Environmental Defense Fund v. Massey: APPLICATION OF THE NATIONAL ENVIRONMENTAL POLICY ACT TO THE EXTRATERRITORIAL ACTIVITIES OF UNITED STATES AGENCIES

Until early 1991, the National Science Foundation (NSF) routinely burned the food waste produced at its McMurdo Station research facility in Antarctica in an open incinerator. The NSF later realized that the practice created a risk of releasing toxic substances into the environment. In response, the NSF decided to stop the incineration of refuse at the facility by October 1991 and to develop an alternative disposal method. Shortly thereafter the NSF discovered asbestos in the landfill and vowed to halt incineration ahead of schedule. Food waste was stored at McMurdo Station from February to July 1991. In July, however, the NSF resumed burning the waste in a temporary incinerator and determined to do so until a new incinerator could be delivered. The Environmental Defense Fund (EDF) filed suit in the United States District Court for the District of Columbia[1] based on provisions of the National Environmental Policy Act (NEPA).[2] The EDF sought to enjoin the NSF from using either incinerator because a formal analysis of the possible environmental effects of the incineration, as required by NEPA, had not been prepared.[3] The district court dismissed the EDF's claim and held that NEPA's requirements did not apply to the NSF's actions in Antarctica because United States statutes presumptively apply only within United States territory unless Congress clearly expresses a contrary intent.[4] The district court acknowledged the broad nature of NEPA's language but, nevertheless, found congressional intent regarding extraterritorial application of the statute to be ambiguous.[5] The EDF appealed and the United States Court of Appeals for the District of Columbia Circuit reversed the district court's decision. The Court of Appeals held that the presumption against extraterritorial application of United States statutes does not apply when the regulated conduct occurs primarily within the United States and when the effects of that conduct

1. Environmental Defense Fund, Inc. v. Massey, 772 F. Supp. 1296 (D.D.C. 1991).

2. National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-70a (1993).

3. *Massey*, 772 F. Supp. at 1297.

4. *Id.* (citing Equal Employment Opportunity Commission v. Arabian American Oil Co., 499 U.S. 244, 248 (1991)).

5. *Massey*, 772 F. Supp. at 1297.

occur in Antarctic territory. The court reasoned that NEPA regulates federal agencies' decision-making processes occurring in the United States, but does not expressly confine agencies to the consideration of significant environmental effects that occur exclusively in the United States. Therefore, the court concluded that NEPA required the NSF to prepare an Environmental Impact Statement (EIS) before resuming incineration at McMurdo Station. *Environmental Defense Fund, Inc. v. Massey*, 986 F.2d 528 (D.C. Cir. 1993).

The National Environmental Policy Act of 1969 requires the United States government to "use all practical means and measures...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."[6] To this end, NEPA requires federal agencies to consider any possible environmental consequences before committing to major projects and decisions.[7] Section 4332(2)(C) of NEPA[8] prescribes a decision-making process under which federal agencies must weigh the costs of foreseeable

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6. 42 U.S.C. § 4331(a) (1993).

7. 115 CONG. REC. 40,416 (1969).

8. 42 U.S.C. § 4332(2)(C) states that:

> (2) all agencies of the Federal government shall -
> (C) include in every recommendation or report on proposals for legislation and other major actions significantly affecting the quality of the human environment, a *detailed statement* by the responsible official on -
> (i) the environmental impact of the proposed action,
> (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
> (iii) alternatives to the proposed action,
> (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
> (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

and significant environmental impacts[9] resulting from major federal actions[10] against any potential benefits and consider any viable alternatives.[11] NEPA also establishes the Council on Environmental Quality (CEQ), an administrative body charged with enforcing the Act.[12] The CEQ maintains regulations detailing the procedural requirements of NEPA.[13] To determine whether preparation of an EIS is necessary, the CEQ regulations permit federal agencies to prepare a less exacting document, an Environmental Assessment (EA),[14] which discusses the need for a proposed agency action, its likely environmental effects, and any alternatives to the action.[15] If the CEQ determines the project will not have a significant environmental impact, it may issue a "finding of no significant impact," and no further consideration of the action's

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9. Courts disagree as to the definition of "significant environmental effects." *See, e.g.*, Sierra Club v. United States Forest Service, 843 F.2d 1190 (9th Cir. 1988) (requiring analysis of project results that will significantly affect environment); Sierra Club v. Sigler, 695 F.2d 957 (5th Cir. 1983) (requiring Army Corps of Engineers to include analysis of statistically unlikely worst case scenario in EIS); Hanly v. Kleindienst, 471 F.2d 823 (2d Cir. 1972) (creating two-prong test for significance based on degree of change from status quo and severity of impact).

10. Whether an action is major and/or federal is also commonly at issue in disputes regarding NEPA's applicability. *See, e.g.*, Winnebago Tribe of Nebraska v. Ray, 621 F.2d 269 (8th Cir. 1980) (holding that Army Corps of Engineers' veto authority over states' power line project did not render project "federal" because federal government did not have authority to enable states' project); Atlanta Coalition on Transp. Crisis, Inc. v. Atlanta Regional Comm'n, 599 F.2d 1333 (5th Cir. 1979) (finding no need for EIS when federal monies were used to fund a tentative regional transportation plan).

11. *See, e.g.*, Strycker's Bay Neighborhood Council, Inc. v. Karlen, 444 U.S. 223 (1980) (holding NEPA's procedural requirements call for equal consideration of environmental concerns in agency decision-making); Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519 (1978) (holding courts may not overturn agency decision where agency has employed NEPA's minimal procedural requirements); Kleppe v. Sierra Club, 427 U.S. 390 (1976) (holding NEPA requires consideration of possible environmental impacts and alternatives to proposed agency action, and not of less imminent agency actions); Calvert Cliffs' Coordinating Comm., Inc. v. United States Atomic Energy Comm'n, 449 F.2d 1109 (D.C. Cir. 1971) (permitting courts to enforce NEPA's procedural requirements where agency rules categorically or conditionally preclude consideration of environmental issues).

12. 42 U.S.C. §§ 4321, 4341-47 (1993).

13. Council on Environmental Quality Regulations, 40 C.F.R. §§ 1500-08 (1993) [hereinafter CEQ Regs.].

14. *Id.* § 1508.9.

15. *Id.*

environmental impacts is necessary.[16] If, however, the CEQ finds that the action will result in significant environmental effects, it must then prepare a formal EIS containing a comprehensive assessment of those effects.[17] The EIS must advise those undertaking the project whether to proceed with a particular project and may not be merely conclusory.[18]

The force of the laws of sovereign nations is generally confined within each nation's territorial boundaries.[19] Jurisdictional rules of international law, however, recognize five bases upon which a nation may enact laws that affect the interests of other states.[20] According to the Restatement (Third) of Foreign Relations Law, a nation has authority to prescribe laws regarding:

> (1) (a) conduct that, wholly or in substantial part, takes place within its territory;
> (b) the status of persons, or interests in things, present within its territory;
> (c) conduct outside its territory that has or is intended to have substantial effect within its territory;
> (2) the activities, interests, status, or relations of its nationals outside as well as within its territory; and
> (3) certain conduct outside its territory by persons not its nationals that is directed against the security of the state or against a limited class of other state interests.[21]

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16. *Id.* §§ 1508.9, 1508.13.

17. *Id.* § 1508.9.

18. CEQ Regs. § 1502.2.

19. *See, e.g.*, Equal Employment Opportunity Commission v. Arabian American Oil Co., 499 U.S. 244, 248 (1991) [hereinafter *Aramco*]; Foley Bros., Inc. v. Filardo, 336 U.S. 281, 285 (1949); American Banana Co. v. United Fruit Co., 213 U.S. 347, 355-57 (1909).

20. *See, e.g.*, RESTATEMENT OF THE LAW (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 402 (1987) [hereinafter RESTATEMENT]. The Restatement's jurisdictional rules, although initially a combination of international and domestic law, have been adopted by the courts of other nations to be incorporated into the international customary law. *Id.* § 231.

21. *Id.* § 402.

A nation may also regulate conduct that is of universal concern in the international community, such as war crimes, piracy, and terrorism.[22]

Despite the broad scope of extraterritorial jurisdiction, nations must act reasonably when enacting laws that have implications beyond national boundaries.[23] Reasonableness depends on factors such as the extent to which the conduct regulated involves the citizens of the prescribing nation or has substantial, direct, and foreseeable effects on that nation.[24] Furthermore, when a law with international scope would fulfill the criteria of reasonableness but would place the laws of two or more nations in conflict, a nation must, when enforcing the law, weigh its own interests with respect to the purpose of the law against the corresponding interests of the other nations.[25]

United States courts employ the principle of extraterritoriality to evaluate the reasonableness of Congress' assertions of extraterritorial jurisdiction.[26] Pursuant to this principle, courts presume that the laws of the United States apply only to conduct that occurs or causes effects within United States territory.[27] The Supreme Court recently affirmed the extraterritoriality principle in *Equal Employment Opportunity Commission v. Arabian American Oil Company*.[28] Quoting its 1949 *Foley Bros., Inc. v. Filardo* decision, the Court noted that "it is a long-standing principle of American law 'that legislation of Congress, *unless a contrary intent appears*, is meant to apply only within the territorial jurisdiction of the United States.'"[29] Contrary congressional intent may be expressed explicitly,[30] or implicitly, through statutory provision for extraterritorial enforcement.[31] Limiting congressional ability to enact and enforce laws applicable to persons or events outside of United States

22. *Id.* § 404.

23. *Id.* § 403(1).

24. *Id.* § 403(2)(a)-(h).

25. RESTATEMENT, *supra* note 20, § 403(3).

26. *See, e.g., Aramco*, 499 U.S. at 255; *Foley Bros.*, 336 U.S. at 285.

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

28. *Id.*

29. *Id.* at 248 (quoting Foley Bros., Inc. v. Filardo, 336 U.S. 281, 285 (1949) (emphasis in original)).

30. *Id.* at 248.

31. *Id.* at 255-56.

territory minimizes the risk of disputes arising from interference with the sovereignty of other nations.[32]

Prior to *Massey*, no United States court had held NEPA applicable to federal agency activities occurring outside of United States territory.[33] Some courts, however, have implied that NEPA's protections extend beyond the national boundaries of the United States.[34] For example, in *Wilderness Society v. Morton*,[35] the United States Court of Appeals for the District of Columbia held that a Canadian citizen and a Canadian environmental organization had standing to join a NEPA action brought by several American environmental organizations against the United States Secretary of the Interior. The Secretary had not prepared an EIS before issuing a permit for a trans-Alaska oil pipeline and, therefore, had not formally considered whether the project would have significant environmental consequences in either the United States or Canada.[36] Recognizing that the proposed pipeline could threaten the Canadian environment, the *Morton* court held that the Canadian parties were "sufficiently antagonistic" with respect to the NEPA claims.[37] Therefore, the court permitted the Canadian parties to pursue a remedy for the Secretary's failure to consider the pipeline's effects on Canada's environment.[38]

The United States District Court for the District of Hawaii in *People of Enewetak v. Laird*[39] considered NEPA's applicability to environmental impacts in a United States trust territory. The plaintiffs, tribal inhabitants of Enewetak Atoll, sought an injunction against core drilling and nuclear blast simulation activities conducted by the United

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32. *Aramco*, 499 U.S. at 255; McCulloch v. Sociedad Nacional de Marineros de Honduras, 372 U.S. 10, 20-22 (1963).

33. David A. Wirth, *International Decisions*, 87 AM. J. INT'L L. 626, 627 (1993); Karl S. Bourdeau & Paul E. Hagen, *Courts Examine U.S. Environmental Laws' Extraterritorial Reach*, NAT'L L.J., Sept. 11, 1993, at S5.

34. *See, e.g.*, Sierra Club v. Adams, 578 F.2d 389 (D.C. Cir. 1978); Wilderness Soc'y v. Morton, 463 F.2d 1261 (D.C. Cir. 1972); Nat'l Org. for the Reform of Marijuana Laws (NORML) v. United States Dep't of State, 452 F. Supp. 1226 (D.D.C. 1978); Envtl. Defense Fund v. United States Agency for Int'l Dev., 6 Envtl. L. Rep. 20,121 (D.D.C. 1975); Saipan v. United States Dep't of Interior, 356 F. Supp. 645 (D. Haw. 1973); Enewetak v. Laird, 353 F. Supp. 811 (D. Haw. 1973).

35. 463 F.2d 1261, 1262-3 (D.C. Cir. 1972).

36. *Id.* at 1262.

37. *Id.* at 1262-63.

38. *Id.*

39. 353 F. Supp. 811 (D. Haw. 1973).

States Air Force.[40] The Enewetakese claimed that NEPA required the Air Force to prepare and submit a final EIS[41] evaluating the environmental effects of the proposed action before the project's commencement.[42] After acknowledging the presumption against extraterritorial application of United States statutes, the district court held that Congress manifested its intent to apply NEPA to the trust territories in the express language of the statute which attributed its policies to "the Nation" rather than to "the United States."[43] Additionally, Congress' use of general language to apply NEPA to "man and his environment" and "the health and welfare of man," supported the court's position.[44] NEPA's legislative history also demonstrated an intent to apply the statute broadly.[45] Consequently, the court held that the Air Force's activities on Enewetak Atoll fell within NEPA's ambit and injunctive relief prohibiting the activities was appropriate until completion of a final EIS.[46]

Two months later, in *People of Saipan v. United States Department of Interior*,[47] the Hawaiian district court reaffirmed *Enewetak* by applying NEPA to federal agency activities occurring in trust territories, but declined to apply NEPA on other grounds. The *Saipan* court held that the High Commissioner of the Trust Territory of the Pacific Islands was not required to prepare an EIS before approving a lease agreement for construction and operation of a hotel on land adjoining a public beach[48] because he failed to qualify as a federal agency under both NEPA and the Administrative Procedure Act

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40. *Id.* at 812-13.

41. The Air Force had prepared and submitted to the Enewetakese a Draft Environmental Impact Statement (DEIS). *Id.* CEQ regulations require that a DEIS be circulated among federal agencies and local communities involved with a particular project before the final EIS is submitted. CEQ Regs. §§ 1502.9, 1502.19. The Air Force, however, did not wait for a response from the Enewetakese before commencing the project. *Enewetak*, 353 F.2d at 814.

42. *Id.* at 813.

43. *Id.* at 815-17 (quoting 42 U.S.C. §§ 4321, 4331(b), 4341).

44. *Id.*

45. *Id.* at 817-18.

46. *Enewetak*, 353 F.2d at 821.

47. 356 F. Supp. 645, 648-50 (D. Haw. 1973).

48. *Id.* at 653 (citing NEPA, 42 U.S.C. § 4332 (1988); Administrative Procedure Act, 5 U.S.C. § 701(b)(1)(C) (1988)).

(APA).[49] Therefore, application of NEPA to the High Commissioner's decision was inappropriate, not only because NEPA's regulatory control is limited to the actions of federal agencies,[50] but also because Section 701(b)(1)(c) of the APA excludes the decisions of "governments of the territories or possessions of the United States" from judicial review.[51]

The United States District Court for the District of Columbia considered NEPA's requirements with respect to federal agency activity in the sovereign territory of other nations in *Environmental Defense Fund, Inc. v. United States Agency for International Development*.[52] The Environmental Defense Fund (EDF) challenged the United States Agency for International Development's (AID) participation in an international pest management program, whereby AID financed, procured, and used pesticides in twenty lesser-developed countries.[53] EDF claimed that the risks posed by the use of the pesticides triggered NEPA's requirements and, therefore, that AID should have first considered the program's environmental impact on the participating countries.[54] Because the parties had reached an agreement prior to the litigation that AID would prepare an EIS before resuming participation in the program, the court did not rule on the issue of NEPA's extraterritoriality.[55] In approving the stipulation, however, the court explicitly required that AID include in its EIS an assessment of environmental impacts on the people, flora, fauna, and food supply of the nations concerned.[56]

Similarly, in *Sierra Club v. Adams*,[57] the Court of Appeals for the District of Columbia did not rule on the issue of NEPA's applicability to extraterritorial activity because the Secretary of Transportation had prepared an EIS on a challenged highway construction project in Panama and Colombia before the onset of the suit. The Sierra Club claimed that the Secretary's EIS was inadequate in its appraisal of the project's effects on the local Indian population and livestock, and in its failure to mention

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49. *Id.*

50. *Id.* at 658.

51. *Id.* at 653 n.17 (citing Administrative Procedure Act, 5 U.S.C. § 701(b)(1)(C) (1988)).

52. 6 Envtl. L. Rep. 20,121 (D.D.C. 1975).

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.* at 20,121-22.

57. 578 F.2d 389, 390-91 (D.C. Cir. 1978).

possible alternatives.[58] Although the court held the EIS to be adequate, it discredited the government's argument that mere mention of the project's effects on the Cuna and Choco Indians would be sufficient under NEPA.[59] The court "emphatically reject[ed] the assertion by the Government that something less than a thorough discussion is required because the Indians represent only a small fraction of the Panamanian population."[60]

In *National Organization for the Reform of Marijuana Laws (NORML) v. United States Department of State*,[61] the District Court for the District of Columbia also defined NEPA's requirements with respect to extraterritorial effects without directly ruling on the issue. After NORML had filed suit, the State Department prepared an EIS regarding its role in the spraying of herbicides on marijuana and poppy plants in Mexico.[62] In its memorandum opinion, the court agreed that an EIS was necessary and expressly directed the State Department to consider the effects of the spraying on the Mexican, as well as the American, environment.[63]

Although most courts that considered NEPA's extraterritoriality prior to the noted case have extended its application beyond United States territory, some have found NEPA inapplicable to conduct or effects occurring outside of the United States when foreign policy considerations outweighed the benefits of preparing an EIS. In *Natural Resources Defense Council, Inc. v. Nuclear Regulatory Comm'n*,[64] for example, the United States Court of Appeals for the District of Columbia Circuit held that the Nuclear Regulatory Commission was not required to prepare an EIS before approving a private company's application to export nuclear reactors to the Philippines. Although the NRC would be required to consider the foreign environmental impacts of its decision if Congress had clearly manifested an intent to categorically apply NEPA to the extraterritorial activities of federal agencies, the court found that no such intent was expressed in NEPA.[65] As a result, the court weighed

58. *Id.* at 391.

59. *Id.* at 396-97.

60. *Id.* at 396.

61. 452 F. Supp. 1226, 1235 (D.D.C. 1978).

62. *Id.* at 1229.

63. *Id.* at 1233-35.

64. 647 F.2d 1345, 1368 (D.C. Cir. 1981).

65. *Id.* at 1357.

Congress' interest in regulating the international exchange of nuclear technology against the Philippines' interest in self-regulation and the international community's interest in regulating nuclear trade.[66] Given these interests, imposing NEPA upon the NRC would have unreasonably interfered with the Philippines' sovereign authority to self-regulate.[67] Moreover, the amount of time needed to prepare an EIS would have thwarted the United States' objectives of expedition and predictability in international nuclear trade under the Nuclear Non-Proliferation Treaty.[68] Therefore, the court held that NEPA did not require the NRC to disclose the environmental impacts its decision would have on the Philippines in a formal EIS.[69]

Similarly, the United States District Court for the District of Hawaii rejected extraterritorial application of NEPA in *Greenpeace U.S.A. v. Stone*.[70] The United States Army was involved in a project to relocate chemical weapons stored in Germany to Johnston Atoll, a United States Trust Territory near Hawaii.[71] Greenpeace challenged the sufficiency of the Army's EIS for the project because the statement did not consider the environmental impact accidents en route would have in Germany or on the high seas.[72] Finding unclear congressional intent with respect to the Act's extraterritorial application to situations raising foreign policy considerations,[73] the court weighed the interests of the United States against those of Germany.[74] Requiring the Army to consider the environmental impact of its actions on Germany would have interfered with Germany's interest in self-government.[75] Hence, the court did not require an EIS for the relocation project.[76] Furthermore, the court held that NEPA did not apply to the Army's activities on the high seas, but factually restricted this holding to situations in which United States agency activity in international waters or other territory under cooperative

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66. *Id.* at 1356-63.

67. *Id.* at 1365.

68. *NRDC v. NRC*, 647 F.2d at 1363.

69. *Id.* at 1368.

70. 748 F. Supp. 749, 752 (D. Haw. 1990).

71. *Id.* at 752-53.

72. *Id.* at 754.

73. *Id.* at 759.

74. *Id.* at 759-61.

75. *Stone*, 748 F. Supp. at 761.

76. *Id.*

sovereign control (the "global commons") is inextricably linked to activity within the sovereign territory of another nation.[77] The court indicated that sovereignty concerns would not be implicated when the federal activity in question occurs solely in the global commons.[78]

The relevant case law has not established clear rules extending NEPA to federal projects outside the United States, but trends have emerged.[79] Courts disagree as to whether NEPA's language manifests a congressional intent for extraterritorial application.[80] Courts will generally extend NEPA's reach, however, when the action in question occurs in sovereignless territory, such as the high seas,[81] or in territory over which the United States exercises legislative control, such as trust territories.[82] The courts also appear willing to extend NEPA's reach when the United States possesses significant control over projects in other sovereign territories.[83] NEPA may not apply extraterritorially when compliance with the Act would infringe upon another nation's sovereignty or interfere with the United States' commitment to certain international goals, such as nuclear non-proliferation or international disarmament.[84]

In the noted case, the District Court of Appeals for the District of Columbia analyzed NEPA's extraterritoriality in a unique manner. Citing *EEOC v. ARAMCO*, the *Massey* court acknowledged that United States laws presumptively apply to conduct that occurs or produces effects solely within the United States.[85] The court also recognized, however, that a statute may apply extraterritorially when Congress clearly expresses its intent to regulate activities beyond the boundaries of the United States.[86] In addition, the presumption against extraterritorial application

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77. *Id.* at 761-63.

78. *Id.* at 761.

79. Joan R. Goldfarb, Note, *Extraterritorial Compliance with NEPA Amid the Current Wave of Environmental Alarm*, 18 B.C. ENVTL. AFF. L. REV. 543, 563-64 (1991).

80. *Compare Morton*, 463 F.2d at 1261 *and Enewetak*, 353 F. Supp. at 811 *with NRDC v. NRC*, 647 F.2d at 1345 *and Stone*, 748 F. Supp. at 749.

81. *Stone*, 748 F. Supp. at 749.

82. *Saipan*, 356 F. Supp. at 645; *Enewetak*, 353 F. Supp. at 811.

83. *See Adams* 578 F.2d at 389; *Morton*, 463 F.2d at 1261; *NORML*, 452 F. Supp. at 1226; *Envtl. Defense Fund*, 6 Envtl. L. Rep. at 20,121.

84. *NRDC v. NRC*, 647 F.2d at 1345; *Stone*, 748 F. Supp. at 749.

85. *Massey*, 986 F.2d at 530 (citing Equal Opportunity Commission v. Arabian American Oil Co., 499 U.S. 244, 248 (1991)).

86. *Id.* at 531.

of statutes is not implicated when failure to apply a law to extraterritorial conduct would adversely affect the United States or when a statute regulates conduct occurring in the United States that produces effects outside of United States territory.[87]

Based on the latter exception to the presumption against statutory extraterritoriality, the *Massey* court held that the application of NEPA to the NSF's activities in Antarctica was not presumptively banned.[88] NEPA regulates the decision-making processes of federal agencies, pertains to United States officials, and requires procedural, rather than substantive results.[89] In addition, since the regulated conduct under NEPA takes place in the United States, extraterritorial application of NEPA would not call for foreign enforcement or choices of law.[90] Therefore, the Act does not raise the issue of extraterritoriality. Thus, NEPA's regulation of the agency decision-making process falls within congressional jurisdiction.[91]

The *Massey* court additionally held that a presumption against the extraterritorial application of NEPA was unnecessary with respect to United States agency activity in Antarctica.[92] Antarctica is unique in its status as a sovereignless nation and the United States maintains a significant amount of control over scientific research activities in Antarctica.[93] Under these conditions, applying NEPA would not unreasonably infringe upon another nation's sovereignty or create a risk of international conflict.[94] Therefore, a presumption that NEPA could not require consideration of the extraterritorial effects of NSF's decision on the Antarctic environment would be improper.[95]

The unique status of Antarctica also supported the *Massey* court's conclusion that application of NEPA to the NSF's activities in Antarctica would not interfere with the United States' ability to cooperate in international projects in Antarctica.[96] NEPA does not impose any

87. *Id.*

88. *Id.* at 532.

89. *Id.* at 532-33.

90. *Massey*, 986 F.2d at 532-33.

91. *Id.* at 532.

92. *Id.* at 534.

93. *Id.* at 533-34.

94. *Id.* at 533.

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

96. *Id.* at 535.

substantive duties upon United States agencies participating in international cooperative efforts in Antarctica.[97] Consequently, interference with those efforts would occur only "when the time required to prepare an EIS would itself threaten international cooperation," or when unique or particularly delicate foreign policy issues are involved.[98] Such considerations were not involved in NSF's activity at McMurdo Station due to its location in the sovereignless territory of Antarctica.[99]

Finally, NEPA's plain language does not restrict United States agencies to the consideration of environmental impacts only on the United States.[100] The court cited Section 102(2)(C) of NEPA, in which Congress states NEPA's underlying plan to "encourage productive harmony between *man* and *his environment*" and to "promote efforts which will prevent or eliminate damage to the environment and the *biosphere*."[101] The court agreed with *Enewetak* that "there appears to have been a conscious effort to avoid the use of restrictive or limiting terminology" in NEPA.[102] The *Massey* court did not find the placement of discussion relating to the EIS requirement and to NEPA's relationship to matters of foreign policy in separate subsections of NEPA to be indicative of Congress' intent that the requirements contained in each subsection be mutually exclusive.[103] Rather, agencies must fulfill the whole of NEPA's requirements.[104]

The *Massey* court is the first to hold that NEPA applies extraterritorially on the grounds that the activity sought to be regulated by NEPA occurs within the United States.[105] This result creates the potential for broader application of NEPA's requirements to United States agency actions abroad for several reasons.[106] First, the court's reasoning evades the problematic issue of congressional intent. As evidenced by prior cases, courts disagree as to whether NEPA expresses congressional

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97. *Id.*

98. *Id.*

99. *Id.* at 535-36.

100. *Massey*, 986 F.2d at 535-36.

101. *Id.* at 536 (quoting 42 U.S.C. § 4321 (1988) (emphasis added)).

102. *Id.* (quoting Enewetak v. Laird, 353 F. Supp. 811, 816 (D. Haw. 1973)).

103. *Id.* at 536.

104. *Id.* at 536.

105. Wirth, *supra* note 33, at 627; Bourdeau & Hagen, *supra* note 33, at S5.

106. Bourdeau & Hagen, *supra* note 33, at S5-6.

intent on the issue of extraterritoriality.[107] *Massey's* analytical framework, however, permits courts to consider application of NEPA's requirements without analyzing the congressional intent behind the statute.

Massey's focus on the site of agency decision-making, rather than on the activities conducted pursuant to agency decisions, will similarly facilitate the application of NEPA to a greater number of agency decisions. The rationale that NEPA regulates decision-making seems to create a nearly categorical exception to the presumption against statutory extraterritoriality and also raises the threshold for a finding of unreasonable interference with foreign policy that, as the court indicated, *might* preclude application of NEPA on a case-by-case basis.[108] Because the court's analysis characterizes the subject of NEPA's regulations as activity occurring in the United States, commonplace interference with another nation's interests, such as choice of law problems, logistical problems with respect to statutory enforcement, and encroachment upon another nation's right of self-government, will rarely occur.[109] According to the court, an agency *might* be exempt from NEPA's requirements when the time required for preparation of the EIS will threaten international cooperation in a particular matter, as would be the case if a statute imposed compliance with strict deadlines as a prerequisite for a particular project's completion.[110] Since the court did not find that the circumstances involved in the case interfered with United States foreign policy,[111] however, the standard for interference remains undefined.

The *Massey* court's reasoning may also serve as a basis for extraterritorial extension of other environmental regulatory statutes.[112] In addition to NEPA, United States environmental laws, such as the Endangered Species Act (ESA),[113] the Clean Air Act,[114] and the

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107. *See, e.g., Stone*, 748 F. Supp. at 749; *NRDC v. NRC*, 647 F.2d at 1345; *Morton*, 463 F.2d at 1261; *Enewetak*, 353 F. Supp. at 811.

108. *Massey*, 986 F.2d at 537 (emphasis added).

109. *Id.* at 532-35.

110. *Id.* (emphasis added).

111. *Id.* at 535.

112. Bourdeau & Hagen, *supra* note 33, at S7-8.

113. 16 U.S.C. § 1531-43 (1993).

114. 42 U.S.C. § 7401-7671 (1993).

Federal Water Pollution Control Act,[115] regulate the decision-making processes of federal agencies. For example, the ESA prescribes a procedure for evaluating all federal agency actions likely to affect endangered or threatened species.[116] Plaintiffs seeking to apply the ESA to federal agency actions outside United States territory could argue that *Massey*, by analogy, requires broad application of the ESA. Similar arguments could be made for the extraterritorial application of other environmental statutes with procedural regulatory effects.

Massey, most importantly, will contribute to an increased environmental protection in the United States and beyond. Providing judicial authority to apply NEPA to the activities of United States agencies that occur outside of United States territory, the *Massey* court increased NEPA's ability to prevent federal agencies from causing irreparable harm to the environment. Moreover, a broader application of the statute may decrease the risk of international conflicts that arise from an action of a United States agency harming another nation's environment. The *Massey* court's interpretation of NEPA as permitting consideration of the extraterritorial environmental impacts of United States agencies aligns United States judicial policy with the current international initiative to maintain and improve the global environment.[117] The decision marks an appropriate step toward solving environmental problems that affect the Earth as a whole, not merely as individual nations.

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115. 33 U.S.C. § 1251-1387 (1993).

116. 16 U.S.C. § 1536(a)(2) (1993).

117. *See, e.g.*, Protocol on Environmental Protection to the Antarctic Treaty, *opened for signature* Oct. 4, 1991, *reprinted in* 30 I.L.M. 1461 (1991) (not in force).