

file : Justice
Dept.



Office of the Attorney General
Washington, D. C. 20530

April 21, 1993

The Honorable Anthony Lake
Assistant to the President
for National Security Affairs
The White House
Washington, D.C. 20500

Dear Tony:

Last week we received a copy of Presidential Review Directive (PRD)/NSC-23 pertaining to proposed application of the National Environmental Policy Act (NEPA), or other environmental assessment mechanisms, to federal activities outside the territorial jurisdiction of the United States. We look forward to working with you and other interested agencies on this important issue.

As you will recall, in the recent case of Environmental Defense Fund v. Massey, a panel of the United States Court of Appeals for the D.C. Circuit held that NEPA applies to activities of the National Science Foundation in Antarctica. The government declined to seek rehearing in that case, having concluded that it would acquiesce on the narrow issue there -- the application of NEPA to Antarctica. Left open, however, was whether NEPA applies beyond Antarctica to major federal actions on the global commons, in outer space, or in foreign countries.

That issue is now squarely presented in a pending district court case (NEPA Coalition of Japan v. Aspin) in which the plaintiffs seek to apply NEPA in a manner that would directly affect the conduct of U.S. naval operations in Japan. In that case, plaintiffs recently filed the Massey decision in support of their argument that NEPA applies to challenged activities in Japan. Although we recognize that your review of PRD-23 may take a while to complete, we nevertheless believe we must respond to plaintiffs' argument in NEPA Coalition of Japan within the next few weeks. Accordingly, we would appreciate your reviewing the attached draft brief and providing us with any comments you may have. This brief reflects our understanding of the limited scope

of Massey, and both the State and Defense Departments have concurred. (Attached also is a copy of DOJ's press release on Massey). We would like to be in a position to file the brief on April 30.

Please call me if you have any questions or comments.

Sincerely,

A handwritten signature in cursive script, appearing to read "W. Hubbell".

Webster Hubbell
Acting Associate Attorney General

cc: Distribution

Distribution

Department of Defense

Mr. John H. McNeill
Acting General Counsel
(703) 697-7248
(703) 693-7278

Department of the Navy

Mr. Harvey J. Wilcox
Acting General Counsel
703-602-2702
703-602-4532 (Fax)

Department of State

Mr. James H. Thessin
Acting Legal Advisor
647-8460
647-1037 (Fax)

National Security Council

Mr. Alan J. Kreczko
Special Assistant to the President and Legal Adviser
to the National Security Council
456-6538
395-1039 (Fax)

The White House

Mr. Bernard Nussbaum
White House Counsel
456-2632
456-6279 (Fax)

Katie McGinty
Deputy Assistant to President
for Environment Policy
OEOB Room 358
456-6224
456-6231 (Fax)

Mr. Jack Quinn
Counsel and Deputy Chief of Staff to the Vice President
456-7022
456-6429 (Fax)

Ms. Carol H. Rasco
Assistant to the President for Domestic Policy
456-2216
456-2878 (Fax)

DRAFT: APRIL 16, 1993

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THE NEPA COALITION OF JAPAN,
et al.,

Plaintiffs,

v.

LES ASPIN, et al.,

Defendants.

Civil Action No.
91-1522 JHP

RESPONSE TO PLAINTIFFS' NOTICE OF FILING

MYLES E. FLINT
Acting Assistant Attorney General

CHARLES W. FINDLAY
CAROL ANNETTE PETSONK
BEVERLY SHERMAN NASH
Attorneys
United States Department of Justice
Environment and Natural Resources
Division
P.O. Box 663
Washington, D.C. 20044-0663
(202) 272-6960/514-7982/272-6867

Of Counsel:

RONALD J. BORRO
RICHARD T. EVANS
MARC L. SWARTZ
Office of the Judge
Advocate General
Department of the Navy
Alexandria, Virginia

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INTRODUCTION

This memorandum responds to plaintiffs' submission of the opinion in Environmental Defense Fund v. Massey, 986 F.2d 528, 36 E.R.C. 1053 (D.C. Cir., Jan. 29, 1993), in which the Court of Appeals held that the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4332(2)(C), applies to the United States National Science Foundation's decision to incinerate food waste at one of its Antarctic research stations. Plaintiffs would have this Court bootstrap upon the narrow Massey holding, which was premised explicitly on Antarctica's "unique" status as an "international anomaly", 36 E.R.C. at 1053, in order to reach operations of the U.S. Department of Defense (DOD) undertaken entirely in the foreign sovereign territory of Japan pursuant to a treaty between Japan and the United States. Massey, however, does not support plaintiffs' argument for any extension of NEPA.

beyond Antarctica, to include activities undertaken on the high seas, in space, or in a foreign country.

The presumption against extraterritorial application of statutes, reiterated by the Supreme Court just last month, compels dismissal of this action. See Smith v. United States, 113 S.Ct. 1178, 1182 (March 8, 1993); Equal Opportunity Employment Commission v. Arabian American Oil Co. (Aramco), 111 S.Ct. 1227, 1230 (1991); Foley Bros., Inc. v. Filardo, 336 U.S. 282, 285 (1949). Moreover, the Massey opinion does not support plaintiffs' case: in Massey the Court of Appeals dealt only with Antarctica, and expressly refused to consider the question of NEPA's application to federal agency actions in foreign sovereign territory such as Japan. Even if this Court were to find that NEPA applied to DOD actions in Japan, constitutional considerations and, under the foreign policy balancing test laid out in Massey, overriding foreign policy and national security interests would preclude preparation of an EIS.

ARGUMENT

- I. THIS ACTION SHOULD BE DISMISSED BECAUSE, NOTWITHSTANDING MASSEY, NEPA DOES NOT APPLY TO FEDERAL ACTIONS UNDERTAKEN IN FOREIGN COUNTRIES

As DOD has previously explained, this case is governed by the longstanding canon of statutory construction that "'legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.'" Aramco, 111 S.Ct. at 1230 and Foley 336 U.S. at 285. Because NEPA's language does not establish that contrary

intent, NEPA does not apply to United States activities in Japan.¹

On its face, Massey applies only to Antarctica. The Court examined only the activities of the National Science Foundation (NSF) undertaken in Antarctica; the Massey holding was premised on the unique status of that continent. 36 E.R.C. at 1058-1059. The Court of Appeals expressly refused to address NEPA's applicability in situations where, as here, the federal activities in question take place in foreign sovereign territory: "We find it important to note, however, that we do not decide today how NEPA might apply to actions in a case involving an actual foreign sovereign." Id. at 1061. The opinion therefore does not even purport to control the instant case.

The rationale in Massey is thus inapplicable to the case at hand, and it would be wrong for this Court to attempt to stretch the Massey reasoning to reach United States activities in Japan. In Massey, the Court of Appeals found that the presumption against extraterritoriality was not triggered in part because Massey dealt with the unique circumstances of Antarctica, where the United States recognizes no claims to national sovereignty. In the case at hand, however, Supreme Court law is

¹ See DOD's two memoranda in this action: Defendants' Memorandum In Support of Defendants' Motion to Dismiss or, in the Alternative, for Summary Judgment And In Opposition To Plaintiffs' Motion For Partial Summary Judgment (Feb. 19, 1992) and Reply to Plaintiffs' Opposition to Motion to Dismiss or, in the Alternative, for Summary Judgment (May 29, 1992). With the latter filing, this action was fully briefed, and it has been sub judice since that time.

clear: legal analysis of whether NEPA applies to DOD operations in the sovereign territory of Japan must begin -- and end -- with the "longstanding 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.'" Smith v. United States, 113 S.Ct. at 1182 (quoting Aramco, 111 S.Ct. at 1230, and Foley, 336 U.S. at 285).² In Massey, the Court of Appeals refused to apply the Foley-Aramco presumption because, in the Court's explicit view, Antarctica was a kind of legal tabula rasa where the rationale for the presumption -- avoiding clashes with foreign law -- did not apply. 36 E.R.C. at 1055-1058. In the instant litigation, by contrast, the potential for clash and international discord with the foreign sovereign of Japan is evident; moreover, plaintiffs

² In fact, the Court has emphasized the principle several times recently, including twice since the parties completed briefing on their cross motions for summary judgment. In addition to Smith, Justice Stevens observed it in a concurring opinion in Lujan v. Defenders of Wildlife, 112 S.Ct. 2130, 2149-2951 (1992), giving "particular significance" to the absence of an expression of extraterritorial intent in one provision of a statute when it is present in others.

The lack of an express indication that the consultation requirement [in section 7(a)(2) of the Endangered Species Act (ESA), 16 U.S.C. 1536(a)(2),] applies extraterritorially is particularly significant because other sections of the ESA expressly deal with the problem of protecting endangered species abroad.

112 S.Ct. at 2151 (J. Stevens, concurring). He could have been addressing NEPA rather than the ESA. That absence exists in NEPA's EIS requirement, 42 U.S.C. 4332(2)(C), and Congress expressly provided for foreign policy coordination in a separate provision of NEPA, 42 U.S.C. 4332(2)(F).

have presented no evidence to indicate that in legislating NEPA's action-forcing provisions, Congress intended, through NEPA, to risk such discord. The Massey Court made it clear that it could not impute such an intent to Congress. 36 E.R.C. at 1059 (noting that "the challenges inherent in relations between sovereign nations" present a more difficult case than the problem of U.S. activities in Antarctica).

Nor could the Court of Appeals have divined the requisite Congressional intent even if it had been presented with a case in foreign sovereign territory. The Foley-Aramco presumption requires "clear evidence of congressional intent" to apply the statute at issue extraterritorially. Smith, 113 S.Ct. at 1183. The intent must be expressed through a "plain statement of extraterritorial statutory effect." Astoria Federal Savings & Loan Ass'n v. Solimino, 111 S.Ct. 2166, 2170 (1991). This requirement is the result of the foreign policy problems inherent in extraterritorial application of U.S. law, and forbids such extension absent a clear indication that Congress so intended. Its purpose is therefore to provide assurance that "the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision." Id.

As DOD made clear in previous filings, application of NEPA to U.S. activities conducted under treaty, in foreign sovereign territory, raises complex foreign policy and national security issues. Plaintiffs have provided no evidence, nor does Massey provide any evidence, that Congress "faced, and intended

to bring into issue," the foreign policy and national security concerns that extraterritorial application of NEPA would raise. And, as DOD has demonstrated in previous memoranda, nothing in NEPA's plain language or legislative history provides any statement, let alone a clear statement, that Congress intended NEPA to apply in foreign sovereign territory. Accordingly, there is no basis upon which this Court could overcome the Foley-Aramco presumption and apply NEPA to Defense Department activities in Japan. As stated in Smith, "the presumption against extraterritorial application of United States statutes requires that any lingering doubt regarding the reach" of NEPA be resolved against its encompassing activities undertaken by DOD in the sovereign territory of, and in pursuance of treaty arrangements with, Japan. 113 S.Ct. at 1182.

The so-called "headquarters" theory, which the Massey Court invoked when it refused to apply the Foley-Aramco presumption to NSF activities in Antarctica, 36 E.R.C. 1057, does not provide a basis for applying NEPA to DOD's operation of three military bases in Japan. The United States decided not to challenge Massey's narrow holding that NEPA applies to NSF's activities in Antarctica. However, it did not accept, and does not accept here, Massey's rationale that the Foley-Aramco presumption need not be applied because NEPA is triggered by agency decisions at headquarters rather than by agency activities

abroad.³ Both the decisional and the locational emphases of the "headquarters" theory are completely at odds with NEPA and would, if applied in the case at hand, lead to illogical and unjustifiable results.

Massey's view that NEPA is triggered by decision-making is at odds with basic NEPA law. NEPA's EIS requirement applies to proposals for "major federal actions" - not decisions per se - that significantly affect the environment. 42 U.S.C. § 4332(2)(C). "NEPA only refers to decisions which the agency anticipates will lead to actions." Defenders of Wildlife v. Andrus, 627 F.2d 1238, 1243 (D.C. Cir. 1980). Without a proposal for such an "overt action," a NEPA duty to prepare an EIS prior to decision-making never arises. Id.; Cross-Sound Ferry Services, Inc. v. Interstate Commerce Commission, 934 F.2d 327, 344 (D.C. Cir. 1991). See also Foundation on Economic Trends v.

³ In any event, Massey has been undercut by the Supreme Court's subsequent decision in the Smith case. In Massey, the Court of Appeals avoided applying the presumption against extraterritoriality by assuming that a primary purpose of the presumption is to prevent "clashes between our laws and those of other nations," that the unique status of Antarctica presented "no potential" for clashes, that the purpose of the presumption was "eviscerated," and that the presumption had "little relevance and a dubious basis for its application" in Antarctica. 36 E.R.C. at 1055-1058 (internal quotations omitted). The Supreme Court in Smith, however, presented with a similar argument on the question whether the Federal Tort Claims Act applied to torts in Antarctica, expressly dismissed this reasoning. It found that Antarctica is "an entire continent of disputed territory," Smith, 113 S.Ct. at 1180 n. 1 (citation omitted); and that the presumption derives from many reasons other than clash avoidance, "not the least of which is the common-sense notion that Congress generally legislates with domestic concerns in mind." Id. at 1183 n. 5. The Court therefore applied the Foley-Aramco presumption, found no evidence that Congress had intended the Federal Tort Claims Act to apply in Antarctica, and affirmed dismissal

Lyng, 943 F.2d 79, 86 (D.C. Cir. 1991). Therefore, a central question in any NEPA case is whether there is a proposal for a "major federal action[]" within the meaning of the statute, to which the EIS requirement might be applicable. See, e.g., Kleppe v. Sierra Club, 427 U.S. 390, 399 (1976)

In this case, the challenged actions are DOD's operation of three military bases in Japan, bases it uses jointly with the Japanese military. It is inescapable that these actions wholly in foreign sovereign territory are the only "overt activities" which could trigger any NEPA EIS duty. Thus, this case raises the question of whether activity entirely within foreign sovereign territory, undertaken with the consent of that sovereign pursuant to treaty, could constitute "major federal action[]" within the meaning of the EIS requirement in NEPA. 42 U.S.C. 4332(2)(C). It is undisputed that the language of the statute leaves the term "major federal actions" undefined geographically and that, in the absence of an "affirmative intention of Congress clearly expressed," the court must presume that the term "major federal action" applies domestically. Aramco, 111 S. Ct. at 1230.

Moreover, if this Court were to attempt to adapt to this case the emphasis in Massey on the location of decision-making, it would find itself immersed in a scattershot NEPA analysis in which subject matter jurisdiction is dependent entirely on the happenstance whereabouts of DOD decision-makers. DOD makes many decisions on operational matters regarding the

Japan bases. Some of those decisions may be "major federal actions," and could be made on the bases themselves, within the territory of Japan; or at the Pentagon; or at other field locations in Japanese or other foreign territory; or even on ships or planes on or over the high seas while decision-makers are in transit. In some instances the location of decision-making may be confidential because of national security or foreign policy considerations. Thus, applying the "headquarters" reasoning in Massey to the instant case would lead to an illogical application of NEPA that turned on the location of the decision-maker at the time a decision was taken.⁴ Nothing in the statute or its legislative history indicates that Congress intended such a strained interpretation of NEPA. This Court must utilize the presumption against extraterritoriality laid down in Foley, reaffirmed in Aramco, and applied most recently last month in Smith. The presumption compels dismissal.

II. APPLICATION OF THE MASSEY FOREIGN POLICY BALANCING TEST WOULD IMPINGE ON FOREIGN AFFAIRS POWERS WHICH THE CONSTITUTION DELEGATES EXCLUSIVELY TO THE PRESIDENT

If, despite the presumption against extraterritoriality, this Court were to apply NEPA to DOD's activities in Japan, it must address the directive in Massey that

⁴ Such an outcome would be entirely at odds with the approach taken by the Supreme Court in both Foley and Aramco. In both those cases, the Supreme Court applied the presumption against extraterritoriality even though all the relevant decisions -- from entering into contracts to hiring and (presumably) firing -- took place in the United States.

"the government may avoid the EIS requirement where U.S. foreign policy interests outweigh the benefits derived from preparing an EIS." 36 E.R.C. at 1060. It is doubtful, however, whether this Massey foreign policy balancing test can even be applied in cases like the one at hand without raising constitutional questions. Where the United States is undertaking activities in foreign sovereign territory, in cooperation with the foreign sovereign government and in accordance with the terms of an international agreement, application of NEPA would substantially and adversely affect the Executive Branch's exercise of foreign policy by imposing impediments and delay and by subjecting it to protracted litigation. This imposition of NEPA's procedural requirements would be altogether at variance with the requirements of decisiveness, confidentiality, and dispatch that the framers of the Constitution understood to be critical in the conduct of foreign affairs. See The Federalist No. 75, at 452 (A. Hamilton) (C. Rossiter ed. 1961).⁵

⁵ For example, Article XXVI of the U.S.-Japan Status of Forces Treaty (SOFA) directs the establishment of a Joint Committee consisting of a representative of each country for the purpose of resolving "all matters requiring mutual consultation regarding the implementation of this Agreement." Agreement Under Article VI of the Treaty of Mutual Cooperation And Security Between Japan and the United States of America, Regarding Facilities and Areas and the Status of United States Armed Forces in Japan, 3 U.S.T. 3342, 3361; U.S. Exh. 2. It further directs that the Committee shall be organized so "that it may meet immediately at any time at the request of the representative of either" government. Id (emphasis added). The purpose of the Joint Committee, namely to accomplish the prompt resolution of all matters requiring mutual consultation under the treaty, would be frustrated - with attendant adverse effects on foreign affairs - if decisions of the Joint Committee were effectively subjected (continued...)

Where the activity is cooperative in nature or pursuant to treaty, the foreign sovereign is presumed to have decided the nature and extent of environmental review, if any, to be undertaken pursuant to its applicable sovereign law. Application of NEPA to joint military activities abroad would increase the time needed to plan military operations, and it would potentially delay the ability of the United States to respond to the needs of foreign governments as well as comply with treaty obligations. Moreover, it would render U.S. participation in those activities subject to the vagaries of litigation in courts thousands of miles from the sovereign territory where the activities are to be undertaken. And where, as here, questions about the environmental effects of the action are the subject of active litigation in the courts of the foreign sovereign, NEPA challenges could put U.S. courts in the position of being called upon to ignore the effect of foreign judgments, with adverse effects on foreign relations.

In short, application of the Massey balancing test would place courts generally, and this Court in particular, in the untenable position of second-guessing Executive Branch decisions in the delicate field of foreign relations, where the President exercises "plenary and exclusive power." United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319-20 (1936). There is no indication in the legislative history or

⁵(...continued)
to EIS requirements and the attendant unpredictable threat of litigation.

plain language of NEPA that Congress intended application of the Act to intrude on the foreign relations process in this fashion.

III. EVEN IF THIS COURT FINDS THAT NEPA APPLIES TO NAVY'S ACTIVITIES IN JAPAN, NO EIS IS REQUIRED UNDER MASSEY'S FOREIGN POLICY BALANCING TEST.

Even if this Court were to find that NEPA applies to the Defense Department's activities in Japan, despite the presumption against extraterritorial application of statutes and the constitutional considerations, "the government may avoid the EIS requirement where U.S. foreign policy interests outweigh the benefits derived from preparing an EIS." 36 E.R.C. at 1060. The DOD activities at issue are joint military operations conducted with a valued ally in accordance with a treaty protecting the mutual security interests of the two countries. U.S. Navy activities are undertaken in close consultation with the Joint Committee established by Article XXVI of the SOFA. Notwithstanding the inherent difficulties in conducting this type of balancing, the Department of State, in consultation with DOD, has undertaken to weigh the foreign policy and environmental interests. [[NAME]], [[title]], a State Department Political Counselor familiar with the operations at Yokosuka, Atsugi, and Iwakuni, with the activities of the Joint Committee Environmental Sub-Committee, with the requirements of NEPA and the preparation of EISS, and with the U.S.-Japan foreign policy relationship, in consultation with [[NAME]], [[title]], a Naval officer XXXXX, has determined that preparation of an EIS for the activities plaintiffs challenge would not be in the foreign policy interests

of the United States, and that the United States' foreign policy interests outweigh the benefits that might be derived from preparing an EIS. Where the Departments of State and Defense, as the agencies charged with responsibility for the activities in question, have undertaken the foreign policy balancing, and, after carefully weighing the sensitive issues, determined not to prepare an EIS, it would be inappropriate for this Court to direct the United States otherwise.

CONCLUSION

For the foregoing reasons, this Court should find that Massey is limited to Antarctica, and provides no basis for extending NEPA to DOD activities in the foreign sovereign territory of Japan. The Court should apply the presumption against extraterritorial application of U.S. laws, and dismiss the case. If the Court determines that, notwithstanding the presumption, it has jurisdiction of the case, it should still order dismissal in light of the serious constitutional issues raised by any adjudication of the weighing of foreign policy interests here. Alternatively, if this Court finds that NEPA applies to U.S. activities in the sovereign territory of Japan, undertaken with the consent of the Japanese Government and pursuant to treaty, and if the Court determines, notwithstanding the constitutional considerations, to apply Massey's foreign policy balancing test, the Court should uphold the United States' determination that its foreign policy interests outweigh the benefits that would be derived from preparing an EIS.

Respectfully submitted,

MYLES E. FLINT
Acting Assistant Attorney General
CHARLES W. FINDLAY
CAROL ANNETTE PETSONK
BEVERLY SHERMAN NASH
Attorneys
United States Department of Justice
Environment & Natural Resources
Division
P.O. Box 663
Washington, D.C. 20044-0663
(202) 272-6960/514-7982/272-6867

Attorneys for Defendants

Of Counsel:

RONALD J. BORRO
RICHARD T. EVANS
MARC L. SWARTZ
Office of the Judge Advocate General
Department of the Navy
Alexandria, Virginia

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Distribution

Department of Defense

Mr. John H. McNeill
Acting General Counsel
(703) 697-7248
(703) 693-7278

Department of the Navy

Mr. Harvey J. Wilcox
Acting General Counsel
703-602-2702
703-602-4532 (Fax)

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Mr. James H. Thessin
Acting Legal Advisor
647-8460
647-1037 (Fax)

National Security Council

Mr. Alan J. Kreczko
Special Assistant to the President and Legal Adviser
to the National Security Council
456-6538
395-1039 (Fax)

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Mr. Bernard Nussbaum
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456-2632
456-6279 (Fax)

Katie McGinty
Deputy Assistant to President
for Environment Policy
OEOB Room 358
456-6224
456-6231 (Fax)

Mr. Jack Quinn
Counselor to the Vice President

Ms. Carol H. Rasco
Assistant to the President for Domestic Policy
456-2216
456-2878 (Fax)



Department of Justice

FOR IMMEDIATE RELEASE
MONDAY, MARCH 15, 1992

SG
(202) 514-2007
TDD (202) 514-1888

Statement by the Department of Justice on EDF v. Massey

WASHINGTON, D.C. -- In declining to seek a rehearing in this case today, the administration has decided not to challenge the Court's precise holding -- namely, that the National Environmental Policy Act applies to the National Science Foundation's activities in Antarctica described in the opinion. However, the administration does not embrace language in the opinion which may be interpreted to extend beyond this holding.

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