern. NEPA sets out the nation's policy to protect the environment and requires federal agencies to address environmental effects of their actions before the action is taken. NEPA has always governed federal agency actions domestically, but the question of its reach outside our borders has not been settled.

If NEPA does govern federal agency actions overseas, the impacts will be felt in many different arenas. Closure of military bases and perhaps even their ongoing operations would require NEPA compliance. Monetary obligations such as involvement in the World Bank and foreign aid packages for specific projects could require NEPA documentation. International bargaining and negotiations could take on an additional dimension. Thus, the issue of NEPA's extraterritorial application raises important questions. As with any controversial topic, there are both proponents and opponents who vigorously disagree on NEPA's extraterritorial scope.

The overriding purpose of NEPA is to ensure that federal decision-makers consider the environmental impacts of any major proposed action and its alternatives before deciding how to act. The statute itself requires an Environmental Impact Statement (EIS) to be completed for major federal actions significantly affecting the quality of the human environment.² The human environment does not stop at United States borders. Thus, the question of NEPA requiring accountability outside U.S. borders arises.

American involvement in the World Bank and foreign aid packages for specific projects could require NEPA documentation.

NEPA'S ENACTMENT: LANGUAGE AND LEGISLATIVE HISTORY

NEPA employs expansive language such as “man and his environment,” “biosphere,” and “health and welfare of man.”³ This language suggests Congressional intent that NEPA applies globally. Proponents of extraterritorial application suggest that this premise is reinforced, rather than diminished, by the fact that certain areas of the statute contain purely domestic language. The term “nation” appears repeatedly in NEPA to discuss “resources important to the Nation,” “environmental classes of the Nation,” and “social, economic, and other requirements of the Nation.”⁴ Proponents claim that these domestic sections of the statute show that Congress knows how to use domestic language when it intends a domestic effect. Instead of utilizing this language in the sections dealing with the scope of the statute, Congress instead used global, expansive language.

Opponents of extraterritorial application claim Congress intended only domestic application of the statute. The global language, they argue, only expresses an awareness that all ecosystems are linked in the world and that actions in our nation could have effects elsewhere, such as acid rain from the U.S. destroying Canadian lakes. They assert that Congress’s true concerns were addressed in the sections of NEPA discussing our concerns as a nation.

An analogous language interpretation arose with regard to the Endangered Species Act⁵ in *Defenders of Wildlife v. Lujan*⁶ [For a more detailed explanation of the *Defenders* case, see the article in this issue at page 17. Ed.] The *Defenders* case addressed whether the Endangered Species Act (ESA) applied to activities authorized, funded or carried out by the United States government in foreign countries. The Court of Appeals for the 8th Circuit affirmed the district court’s holding that it does.

First, the court recognized that Congress intentionally chose “expansive language, admitting no exceptions.”⁷ Then, the *Defenders* court addressed the fact that the plain intent of Congress in enacting the ESA was to halt and reverse the trend toward species extinctions. Finally, 507 of the 1046 species listed as endangered or threatened under the ESA have ranges outside of the United States.

Proponents of NEPA’s extraterritorial application argue that the ESA’s purpose is analogous to NEPA’s. First, NEPA also contains expansive language, intentionally chosen by Congress. Second, in enacting NEPA, Congress plainly intended to protect the earth’s environment, or the “biosphere,” from further degeneration, just as it intended to preserve endangered species with the ESA. Finally, over 25% of the federal agencies listed by the Council on Environmental Quality (CEQ)⁸ as falling under NEPA participate in extraterritorial activities. Therefore, NEPA, as the ESA, should apply to federal actions wherever they occur. Opponents disagree that such similarities exist between the two statutes and argue that *Defenders*’ reasoning does not apply to NEPA.

The legislative history of NEPA tends to favor proponents with evidence of Congressional intent to apply the statute’s requirements outside of the United States. A *Congressional White Paper on a National Policy for the Environment* summarized the debates and conclusions of the joint House-Senate colloquium that conceived NEPA.⁹ The *White Paper* recognized the importance of considering environmental impacts of foreign projects and recognized the principal that everything in the world is interactively linked.¹⁰ The *White Paper* “recommended that the U.S. consider the policies in a ‘worldwide context’ with ecological considerations.”¹¹

After jointly conceiving NEPA, the House and Senate separated to draft the text of the statute. The House Committee report emphasized the need for international environmental analyses.¹² The House report declared that “implicit in this section [42 U.S.C. §4341] is the

The ESA’s purpose is analogous to NEPA’s.

The final Senate bill contained much more expansive global language.

understanding that the international implications of our current activities will also be considered, inseparable as they are from the purely national consequences of our actions.”¹³

The Senate bill, S. 1075, as originally introduced, contained solely domestic language and concentrated on management of our natural resources. The entire text of this bill was deleted and rewritten. The final Senate bill contained much more expansive global language, echoing the committee’s conviction that we must address environmental problems “as a nation, and as a world....”¹⁴

The final draft of NEPA was patchworked from segments of the House and Senate bills. The committee compiling the final draft incorporated the international language from both bills, but discarded most of the domestic language. Finally, when presenting the final bill to the Senate, Senator Jackson emphasized NEPA’s global focus.

One year after NEPA’s enactment, the House committee rejected a State Department assertion that it was exempt from complying with NEPA.¹⁵ The House committee remarked that “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.”¹⁶ Therefore, the legislative history tends to support extraterritorial application of NEPA.

Opponents claim, however, that legislative history is not dispositive nor even relevant in determining the scope of a statute. Many factors weigh into the legislative process. Intent of the legislature during the legislative process, opponents argue, does not necessarily coincide with the final product. Therefore, some courts refuse to consider legislative history when interpreting statutes.

IMPLEMENTING NEPA: COUNCIL ON ENVIRONMENTAL QUALITY INTERPRETATION, CASE LAW, AND EXECUTIVE ORDER 12114

Title II of NEPA created the Council on Environmental Quality to interpret and implement NEPA.¹⁷ Proponents note that CEQ has consistently maintained that NEPA applies extraterritorially.¹⁸ In 1977, CEQ issued a memorandum concluding that “the impact statement requirement.. ..applies to effects...on the quality of the human environment--in the United States, in other countries, and in areas outside the jurisdiction of any country.”¹⁹ Based on CEQ’s fervent insistence that NEPA applies outside the U.S., most agencies have complied with NEPA and prepared EIS’s for actions on foreign soil.²⁰ However, some agencies have refused to comply with CEQ mandates and this has resulted in litigation.

Generally, the case law conflicts over application of NEPA abroad. Many cases deal not with the question of whether NEPA applies, but with the question of whether compliance was adequate.²¹ In other cases, the courts have addressed the issue of whether NEPA applies abroad. In Enewetak v. Laird,²² the People of Enewetak Atoll challenged the Secretary of Defense and the Secretary of the Air Force for failing to prepare an adequate EIS for seismic studies on the atoll. The defendants claimed NEPA did not apply to Trust Territories administered by the United States. The court held that NEPA did apply to Trust Territories, recognizing that NEPA’s expansive language evidenced a concern for all persons, “not just United States citizens inside the fifty states.”²³

Several courts have held that NEPA need not be complied with under certain circumstances. In NRDC v. NRC²⁴, the D.C. Circuit Court of Appeals declined to disturb the NRC’s decision that issuing an export license for a nuclear reactor does not require an EIS under NEPA. The Republic of the Philippines purchased the reactor, assuring the court in an amicus brief that extensive regulatory and review procedures exist under Philippine law.²⁵ The Philippines government further stressed that refusal to grant the permit based on NEPA would constitute an unwanted American intrusion into internal affairs of the Philippines. Only two

judges participated in this decision, each writing separate opinions. Judge Wilkey stressed the foreign policy conflict in his conclusion that NEPA should not apply to the NRC decision.

A similar foreign policy problem arose in Greenpeace v. Stone.²⁶ The district court denied Greenpeace's motion for a preliminary injunction against U.S. transportation of chemical weapons through West Germany and across the oceans to Johnston Atoll for incineration. Greenpeace insisted that NEPA required an EIS for movements within Germany. The court disagreed, explaining that application of NEPA would interfere with an executive agreement between President Reagan and Chancellor Kohl. Hence, strong foreign policy arguments oppose extraterritorial application of NEPA.

Many major government agency actions abroad do not involve such foreign policy conflicts, however. On the contrary, the world is paying more attention to the global environment and human impacts upon it. Environmental organizations flourish with global followings and support. People are recognizing what Congress recognized when it enacted NEPA--that the ecosystems of the world are interconnected and must be protected for future generations. Hence, countries may welcome U.S. procedures that protect their environments, rather than allowing the U.S. to destroy their environments while protecting its own. Foreign policy concerns may not often arise if NEPA were applied abroad.

The President has broad powers as Chief Executive, including the power to conduct foreign affairs. These powers do have limits, however; the president cannot make laws, *he can only carry them out*. The President could not act to make law in an area covered by NEPA because Congress has spoken in enacting NEPA.²⁷

President Carter issued Executive Order 12114 in 1979 to "clarify" NEPA.²⁸ Proponents argue that E.O. 12114 directly conflicts with NEPA in the area of international or extraterritorial application. It states that an agency need not address effects on a foreign nation when preparing an EIS to address significant effects on the U.S. or on the global commons.²⁹ The Order also fails to provide for public review of draft impact statements or for access to finalized foreign environmental documents, a fundamental aspect of NEPA.³⁰ Therefore, proponents argue, E.O. 12114 is an unconstitutional application of presidential power and has no effect on NEPA or its scope.

Opponents claim that E.O. 12114 truly clarifies NEPA in stating outright that NEPA does *not* apply to effects of federal projects in foreign nations. In addition, the President exercised his power over foreign affairs which are exclusively within his domain, not that of Congress. Since the courts have not ruled on the constitutionality of E.O. 12114, its true effects on the application of NEPA abroad are unknown.

CONCLUSION

Last October, the U.S. Senate Committee on Environment and Public Works reported out Senate Bill 1278. This bill would strengthen NEPA by commanding enforcement of §102(2)(C) for both domestic and extraterritorial actions, excepting decisions on national security, armed conflict, intelligence, armes, enforcement actions, and votes in international organizations or conferences.³¹

Application of NEPA abroad would require federal agencies to address the environmental impacts of their actions, wherever they occur. S.1278 recognizes the need for such awareness. As the world grows smaller, people are becoming more conscious of the global nature of environmental problems. The rainforests are more than just a Brazilian tourist attraction, they are a world responsibility. Our oceans are also a world concern. We can no longer look at our actions and their effects within our boundaries alone. Along with this increased responsibility comes increased obligation, however. Our international transactions,

Judge Wilkey stressed the foreign policy conflict in his conclusion that NEPA should not apply to the NRC decision.

Dawn
Andrews is a
graduating 3L
at King Hall.
She will be
practicing
environmental
law in Los
Angeles.

military bases overseas, and projects we support on foreign soil will need to consider our environmental policy, in addition to other concerns. We could run into foreign policy conflicts, but if a healthy environment is worth having, it's worth the effort. Drastic measures must be taken now if we plan to give future generations a planet they can live on and enjoy. Hence, our environmental statutes, including NEPA, should be interpreted as broadly as possible to protect our environment today.

ENDNOTES

¹ 42 U.S.C. § 4321 *et. seq.*

² 42 U.S.C. § 4321 *et. seq.*

³ 42 U.S.C. § 4321 *et. seq.*

⁴ *Id.*

⁵ 16 U.S.C. § 1531 *et. seq.* See Defenders of Wildlife v. Lujan, 911 F.2d 117 (8th Cir. 1990), cert. granted, 59 U.S.L.W. 3769 (1991).

⁶ 911 F.2d 117 (8th Cir. 1990), cert. granted, 59 U.S.L.W. 3769 (1991). The Supreme Court heard oral arguments on this case in early December 1991.

⁷ *Id.*

⁸ CEQ was established in NEPA to interpret the statute and advise the President on its implementation. See 42 U.S.C. § 4341 *et. seq.*

⁹ 115 Cong. Rec. 29,078 (1969).

¹⁰ *Id.* at 29,709.

¹¹ Sanford E. Gaines, *Environmental Effects Abroad of Major Federal Actions: An Executive Order Ordains a National Policy*, 3 Harv. Env't L. Rev. 136, 138 (1979) (quoting 115 Cong. Rec. at 29,709).

¹² H.R. Rep. No. 378, 91st Cong., 1st Sess. (1969) reprinted in 1969 U.S. Code Cong. & Admin. News 2751.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ H.R. Rep. No. 316, 92nd Cong., 1st Sess., 33 (1971).

¹⁶ *Id.*

¹⁷ 42 U.S.C. § 4321 *et. seq.*

¹⁸ See 38 Fed. Reg. 20,550, 20,553 (1973); CEQ, "Memorandum on the Application of the EIS Requirement to Environmental Impacts Abroad of Major Federal Actions," (1976), reprinted in 42 Fed. Reg. 61,066 (1977) (cited hereafter as *CEQ Memorandum I*); Council on Environmental Quality Memorandum to Agency Heads on Overseas Application of NEPA Regulations (1978), reprinted in 8 Env't Rep. (BNA) 1493 (1978) (cited hereafter as *CEQ Memorandum II*); and CEQ Draft Regulations on Applying NEPA to Significant Foreign Environmental Effects (1978), reprinted in 8 Env't Rep. (BNA) 1495 (1978) (cited hereafter as *CEQ Draft Regulations*).

¹⁹ See *CEQ Memorandum I*, *supra*, note 18.

²⁰ See Sierra Club v. Adams, 578 F.2d 389 (D.C. Cir. 1978) [Sierra Club challenged the Dept. of Transportation's EIS on the Pan American Highway project, particularly the "Darién Gap" portion connecting Panama and Columbia]; Wilderness Society v. Morton, 463 F.2d 1261 (D.C. Cir. 1972) [Canadian environmental group was allowed to intervene in an American lawsuit regarding the Trans-Alaska pipeline and Dept. of Interior's EIS]; and NORML v. U.S., 452 F.Supp. 1226 (D.C. Cir. 1978) [The Nat'l Organization for the Reform of Marijuana Laws sued the Drug Enforcement Agency and the State Dept. over a failure to prepare an EIS on the proposed spraying of a herbicide on poppy crops in Mexico].

²¹ See cases listed *supra*, note 20.

²² 353 F.Supp. 811 (D. Haw. 1973).

²³ *Id.*, at 816.

²⁴ 647 F.2d 1345 (D.C. Cir. 1981).

²⁵ *Id.*, at 1348, note 9.

²⁶ 748 F.Supp. 749 (D. Haw. 1990).

²⁷ See Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952), known as the Steel Seizure Cases.

²⁸ 44 Fed. Reg. 1957 (1979), reprinted in 42 U.S.C. § 4321 (1982).

²⁹ *Id.* at §3-5.

³⁰ *Id.*

³¹ Equally important for NEPA, the bill would require the EA or EIS to describe actions taken to mitigate any possible adverse environmental effects the project may have, similar to California's requirement in the California Environmental Quality Act (CEQA), found at Public Resources Code § 21000 *et. seq.*