Natural Resources Defense Council v. United States Department of the Navy: The District Court for the Central District of California Applies NEPA to the United States Exclusive Economic Zone for the First Time

I. OVERVIEW

The United States Department of the Navy's (Navy) Littoral Warfare Advanced Development Program (LWAD) is designed to aid in the development and testing of new naval warfare technologies, some of which have been proven to kill marine mammals.[1] The LWAD program's mission is to "test and demonstrate Littoral Anti-Submarine Warfare Future Naval Capabilities technologies to ensure transition to acquisition programs."[2] Since 1996, the LWAD has facilitated or supervised seventeen tests of experimental antisubmarine warfare technologies, including active sonar, in littoral waters in various locations around the globe.[3] Specifically, the LWAD has been responsible for the testing of high-intensity sonar, also known as "active sonar."[4] The Navy's use of active sonar and other experimental high-intensity underwater sounds has drawn the attention of environmentalists and government scientists due to the severe consequences of such actions on underwater sea life.[5] The Navy has also recognized the threat that high-intensity active sonar poses

1. *See* Natural Res. Def. Council (NRDC) v. United States Dep't of the Navy, No. CV-01-07781 CAS (RZx), at 2, 5 (C.D. Cal. Sept. 19, 2002).

2. Office of Naval Research, Littoral Warfare and Advanced Development Website (Oct. 15, 2002), *available at* http://www.onr.navy.mil/sci_tech/ocean/projects/lwad/default.htm.

3. *NRDC*, No. CV-01-07781 CAS (RZx), at 2 n.2. The term "'Littoral' refers to the shelf areas around most land masses, extending as close as a few miles to as far as a hundred miles of shore." *Id.*

4. *Id.* at 5-6.

5. *See id.* at 5; *see also* Marc Kaufman, *Navy Drops Criticized Sonar Test off N.J.; Scientists Say Equipment's Submarine Detection Blasts Can Harm Sea Life*, WASH. POST, May 27, 2000, at A2.

to marine mammals.[6] The most telling evidence of active sonar's danger to marine life was found in a joint task force study conducted by the National Marine Fisheries Service (NMFS) and the Navy.[7] The study found that the most probable explanation for the stranding and, in some instances, death of seventeen cetaceans (mainly whales) along the coast of the Northern Bahamas in March of 2000 was a Naval active sonar test conducted in the area.[8]

The Natural Resources Defense Council and other environmental organizations (Plaintiffs) and the Navy (Defendants) both sought summary judgment on the Plaintiffs' claim to enjoin the Navy from conducting any more LWAD tests, specifically those using active sonar, until the Navy conducted a programmatic environmental impact statement (PEIS).[9] The Plaintiffs asserted that a PEIS was necessary because the LWAD program is responsible for coordinating all of the testing of high-intensity sonar technology in a relatively small geographic area.[10] The Navy moved for summary judgment on the Plaintiffs' claim stating that the LWAD program was not subject to a PEIS because the LWAD was not responsible for the long-term planning of LWAD tests.[11] Furthermore, the Navy stated in its response that a centralized planning committee could not map out the effects that the LWAD program may have on a long-term, programmatic level because the tests are not connected and the preparation of such data is not feasible.[12] Alternatively, the Navy claimed that even if the court found that the LWAD was subject to a PEIS, the National Environmental Protection Act (NEPA) would not apply to the LWAD tests because they are conducted extraterritorially in

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6. NRDC, No. CV-01-07781 CAS (RZx), at 6 (citing JANUARY 2001 FINAL OVERSEAS ENVIRONMENTAL IMPACT STATEMENT AND ENVIRONMENTAL IMPACT STATEMENT FOR SURVEILLANCE TOWED ARRAY SENSOR SYSTEM LOW FREQUENCY ACTIVE SONAR, *available at* http://www.nmfs.noaa.gov.library.csuhayward.edu/prot_res/readingrm/ESAsec7/7pr_surtass-2020529.pdf (last visited Oct. 15, 2002)).

7. *Id.*

8. *See id.* (citing Declaration of Joel Reynolds, Exhibit 21, Joint Interim Report Bahamas Marine Mammal Stranding Event of 14-16 March 2000, at 1237 (2000), *available at* http://www.nmfs.noaa.gov/prot_res/overview/Interim_Bahamas_Report.pdf).

9. *Id.* at 7.

10. *See id.* at 39. For example, Plaintiffs pointed out that five tests were conducted in the vicinity of the South Atlantic Bight off the Carolina Coast and that five other tests were conducted in the Gulf of Mexico. *Id.* at 3-4.

11. *See id.* at 4-5.

12. *See id.* The Navy noted that the LWAD tests are constantly subject to change and stressed that because each test was independent, LWAD did not have enough information to prepare a programmatic review. *Id.* The Navy further claimed it was only capable of preparing an individual EIS once LWAD began to set forth the individual details for a specific test because details such as the necessary resources, specific technologies to be tested, and location of the test could not be predicated very far in advance. *Id.*

the United States Exclusive Economic Zone (EEZ).[13] The government has previously argued that while agency action in the EEZ may require environmental assessments, actions in the EEZ are not subject to NEPA.[14] The United States District Court for the Central District of California granted the Navy's motion for summary judgment and *held* that while the presumption against extraterritoriality did not bar the application of NEPA in the EEZ, the plaintiffs did not fulfill their burden of showing the Navy acted arbitrarily in failing to perform a PEIS.[15] *Natural Resources Defense Council v. United States Department of the Navy*, No. CV-01-07781 CAS (RZx) (C.D. Cal. Sept. 19, 2002).

II. BACKGROUND

Neither NEPA nor its corresponding regulations are clear about whether the presumption of extraterritoriality bars NEPA's application to the EEZ, thus nullifying its procedural requirements.[16] The presumption against extraterritoriality declares that Congress should legislate with the presumption that domestic legislation is not applicable outside of the territories of the United States.[17] When the United States Supreme Court considered the issue in *Equal Employment Opportunity Commission v. Arabian American Oil Co.*, the Court upheld the notion of the presumption against extraterritoriality noting that Congress legislates with the belief that, absent a contrary intent, U.S. statutes will not apply extraterritorially.[18] The Court further stated that the proper test for determining whether Congress intended to apply a given legislation outside of traditional U.S. jurisdiction is to analyze the statutory language in an effort to determine whether Congress sought to broaden the scope of the law to apply outside of territories controlled by the United States.[19]

The United States Court of Appeals for the District of Columbia Circuit has decided two cases involving the issue of whether the presumption against extraterritoriality specifically bars the application of

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13. *See id.* at 11-12. The United States Exclusive Economic Zone (EEZ) was established by Presidential Proclamation in 1983, pursuant to international law. The EEZ "extends for a distance of 200 nautical miles from the baseline from which the breadth of territorial sea is measured." *Id.* at 16 n.8 (citing Proclamation No. 5030, 48 Fed. Reg. 10,605 (Mar. 10, 1983)).

14. *See Whales: Navy Subject to Enviro Rules on Sonar Testing-Judge*, GREENWIRE, Sept. 20, 2002, *available at* http://www.lexis.com.

15. *NRDC*, No. CV-01-07781 CAS (RZx), at 21, 32.

16. *Id.* at 20.

17. *See id.* at 15; *see also* Equal Employment Opportunity Comm'n v. Arabian Am. Oil Co., 499 U.S. 244, 248 (1991) (discussing the presumption against extraterritoriality).

18. *Arabian Am. Oil Co.*, 499 U.S. at 248 (citing Foley Bros., Inc. v. Filardo, 336 U.S. 281, 285 (1949)).

19. *See id.* at 248 (referring to *Foley Bros.*, 336 U.S. at 285).

NEPA.[20] Both cases found that the *Equal Employment Opportunity Commission* test was not necessary in determining whether Congress intended NEPA to apply extraterritorially.[21] The issue in *Environmental Defense Fund, Inc. v. Massey* was whether a National Science Foundation (NSF) incinerator in Antarctica was subject to the requirements of NEPA.[22] The United States Court of Appeals for the District of Columbia found that the NSF incinerator project was required to obey the statutory provisions of NEPA and that the presumption against the extraterritoriality application of NEPA did not factor into the situation.[23] The court stated that even in situations in which the consequences of conduct regulated by NEPA are felt outside of the United States, there is no extraterritorial problem if the actions Congress intended to regulate through NEPA occur within the United States.[24] The court reasoned that the construction of the incinerator in Antarctica was not subject to NEPA review because the underlying policy of NEPA is to insert environmental concerns into the framework of federal agency decisions rather than dictate substantive agency choices.[25] Instead, it was the decisionmaking process that authorized the incinerator that was subject to NEPA review.[26] Therefore, because the NSF decision to build the incinerator took place in the United States, the analysis was subject to the provisions of NEPA despite the fact the project was situated in Antarctica.[27] The court also found Antarctica's unique international position significant in reaching its decision.[28] Specifically, the court referred to a previous decision in which it stated that Antarctica is a continent "most frequently analogized to outer space" rather than a sovereign country.[29] The court also noted that, in addition to Antarctica being viewed as a common territory, the United States exercises dominion over all air traffic to Antarctica and controls several research stations on the continent.[30] These factors led to the court's decision that

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20. *See* Envtl. Def. Fund, Inc. v. Massey, 986 F.2d 528, 530-32 (D.C. Cir. 1994); Natural Res. Def. Council, Inc. (NRDC) v. Nuclear Regulatory Comm'n, 647 F.2d 1345, 1165-68 (D.C. Cir. 1981).

21. *See Massey*, 986 F.2d at 529; *NRDC*, 647 F.2d at 1368. *See generally Arabian Am. Oil Co.*, 499 U.S. 244.

22. 986 F.2d at 530.

23. *See id.* at 532.

24. *See id.* at 531.

25. *See id.* at 532.

26. *See id.*

27. *See id.* at 533.

28. *Id.*

29. *Id.* (citing Beattie v. United States, 756 F.2d 91 (D.C. Cir. 1984) (finding the presumption against extraterritoriality should not be applicable to cases in Antarctica)).

30. *Id.* at 534.

the presumption against extraterritoriality was inapplicable to the situation and that NEPA analysis was proper.[31]

However, the D.C. Circuit has also recognized that there are situations in which the presumption against extraterritoriality will apply to NEPA.[32] In *Natural Resources Defense Council, Inc. v. Nuclear Regulatory Commission*, the court held that the Nuclear Regulatory Commission's (NRC) approval of the sale of a nuclear reactor and other nuclear materials to the Philippines was legitimate and no analysis of the environmental impacts of the sale under NEPA was necessary.[33] In holding that NEPA did not apply to the nuclear sale, the court found that section 102(2)(F) of NEPA was persuasive evidence that NEPA was not intended to apply in certain situations.[34] Such instances concerned distinct foreign policy interests where the likely costs of the cultural and legal problems associated with analyzing the environmental effects in a foreign country, coupled with the difficulties of monitoring or enforcing compliance after the fact, outweighed the benefits of NEPA.[35] The court noted that the language and policy of NEPA dictated multilateral cooperation consistent with foreign policy rather than unilateral action at the cost of foreign relations.[36]

While there are no cases directly addressing whether NEPA applies to the EEZ, two district court decisions have held that NEPA is appropriate in U.S. Trust Territories—areas that are not U.S. territories but are subject to U.S. control.[37] In *People of Enewetak v. Laird*, the

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31. *See id.* at 531-37; *see also* Gushi Bros. v. Bank of Guam, 28 F.3d 1535, 1538 (9th Cir. 1994) (citing *Massey*'s finding that the presumption against extraterritoriality is not relevant when the regulated conduct occurs within the United States).

32. Natural Res. Def. Council, Inc. (NRDC) v. Nuclear Regulatory Comm'n, 647 F.2d 1345, 1347-48 (D.C. Cir. 1981).

33. *Id.*

34. *Id.* at 1348.

35. National Environmental Protection Act (NEPA) § 1022)(F); 42 U.S.C. § 4332(2)(F) (2000) (requiring 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"); *see NRDC*, 647 F.2d at 1366; *see also* NEPA Coalition of Japan v. Aspin, 837 F. Supp. 466, 467-68 (D.D.C. 1993) (finding the plaintiffs failed to show that Congress intended NEPA to apply to where treaty relations may be damaged).

36. *See NRDC*, 647 F.2d at 1366; *see also* Greenpeace USA v. Stone, 748 F. Supp. 749, 760 (D. Haw. 1990) (finding that the extraterritorial application of NEPA would be a disrespectful attempt to control actions outside United States control in a situation in which the United States and Federal Republic of Germany had reached a mutual agreement to dispose of obsolete chemical munitions).

37. *See* People of Enewetak v. Laird, 353 F. Supp. 811, 814 (D. Haw. 1973); The People of Saipan v. United States Dep't of Interior, 356 F. Supp. 645, 647 (D. Haw. 1973), *judgment modified by*, 502 F.2d 90 (9th Cir. 1974).

District Court of Hawaii found the statutory language and legislative history of NEPA to be conclusive evidence that Congress intended to include the Trust Territories within the protection of NEPA.[38] In finding NEPA applied to the Trust Territories, the court reasoned that "[i]n view of [NEPA's] expressed concern with the global ramifications of federal actions, it is reasonable to conclude that the Congress intended NEPA to apply in all areas under its exclusive control."[39] Similarly, in *People of Saipan v. United States Department of Interior*, the same court again found that the statutory language and legislative history of NEPA substantiated the claim that Congress intended NEPA to apply to all areas under U.S. control.[40]

Even if NEPA does apply to LWAD tests in the EEZ, there still exists the question of whether the LWAD program is subject to programmatic review under NEPA.[41] NEPA was enacted in 1970 with the goal of preventing degradation to the environment.[42] Section 102(2)(c) requires federal agencies to conduct an environmental impact statement (EIS) for any major federal action that has a significant effect on the human environment.[43] The policy behind the EIS is to ensure that the directives outlined in NEPA are included in the actions and programs of the federal government and its agencies.[44] The NEPA regulations include in their definitions of major federal actions the adoption of programs and provide instructions for situations that may require a broad EIS encompassing an entire program in contrast to individual statements for specific projects.[45] According to 40 C.F.R. § 1502.4(a), "[p]roposals or parts of proposals which are related to each other closely enough to be, in effect, a single course of action shall be evaluated in a single impact statement."[46] Under 40 C.F.R. § 1508.25(a)(1), the requirements for when an agency's actions are sufficiently "connected" to require a PEIS are defined.[47] Agency actions require a PEIS when the actions "[a]utomatically trigger other actions which may require environmental impact statements," are unable to proceed without taking into account

38. 353 F. Supp. at 816.
39. *Id.* at 818.
40. *See* 356 F. Supp. at 649-50.
41. NRDC v. United States Dep't of Navy, No. CV-01-07781 CAS (RZx), at 23 (C.D. Cal. Sept. 19, 2002).
42. NEPA § 2, 42 U.S.C. § 4321 (2000).
43. *See* NEPA § 102(2)(c); 42 U.S.C. § 4332(2)(c).
44. *See* 40 C.F.R. § 1502.1 (2001).
45. *See id.* § 1502.4(a).
46. *Id.*
47. *Id.* § 1508.25(a)(1)(i)-(iii).

other actions requiring an EIS, or "[a]re interdependent parts of a larger action and depend on the larger action for their justification."[48]

The question of when a major federal action constitutes a single program, as opposed to several unrelated projects, has been considered many times since NEPA was first enacted.[49] In *Lujan v. National Wildlife Federation*, the Supreme Court held that in order to challenge an agency decision to forego a PEIS, a plaintiff must challenge "an identifiable action or event."[50] In reaching its holding, the Court emphasized that plaintiffs cannot use NEPA to seek judicial review of a program or policy merely because they disagree with it. Instead, plaintiffs must focus their complaint on an action undertaken by an agency that has caused the plaintiff harm.[51] Similarly, in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, the Court explicitly stated that the role of the courts in determining the scope of an EIS is not to reflect the court's perception of what is the best policy for the agency to adopt.[52] Substantive decisions are left to the discretion of the agencies so long as they are not made arbitrarily.[53]

In *Kleppe v. Sierra Club*, the Court stated that NEPA does not compel an agency to consider the environmental effects that potential projects may have on a project that has already been proposed.[54] The Court further noted that the "mere contemplation" of agency action is not enough to trigger NEPA.[55] The Court went on to say that while there are situations where a programmatic or regional EIS is appropriate, the task of deciding when these situations arise is left to the "special competency of the appropriate agencies."[56] Therefore, in order for a party to successfully challenge an agency's failure to prepare a PEIS, the party must show that the decision was made arbitrarily.[57] The *Kleppe* Court also clarified that the time an agency must provide a final EIS "is the time at which it makes a recommendation or report on a proposal for

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48. *Id.*

49. *See, e.g.*, Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871 (1990); Kleppe v. Sierra Club, 427 U.S. 390 (1976); Churchill County v. Norton, 276 F.3d 1060 (9th Cir. 2001), *cert. denied*, 427 U.S. 390, 412 (2002); Northcoast Envtl. Ctr. v. Glickman, 136 F.3d 660 (9th Cir. 1998).

50. 497 U.S. at 899.

51. *See id.* at 891.

52. *See* 435 U.S. 519, 549-50 (1977).

53. *See id.*

54. *See* 427 U.S. at 402.

55. *Id.* at 404.

56. *Id.* at 413-14.

57. *See id.* at 412.

federal action."[58] The significance of this distinction is that until an agency proposes an action, it remains a contemplated future action and no EIS is required, thus increasing the burden on a plaintiff to show that agency actions are "connected."[59] A proposal is defined as the point in time when an agency has identified a goal and is "actively preparing to make a decision on one or more alternative means of accomplishing that goal and the effects can be meaningfully evaluated."[60]

The United States Court of Appeals for the Ninth Circuit has also addressed the question of when an agency must perform a programmatic NEPA review.[61] The Ninth Circuit has adopted a stringent definition of when actions are connected, finding that only projects that are "inextricably intertwined" need to be considered programmatically.[62] The level of deference paid to agencies by the court is illustrated in *Churchill County v. Norton*.[63] In *Churchill County*, despite the fact that the Fish and Wildlife Service had the resources to prepare a PEIS and the court's feeling that their actions seemed to support the potential need for one, the court found that NEPA could not be used to challenge the agency's policy decisions and discretion because they were not made arbitrarily.[64] Instead, the decision was best left to the expertise of the agency.[65] *Churchill* went on to say that the "rule of reason" standard of review must be used in determining whether an agency has acted arbitrarily in failing to perform a PEIS.[66] The court defined the "rule of reason" standard as a determination of whether it is reasonable to conclude that in preparing the EIS, the agency took a hard and thorough look at the significant environmental consequences.[67] In *Northcoast Environmental Center v. Glickman,* the Ninth Circuit was again called upon to decide whether a PEIS was required under NEPA.[68] Citing *Kleppe*, the court held that the agencies were not required to prepare a PEIS because the

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58. *Id.* at 406 (citing Aberdeen & Rockfish R.R. Co. v. Students Challenging Regulatory Agency Procedures (SCRAP), 422 U.S. 289, 320 (1975)).

59. *Id.* at 410 n.20.

60. 40 C.F.R. § 1508.23 (2001).

61. *See* Northcoast Envtl. Ctr. v. Glickman, 136 F.3d 660, 662 (9th Cir. 1998); Northwest Res. Info. Ctr., Inc. v. Nat'l Marine Fisheries Serv., 56 F.3d 1060, 1068 (9th Cir. 1995).

62. *Northwest Res. Info. Ctr., Inc.*, 56 F.3d at 1068 (citing Thomas v. Peterson, 753 F.2d 754 (9th Cir. 1985)).

63. 276 F.3d 1060, 1078 (9th Cir. 2001).

64. *Id.* at 1082.

65. *See id.* at 1068; *see also* Kleppe v. Sierra Club, 427 U.S. 390, 390 (1976).

66. *Churchill County*, 276 F.3d at 1071.

67. *Id.* at 1071-72 (citing Trout Unlimited v. Morton, 509 F.2d 1276, 1283 (9th Cir. 1974)).

68. *See* 136 F.3d 660, 662 (9th Cir. 1998).

program only listed guidelines and goals and did not recommend any action.[69]

Finally, in *Conner v. Burford*, the court was faced with deciding whether an EIS or a comprehensive biological opinion were required for a leasing program comprised of two oil and gas leases in two national forests in Montana.[70] The court held that once agency action results in an "irreversible commitment of resources," the agency has committed and an EIS is required as long as "substantial questions" remain about the complete preclusion of "significant environmental effects."[71] This finding was significant in *Conner* because one of the two leases contained a stipulation that allowed the government to prevent the use of the lease.[72] The court felt that this prevented both leases from functioning as a program because the stipulation allowed the government to regulate environmental harms on one of the parcels, thus preventing the need for an EIS on that particular lease and eliminating the alleged NEPA program.[73]

On a final note, courts faced with the question of which agency must conduct a cumulative or programmatic EIS in a situation where several agencies control certain aspects of the project have held that the responsibility falls to the supervising agency.[74] For example, in *Natural Resources Defense Council v. Callaway*, the United States Court of Appeals for the Second District specified that when different agencies perform different functions for a cumulative project, the burden of preparing a PEIS falls upon the agency that is responsible for overseeing the project as a whole.[75]

III. COURT'S DECISION

In the noted case, the court recognized that the question of whether the presumption against extraterritoriality barred the application of NEPA to the EEZ was one of first impression.[76] The court reached its holding by first applying the *Massey* logic and stating that, absent

69. *See id.* at 668.
70. *See* 848 F.2d 1441, 1442-43 (9th Cir. 1988).
71. *Id.* at 1451.
72. *See id.* at 1444.
73. *Id.*
74. *See* Natural Res. Def. Council v. Callaway, 524 F.2d. 79, 87 (2d Cir. 1975); *see also* Nat'l Wildlife Fed'n v. Benn, 491 F. Supp. 1234, 1252 (S.D.N.Y. 1980) (stating that due to the amount of control the Army Corps of Engineers wielded over the project in question, the responsibility fell to them to perform a PEIS despite the fact that other agencies were involved).
75. *See* 524 F.2d at 86.
76. *See* NRDC v. United States Dep't of Navy, No. CV-01-07781 CAS (RZx), at 20 (C.D. Cal Sept. 19, 2002).

foreign policy considerations that outweigh NEPA, the presumption against extraterritoriality does not apply to NEPA.[77] The court agreed with the D.C. Circuit and stated that NEPA functions as a procedural safeguard necessary to incorporate environmental considerations into the agency decisionmaking process and not as a substantive check on agency decisions.[78] Stating that NEPA is a "purely procedural statute," the court found that there was no implication of the presumption against extraterritoriality because all planning for the LWAD program was conducted in the United States.[79] The court then distinguished its decision from *Natural Resources Defense Council, Inc. v. Nuclear Regulatory Commission* and other similar cases on the grounds that while foreign policy considerations often outweigh the benefits of NEPA, the instant case contains no foreign policy considerations in the area in question.[80] Thus, in the absence of foreign policy concerns, the court in the noted case found no reason to apply the presumption against extraterritoriality to NEPA.[81]

The court then proceeded to analyze the facts of the LWAD program to show that the statutory intent of NEPA dictates that NEPA was intended to apply to areas where the United States exercises sovereign control such as the EEZ.[82] Again, the court in the instant case looked to *Massey* and likened the EEZ to Antarctica both because the EEZ is under the sovereign and legislative power of the United States, and because it is akin to a "global common."[83] Specifically, the court found that because the United States has considerable control over natural resources within the EEZ, NEPA applies to LWAD actions in this zone.[84] The court then looked to the decisions in *People of Saipan* and *People of Enewetak*, finding the application of NEPA to United States Trust Territories was evidence of Congress' intent to apply NEPA to all areas under congressional control.[85] According to the court, the similarities between the trust territories and the EEZ was further

77. *See id.* at 21-22.

78. *See id.* at 17; *see also* Envtl. Def. Fund, Inc. v. Massey, 986 F.2d 528, 531-37 (D.C. Cir. 1994).

79. *NRDC*, No. CV-01-07781 CAS (RZx), at 17-18.

80. *See id.* (discussing NRDC v. Nuclear Regulatory Comm'n, 647 F.2d 1345, 1366 (D.C. Cir. 1981)); *see also* NEPA Coalition of Japan v. Aspin, 837 F. Supp. 466, 467-68 (D.D.C. 1993); Greenpeace USA v. Stone, 748 F. Supp. 749, 760 (D. Haw. 1990).

81. *See NRDC*, No. CV-01-07781 CAS (RZx), at 18.

82. *Id.* at 20.

83. *Id.* at 19-20.

84. *See id.* at 22.

85. *Id.* at 20.

evidence that the presumption against extraterritoriality does not apply to NEPA's application in the EEZ.[86]

The court in the instant case then decided that although the LWAD program was subject to the requirements of NEPA, it was not required to perform a programmatic review.[87] The court noted that before it could consider whether the plaintiffs had a valid claim for the Navy's failure to perform a programmatic review, it first had to decide whether the LWAD program did in fact fulfill the definition of a program within the NEPA statute.[88] The court recognized that in determining whether the LWAD was required to perform a PEIS, it could only consider proposals for action made by the LWAD program, not whether the LWAD program had other future or hypothetical plans.[89] Relying heavily on the test devised by the *Conner* court of whether an "irreversible commitment of resources" had triggered NEPA, the court failed to be persuaded that the LWAD program should be subject to a programmatic NEPA analysis.[90] In the noted case, the court stated that there was no "irreversible commitment of resources" to require a programmatic review.[91] This was because the activities planned and conducted by the LWAD were subject to frequent cancellation and alteration, the myriad of potential required resources were not well known in advance, and the possible environmental effects of LWAD tests could not be accounted for until the LWAD began intensive planning for a specific test.[92] Thus, under the *Conner* test, the court felt that, while specific LWAD tests provided an "irreversible commitment of resources" triggering the requisite NEPA analysis, the program as a whole did not stand alone as an independent entity subject to cumulative review.[93]

The court then stated that the individual LWAD tests were not "inextricably intertwined" since the record did not indicate that the tests were in anyway reliant on each other or that the success of the LWAD program is dependant on all of the tests occurring in a predetermined

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86. *See id.*; People of Enewetak v. Laird, 353 F. Supp. 811 (D. Haw. 1973); People of Saipan v. United States Dep't of Interior, 356 F. Supp. 645 (D. Haw. 1973).

87. *See NRDC*, No. CV-01-07781 CAS (RZx), at 32-33.

88. *See id.* at 25.

89. *See id.* at 23 (citing Northcoast Envtl. Ctr. v. Glickman, 136 F.3d 660, 669 (9th Cir. 1998) (stating NEPA's procedural requirements require actions or proposals to act in order to be triggered)); *see also* Kleppe v. Sierra Club, 427 U.S. 390, 409-10 n.20 (1976) (finding contemplated actions do not trigger NEPA).

90. *NRDC*, No. CV-01-07781 CAS (RZx), at 28 (citing Conner v. Burford, 848 F.2d 1441, 1457 (9th Cir. 1988)).

91. *Id.*

92. *Id.*

93. *Id.*

manner.[94] Therefore, the court reasoned that the LWAD tests are "neither connected nor cumulative."[95]

Finally, the court in the instant case declared that even if the Navy is capable of providing a PEIS for the LWAD program, the plaintiffs did not meet their burden under their motion for summary judgment of showing that the Navy acted arbitrarily in failing to perform a PEIS.[96] The court relied on the "*rule of reason*" standard described in *Churchill* to determine that there was nothing in the record to support the Plaintiff's claim that the Navy had failed to conduct a PEIS for the purpose of evading the environmental safeguards of NEPA.[97] The court in the noted case was satisfied that any potential environmental impact inflicted by the LWAD could be adequately analyzed individually rather than on a programmatic level.[98]

IV. ANALYSIS

The court's decision in the noted case is both remarkable for extending the territorial application of NEPA and disappointing for its failure to require the Navy to conduct a PEIS despite evidence in the record that supported a contrary conclusion.[99]

The court properly compared the EEZ to that of both a global common and a United States Trust Territory in its finding that the presumption against extraterritoriality did not bar NEPA from applying to the LWAD tests in the EEZ.[100] Relying on *Massey*, the court correctly concluded that because the conduct being regulated by NEPA was the LWAD's decisionmaking process, which occurred within the United States, and not the Agency's actions in the EEZ, the bar against extraterritoriality was not relevant to the situation.[101] Given the fact that the United States exercises a significant degree of sovereign control over the EEZ, the court correctly found that nothing in NEPA's statutory

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94. *Id.* (citing Northwest Res. Info. Ctr., Inc. v. Nat'l Marine Fisheries Serv., 56 F.3d 1060, 1068 (9th Cir. 1995)).

95. *Id.*

96. *See id.* at 29-30 (citing Churchill County v. Norton, 276 F.3d 1060, 1075 (9th Cir. 2001), *cert. denied*, 427 U.S. 390, 412 (2002)); *see also* Kleppe v. Sierra Club, 427 U.S. 390, 410-14 (1976) (holding that there are situations where programmatic or regional EISs are appropriate, but the task of deciding when these situations arise is left to the "special competency of the appropriate agencies"; therefore, in order for a party to successfully challenge an agency's failure to prepare a programmatic review, the party must show the decision was made arbitrarily).

97. *See NRDC*, No. CV-01-07781 CAS (RZx), at 33.

98. *See id.* at 32-33.

99. *See id.* at 41.

100. *See id.* at 19-22.

101. *See id.* at 21-22.

language or legislative history could lead to the conclusion that Congress did not intend for NEPA to apply to the EEZ.[102] Specifically, the court properly expanded NEPA's application to the Trust Territories to cover the EEZ because the United States has substantial, if not complete, legislative control of the EEZ.[103] Therefore, because Congress intended NEPA to address the concerns of federal agency decisions on the environment as a whole, the court properly held that NEPA applies to the EEZ, an area that is at most under the sovereign power of the Unites States and, at least, a global common.[104]

Despite finding that the LWAD program was subject to the requirements of NEPA, the court in the instant case incorrectly held that the plaintiffs failed to meet their burden of showing that the Navy acted arbitrarily in failing to execute a PEIS.[105] In reaching its holding, the court ignored the meaning of "inextricably intertwined" in finding that the individual LWAD tests were not connected to each other.[106] Based on the evidence that ten of the seventeen confirmed LWAD tests were conducted in two distinct geographical locations, it does not follow that the effects of the tests were not connected on a programmatic level.[107] Furthermore, the court's reliance on the Navy's inability to make an "irreversible commitment of resources" for each test far enough in advance to render a PEIS feasible misinterprets the language of 40 C.F.R. § 1508.25(a)(1)(ii).[108] The LWAD tests fall under the second of three definitions of connected actions found in the regulations, stating that actions are connected when they "[c]annot or will not proceed unless other actions are taken previously or simultaneously."[109] The LWAD tests do not stand independent of each other regardless of whether the Navy could predict the specific resources each test would require years in advance.[110] Even if the Navy could not define the exact specifics of each test distinctly into the future, it should be capable of examining the effects of high-intensity sonar in the South Carolina Bight and the Gulf of Mexico on a programmatic level.[111] Contrary to the Navy's argument that any future tests are "mere contemplation," it is clear that the Navy

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102. *See id.*
103. *See id.* at 20.
104. *See id.* at 19-22.
105. *See id.* at 33.
106. *Id.* at 28.
107. *See id.*
108. *Id.*
109. 40 C.F.R. § 1508.25(a)(1)(ii) (2001).
110. *See NRDC*, No. CV-01-07781 CAS (RZx), at 28.
111. *See id.* at 6.

has identified its goal—the long term testing of sonar[112]—and is "actively preparing to make a decision on one or more alternative means of accomplishing that goal and the effect can be meaningfully evaluated."[113] Therefore, the LWAD program is required under the NEPA regulations to conduct a PEIS.[114] Finally, the Navy's argument that LWAD is not responsible for the effects that may be felt on a programmatic level because it functions as an umbrella organization that simply facilitates different parties coming together to test active sonar is unavailing because the LWAD program is in the unique situation of being the best situated to conduct a PEIS.[115]

Therefore, the court should have found that the LWAD program arbitrarily avoided the policy goals of NEPA by failing to programmatically review the effects of the LWAD tests.[116] The burden of proof for showing that the Navy acted arbitrarily is recognizably high, but the evidence in the record is clear that the LWAD program was installed as a long-term operation in a specified geographical location to test and develop active sonar for naval warfare and that high-intensity sonar poses a threat to marine mammals.[117]

V. CONCLUSION

In holding that NEPA applies to the EEZ, the District Court for the Central District of California followed the trend found in recent case law of applying NEPA extraterritorially in situations where the application of NEPA will not adversely affect foreign relations. In the instant case, the court was convinced that the statutory language and legislative history of NEPA did not provide any justification to bar the application of NEPA absent foreign policy considerations. The court based its holding on the fact that the United States exercises a significant degree of sovereign

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112. Office of Naval Research, Littoral Welfare and Advanced Development Website, *supra* note 2.

113. 40 C.F.R. § 1508.23.

114. *See id.*

115. *See* Natural Res. Def. Council v. Callaway, 524 F.2d. 79, 86 (2d Cir. 1975); Nat'l Wildlife Fed'n v. Benn, 491 F. Supp. 1234, 1250 (S.D.N.Y. 1989) (stating "that the Second Circuit has indicated that as between federal agencies, the responsibility for preparing a comprehensive EIS should be borne by the agency that consistently oversees the projects conducted in the area").

116. *See NRDC*, No. CV-01-07781 CAS (RZx), at 29.

117. *See id.* at 3, 6; Declaration of Joel Reynolds, Exhibit 21, Joint Interim Report Bahamas Marine Mammal Stranding Event of 14-16 March 2000 at 1237, *available at* http://www.nmfs.noaa.gov/prot_res/overview/Interim_Bahamas_Report.pdf; *see also* Churchill County v. Norton, 276 F.3d 1060, 1075 (9th Cir. 2000), *cert. denied* 427 U.S. 390, 412 (2002) ("[A] party challenging an agency's refusal to prepare a comprehensive EIS must show that the agency acted arbitrarily in making that determination.").

power over the natural resources in the EEZ. According to the court, holding otherwise would have gone against NEPA's policy of preventing degradation to the environment.

The court's granting of the motion for summary judgment as to the PEIS was not surprising given the arbitrariness standard of review and the high level of deference afforded agency discretion. The court in the instant case held that the Navy was not required to perform a programmatic review because the LWAD program did not qualify as a program under both NEPA and relevant case law.[118] Although the court felt that the plaintiffs had presented factual evidence that the LWAD program may have been subject to a programmatic review, the court stated the plaintiffs had not provided sufficient evidence that the Navy had acted arbitrarily in failing to conduct a programmatic review.[119]

The decision by the District Court for the Central District of California is noteworthy because it is the first time that a court has held that NEPA applies to the EEZ. The decision therefore ensures that all agency actions in the EEZ will be subject to the procedural safeguards of NEPA. This development is significant due to the vast amount of environmentally detrimental activity that may occur within the EEZ. Further, the instant case is controversial because the government has long contested that agency action in the EEZ does not require public participation, a critical component of NEPA. Therefore, the government is seriously considering appealing this decision.

Josh Schnell

118. *See NRDC*, No. CV-01-07781 CAS (RZx), at 22-32.
119. *See id.* at 32.