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The Extraterritorial Application of the National Environmental Policy Act: Formulating a Reliable Test for Applying NEPA to Federal Agency Actions Abroad

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COMMENT

The Extraterritorial Application of the National Environmental Policy Act: Formulating a Reliable Test for Applying NEPA to Federal Agency Actions Abroad

I. INTRODUCTION

The National Environmental Policy Act (NEPA)[1] is the cornerstone of modern American environmental law.[2] NEPA contains lofty environmental mandates designed to "encourage productive and enjoyable harmony between man and his environment" and to "promote efforts which will prevent or eliminate damage to the environment and biosphere . . . ." [3] To ensure that the government promotes these objectives, NEPA requires all federal agencies to compile an environmental impact statement (EIS) outlining potential environmental impacts and alternatives for all proposed major agency actions that might significantly affect the environment.[4] The EIS requirement is central to NEPA's regulatory scheme.

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1. National Environmental Policy Act (NEPA) of 1969, Pub. L. No. 91-190, 83 Stat. 852 (codified as amended at 42 U.S.C. §§ 4321-47 (1988)).

2. M. Blumm, *The National Environmental Policy Act at Twenty: A Preface*, 20 Envtl. L. 447, 447-54 (1990).

3. 42 U.S.C. § 4331 (1988).

4. *Id.* at § 4332(2)(C) (1988). NEPA section 102(2)(C) provides:

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

Id.

From the outset, controversy arose over whether NEPA's EIS provisions applied to federal agency actions occurring outside the United States. Finding congressional intent on the issue ambiguous—as measured through statutory language, legislative history, and administrative interpretations—courts have either avoided directly answering the question or have explicitly restricted their holdings to the specific facts of the case at hand.[5] Because of the courts' reluctance to conclusively rule on the limits of NEPA's reach, the question of NEPA's extraterritorial application has gone largely unanswered.

A recent entry into this line of cases, Environmental Defense Fund, Inc. v. Massey,[6] addressed the issue of whether NEPA's EIS provisions applied to National Science Foundation (NSF) activities in Antarctica. The Environmental Defense Fund (EDF) sought a preliminary injunction to halt NSF's operation of a new waste incinerator at its research facility, alleging that NSF's failure to prepare an EIS for the project violated NEPA.[7] The district court dismissed EDF's action for lack of subject matter jurisdiction because it could not find in NEPA "a clear expression of legislative intent through a plain statement of extraterritorial statutory effect."[8] Based on the recent Supreme Court decision in Equal Opportunity Employment Comm'n v. Arabian American Oil Co.,[9] which applied a strict presumption against applying United States laws extraterritorially, the district court held that NEPA did not apply to NSF's operation of incinerators in Antarctica.[10] EDF appealed.

The Court of Appeals for the District of Columbia saw the *Massey* case differently and reversed the district court's decision. Noting that "the district court below bypassed the threshold question of whether the application of NEPA to agency actions in Antarctica presents an extraterritoriality problem at all," the appellate court found that NEPA regulates purely domestic decisions of federal agency officials that occur almost exclusively in the United States and involve the workings of the federal government.[11] The court concluded that "since NEPA is designed to regulate conduct occurring within the territory of the United States, and imposes no substantive requirements which could be interpreted to govern conduct abroad, the presumption against extraterritoriality does not apply to this case."[12] The court was careful to point out, however,

5. *See infra* part II.
6. 772 F. Supp. 1296 (D.D.C. 1991), *rev'd*, 986 F.2d 528 (D.C. Cir. 1993).
7. *Id.* at 1297.
8. *Id.*
9. 499 U.S. 244 (1991).
10. 772 F. Supp. at 1298.
11. 986 F.2d 528, 532 (D.C. Cir. 1993).
12. *Id.* at 533. The court therefore remanded the case to the district court to determine whether NSF had actually failed to comply with NEPA. *Id.* at 529.

that "we do not decide today how NEPA might apply to actions in a case involving an actual foreign sovereign . . . ," thereby limiting its holding to the application of NEPA to federal activities in Antarctica.[13]

This comment looks generally at the application of NEPA abroad. Part II reviews case law and other interpretations of NEPA's extraterritoriality before *Massey*. Part III looks at the district court's decision in *Massey* and its application of the Supreme Court's "presumption against extraterritoriality" rule. Part IV examines the *Massey* court of appeals' reversal of the district court and its formulation of a test to determine NEPA's extraterritorial reach. Part V analyzes how the court of appeals' decision might affect application of NEPA to federal actions occurring entirely in foreign countries. The conclusion is that courts should apply a presumption *of* extraterritoriality for NEPA, rebuttable only when NEPA application clashes with laws of another sovereign or impinges on some other foreign policy objective.

II. THE HISTORY OF NEPA'S EXTRATERRITORIALITY

A. NEPA's legislative mandates

Congress enacted NEPA in response to growing concerns over degradation of the world environment.[14] NEPA's EIS requirement forces all[15] federal agencies to take a hard look at the environmental impacts of their actions when they make a recommendation or report on proposed agency actions.[16] In preparing an EIS, a federal agency must consider the environmental impacts of the proposed project, alternatives to the project, and any adverse environmental effects of the action that are unavoidable.[17] The final requirement may impose a substantive duty on federal agencies to take steps to avoid adverse environmental effects of their actions.[18] NEPA, however, "while establishing 'significant substantive goals for the Nation,' imposes upon agencies duties that are 'essentially procedural.'"[19] Furthermore, NEPA does not require any particular outcome of an agency's review, only that the agency weigh

13. *Id.* at 537.

14. 42 U.S.C. § 4321 (1988).

15. NEPA requirements apply to *all* federal agencies, regardless of whether an agency's other legislative mandates require consideration of environmental concerns. *Calvert Cliffs' Coordinating Comm., Inc. v. Atomic Energy Comm'n*, 449 F.2d 1109, 1112 (D.C. Cir. 1971).

16. Kleppe v. Sierra Club, 427 U.S. 390, 406 (1979).

17. 14 U.S.C. § 4332(2)(C).

18. Calvert Cliffs' Coordinating Comm., 449 F.2d at 1115.

19. Strycker's Bay Neighborhood Council, Inc. v. Karlen, 444 U.S. 223, 227 (1980) (per curiam) (quoting Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 558 (1978)).

environmental costs against the benefits of the proposed action.[20] The Supreme Court has noted that "it is now well settled that NEPA itself does not mandate particular results [and] simply prescribes the necessary process," although "these procedures are almost certain to affect the agency's substantive decision."[21]

NEPA is largely silent on whether its provisions apply to federal agency actions abroad. Congress' omissions on this point have caused the courts frustration in interpreting NEPA's application to projects that occur outside the United States.[22] Courts have wrestled with NEPA's language, minimal legislative history, and administrative interpretations in an effort to determine the extent of NEPA's extraterritorial application, but such attempts have met with little success or consistency in result.[23]

B. *Administrative interpretations of NEPA's extraterritoriality*

NEPA created the Council on Environmental Quality (CEQ) in the executive branch of the federal government.[24] One of CEQ's duties is to interpret and oversee the legislative mandates of NEPA,[25] and CEQ's interpretation of NEPA is generally granted "substantial deference."[26] In 1976, CEQ concluded that the EIS requirement "applies to all significant effects of proposed Federal actions on the quality of the human environment—in the United States, in other countries, and in areas outside the jurisdiction of any country . . . ."[27] Rules proposed by CEQ would have required an agency considering actions affecting global commons to comply fully with NEPA, and agencies considering actions in foreign countries would have had to prepare an "environmental statement."[28] Pressure from the State Department, however, forced CEQ

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20. *See Calvert Cliffs' Coordinating Comm.*, 449 F.2d at 1123.

21. Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 350 (1989).

22. Natural Resources Defense Council (NRDC) v. Nuclear Regulatory Comm'n, 647 F.2d 1345, 1355 (D.C. Cir. 1981). "Construing the equivocal reach of NEPA abroad, however, is a judicial endeavor oft-encountered, but not yet fully realized by any court." *Id.*

23. *Id.* at 1367. "NEPA's legislative history illuminates nothing in regard to extraterritorial application." *Id.*

24. 42 U.S.C. § 4342 (1988).

25. *Id.* § 4344.

26. *See* Andrus v. Sierra Club, 442 U.S. 347, 358 (1979); Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 372 (1989); Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 354-56 (1989).

27. Council on Environmental Quality, *Memorandum on the Application of the EIS Requirement of Environmental Impacts Abroad of Major Federal Actions* (1976), *reprinted in* 42 Fed. Reg. 61,066, 61,068 (1977).

28. Council on Environmental Quality, *Draft Regulations on Applying NEPA to Significant Foreign Environmental Effects* (1978), *reprinted in* 8 Env't Rep. (BNA) 1495 (1978).

to retreat from this position and withdraw the proposed rules.[29] Current CEQ regulations do not address NEPA's application to agency actions occurring outside the United States.[30] Thus, although CEQ's earlier position that NEPA applies abroad has been influential in helping courts decide NEPA's extraterritorial applicability,[31] the agency's current silence on the issue merely adds to the confusion.

In 1979, President Carter further confounded the question of NEPA's application abroad when he issued Executive Order 12,114.[32] The order purportedly "represents the United States government's exclusive and complete determination of the procedural and other actions to be taken by agencies to further the purpose of [NEPA] with respect to the environment outside the United States . . . ."[33] In contrast to NEPA, however, Executive Order 12,114 is significantly less demanding on federal agencies because it severely limits the scope of actions that require a full EIS.[34] For instance, in most cases the executive order allows federal agencies to prepare an "environmental assessment" of their actions, a document much less comprehensive than NEPA's EIS.[35] Also, unlike NEPA, the order defines "environment" to exclude "social, economic and other environments."[36] Furthermore, the order states that an action significantly affects the environment if it "does significant *harm*,"[37] whereas the corresponding NEPA definition applies to actions "affecting the *quality*"[38] of the environment. In addition to these limitations, Executive Order 12,114 provides no private cause of action.[39] Thus, although the Executive Order appears to recognize the importance of applying NEPA extraterritorially, exceptions and limitations render its mandates relatively ineffective compared to NEPA requirements.

C. *Judicial interpretations of NEPA's extraterritoriality*

NEPA case law has not clearly answered the question of whether NEPA applies to federal agency actions occurring outside the territory of

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29. Note, *The Extraterritorial Application of NEPA under Executive Order 12,114*, 13 Vand. J. Transnat'l L. 173, 201-02 (1980).

30. *See generally* 40 C.F.R. §§ 1500-17 (1992).

31. *See Massey*, 986 F.2d at 536.

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

33. *Id.*

34. *See generally* G. Pincus, Note, *The "NEPA-Abroad" Controversy: Unresolved by an Executive Order*, 30 Buff. L. Rev. 611, 638-51 (1981).

35. Exec. Order No. 12,114 §§ 2-3 through 2-5, 3 C.F.R. §§ 357-59 (1980).

36. *Id.* § 3-4, 3 C.F.R. 360.

37. *Id.* (emphasis added).

38. 42 U.S.C. § 4332(2)(C) (1988) (emphasis added).

39. *See Massey*, 772 F. Supp. at 1298, *rev'd on other grounds*, 986 F.2d 528 (D.C. Cir. 1993).

the United States. Several courts have *assumed* that NEPA applies abroad, but have declined to directly rule on the issue largely at the request of the government, which in each case agreed to prepare an EIS for its foreign action. In decisions rejecting NEPA's application to foreign projects, the courts explicitly restricted their holdings to the specific circumstances of the cases, thereby leaving open the possibility that NEPA might apply to such actions absent overriding foreign policy considerations.

Two early NEPA cases addressed whether NEPA requirements apply to federal agency actions in United States trust territories. In People of Enewetak v. Laird,[40] plaintiffs sought to enjoin a federal project to test explosives on a Pacific island that the United States held in trust. Holding that NEPA applied to federal activities on the island, the district court declared that "[by] its own terms, NEPA is not restricted to United States territory delimited by the fifty states . . . ."[41] The court's determination was based on the observation that "[w]here one would have expected 'United States' to have been used, the lawmakers substituted the much broader term 'Nation.'"[42] Also, NEPA's legislative history was couched in broad language, lending support to the conclusion that Congress intended NEPA to apply abroad.[43]

In People of Saipan v. United States Dep't of Interior,[44] the court reaffirmed that NEPA applies to United States trust territories. Relying on the Supreme Court's opinion in Foley Bros., Inc. v. Filardo,[45] the *Saipan* court found that a statute would be presumed to apply only within the territory of the United States only if all indicia of legislative intent failed to answer the extraterritorial question.[46] Because "both the language and legislative history of NEPA evidenced a congressional intent to apply the statute to all areas under United States control," the court reaffirmed its decision in *Enewetak* that NEPA applied to trust territories.[47] The Ninth Circuit agreed with the *Saipan* district court's finding, but found that NEPA did not apply because the Saipan government was not a federal agency within the meaning of NEPA.[48]

Other courts have addressed whether NEPA applies to federal actions taking place in foreign countries, but none have squarely

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40. 353 F. Supp. 811, 813 (D. Haw. 1973).
41. *Id.* at 816.
42. *Id.*
43. *Id.* at 816-19.
44. 356 F. Supp. 645 (D. Haw. 1973), *modified on other grounds*, 502 F.2d 90 (9th Cir. 1974), *cert. denied*, 420 U.S. 1003 (1975).
45. 336 U.S. 281 (1949).
46. *Saipan*, 356 F. Supp. at 649-50.
47. *Id.* at 650.
48. 502 F.2d 90, 96 (9th Cir. 1974), *cert. denied*, 420 U.S. 1003 (1975).

answered the question. In Sierra Club v. Adams,[49] the court assumed, without deciding, that NEPA's EIS requirement applied to a highway construction project in Panama and Columbia that could potentially allow the epidemic spread of a serious livestock disease to cattle in the United States.[50] In noting that it was merely assuming NEPA applied to the highway project because the government had prepared an EIS, the court stated:

> The effect of the construction . . . also brings into question the applicability of NEPA to United States foreign country projects that produce entirely local environmental impacts, or as in this case, some impacts that are strictly local and others that also affect the United States . . . . We leave consideration of this important issue to another day.[51]

In National Organization for the Reform of Marijuana Laws (NORML) v. Department of State,[52] the court partially answered the question of NEPA's applicability to federal actions in foreign countries. In *NORML*, plaintiffs claimed that the Department of State and other federal agencies had violated NEPA by failing to prepare an EIS for their participation in a program of spraying a chemical herbicide to help eradicate illegal marijuana and poppy plants in Mexico.[53] Plaintiffs complained that the spraying was causing serious health effects in persons who used the plants in the United States. The court found that NEPA requirements applied to a consideration of effects felt within the United States environment.[54] When asked to answer the question of whether an EIS would need to discuss environmental effects felt solely in Mexico, the court only "assume[d], without deciding, that NEPA is fully applicable to the Mexican herbicide program."[55] Because defendants agreed to prepare an EIS that would include an analysis of such effects, the court found that it did not need to reach the issue of whether NEPA required consideration of environmental impacts in foreign countries.[56] The court noted that the government "entreat[ed] the Court to assume, without deciding, the applicability of NEPA to the Mexican impact of this country's participation in chemical eradication efforts in Mexico."[57]

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49. 578 F.2d 389 (D.C. Cir. 1978).
50. *Id.* at 391-92 n.14.
51. *Id.*
52. 452 F. Supp. 1226 (D.D.C. 1978).
53. *Id.* at 1228.
54. *Id.* at 1232.
55. *Id.* at 1233.
56. *Id.*
57. *Id.* at 1232. The government has used similar tactics to avoid a conclusive ruling on the NEPA extraterritoriality issue on other occasions. For instance, in *Environmental Defense Fund v. Agency for International Development*, 6 Envtl. L. Rep. 20,121 (D.D.C. 1975), plaintiffs challenged the government's failure to prepare an EIS for its role in helping foreign

In two recent cases, the courts found that NEPA did not apply to particular federal agency actions in foreign countries, based largely on specific foreign policy considerations. In Natural Resources Defense Council (NRDC) v. Nuclear Regulatory Comm'n,[58] plaintiffs challenged a federal agency decision to license components for a nuclear reactor to be built on a volcano and earthquake zone in the Philippines. Finding foreign policy considerations controlling, the court held that NEPA applied internationally only "where consistent with the foreign policy of the United States."[59] NEPA should not interfere with the right of a foreign country to determine its own environmental protection standards or with the President's prerogative to determine foreign relations, at least in the case of nuclear exports.[60] The court expressly limited its finding: "[The court finds] only that NEPA does not apply to NRC nuclear export licensing decisions—and not necessarily that the [EIS] requirement is inapplicable to some other major federal action abroad."[61]

In Greenpeace, USA v. Stone,[62] plaintiff alleged that the government violated NEPA by failing to prepare an EIS covering the transportation of missiles containing dangerous nerve gas through Germany and the open oceans in order to dispose of the missiles on an island in the Pacific Ocean. The court broke the activity into three segments:[63] 1) the movement of the missiles across German soil, 2) their transportation across the open oceans, and 3) their disposal on Johnston Atoll, a United States trust territory. Because the Department of Defense ("DOD") had prepared an EIS for disposal of the missiles on the island, the court reviewed only the first two segments of the journey.

In finding that NEPA did not apply to transportation of the missiles through Germany, the *Greenpeace* court relied heavily on "the political question and foreign policy considerations which would necessarily result from such an application of a United States statute to joint actions taken on foreign soil based on an agreement between the President and a foreign head of state."[64] The court found that it could not justify the political and foreign policy implications of imposing United States environmental policy on an action occurring entirely in a foreign country

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governments administer pesticide programs. The government settled the case by stipulating that it would prepare an EIS for the action, thereby preventing the court from deciding whether NEPA applied. *Id.* at 20,121-22.

58. 647 F.2d 1345 (D.C. Cir. 1981).

59. *Id.* at 1366 (quoting 42 U.S.C. § 4332(2)(F)).

60. *Id.* at 1348.

61. *Id.* at 1366.

62. 748 F. Supp. 749 (D. Haw. 1990), *appeal dismissed as moot*, 924 F.2d 175 (9th Cir. 1991).

63. The court thus implicitly conditioned its own finding that NEPA required a "comprehensive environmental impact statement" covering the entire transport and disposal action on a finding that NEPA applied extraterritorially. 748 F. Supp. at 757. *See* 40 C.F.R. § 1508.25(a)(1) (1992) (requiring that "connected actions" be considered together in a single EIS).

64. 748 F. Supp. at 757.

that had approved of the transportation.[65] The court also noted that employing NEPA in this case would interfere with an agreement between President Reagan and Chancellor Kohl of Germany.[66]

The *Greenpeace* court also found that NEPA did not apply to the transoceanic segment of the transportation. The DOD had prepared an environmental analysis (EA) under Executive Order 12,114 for the transoceanic portion of the transport. The EA concluded that the transportation "would cause no significant impact on the environment of the global commons, assuming that none of the low probability accidents examined actually occur."[67] Noting that Executive Order 12,114 does not preempt application of NEPA to *all* federal agency actions occurring outside the United States, the court nonetheless deferred to the DOD's compliance with the order and found that NEPA did not apply to the transoceanic segment of the transportation.[68] Foreign policy considerations were again persuasive, because forcing the DOD to comply with NEPA even for the transoceanic segment would "affect the movement of the weapons through West Germany."[69]

In reaching the conclusion that NEPA did not apply to the first two segments of the transportation, the *Greenpeace* court relied on concepts from the presumption against extraterritoriality doctrine.[70] The court noted that "absent evidence of Congressional intent to the contrary, a federal statute should be construed as applying only within the territorial jurisdiction of the United States."[71] Although "the language of NEPA indicates that Congress was concerned with the global environment and the worldwide character of environmental problems," the court concluded that NEPA "does not explicitly provide that its requirements are to apply extraterritorially."[72] A strict reading of the statute's language called NEPA's extraterritorial application into doubt. Like the *NRDC* court, however, the *Greenpeace* court limited its holdings on NEPA's extraterritorial application to the particular circumstances of a case involving overriding foreign policy implications.[73]

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65. *Id.* at 759-60.

66. *Id.* at 758.

67. *Id.* at 762 (quoting DOD's Global Commons Environmental Assessment). The assessment thus reached a "Finding of No Significant Impact" ("FONSI"), negating the preparation of an EIS pursuant to Executive Order 12,114. *Id.*

68. *Id.* at 762-63.

69. *Id.* at 763.

70. *See generally id.* at 758-63.

71. *Id.* at 758 (citing Foley Bros., Inc. v. Filardo, 336 U.S. 281, 285 (1949); McKeel v. Islamic Republic of Iran, 722 F.2d 582 (9th Cir. 1983); Meredith v. United States, 330 F.2d 9, 11 (9th Cir. 1964); Commodity Futures Trading Comm'n v. Nahas, 738 F.2d 487, 493 (D.C. Cir. 1984)).

72. *Id.* at 759.

73. *Id.* at 768. "In other circumstances, NEPA *may* require a federal agency to prepare an EIS for action taken abroad . . . . " *Id.* at 761 (citations omitted).

III. DECISION OF THE MASSEY DISTRICT COURT

Shortly after the District of Hawaii's treatment of the *Greenpeace* case, the District Court for the District of Columbia was faced the question of whether NEPA applied to federal agency actions in Antarctica. Like the open oceans addressed in *Greenpeace*, Antarctica is an area of global commons over which no country is truly sovereign.[74] Relying on a strict interpretation of the presumption against extraterritoriality doctrine recently reaffirmed in Equal Opportunity Employment Comm'n v. Arabian American Oil Co. (Aramco),[75] the district court in Environmental Defense Fund, Inc. v. Massey[76] refused to apply NEPA to federal actions occurring in global commons such as Antarctica.

A. *Statement of the case*

In *Massey*, plaintiff Environmental Defense Fund (EDF) sought a preliminary injunction to prevent the National Science Foundation (NSF) from incinerating food and other domestic waste at NSF's McMurdo Station in Antarctica.[77] EDF contended that NSF's failure to prepare an EIS for the incineration violated NEPA, CEQ regulations, and Executive Order 12,114.[78] NSF filed a motion to dismiss for lack of subject matter jurisdiction, asserting that NEPA does not apply to federal agency actions outside the United States and because Executive Order 12,114 does not create a cause of action.[79] The district court upheld NSF's motion on both grounds.

B. *The district court's analysis*

Rejecting the extraterritorial application of NEPA, the district court noted that the Supreme Court had recently reaffirmed the presumption against extraterritoriality doctrine. In *Aramco*, the Supreme Court concluded that "legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States."[80] The *Massey* court determined from *Aramco* that for a statute

74. *See* Beattie v. United States, 756 F.2d 91, 99 (D.C. Cir. 1984).
75. 499 U.S. 244 (1991).
76. 772 F. Supp. 1296 (D.D.C. 1991), *rev'd*, 986 F.2d 528 (D.C. Cir. 1993).
77. *Id.* at 1297.
78. *Id.* (citing 42 U.S.C. §§ 4321-4370a (1969); 40 C.F.R. §§ 1500-1508 (1990); 44 Fed. Reg. 1957 (1979)).
79. 772 F. Supp. at 1297.
80. *Id.* at 1297 (quoting *Aramco*, 499 U.S. at 248 (quoting Foley Bros., Inc. v. Filardo, 336 U.S. 281, 285 (1949))).

to apply extraterritorially "the affirmative intention of the Congress [must be] clearly expressed."[81] After a brief recital of some of NEPA's provisions, the court summarily dismissed NEPA's broad language as failing "to provide a clear expression of legislative intent through a plain statement of extraterritorial statutory effect."[82] Finding an analysis of statutory language sufficient, the court stated that it "does not need to examine the legislative history in order to divine Congressional intent."[83] The conclusion that NEPA's statutory language provided no clear expression of an intent to apply NEPA extraterritorially left the court with "no choice but to decide that NEPA does not apply to the NSF's decision to build the incinerators in the Antarctica."[84]

C. *The presumption against extraterritoriality*

In addition to missing the threshold question of whether the case presented an issue of extraterritoriality,[85] the district court misapplied the presumption against extraterritoriality doctrine. The presumption begins with congressional authority and power to regulate activities occurring outside United States territory. The United States Constitution grants Congress such authority as the power to define offenses on the high seas or against the law of nations.[86] The Supreme Court has upheld this power in a number of situations and under a variety of laws.[87] In addition, "the United States is not debarred by any rule of international

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81. 772 F. Supp. at 1297 (quoting *Aramco*, 499 U.S. at 248).

82. *Id.* The court's analysis consisted of the following:

> The Court cannot ferret out a clear expression of Congress' intention that NEPA should apply beyond the territorial jurisdiction of the United States. Rather, NEPA contends [sic] language such as "the human environment" *see* 42 U.S.C. § 4332(2)(C), "the worldwide and long-range character of environmental problems" *see id.* at § 4332(2)(F), and the purpose of NEPA is to "encourage productive and enjoyable harmony between man and his environment [and] to promote efforts which will prevent or eliminate damage to the environment and biosphere." *See id.* at § 4321.

Id.

83. *Id.*

84. *Id.* at 1298 (footnote omitted).

85. *See infra* part IV for a discussion of the court of appeals' analysis of this threshold question.

86. U.S. Const. art. I, § 8, cl. 10.

87. *See* United States v. Bowman, 260 U.S. 94, 97-100 (1922) (holding that Congress may regulate criminal activity outside the territory of the United States); Vermila-Brown Co. v. Connell, 335 U.S. 377, 381 (1948) (holding that "Congress may regulate the actions of our citizens outside the territorial jurisdiction of the United States whether or not the act punished occurred within the territory of a foreign nation"); Steele v. Bulova Watch Co., 344 U.S. 280, 282-86 (1952) (finding that United States trademark law applies to activities in Mexico).

law from governing the conduct of its own citizens upon the high seas or even in foreign countries when the rights of other nations and their nationals are not infringed."[88] The Supreme Court noted in *Aramco* that "[b]oth parties concede, as they must, that Congress has the authority to enforce its laws beyond the territorial boundaries of the United States."[89] Thus, if it so desires, Congress may authorize the extraterritorial application of a statute such as NEPA.

To determine whether a statute applies to conduct occurring outside the United States, courts have generally attempted to discern congressional intent through an analysis of statutory construction. The analysis has traditionally started with the assumption that "legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States."[90] This premise represents the so-called "presumption against extraterritoriality" or "presumption of territoriality" doctrine. Unless Congress "clearly expressed" an "affirmative intention" to apply the statute to extraterritorial activities, a law of the United States will only be applied to conduct occurring within United States territory.[91]

The tendency of Congress to phrase statutes in "[w]ords having universal scope" confounds attempts to look for a clear expression of congressional intent.[92] The broad wording of statutes suggests that almost all United States law should enjoy extraterritorial application, and a number of courts have struggled with the implications of this result.[93] The Supreme Court, however, has found that ambiguous statutory language alone does not overcome the presumption against extraterritoriality.[94]

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88. *Steele*, 344 U.S. at 285-86 (quoting Skiriotes v. Florida, 313 U.S. 69, 73 (1941)). *See also* Restatement of Conflict of Laws § 63 (1934) (stating that a nation "has jurisdiction over its nationals wherever they may be to require or forbid them to do an act unless the exercise of this jurisdiction involves the violation of the law or public policy of the state where the national is").

89. 499 U.S. at 248.

90. Foley Bros., Inc. v. Filardo, 336 U.S. 281, 285 (1949) *quoted in Aramco*, 499 U.S. at 248. *See also* American Banana Co. v. United Fruit Co., 213 U.S. 347, 356-57 (1909); Restatement (Second) of Foreign Relations Law of the United States § 38 (1965). "The rules of United states statutory law . . . apply only to conduct occurring within, or having effect within, the territory of the United States, unless the contrary is clearly indicated by the statute." *Id.*

91. Benz v. Compania Naviera Hidalgo, 353 U.S. 138, 147 (1957).

92. *American Banana*, 213 U.S. at 357.

93. *See* G. Born, *A Reappraisal of the Extraterritorial Reach of U.S. Law*, 24 Law & Pol'y Int'l Bus. 1, 7 (1992) (citing several cases and other authorities that have found that various statutes are "couched in the most general terms and suggest no meaningful geographic limits").

94. *American Banana*, 213 U.S. at 357.

In an effort to overcome the problem of overly broad language, courts applying the presumption against extraterritoriality doctrine often look to other indicia of congressional intent to support their conclusions on a statute's extraterritorial effect. For instance, in Foley Bros., Inc. v. Filardo, the case from which *Aramco* derived its presumption against extraterritoriality rule,[95] the Supreme Court examined a labor law's overall scheme, legislative history, and administrative interpretations to help determine whether Congress intended it to apply abroad.[96] In Steele v. Bulova Watch Co., the Supreme Court relied in large part on the statute's underlying purpose, the nationality of the regulated parties, and the absence of conflict between United States and Mexican law to find that a trademark act could regulate a defendant's conduct in Mexico.[97] Also, the Court has found extraterritorial application of United States criminal law when Congress has not been explicit in including "specific provisions in the law that the locus shall include the high seas of foreign countries, but allows it to be inferred from the nature of the offense."[98] Thus, ambiguous language should not defeat a statute's extraterritorial application when such limits would necessarily "curtail the scope and usefulness of the statute" and leave a large loophole in the law's protections.[99]

In contrast to Supreme Court cases that looked beyond a statute's language to discern its applicability abroad, the *Aramco* Court did not apply Title VII of the Civil Rights Act of 1964[100] extraterritorially because its language "is ambiguous, and does not speak directly to the question presented here."[101] The Court failed to address the Act's legislative history or other indicia of congressional intent that might clarify its extraterritorial application, although it noted that a number of "other elements" in Title VII's statutory framework suggested a "purely domestic focus."[102] The dissent rejected the majority's invocation of a "clear statement" rule,[103] noting that the presumption against extraterritoriality was only a "weak presumption" that should not be applied until a court has "exhausted all available indicia of Congress' intent."[104]

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95. *See* 499 U.S. at 248.

96. 336 U.S. at 286-90.

97. 344 U.S. 280, 285-89 (1952).

98. United States v. Bowman, 260 U.S. 94, 98 (1922). "The necessary locus [of a statute's reach], when not specifically defined, depends on the purpose of Congress . . . . " *Id.* at 97-98.

99. *Id.*

100. Pub. L. No. 102-166, § 109, 105 Stat. 1071, 1077.

101. 499 U.S. at 250.

102. *Id.* at 255.

103. *Id.* at 261 (Marshall, J., dissenting).

104. *Id.* at 265-66 (Marshall, J., dissenting).

The purpose of the presumption against extraterritoriality is "to protect against unintended clashes between our laws and those of other nations which could result in international discord."[105] A long-standing principle of statutory construction states that "an act of Congress ought never be construed to violate the law of nations if any other possible construction remains."[106] When conflicts of law become evident, a regulating country should defer to the other country's law if that country's interest is clearly greater.[107] Following this premise, the Supreme Court has created a rule that a United States law will not be applied extraterritorially when such conflict exists.[108]

Courts often recognize an exception to the presumption against extraterritoriality doctrine when an action occurring in a foreign country significantly affects the environment of United States. When conduct abroad results in effects reaching the regulating nation, international law allows a nation to "impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends."[109] This exception has been applied in a number of contexts in which a failure to apply a statute extraterritorially would have had negative effects within the United States.[110] Exercises of extraterritorial jurisdiction may not be "unreasonable," as determined by such factors as the extent to which the activity takes place or has effects within the territory of the regulating state, nationalities of the parties, the importance of the regulation within the regulating state, and the likelihood of conflict with another sovereign's laws.[111]

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105. *Id.* at 248.

106. Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804).

107. Restatement (Third) Foreign Relations Law § 403(3) (1986).

108. *See* Lauritzen v. Larsen, 345 U.S. 571, 582 (1953); Steele v. Bulova Watch Co., 344 U.S. 280, 289 (1952).

109. United States v. Aluminum Co. of America, 148 F.2d 416, 443 (2d Cir. 1945). *See also* Restatement (Third) Foreign Relations Law § 402(1)(c) (1987). A nation may regulate conduct outside its territory "that has or is intended to have substantial effect within its territory" *Id.*

110. *See* Steele v. Bulova Watch Co., 344 U.S. 280 (1952) (United States trademark act applies extraterritorially when defendant is a United States citizen); United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945) (United States antitrust laws apply extraterritorially); Laker Airways Ltd. v. Sabena, Belgian World Airlines, 731 F.2d 909, 925 (D.C. Cir. 1984) ("Jurisdiction exists under United States antitrust laws whenever conduct is intended to, and results in, substantial effects within the United States."); Schoenbaum v. Firstbank, 405 F.2d 200 (2d Cir. 1968) (United States securities laws apply extraterritorially when necessary to protect American investors).

111. Restatement (Third) Foreign Relations Law § 403 (1987). Section 403(2) determines what is "reasonable" as follows:

> Whether exercise of jurisdiction over a person or activity is unreasonable is determined by evaluating all relevant factors, including, where appropriate: (a) the link of the activity to the territory of the regulating

The *Massey* district court's application of the presumption against extraterritoriality was inadequate. Although the court recognized that Congress "selected broad language to describe NEPA's purpose . . . . ," it failed to find a "clear expression of Congress' intention that NEPA should apply beyond the territorial jurisdiction of the United States."[112] The court's analysis ended there. Apparently the *Massey* district court interpreted the *Aramco* "clear expression" rule as restricting the reviewing court to literal translations of statutory language without any assistance from other indicia of legislative intent. The court's interpretation, however, does not comport with cases upon which the presumption against extraterritoriality is based.

After determining that NEPA's language suggested a broad application, the *Massey* district court should have moved onto other sources of congressional intent to determine NEPA's application. First, the court should have looked at NEPA as a whole, as the Supreme Court did in *Steele* and *Bowman*, to determine NEPA's purpose and the effect that restricting its application would have on this purpose. Second, following the Supreme Court in *Foley Bros.*, the district court should have reviewed NEPA's legislative history and administrative interpretations. This level of review is precisely the application of *Foley Bros.* that the *Saipan* court completed in determining that NEPA applied to federal actions in United States trust territories. Finally, the *Massey* district court should have examined NEPA case law to determine what other courts have found regarding NEPA's extraterritorial effect, rather than dismissing such case law as "not directly address[ing] whether NEPA applies extraterritorially."[113] The reasoning and conclusions of earlier courts

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state, i.e., the extent to which the activity takes place within the territory, or has substantial, direct, and foreseeable effect upon or in the territory; (b) the connections, such as the nationality, residence, or economic activity, between the regulating state and the person principally responsible for the activity to be regulated, or between the state and those whom the regulation is designed to protect; (c) the character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted; (d) the existence of justified expectations that might be protected or hurt by the regulation; (e) the importance of the regulation to the international political, legal, or economic system; (f) the extent to which the regulation is consistent with the traditions of the international system; (g) the extent to which another state may have an interest in regulating the activity; and (h) the likelihood of conflict with regulation by another state.

Id.

112. 772 F. Supp. at 1297.

113. *Id.* (citation omitted).

concerning NEPA's application provide important guidance in determining NEPA's extraterritorial application.

Even if the *Massey* district court had looked at all these other indicia of congressional intent regarding NEPA's extraterritorial application, it still may have concluded that NEPA did not apply to NSF activities in Antarctica. Although all the evidence taken together suggests that NEPA should be applied to federal activities occurring outside the United States, the argument for the opposite result is also persuasive. If the court *had* thoroughly analyzed all relevant evidence, however, its decision would have been more persuasive and less open to attack than the simple statement that "this Court has no choice but to decide that NEPA does not apply to the NSF's decision to build the incinerators in Antarctica."[114]

IV. DECISION OF THE MASSEY COURT OF APPEALS

The United States Court of Appeals for the District of Columbia reversed the decision of the *Massey* district court.[115] The *Massey* appellate court admonished the district court for "bypass[ing] the threshold question of whether the application of NEPA to agency actions in Antarctica presents an extraterritorial question at all."[116] The court held that, because NEPA regulates conduct that "occurs primarily, if not exclusively, in the United States," the presumption against extraterritoriality espoused in *Aramco* does not apply.[117] The court broke its analysis into two parts: 1) assessing the importance of where the *conduct* regulated by the statute actually occurred and 2) assessing the importance of where the *effects* of that conduct are felt.

A. Analysis of the regulated conduct

The *Massey* court of appeals began its analysis of whether NEPA applies extraterritorially by noting that "[t]here are at least three general categories of cases for which the presumption against the extraterritorial application of statutes clearly does not apply."[118] First, the presumption does not apply when "an affirmative intention of the Congress clearly expressed" extends the scope of the statute to cover conduct occurring

114. *Id.* at 1298 (footnote omitted).

115. Environmental Defense Fund v. Massey, 986 F.2d 528, 529 (D.C. Cir. 1993).

116. *Id.* at 532. "In particular, the court failed to determine whether the statute seeks to regulate conduct in the United States or in another sovereign country." *Id.*

117. *Id.* at 529.

118. *Id.* at 531.

outside the United States.[119] Second, the presumption is generally not applied when failure to extend the statute to conduct abroad will result in adverse effects within the United States.[120] Third, the extraterritorial presumption is not applicable when the regulated conduct occurs within the United States, because by definition "an extraterritorial application of a statute involves the regulation of conduct beyond United States borders."[121]

The third exception actually represents a threshold question of whether the case presents an extraterritorial problem in the first place. If NEPA seeks to regulate conduct primarily in the United States and not a foreign country, then the problem is one of domestic application, even where significant effects of the action are felt outside the United States.[122] The *Massey* appellate court noted that the district court failed to address this question.[123] The district court's oversight turned out to be fatal to its decision because, "[a]fter a thorough review of these relevant factors," the appellate court concluded that "this case does not present an issue of extraterritoriality."[124]

The appellate court found that "NEPA is designed to control the decision-making process of United States federal agencies, not the substance of agency decisions."[125] The court noted that the heart of NEPA, its "action-forcing" EIS provision, requires "all agencies of the Federal Government" to prepare an EIS for "major Federal actions" that could significantly affect the "human environment."[126] The EIS provision binds only American officials and controls only governmental decisionmaking, an activity that occurs almost exclusively in the United States.[127] Because Congress enacted NEPA to effect the factors that government officials consider in exercising agency discretion, NEPA "created a process whereby American officials, *while acting in the United*

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119. *Id.* (quoting *Aramco*, 499 U.S. at 248 (quoting Benz v. Compania Naviera Hidalgo, 353 U.S. 138, 147 (1957))). *But see Aramco*, 499 U.S. at 261 (Marshall, J., dissenting) (rejecting the *Aramco* majority's application of a clear expression rule under the presumption against extraterritoriality doctrine).

120. 986 F.2d at 531. *See supra* notes 50-57 and accompanying text.

121. 986 F.2d at 531.

122. *Id.* at 531-32 (citing Laker Airways Ltd. v. Sabena, Belgian World Airlines, 731 F.2d 909, 921 (2d Cir. 1984); Restatement (Second) of Foreign Relations Law §§ 17, 38 (1965); Restatement (Third) of Foreign Relations Law § 492(1)(a),(b) (1987)).

123. 986 F.2d at 532.

124. *Id.*

125. *Id.*

126. *Id.* (citing S. Rep. No. 91-296, 91st Cong., 1st Sess. 19 (1969); Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 350 (1989); 42 U.S.C. § 4332(2)(C) (1988)).

127. 986 F.2d at 532.

States, can reach enlightened policy decisions by taking into account environmental effects."[128] Such decisions are "uniquely domestic."[129]

In support of its finding that application of NEPA does not invoke the presumption against extraterritoriality, the appellate court noted that NEPA "does not dictate agency policy or determine the fate of contemplated actions."[130] NEPA does not mandate substantive requirements, but merely requires federal officials to consider environmental effects and does not dictate that environmental concerns be given greater weight than other policy concerns.[131] In addition, the court distinguished *Massey* from *Aramco* and other cases applying the presumption against extraterritoriality because "NEPA would never require enforcement in a foreign forum or involve 'choice of law' dilemmas" with which those cases were concerned.[132] The fact that NEPA does not impose substantive requirements and does not create conflict of law problems is evidence that NEPA affects only domestic conduct.

The *Massey* court also looked to Antarctica's unique position as a global commons to support its decision that the presumption against extraterritoriality did not apply to the NSF activities. *Aramco* explicitly stated that courts applying the presumption should look to see if Congress intended to extend the statute's reach "beyond places over which the United States has sovereignty or *some measure of legislative control.*"[133] Because Antarctica is a sovereignless region over which the United States has exercised "a great measure of legislative control," the court concluded that "the presumption of territoriality has little relevance and a dubious basis for application" in this case.[134] The question of NEPA's application to federal agency actions in Antarctica thus did not invoke the presumption against extraterritoriality.

The court summarily dismissed NSF's contention that, even if the presumption against extraterritoriality did not apply, NEPA's plain language precludes its application to decisions regarding federal actions

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128. *Id.* (emphasis added).

129. *Id.* (citing Mary A. McDougall, *Extraterritoriality and the Endangered Species Act of 1973*, 80 Geo. L.J. 435, 445 (1991)). The *Massey* court is not the first court to reach this result. In *NRDC*, the court conceded that nuclear plant export licensing, the conduct regulated by NEPA in that case, "takes place of course, at NRC headquarters inside the United States." 647 F.2d at 1355. *See also id.* at 1384 n.138 (Robinson, J., concurring in the judgment). This suggests *NRDC* may not have presented a question of NEPA extraterritoriality because "[t]he licensing procedure takes place entirely within the United States and domestic law completely extends its force then and there." *Id.*

130. 986 F.2d at 532 (citing *Robertson*, 490 U.S. at 350; Strycker's Bay Neighborhood Council, Inc. v. Karlen, 444 U.S. 223, 227-28 (1980) (per curiam)).

131. *Id.* (citing *Robertson*, 490 U.S. at 350). *See supra* note 20 and accompanying text.

132. 986 F.2d at 533.

133. *Aramco*, 499 U.S. at 248 (quoting *Foley Bros.*, 336 U.S. at 285) (emphasis added).

134. 986 F.2d at 534.

in Antarctica.[135] Citing NEPA case law,[136] NEPA statutory language,[137] and CEQ's interpretation of NEPA,[138] the court found that NEPA incorporates broad language that clearly applies to decisions regarding actions having environmental effects partly or entirely outside the United States.[139]

B. *Analysis of the effects of the regulated conduct*

The *Massey* court of appeals next turned to the second tier of its analysis: whether the effects of applying NEPA to federal activities in Antarctica would interfere with national security and foreign policy. NSF complained that a NEPA injunction would hamper its "ability to cooperate with other nations in Antarctica in accordance with United States foreign policy."[140] The *Massey* court agreed that such interference with foreign policy considerations might render NEPA inapplicable to a given case, but found that "NSF's efforts to cooperate with foreign governments regarding environmental practices in Antarctica will not be frustrated by forced compliance with NEPA."[141]

The court cited *NRDC* for the premise that "where the EIS requirement proves to be incompatible with [NEPA section] 102(2)(F), federal agencies will not be subject to injunctions forcing compliance with [NEPA section] 102(2)(C)."[142] In *NRDC*, the court found that the EIS

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135. *Id.* at 535-36.

136. *Id.* at 536 (citing Calvert Cliffs' Coordinating Comm. v. United States Atomic Energy Comm'n, 449 F.2d 1109, 1122 (D.C. Cir. 1971) ("[T]he sweep of NEPA is extraordinarily broad, compelling consideration of any and all types of environmental impact of federal action."); City of Los Angeles v. NHTSA, 912 F.2d 478, 491 (D.C. Cir. 1990) ("[NEPA] was designed explicitly to take account of impending as well as present crises in this country and in the world as a whole."); *Enewetak*, 353 F. Supp. at 816. ("[T]here appears to have been a conscious effort to avoid the use of restrictive or limiting terminology.").

137. 986 F.2d at 536 (citing 42 U.S.C. § 4321 (1988) (NEPA is intended to "encourage productive and enjoyable harmony between man and his environment" as well as "to promote efforts which will prevent or eliminate damage to the environment and biosphere."); 42 U.S.C. § 4332(2)(F) (Federal agencies are required to "recognize the worldwide and long-range character of environmental problems.")).

138. 986 F.2d at 536 ("[P]rior to the issuance of Executive Order 12,114, the [CEQ] maintained that NEPA applies to the decisionmaking process of federal agencies regarding actions in Antarctica.") Because CEQ is the agency Congress created to oversee NEPA implementation, its interpretation of NEPA is generally entitled to "substantial deference." *Id.* (citing Andrus v. Sierra Club, 442 U.S. 347, 358 (1979)).

139. 986 F.2d at 536.

140. *Id.* at 535.

141. *Id.*

142. *Id.* (citing *NRDC*, 647 F.2d at 1366). Section 102(2)(F) requires all federal agencies to "recognize the worldwide and long-range character of environmental problems and, where consistent with the foreign policy of the United States, lend appropriate support to

requirement was subordinate to section 102(2)(F)'s explicit directive requiring federal agencies to cooperate with other nations where consistent with United States foreign policy.[143] The *Massey* court also relied on Committee for Nuclear Responsibility v. Seaborg[144] to support this premise, noting that the *Seaborg* court "refused to issue an injunction under NEPA, despite the real potential for significant harm to the environment, because the government made 'assertions of harm to national security and foreign policy.'"[145] Therefore, where compliance with the EIS requirement interferes with foreign policy considerations, NEPA itself dictates that an EIS need not be completed. The *Massey* court found, however, that NEPA compliance would not affect NSF's foreign policy requirements in this manner.

The *Massey* court of appeals' decision provides a more thorough and logical analysis of NEPA's application to federal agency actions in Antarctica than the district court's decision. *Massey* sets clear precedent for other courts to follow, or disagree with, because it clearly lays out the factors that the court of appeals applied in its analysis. Most importantly, the court of appeals' holding that NEPA almost inevitably regulates decisionmaking conduct occurring largely in the United States sets the groundwork for a general rule regarding NEPA's application to all agency activities that occur outside the United States.

V. APPLYING NEPA IN FOREIGN COUNTRIES

Even after the D.C. Circuit's opinion in *Massey*, the question of whether NEPA applies to federal actions occurring in foreign countries had not been explicitly answered. The growing complexity of the modern world and recognition that environmental effects regularly cross international borders[146] suggest that national governments have an obligation to act responsibly regarding effects of their actions, no matter where such effects or actions occur. NEPA represents the United States answer to this obligation, particularly when it is enforced under a presumption *of* extraterritoriality rule that logically follows from the *Massey* decision. Despite assertions that "we do not decide today how

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initiatives, resolutions, and programs designed to maximize international cooperation . . . ." 42 U.S.C. § 4332(2)(F).

143. *NRDC*, 647 F.2d at 1348.

144. 463 F.2d 791 (D.C. Cir. 1971).

145. 986 F.2d at 535 (quoting *Seaborg*, 463 F.2d at 798).

146. "In today's highly integrated world economy, international economic policy issues are inseparably intertwined with domestic policy issues. International features arise naturally as one considers traditionally domestic issues such as fiscal policy, monetary policy, and *environmental policy*." The Annual Report of the Council of Economic Advisors 264 (1990) (emphasis added).

NEPA might apply to actions in a case involving an actual foreign sovereign . . . ,"[147] the test that the *Massey* court of appeals applied in determining whether NEPA applies to Antarctica extrapolates well into the arena of foreign sovereigns.

In reviewing whether NEPA should apply to an agency action occurring in a foreign country, a court must first look to the conduct that NEPA is regulating. The conduct will always be the decision-making process of the federal agency which has proposed an action in a foreign country, not the proposed action itself. Because almost all federal agency decisions are made by governmental officials whose offices are in the United States,[148] the presumption against extraterritoriality articulated in *Aramco* will rarely apply to NEPA cases unless the agency decisions are made almost entirely in the foreign country. The actual locus of the proposed agency action is irrelevant to the first stage of the analysis. If the court determines that the basic decisions concerning the proposed action are to be made in the United States, no question of extraterritoriality exists and NEPA applies.[149]

Once a court determines that NEPA is regulating a domestic decision, NEPA mandates that "the government may avoid the EIS requirement where United States foreign policy interests outweigh the benefits derived from preparing an EIS."[150] The NEPA analysis is thus given a degree of flexibility that alleviates the pressure that NEPA requirements might place on important foreign policy interests. A court may relieve the federal agency from its NEPA duties if the EIS requirement presents a clear and unavoidable conflict with the agency's statutory authority, including conflicts arising out of timetables imposed by statute,[151] or when the foreign policy interests at stake are particularly important or delicate, as in *NRDC* and *Greenpeace*.

Conflicts with foreign policy interests will be more common when the agency action occurs in a foreign country than they are in

147. 986 F.2d at 537.

148. *See Massey*, 986 F.2d at 532-33; *NRDC*, 647 F.2d at 1384 n.138 (Robinson, J., concurring in the judgment).

149. This result is consistent with the Restatement (Third) Foreign Relations Law § 402(1)(a) (1986) (noting that a state may exercise jurisdiction over "conduct that, wholly or in substantial part, takes place within its territory"). The Restatement also allows states to exercise jurisdiction over "the activities, interests, status, or relations of its nationals outside as well as within its territory." *Id.* § 402(2). Federal agencies are clearly such "nationals."

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

151. Flint Ridge Development Co. v. Scenic Rivers Ass'n, 426 U.S. 776, 791 (1976). *See also Calvert Cliffs' Coordinating Comm.*, 449 F.2d at 1128 ("NEPA requires that an agency must—*to the fullest extent possible under its other statutory obligations*—consider alternatives to its actions which would reduce environmental damage.") (emphasis added).

Enewetak's trust territories or *Massey*'s global commons.[152] Courts must take a more ad hoc approach at the second stage of the analysis when agency actions occur in foreign countries because each situation will present unique, complicating factors. The basic formula remains, however, a weighing of the effects on foreign policy against the benefits of complying with NEPA.[153] The application of NEPA to agency decisions made in the United States on activities that occur in foreign countries will be negated only when foreign policy concerns outweigh NEPA benefits.

If, on the other hand, the court determines that substantial agency decisions regarding the action are to be made in the foreign country, then the presumption against extraterritoriality may apply. The court must then look for a "clear expression" of congressional intent to apply NEPA to the activity in the foreign country. As discussed above, courts analyzing NEPA's statutory language, legislative history, and administrative interpretations have largely found NEPA ambiguous on this point.[154]

A court might reach a supportable conclusion that Congress intended NEPA to apply to federal agency decisions no matter where they occur after examining NEPA's overall purpose, a test suggested by the Supreme Court in *Bowman*. As the *Massey* court of appeals found, such a review of NEPA purposes leads to the conclusion that "Congress, when enacting NEPA, was concerned with worldwide as well as domestic problems facing the environment."[155]

Other courts have concurred that Congress intended NEPA to protect the world environment. The *Greenpeace* court recognized that "NEPA *may* require a federal agency to prepare an EIS for action taken abroad, especially where [a] United States agency's action has direct environmental impacts within this country, or where there has clearly been a total lack of environmental assessment by the federal agency or foreign country involved."[156] The court was "convinced that Congress intended to *encourage* federal agencies to consider the global impact of domestic actions and *may* have intended under certain circumstances for NEPA to apply extraterritorially."[157] Likewise, the *Enewetak* court found that "NEPA is framed in expansive language that clearly evidences a

152. *See Enewetak*, 353 F. Supp. at 818 ("In areas like trust territories there is little, if any, need for concern about conflicts with United States foreign policy or the balance of world power.")

153. *See Massey*, 986 F.2d at 535 (citing *Seaborg*, 463 F.2d 796; *NRDC*, 647 F.2d 1345).

154. *See supra* part II(B).

155. 986 F.2d at 536 (citing 42 U.S.C. § 4332(2)(F)).

156. 748 F. Supp. at 761 (citing Sierra Club v. Adams, 578 F.2d 389; *NORML*, 452 F. Supp. at 1233).

157. *Id.* at 759.

concern for all persons subject to federal action which has a major impact on their environment—not merely the United States citizens located in the fifty states."[158]

Aramco justified reviving the presumption against extraterritoriality based on the assertion that Congress is "primarily concerned with domestic conditions."[159] The findings of the *Massey*, *Greenpeace*, and *Enewetak* courts, and almost all other courts reviewing NEPA's extraterritoriality, have reached the conclusion that Congress was clearly concerned with the condition of the *world* environment when enacting NEPA. In light of the *Massey* opinion, the presumption against extraterritoriality if applied at all in NEPA cases should be applied as a weak presumption that is strengthened only when the effects on foreign policy or similar concerns become an issue.[160]

Despite the development of the *Massey* court of appeals' test for application of NEPA to federal agency actions occurring outside the United States, the first post-*Massey* decision concerning NEPA's extraterritorial application failed to apply the test. In NEPA Coalition of Japan v. Aspin,[161] plaintiffs contended that certain federal agency activities at

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158. 353 F. Supp. at 816. The *Enewetak* court also found that language in committee reports, hearings, and debates on the creation of NEPA indicate that Congress intended NEPA to be broadly applied. *Id.* at 817.

159. 499 U.S. at 248 (quoting *Foley Bros.*, 336 U.S. at 285).

160. Rigid application of a presumption against extraterritoriality rule—as found in *Aramco*—has come under increasing fire in recent years:

> This century's profound international political, economic, technological, and legal transformations have significantly undermined the strict territoriality presumption that prevailed in nineteenth century conceptions of public international law. The doctrine of territorial sovereignty has been eroded by the slow emergence of the United Nations and other international institutions, the increasing importance of public international law in domestic affairs, and the international community's diminishing patience with local tyrants and torturers. Technological advances have ensured that "domestic" military, environmental, health, social and other developments have serious international consequences. Communications developments and the global media have reduced the significance and effectiveness of national borders.

G. Born, *A Reappraisal of the Extraterritorial Reach of U.S. Law*, 24 Law & Pol'y Int'l Bus. 1, 61-62 (1992) (citations omitted). Thus, "an inflexible territoriality principle is no longer suited to the modern world." Joined Cases 89, 104, 114, 116, 117 & 125-29/85, A. Åhlström Osakeyhtio v. Commission, 1988 E.C.R. 5193, 4 Common Mkt. Rep. (CCH) ¶ 14,491 (1988), *quoted in* Born, 24 Law & Pol'y Int'l Bus. at 64. *See also* Restatement (Third) Foreign Relations Law pt. IV, ch. 1(A) (introductory note) (1986) ("Increasingly, the practice of states has reflected conceptions better adapted to the complexities of contemporary international intercourse . . . . Territoriality and nationality remain the principal bases of jurisdiction to prescribe, but in determining their meaning rigid concepts have been replaced by broader criteria.")

161. 837 F. Supp. 466 (D.D.C. 1993).

United States military installations in Japan required the DOD to prepare EISs.[162] The District Court for the District of Columbia, over which the *Massey* court of appeals' decision has binding authority, distinguished *NEPA Coalition of Japan* from *Massey* because *Massey* did not involve a foreign sovereign such as Japan.[163]

As in *Massey*, the *NEPA Coalition of Japan* district court bypassed the threshold question of whether the conduct regulated by NEPA occurred outside the United States and squarely applied the presumption against extraterritoriality doctrine.[164] Without any analysis of congressional intent to have NEPA apply abroad,[165] the court emphasized that "requiring the DOD to prepare EISs . . . would risk intruding upon a long standing treaty relationship."[166] Thus, "the presumption against extraterritoriality not only is applicable, but particularly applies in this case because there are clear foreign policy and treaty concerns involving a security relationship between the United States and a sovereign power."[167] The court therefore found NEPA inapplicable.[168]

The district court's analysis in *NEPA Coalition of Japan* missed an opportunity to apply the *Massey* test to a NEPA case directly involving a foreign country. The district court relied on the *Massey* court's express limitation of its ruling to the application of NEPA to Antarctica, but ignored the fact that the *Massey* court did not limit its *test* to such cases. As a result, the *NEPA Coalition of Japan* decision further confuses the case law regarding NEPA extraterritorial application. If the district court had applied the *Massey* test, it could have been the beginning of a coherent line of cases dealing with the application of NEPA abroad.[169]

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162. *Id.* at 467.

163. *Id.*

164. *Id.* In addition, the district court attached the burden that "[a]ny doubts concerning the extraterritorial application of statutes must be resolved restrictively." *Id.* (citing Smith v. United States,—U.S. —, 113 S. Ct. 1178, 1182 (1993)).

165. The court limited its discussion on this issue to a statement that "[p]laintiffs are unable to show that Congress intended NEPA to apply in situations where there is a substantial likelihood that treaty relations will be affected." 837 F. Supp. at 467-68 (citing *NRDC*, 647 F.2d at 1366-67).

166. 837 F. Supp. at 467 (footnote omitted).

167. *Id.* at 468.

168. *Id.* at 467.

169. Even if the district court had applied the *Massey* test, it could have reached the same result. As the court noted, *Massey* dictates that "even if NEPA did apply in this case . . . . no EISs would be required because U.S. foreign policy interests outweigh the benefits from preparing an EIS." *Id.* at 468 (citing *Massey*, 986 F.2d at 535; *Seaborg*, 463 F.2d at 798; *Greenpeace*, 748 F. Supp. at 760).

VI. CONCLUSION

NEPA is a key environmental law that governs the decisions of United States federal agencies. Because NEPA regulates agency decision-making, conduct that almost always occurs entirely or substantially in this country, the presumption against extraterritoriality does not apply, as determined by the *Massey* court of appeals. Rather, the importance of NEPA, particularly in light of the *Massey* opinion, dictates that courts apply a presumption *of* extraterritoriality in NEPA cases that involve federal agency actions in foreign countries and global commons. This presumption should be overcome only when NEPA requirements significantly conflict with important foreign policy concerns. If applied in this manner, NEPA can best serve to protect the world environment.

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