

# THE NATIONAL ENVIRONMENTAL POLICY ACT TODAY, WITH AN EMPHASIS ON ITS APPLICATION ACROSS U.S. BORDERS

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## I. BACKGROUND

The National Environmental Policy Act (“NEPA”) was enacted in 1969 and became effective on January 1, 1970.<sup>1</sup> A hallmark environmental law, it has important aspirational components, a number of substantive provisions, a section establishing the Council on Environmental Quality (“CEQ”), and a requirement that, “to the fullest extent possible,” all federal agencies 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 the environment[al] impact of the proposed action . . .” and other specified requirements.<sup>2</sup> This Environmental Impact Statement (“EIS”) requirement has become, over time, a central feature of NEPA and indeed, in the public mind, the primary feature of the statute.

The Environmental Review (comprising the EIS and the Environmental Assessment (“EA”) component of NEPA) serves several critical purposes: it obliges the agency to develop effective information about the environmental impacts of a proposed action; it obliges the agency decision-maker to consider “every significant aspect of the environmental impact of a proposed action;”<sup>3</sup> and it involves the pub-

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1. National Environmental Policy Act of 1969, 42 U.S.C. § 4321-4370f (2000).

2. 42 U.S.C. § 4332(2)(C).

3. *Vt. Yankee Nuclear Power Corp. v. Natural Res. Defense Council, Inc.*, 435 U.S. 519, 553 (1978).

lic in the agency's decision-making process.<sup>4</sup> Court review of agency application of NEPA, while somewhat deferential to agencies, is crucial to keeping agencies honest in applying NEPA, just as court review of substantive agency decisions under the Administrative Procedure Act and similar provisions in other statutes assures that agency exercise of discretion is within the bounds of the law. Thus, judicial decision-making plays a significant role in the operation of NEPA.

In early 1995, NEPA turned twenty-five. A review at that time of its evolution revealed that the Act had stood the test of time well. Its growth has followed many steps. Courts gave meaning to the short paragraphs of the statute. The CEQ issued guidance and later promulgated regulations interpreting the statute. Virtually every agency adopted its own NEPA regulations applying the CEQ regulations to its own activities.<sup>5</sup> Through court interpretation and agency regulation, agencies came to have a reasonably clear idea of when a full EIS was required and when a more short-form EA would be sufficient. Under CEQ regulations, a "categorical exclusion" process developed allowing agencies to undertake routine actions without an EIS or EA. The public actively participated in the EIS process, and therefore in the agency decision-making process. Agency decision-makers more fully took environmental information and values into account as a result of the NEPA process. At mellow middle age, NEPA was energetic and effective.

To understand the effect of the EIS requirements on agency decision-making, it is helpful to know that agencies issue approximately 500 EISs and 50,000 EAs each year. Each EIS must be filed with the EPA, which then publishes a notice of its availability in the Federal Register.<sup>6</sup>

States and other countries have emulated NEPA. The CEQ website lists seventeen states (including the District of Columbia and

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4. For EISs, the public has a role in scoping and commenting. For EAs, the public is generally given the opportunity to comment. At a minimum, as the Supreme Court states in *Baltimore Gas & Electric Co. v. NRDC*, 462 U.S. 87, 97 (1983), NEPA "ensures that the agency will inform the public that it has indeed considered environmental concerns in its decision-making process." *Id.* (citations omitted).

5. In fact, CEQ regulations require each agency to adopt its own procedures. 40 C.F.R. § 1507.3 (2003).

6. See *Current Environmental Impact Statements*, available at <http://www.epa.gov/compliance/nepa/current/index.html> (last modified on Feb. 10, 2004) (providing links monthly to EISs from Jan. 2002 through Feb. 2004).

Puerto Rico) that have laws similar to NEPA.<sup>7</sup> Further, over one hundred countries, as well as many international organizations such as the World Bank, have analogous laws and procedures.<sup>8</sup> The United States has been considered a model of environmental leadership, in part because of the importance of its environmental review process.

So what is happening to NEPA as middle age wears on? This article will focus on two conditions of NEPA's advancing middle age. First, efforts by the Bush Administration to limit this important tool through statutory interpretation, litigation, and legislation to the detriment of the statute and to United States global leadership in environmental issues will be discussed. Then, the influence of NEPA beyond U.S. borders will be considered. NEPA's influence beyond U.S. borders, sometimes referred to as "extraterritorial application of NEPA," has long been contentious. It is a helpful case study of NEPA in an increasingly globalized world with growing concern about the United States' environmental leadership.

## II. NEPA'S CHALLENGES IN ADVANCING MIDDLE AGE: THE BUSH ADMINISTRATION'S APPROACH TO NEPA.

Much has been written about NEPA over the years, and it is fair to say that federal agencies have complied with its requirements sometimes with vigor and sometimes with reluctance. NEPA's provisions regarding public participation have created an effective forum for those affected by proposed actions and projects and for those seeking permits for projects to voice their opinion. An excellent report written for the Natural Resources Council of America entitled *NEPA in the Agencies—2002*, covering twelve agencies, found that "the NEPA process was often viewed as the means by which a wide range of planning and review requirements were integrated."<sup>9</sup> The CEQ has, over the years, provided a fairly steady and consistent hand on the wheel of NEPA application and interpretation. Nevertheless, some see NEPA as an impediment, and the current administration

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7. See *State Environmental Planning Information*, at <http://ceq.eh.doe.gov/nepa/regs/states/states.cfm> (last visited on Mar. 2, 2004) (listing states that have environmental planning laws similar to NEPA along with the organizations and citations to the state laws).

8. See *International EIA Organizations and Nongovernmental Organizations*, available at <http://ceq.eh.doe.gov/nepa/eia.html> (last visited on Mar. 2, 2004) (listing a roster of EIA and nongovernmental organizations).

9. Robert Smythe & Caroline Isber, *NEPA in the Agencies—2002*, A Report to the Natural Resources Council of America (2002), at <http://www.naturalresourcescouncil.org>.

seems to be building NEPA a new obstacle course with some fairly unappealing bumps. What are some of its features?

#### A. *NEPA is Alone in Court*

Federal agencies do sometimes write EAs and EISs that are not perfect. To ameliorate the problem, attorneys in the Environment and Natural Resources Division at the U.S. Department of Justice, charged with defending EAs and EISs in court, have sometimes suggested to agencies that they would be better off doing an EIS rather than stand on an EA, or that they may want to consider additional alternatives before making an EIS final. But in the Roadless Rule case, the new administration found that an EIS developed over more than a year with extensive public meetings and comment was not sufficient to be defensible. The approach poses a high barrier for middle-aged NEPA.

After over a year of extensive effort, including four hundred public hearings across the country and receipt of substantial public comment, on January 5, 2001, the U.S. Forest Service issued a rule that prohibited further road construction in “inventoried roadless areas” of National Forests except in limited circumstances, and also prohibited timber harvesting in those areas except for stewardship purposes.<sup>10</sup> Although the regulation has been referred to as “last minute,” a moratorium on road construction had been in place for some time; the regulation took over a year to develop, and like many actions, was finally promulgated at the deadline of the Clinton Administration’s departure from office. Deadlines do, of course, have a way of causing action. At virtually the moment the regulation issued, several states and organizations filed a total of nine lawsuits challenging it.

Upon its arrival in office, the Bush Administration, like many administrations before it, put a hold on all recently issued regulations until they could be examined.<sup>11</sup> The effective date of the “Roadless Rule” was deferred sixty days to May 12, 2001. In April 2001, after the government filed a court pleading essentially taking no position to

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10. Special Areas; Roadless Area Conservation, 66 Fed. Reg. 9, 3272-73 (Jan. 12, 2001) (to be codified at 36 C.F.R. pt. 294).

11. Defenders of Wildlife has set forth its view of the Bush Administration’s positions in court on NEPA cases from January 21, 2001 through January 21, 2003. William Snape, III & John M. Carter, II, *Weakening the National Environmental Policy Act: How the Bush Administration Uses the Judicial System to Weaken Environmental Protections* (2003), available at <http://www.defenders.org/publications/nepareport.pdf>.

defend the Rule, the District Court in Idaho issued two decisions that heavily criticized the NEPA process in the case but deferred issuance of a preliminary injunction until the new administration determined what it wanted to do about the Rule.<sup>12</sup>

On May 4, Agriculture Secretary Ann Veneman announced that she would implement the Roadless Rule, but would consider amendments to it. On May 10, the Idaho District Court enjoined the Rule nationwide for, *inter alia*, inadequate NEPA compliance.<sup>13</sup> Intervening environmental groups appealed, but the federal government did not. On appeal, the Ninth Circuit overruled the District Court and upheld the Roadless Rule. In its opinion, the Ninth Circuit detailed and approved the extensive and thorough EIS process conducted by the U.S. Forest Service.<sup>14</sup> It vacated the injunction and remanded.<sup>15</sup> However, there was a vigorous dissent.<sup>16</sup> A petition for rehearing en banc was denied on May 4, 2003.<sup>17</sup>

That, however, is not the end of the story. Wyoming and its colleagues also challenged the Roadless Rule. On July 14, 2003, in *Wyoming v. U.S. Department of Agriculture*, Judge Clarence A. Brimmer of the United States District Court for the District of Wyoming issued a lengthy decision finding the EIS inadequate for five different reasons:

(1) the Forest Service's decision not to extend the scoping comment period was arbitrary and capricious; (2) the Forest Service's denial of cooperating agency status [to the ten most affected states] without explanation was arbitrary and capricious; (3) the Forest Service's failure to rigorously explore and objectively evaluate all reasonable alternatives was contrary to law; (4) the Forest Service's conclusion that its cumulative impacts analysis in the Roadless Rule Final EIS satisfied its NEPA duties was a clear error in judgment; and (5) the Forest Service's decision not to issue a supplemental EIS was arbitrary, capricious, and contrary to law.<sup>18</sup>

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12. *Kootenai Tribe of Idaho v. Veneman*, 142 F. Supp. 2d 1231, 1248 (D. Idaho, 2001); *Idaho ex rel. Kempthorne v. U.S. Forest Service*, 142 F. Supp. 2d 1248, 1264 (D. Idaho 2001).

13. *Kootenai Tribe of Idaho v. Veneman*, No. CU01-10-N-EJL, 2001 WL 1141275, at \*2 (D. Idaho May 10, 2001), *rev'd* 313 F.3d 1094 (9th Cir. 2002).

14. *Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1115-1124 (9th Cir. 2002).

15. *Id.*

16. *Id.* at 1126.

17. Utah State Bar, Energy, Natural Resources and Environmental Law Section, *Public Lands Updates*, at [http://www.utahbar.org/sections/enrel/html/public\\_land\\_updates.html](http://www.utahbar.org/sections/enrel/html/public_land_updates.html) (last visited Aug. 25, 2004).

18. *Wyoming v. U.S. Dept. of Agric.*, 277 F. Supp. 2d 1197, 1231-32 (D. Wyo. 2003).

Judge Brimmer gave the Ninth Circuit decision short shrift and enjoined the Rule nationwide. Despite a longstanding practice of the Justice Department that rulings should affect only the District where the ruling is made,<sup>19</sup> the federal government did not seek any clarification, stay, nor did it appeal the decision. Environmental groups have appealed the case to the Tenth Circuit, but NEPA does not have a sure protective escort through the courts by the federal government.

In another NEPA case, *Public Citizen v. Department of Transportation*, the Ninth Circuit ruled in a careful and detailed opinion that regulations promulgated by the Department of Transportation (“DOT”) regarding trucks that cross the border from Mexico into the United States must be stayed while the agency prepares an EIS and undertakes a required “conformity” review under the Clean Air Act.<sup>20</sup> In May 2001, after an arbitral panel determined that the moratorium on consideration of applications by Mexican truck operators seeking U.S. operating authority to travel beyond commercial zones at the border for safety reasons was a violation of free trade principles under the North American Free Trade Agreement (“NAFTA”),<sup>21</sup> the President announced his intention to lift the moratorium by January 2002. After the President’s announcement, the DOT began a process of promulgating regulations governing the applications of those truck operators and safety requirements for trucks.<sup>22</sup> Congress passed a rider stating that no applications could be processed until the regulations were final.<sup>23</sup> Once the DOT issued its regulations, Public Citizen and other groups challenged the regulations (not the President’s action) for inadequate NEPA and Clean Air Act compliance.<sup>24</sup> Plaintiffs sued on the ground that the agency should have prepared an EIS, not just an EA, to examine the environmental consequences of the regu-

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19. *Id.* at 1238.

20. *Pub. Citizen v. Dep’t of Transp.* 316 F.3d 1002, 1032 (9th Cir. 2003), *cert. granted*, 124 S.Ct. 957 (Dec. 15, 2003) (No. 03-358).

21. In the Matter of Cross Boarder Trucking Services (Mex. v. U.S.), North American Free Trade Arbitral Panel, Secretariat File No. USA-MEX-98-2008-01 (2001).

22. Press Release, Dep’t of Transp., U.S. Transportation Department Implements NAFTA Provisions for Mexican Trucks, Buses (Nov. 22, 2002), *available at* <http://www.dot.gov/affairs/dot10702.htm>.

23. Transportation (DOT) and Related Agencies Appropriations Act, 2002 Pub. L. No. 107-87 § 350, 115 Stat. 833 (2001); Consolidated Appropriations Act, 2003, Pub. L. No. 108-7, 117 Stat. 11 (2002); Consolidated Appropriations Act, 2004, Pub. L. No. 108-199, § 130, 118 Stat. 3 (2003).

24. *Pub. Citizen v. Dep’t of Transp.* 316 F.3d 1002, 1014 (9th Cir. 2003), *rev’d* 124 S.Ct. 2204 (2004).

lations.<sup>25</sup> While the litigation was pending, the President lifted the moratorium.<sup>26</sup> Because implementing the rules was a separate requirement under NAFTA, however, no trucking beyond the border zone occurred.<sup>27</sup> In *Public Citizen v. Department of Transportation*, the Ninth Circuit found that the regulations could cause substantial environmental effects, enjoined them, and ordered the federal agency to write an EIS and undertake a Clean Air Act conformity review.<sup>28</sup> The government sought certiorari on the basis that the Ninth Circuit decision, requiring NEPA compliance for an agency regulation, interfered with the president's authority to conduct foreign affairs.<sup>29</sup> On December 15, 2003, certiorari was granted. In its petition for certiorari, the federal government essentially argued that NEPA has no role if the president may undertake any action on a subject matter affected by the rules that NEPA could inform. This position seems to neglect two important purposes of NEPA: to inform agency decision-makers of environmental impacts of proposed agency action and to involve the public in the rulemaking process.

Despite the broad issue raised by the United States' petition for certiorari, the Supreme Court decided the case on a far more narrow ground. In a June 7, 2004 opinion,<sup>30</sup> the Court ruled that because the president had, in implementing a statute, decided to lift a moratorium against Mexican trucks coming beyond the border zone into the United States, the DOT was without any discretion to change that decision in its regulations and, thus, did not have to undertake a NEPA review of a decision as to which it had no discretion. Foreign policy was simply not addressed. Further, the Court ruled that while the agency did have discretion as to the nature of safety rules, plaintiffs had not raised before the agency its concerns about addressing alternatives to those rules, and thus that issue of applying NEPA would not be addressed by the Court. In short, the decision should have little impact on the application of NEPA in the context of foreign policy.

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25. *Id.*

26. See Memorandum for the Sec'y of Transp., 67 Fed. Reg. 71,795 (Nov. 27, 2002) (lifting the moratorium).

27. Dep't of Transp. *NAFTA Background*, at <http://www.dot.gov/NAFTA/> (last visited Aug. 25, 2004).

28. *Pub. Citizen v. Dep't of Transp.* 316 F.3d 1002, 1032 (9th Cir. 2003), *cert. granted*, 124 S.Ct. 957 (Dec. 15, 2003) (No. 03-358).

29. Petition for Cert. at 13-14, *Pub. Citizen v. Dep't of Transp.* 316 F.3d 1002 (9th Cir. 2003), *cert. granted*, 124 S.Ct. 957 (Dec. 15, 2003) (No. 03-358).

30. *Dep't of Transp. v. Public Citizen*, 124 S.Ct. 2204 (2004).

### B. *New Regulations Question NEPA's Purpose*

NEPA has faced few regulatory cutbacks over the course of its history. The CEQ has amended its regulations only once to replace the “worst case scenario” requirement with a method for handling “incomplete or unavailable information” in an EIS.<sup>31</sup> Until now, agencies generally have not cut back NEPA compliance through regulation.

However, recently, the Forest Service and land management agencies in the Department of the Interior have adopted new and broad “categorical exclusions” that effectively limit the scope of NEPA.<sup>32</sup> The CEQ regulations provide that each agency should adopt rules classifying various actions the agency generally takes into one of the following three groups: (a) those normally requiring an EIS;<sup>33</sup> (b) those normally requiring an EA;<sup>34</sup> and (c) those that “do not individually or cumulatively have a significant effect on the human environment.”<sup>35</sup> As to the last group, an environmental review may be dispensed with, so long as the categorical exclusion has a provision that under extraordinary circumstances environmental review will be undertaken.<sup>36</sup>

On June 5, 2003, the Forest Service and the Department of the Interior land management agencies promulgated final regulations substantially expanding categorical exclusions for what are called hazardous fuels reduction projects, which, in laymen’s terms, are projects for timber cutting and controlled burns at the urban-wilderness interface and in a substantial number of other land areas,<sup>37</sup> excluding wilderness areas. The justification for these regulations is fire protection; but the examination of alternative environmental approaches for such protection that would come from effective NEPA review is ignored.<sup>38</sup> Included in agency activities that are “categorically excluded” from the requirement of environmental review are logging and other land management activities in areas of up to 1,000 acres and controlled burns in areas of up to 4,500 acres, if such actions are de-

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31. 51 Fed. Reg. 15625 (Apr. 25, 1986) (codified at 40 C.F.R. § 1502.22 (2004)).

32. 40 C.F.R. § 1508.4 (2004).

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. 68 Fed. Reg. 33,813 (June 5, 2003).

38. Wilderness Society, *Categorical Exclusions for Fuel Projects*, at <http://www.wilderness.org/OurIssues/Forests/ce.cfm> (last visited Aug. 25, 2004).



scribed as being designed to reduce the risk of wildfires.<sup>39</sup> These exclusions exist despite possible deleterious effects on air, soil, water, wildlife, and other environmental concerns. A lawsuit has been filed to challenge these regulations.<sup>40</sup>

Limitations to NEPA being sought by the Department of Homeland Security (“DHS”) provide further challenges by regulation to NEPA’s vitality. DHS, as a result of the large collection of agencies put under its auspices, has significant NEPA obligations with respect to national disaster and emergency planning.<sup>41</sup> Because of what it claims are special issues regarding “intergovernmental coordination, public involvement, dispute resolution, handling of sensitive information, and emergency procedures in Department decision making,” DHS is seeking an exception from NEPA’s mandatory disclosure requirements, a part of its very backbone.<sup>42</sup> The comment period for this provision was extended until August 2004.

It appears NEPA is headed for a possible midlife crisis.

### C. Congressional Limitations to NEPA

NEPA has throughout its life faced the nicks and scrapes of legislative exceptions. A famous example is the express limitation of NEPA with respect to the Trans-Alaska Pipeline (“TAPS”). A number of environmental groups challenged TAPS arguing, among other grounds, that the Department of the Interior’s EIS review was insufficient. While the courts had not yet addressed the completeness of the EIS review,<sup>43</sup> Congress, in an attempt to stave off future challenges to TAPS, passed legislation that declared the EIS was sufficient for compliance with NEPA.<sup>44</sup> As with TAPS in some of the instances of legislative override of NEPA, legislative provisions were enacted only after an EIS or other environmental review had occurred. Now NEPA is facing severe limitations *before any* environmental review occurs. The SAFETEA bill, a new highway and related transportation bill, would set limits on NEPA review and the opportunity to

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39. *Id.*

40. *Id.*

41. Department of Homeland Security, *National Environmental Policy Act (NEPA)—Comments Sought on Draft Procedures*, available at [http://www.dhs.gov/dhspublic/interapp/editorial/editorial\\_0468.xml](http://www.dhs.gov/dhspublic/interapp/editorial/editorial_0468.xml) (last visited Aug. 25, 2004).

42. *Cf id.* (proving information about the extent of the exception DHS is seeking).

43. *Wilderness Soc’y v. Morton*, 479 F.2d 842, 848 (D.C. Cir. 1973) (holding that NEPA compliance was not yet ripe for review).

44. Pub. L. No. 93-153, § 203, 87 Stat. 584 (Nov. 16, 1973).

seek court review of NEPA compliance for transportation and road building. And another bill would impose limits on NEPA compliance necessary for energy development projects on Indian lands.<sup>45</sup> With the enactment of the Healthy Forest Restoration Act in December 2003, which exempts certain timber sales on the basis that the timber cuts are necessary for fire protection,<sup>46</sup> NEPA in its ripe middle age is certainly facing significant assault.

#### D. *NEPA, lacking funds, is weakened*

The majority of federal offices evaluated in the Study for the Natural Resources Council of America note that, in the face of increasing workloads due to an increase in the variety of federal actions subject to NEPA and an increasing emphasis on the role of non-federal cooperating agencies, reductions in budget and staff have caused a serious impediment to swift and thorough NEPA compliance.<sup>47</sup> The amount of time it takes to write an effective EIS can be attributed in part to inadequate resources available to undertake the project quickly the project. Lack of funding has significant negative effects on the environmental goals NEPA forwards. Thus, NEPA is forced to deal with its midlife challenges without sufficient resources. It is, in short, having a rough go of it in the Bush Administration.

### III. A CASE STUDY ON NEPA'S AGING: NEPA'S APPLICATION TO FEDERAL AGENCY DECISIONS WITH IMPACTS OUTSIDE THE UNITED STATES.

For many years, federal agencies have struggled with the issue of how to apply NEPA when an agency makes a decision to fund or otherwise participate in a project outside the United States or in a project that has an impact outside the United States. The issue is some-

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45. National Resources Council of America, NEPA NEWS, Vol. 6, No. 1 (June 2003). Legislation is pending in Congress that would essentially exempt leases and right-of-way permits for energy development companies on Indian lands. The bill, if passed, would remove these actions from the purview of the Secretary of Interior. As a result, these actions would arguably become non-federal and therefore, would not be subject to environmental review. See U.S. Forest Serv., *The Healthy Forests Initiative and Healthy Forests Restoration Act Interim Field Guide*, at <http://www.fs.fed.us/projects/hfi/field-guide/web/page14.php> (last updated Mar. 10, 2004); Ala. Env'tl. Council, *Synopsis of the Healthy Forest Restoration Act (HFRA)* at [http://www.aeconline.ws/synopsis\\_of\\_the\\_healthy\\_forests\\_.htm](http://www.aeconline.ws/synopsis_of_the_healthy_forests_.htm) (last updated Sept. 2, 2004).

46. Healthy Forest Restoration Act of 2003, Pub. L. No. 108-148, 117 Stat. 1887 (Dec. 3, 2003).

47. Smythe & Isber, *supra* note 9.

times referred to as the “extraterritorial application of NEPA.”<sup>48</sup> Throughout NEPA’s years, the issue has been contentious and is worth a focused look in these days of increasing globalization. The opposing sides of the issue are (1) NEPA serves to fully inform decision-makers of the environmental consequences of their choices and to inform the public of such consequences even when project impacts are felt outside U.S. borders and (2) gathering information from other countries or affecting action of another country is an affront to the other country’s sovereignty and an interference in United States foreign policy.

A. *The Ebb and Flow of NEPA’s Application to Impacts Outside the United States: Examples*

Describing the issue as one of “extraterritorial application of NEPA” is somewhat of a misnomer, since the issue arises when the decision-making agency is a United States federal agency and the decision that is to be informed by the environmental review is made in the United States. In the early days of NEPA, its application was handled with a fair amount of common sense and an understanding of the usefulness of environmental information in decision-making. This approach somehow veered off course in the late 1970s and has not been effectively corrected since. In the past few years, the U.S. government has taken an even narrower position regarding the importance of NEPA to the decision-making process of federal agencies dealing with actions that have effect beyond U.S. borders. This article suggests that instead of further restrictions this area of NEPA application needs an extreme makeover.

1. NEPA’s Early Flow

In NEPA’s infancy, the government took the position that it would examine environmental impacts of projects outside the United States, and several court decisions addressed the issue by assumption. In *Wilderness Society v. Morton*, the D.C. Circuit held that a Canadian citizen and a Canadian environmental group could intervene in a challenge to NEPA compliance regarding the issuance of permits for the Trans-Alaska Pipeline (“TAPS”).<sup>49</sup> Because one proposed route for the pipeline cut across Canada, the court in its recitation of effects

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48. See, e.g., *Natural Res. Def. Council v. Nuclear Regulatory Comm’n*, 647 F.2d 1345, 1467 (D.C. Cir. 1981) (recognizing that the issue of “extraterritorial application of NEPA” was left open by the NEPA Congress).

49. 463 F.2d 1261, 1262-63 (D.C. Cir. 1972).

simply assumed that impacts in Canada would be addressed.<sup>50</sup> Similarly, in a challenge to the Secretary of Transportation's compliance with NEPA in the construction of the Darien Gap Highway in Panama (the highway ran from Alaska to Chile), the court of appeals noted that the case raised the question of 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 . . ."<sup>51</sup> The court went on to say that "the Government stated that it 'never questioned the applicability of NEPA to the construction of this highway in Panama . . .,' but it also intimated that this position might not apply to 'purely local concerns.'"<sup>52</sup> The court assumed, without expressly deciding, that NEPA is fully applicable to construction in Panama and leaves resolution of the legal issue to another day.<sup>53</sup> Implicit in the opinion is the observation that the highway may have effects inside the United States as well.<sup>54</sup>

During these early years, the CEQ issued a Memorandum dated September 24, 1976, to *Heads of Agencies on Applying the EIS Requirement to Environmental Impacts Abroad*. The memorandum stated that NEPA "requires analysis and disclosure in environmental statements of significant impacts of federal actions on the human environment—in the United States, in other countries, and in areas outside the jurisdiction of any country."<sup>55</sup> Subsequently, the Agency for International Development settled a lawsuit by agreeing both to prepare an EIS for its pest management program and to issue regulations guiding NEPA compliance for other activities.<sup>56</sup>

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50. *Id.* at 1262.

51. *Sierra Club v. Adams*, 578 F.2d 389, 391 n.14 (D.C. Cir. 1978).

52. *Id.*

53. *Id.* at 395.

54. *Id.*; see also *Swinomish Tribal Cmty. v. Fed. Energy Regulatory Comm'n*, 627 F.2d 499, 511-12 (D.C. Cir. 1980) (noting consideration of NEPA's impact in Canada on a dam modification project).

55. 42 Fed. Reg. 61068, 61068-69 (Dec. 1, 1977) (cited in *Natural Res. Def. v. Nuclear Regulatory Comm'n*, 647 F.2d 1345, 1386 n.156 (D.C. Cir. 1981)).

56. *Envtl. Def. Fund v. Agency for Int'l Dev.*, 6 ENVTL. L. REP. 20121 (D.D.C. Dec. 5, 1975); see "Renewed Controversy Over the International Reach of NEPA", 7 ENVTL. L. REP. 10205 (Nov. 1977); see also *Forthcoming CEQ Regulations to Determine Whether NEPA Applies to Environmental Impacts Limited to Foreign Countries*, 8 ENVTL. L. REP. 10111 (June 1978) (providing a helpful history of this issue up to 1978).

## 2. NEPA's Ebb Encountered

After the Carter Administration took office, battle lines were drawn. One side firmly believed in the importance of developing environmental information to inform decision-makers, even when environmental impacts were felt outside the United States. The other side argued that application of NEPA to "impacts abroad" could have an adverse effect on foreign policy. While the federal government developed a strategy, several lawsuits were filed raising the issue of whether NEPA required an EIS for projects that caused impacts in other countries. In *National Organization for Reform of Marijuana Laws v. United States*, plaintiffs argued that an EIS was required before the U.S. sprayed paraquat on marijuana plants in Mexico in part because the impacts of spraying could cross the border into the United States.<sup>57</sup> The agency agreed to undertake an environmental review (not called an EIS),<sup>58</sup> the district court then assumed that NEPA applied to any herbicide spraying in Mexico that affected the environment in the United States.<sup>59</sup> Other cases that did not reach the decision stage include challenge to a Defense Department housing project in Berlin and a challenge to Export-Import Bank funding of nuclear reactors.

In 1979, President Carter issued Executive Order 12114.<sup>60</sup> The Order purported to resolve the interagency dispute as to whether an EIS was required when agency action is implemented abroad by setting up a flexible procedure for review of such actions (with a number of exceptions).<sup>61</sup> The order also specified that if an action affected both the U.S. and a foreign country, an EIS need not be prepared for the impacts on the foreign country.<sup>62</sup> Finally, it provided that environmental reviews prepared under the Executive Order were not reviewable by courts.<sup>63</sup> As later courts have recognized, of course, the president, even in his broad discretion, cannot repeal a statute by Executive Order.<sup>64</sup> The Executive Order in this instance proceeds from the idea that what matters are the "effects" of the action, not the de-

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57. 452 F. Supp. 1226, 1227 (D.D.C. 1978).

58. *Id.*

59. *Id.* at 1232.

60. Exec. Order No.12114, 44 Fed. Reg. 1957 (Jan. 4, 1979).

61. *Id.*

62. *Id.*

63. *Id.*

64. *See, e.g.,* *Env'tl. Def. Fund, Inc. v. Massey*, 986 F.2d 528, 530 (D.C. Cir. 1993) (noting that the breadth of Congress's command for NEPA review cannot be overcome through Executive Order).

cision-making process that informed the choice to proceed with an action. In departing from the 1976 CEQ memorandum and the position of the government in the Darien Gap case, the Executive Order provided a questionable interpretation of NEPA and a questionable policy regarding when environmental reviews must be prepared to inform U.S. agency decisions.

The next big case regarding NEPA's application to impacts abroad was *Natural Resources Defense Council v. Nuclear Regulatory Commission*, in which the Natural Resources Defense Council ("NRDC") argued that NEPA required the Nuclear Regulatory Commission ("NRC") to prepare an environmental review before it approved the export of a nuclear reactor and nuclear materials.<sup>65</sup> The NRC had evaluated effects on U.S. territory and the global commons before granting the export application; NRDC sought more.<sup>66</sup> Only two judges heard the case, and each wrote a separate opinion. Judge Wilkey ruled that conditioning a permit on health and safety requirements was an "extraterritorial application of U.S. law in this particular context"; he was also concerned about foreign policy implications. He referred to the Supreme Court case *Foley Bros. v. Filardo*<sup>67</sup> as creating a presumption against application of U.S. law in other countries.<sup>68</sup> Judge Robinson, separately, found that the NRC was not required to assess impacts in the Philippines in a formal EIS because the time frames provided in the agency's own statute were not sufficient; foreign policy concerns and deference to the agency also played a role in his decision.<sup>69</sup> Judge Robinson expressly did not accept the argument that the requirement of an EIS would constitute an extraterritorial application of NEPA.<sup>70</sup> While both judges ruled that further environmental review was not required and that no injunction should issue, their interpretations of NEPA differed substantially.

### 3. NEPA Under Clinton

During much of the Clinton Administration, there were few cases raising the issue. The issue returned to court in *Environmental Defense Fund v. Massey*.<sup>71</sup> This important and well-reasoned decision

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65. 647 F.2d 1345, 1355 (D.C. Cir. 1981).

66. *Id.* at 1365. The Philippine government stated in an amicus brief that it had "responsibly undertaken to assess and protect the Philippine environment . . ." *Id.* at 1348 n.9.

67. 336 U.S. 281 (1949).

68. *Natural Res. Def. Council v. Nuclear Regulatory Comm'n*, 647 F.2d at 1357 n.54.

69. *Id.* at 1385-86.

70. *Id.* at 1384 n.138.

71. 986 F.2d 528 (D.C. Cir. 1993).

determined that the National Science Foundation was indeed required to undertake an environmental review before it issued permits for incineration of food waste in Antarctica.<sup>72</sup> The court analyzed the presumption against “extraterritorial application” of U.S. law and quoted the principle as providing that statutory rules apply only to conduct occurring within, or having an effect within, the territory of the United States unless Congress specifically provides otherwise.<sup>73</sup> The court then noted that there are at least three general categories of cases for which the presumption against extraterritorial application of statutes clearly does not apply: (1) where there is an affirmative intention of Congress clearly expressed; (2) where the failure to extend the statute will result in adverse effects within the United States (such as antitrust and trademark violation, both of which can cause adverse economic effects to Americans); and (3) when the regulated conduct occurs in the U.S.<sup>74</sup> The court stated:

By definition, an extraterritorial application of a statute involves the regulation of conduct beyond the U.S. borders. Even where the significant effects of the regulated conduct are felt outside U.S. borders, the statute itself does not present a problem of extraterritoriality, so long as the conduct which Congress seeks to regulate occurs largely within the United States.<sup>75</sup>

The court went on to analyze NEPA, and ruled: “In sum, 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.”<sup>76</sup> The court also reviewed the unique status of Antarctica as part of the global commons and found that in a sovereignless region like Antarctica, the presumption against extraterritoriality has little relevance.<sup>77</sup> This approach in *Massey*, that decisions are made in the U.S. so the application of NEPA is not “extraterritorial,” is a sensible interpretation of the language of the law and its purposes.

In *NEPA Coalition of Japan v. Aspin*, NEPA was held not to apply to activities at Defense Department installations in Japan that were undertaken pursuant to “complex and long standing treaty arrangements” under which joint committees were directly responsible

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72. *Id.* at 537.

73. *Id.* at 530-31.

74. *Id.* at 531.

75. *Id.* at 531-32 (citations omitted).

76. *Id.* at 533.

77. *Id.* at 533-34.

for dealing with environmental matters.<sup>78</sup> In *Hirt v. Richardson*, the government argued, and the court agreed, that NEPA applied to an agency to permit the transport of nuclear materials through the United States to the border of Canada (considering the potential impact in Canada of an accident). But, the court held that, due to foreign policy concerns, an injunction should not issue.<sup>79</sup>

While there has been some suggestion that the Supreme Court's decision in *Sale v. Haitian Centers Council, Inc.*,<sup>80</sup> decided after *Massey* and before *NEPA Coalition* and *Hirt*, overruled the court of appeals' decision in *Massey*, such suggestion is without merit. In *Massey*, the court clearly ruled that the case of applying NEPA to a U.S. government decision about a project in Antarctica does not present a question of extraterritoriality at all—it meets exceptions to the principle, it does not prescribe actions in foreign jurisdictions, does not require “enforcement” in those jurisdictions, and raises no choice of law problems.<sup>81</sup> The *Massey* Court noted that its decision drew “further support” from Antarctica's unique status as a place with no potential for conflict with U.S. laws, so the presumption applies with less force.<sup>82</sup> A discussion of “extraterritoriality” in *Sale* does not undermine this reasoning in *Massey*.<sup>83</sup>

In *Sale*, the Court construed a specific provision of the Immigration and Nationality Act (“INA”) on its face and in the structure of the Act and construed Article 33 of the *United Nations Convention Relating to the Status of Refugees*<sup>84</sup> to permit the President to return

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78. *NEPA Coalition of Japan v. Aspin*, 837 F. Supp. 466, 467 (D.C. Cir. 1993). These “joint arrangements” are similar to those in *Greenpeace USA v. Stone*, 748 F. Supp. 749 (D. Haw. 1990), where an agreement between Germany and the United States under which the United States removed certain nerve gas agents from German soil was at issue. Germany had actively sought the agreement, was characterized by the court as a participant in a “joint operation” and was responsible for and had taken its own “extensive planned safety precautions.” *Greenpeace*, 748 F. Supp. at 754.

79. *Hirt v. Richardson*, 127 F. Supp. 2d 833, 849 (W.D. Mich. 1999). *Hirt* underscores that courts are willing to rule that an environmental review may be required, yet because of foreign policy or national security concerns, an injunction is not appropriate. *Id.*; see also *Committee for Nuclear Responsibility, Inc. v. Seaborg*, 463 F.2d 796 (D.C. Cir. 1971) (applying the standard that foreign policy and national security concerns required denial of a stay of an underground nuclear test but not the application of the EIS requirement itself).

80. 509 U.S. 155 (1993).

81. 986 F.2d at 530-533.

82. *Id.*

83. The Court's recent decision in *F. Hoffman-LaRoche Ltd. V. Empagran S. A.*, 542 U.S. \_\_\_\_ (2004) (03-724) further supports a broader application of U.S. law to foreign conduct when such conduct is in concert with domestic activity.

84. April 22, 1954, 19 U.S.T. 6259, 189 U.N.T.S. 150.



Haitians found on the high seas to Haiti without a hearing under U.S. law as to their refugee status.<sup>85</sup> As an *alternative factor*, the Court noted that the presumption that acts of Congress do not ordinarily apply outside U.S. borders would support its interpretation that the relevant INA provision applied only to persons within the United States.<sup>86</sup> *Hirt* underscores that courts are willing to rule that an environmental review may be required, yet because of foreign policy or national security concerns, an injunction is not appropriate. It noted that the presumption against extraterritorial application is on broader principles than the desire to avoid conflict with the laws of other nations.<sup>87</sup> *Sale* suggests neither that Congress must be express to have a U.S. law construed as covering Antarctica or the high seas, nor does it create any novel interpretation of the “extraterritoriality” principles that the Court carefully applies in *Massey*.

Perhaps the two most significant steps taken during the Clinton Administration regarding whether NEPA should apply to impacts of actions outside United States borders of federal action were: (1) the CEQ’s issuance of a *Guidance on NEPA Analyses for Transboundary Impacts*, which provides that “NEPA requires agencies to include analysis of reasonably foreseeable transboundary effects of proposed actions in their analysis of proposed actions in the United States;”<sup>88</sup> and (2) President Clinton’s issuance of Executive Order 13141, which provided for environmental reviews in conjunction with trade agreements.<sup>89</sup> Regulations to implement that Executive Order were issued on December 13, 2000.<sup>90</sup> The Executive Order was reaffirmed by the

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85. 509 U.S. at 159.

86. *Id.* at 173-74 (citing, *inter alia*, *EEOC v. Arabian Amer. Oil Co.*, 499 U.S. 244, 248-259 (1991), *Foley Bros. Inc. v. Filardo*, 366 U.S. 281, 285 (1949), and *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989) (“When it desires to do so, Congress knows how to place the high seas within the jurisdictional reach of a statute.”)).

87. *Id.* (citing *Smith v. United States*, 507 U.S. 197 (1993) (holding that the Federal Tort Claims Act waiver of sovereign immunity does not apply to U.S. government acts in Antarctic)).

88. CEQ, *Guidance on NEPA Analyses for Transboundary Impacts* (July 1, 1997), available at <http://ceq.eh.does.gov/nepa/regs/transguide.html>.

89. Exec. Order No. 13141: *Environmental Review of Trade Agreements*, 64 Fed. Reg. 63169 (Nov. 16, 1999), at <http://ceq.eh.doe.gov/nepa/regs/eos/eo13141.html>.

90. *Guidelines for Implementation of Exec. Order No. 13141: Environmental Review of Trade Agreements*, 65 Fed. Reg. 79442-01 (Dec. 19, 2000).

Bush Administration on April 20, 2001.<sup>91</sup> By express terms of the Order, decisions under it are not reviewable in court.<sup>92</sup>

Interagency discussions were held to evaluate whether Executive Order 12114 should be revisited, but no action was taken. Also during the Clinton Administration, a lawsuit was filed seeking an EIS on the North American Free Trade Agreement and was decided on the basis that NAFTA was a submission by the President to Congress, and thus not a final action reviewable in Court.<sup>93</sup>

#### 4. Bush Keeps NEPA at Home

The Bush Administration has made clear its view that NEPA should be limited to impacts within the United States. In *Natural Resources Defense Council v. U.S. Department of the Navy*, which challenged the Navy's testing of low-frequency sonar on the basis that the Navy must prepare an EIS to evaluate impacts on marine mammals, the government argued that NEPA did not apply to the sonar program because most of the testing took place outside the territorial waters of the U.S.<sup>94</sup> The government relied on the presumption against extraterritorial application of federal laws. In a clear and strong decision, the court rejected the claim and held that NEPA applied.<sup>95</sup> While the Navy and the NRDC then reached a substantive settlement, congressional legislation that redefined what constitutes "harassment" under the Marine Mammal Protection Act reopened this debate.<sup>96</sup>

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91. See United States Trade Representative Releases Draft Environmental Review of the U.S.-Chile Free Trade Agreement (FTA) (Nov. 7, 2001), at <http://www.ustr.gov/releases/2001/11/01-93.htm> (releasing a draft environmental review of the U.S.-Chile Free Trade Agreement and mentioning President Bush's reaffirmation of Exec. Order No. 13141).

92. Exec. Order No. 13141, 64 Fed. Reg. at 63170; see also *Hirt v. Richardson*, 127 F. Supp. 2d 833, 849 (W.D. Mich. 1999) (underscoring that courts are willing to rule that an environmental review may be required, yet because of foreign policy or national security concerns, find an injunction is not appropriate); *Committee for Nuclear Responsibility, Inc. v. Seaborg*, 463 F.2d 796 (D.C. Cir. 1971) (applying the standard that foreign policy and national security concerns required denial of a stay of an underground nuclear test but not the application of the EIS requirement itself).

93. *Public Citizen v. U.S. Trade Representative*, 5 F.3d 549, 551-52 (D.C. Cir. 1993).

94. *Natural Res. Def. Council Inc. v. U.S. Dep't. of the Navy*, No. CV-01-07781 CAS(RZx), 2002 WL 32095131, at \*21 (C.D. Cal. Sept. 17, 2002).

95. An earlier case brought by NRDC regarding low frequency sonar testing was settled during the Clinton administration. The government did not even consider raising a challenge to the application of NEPA on the grounds of extraterritoriality.

96. National Defense Authorization Act for FY 2004, Pub. L. No. 108-136 § 319, 117 Stat. 1433; *Natural Res. Def. Council, Protecting Whales from Dangerous Sonar*, at <http://www.nrdc.org/wildlife/marine/nlfa.asp> (last updated July 14, 2004); Press Release, Natural

In *Center for Biological Diversity v. National Science Foundation*, in which the National Science Foundation's plan to undertake acoustical research in an environmentally sensitive area of the Gulf of California without NEPA compliance was challenged, the United States argued that it need not prepare an environmental review for a project within the Exclusive Economic Zone of Mexico; the court held that the area was the high seas, that NEPA applied, and thus issued a temporary restraining order.<sup>97</sup> In *Border Power Plant Working Group v. Department of Energy*, the federal government argued that the Department of Energy, in permitting transmission lines in the U.S. to connect Mexican power plants to the U.S. grid, need not consider the environmental effects of the power plants.<sup>98</sup> The court disagreed and held that NEPA requires assessment of effects in the U.S. resulting from power plants in Mexico.<sup>99</sup> Since that ruling, the Department of Energy has undertaken an environmental analysis of the project and took public comments on the draft EIS through June 2004.<sup>100</sup>

In *Province of Manitoba v. Norton*,<sup>101</sup> the plaintiff is seeking a full EIS on a water project in North Dakota that would transfer water from the Missouri River Basin to the Hudson Bay Basin.<sup>102</sup> Although both basins are within North Dakota, waters from the Hudson Bay Basin flow into the Province of Manitoba in Canada and could cause serious adverse affects to the fisheries and other biota in Canada.<sup>103</sup> The U.S. government's position is that the longstanding Boundary

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Res. Def. Council, Navy Agrees to Limit Global Sonar Development (Oct. 13 2003), available at <http://www.nrdc.org/media/pressreleases/031013.asp>.

97. 55 ERC 1873, 1876-77 (N.D. Cal. 2002).

98. 260 F. Supp. 2d 997, 1016 n.11 (S.D. Cal. 2003).

99. *Id.* at 1017.

100. Before *Border Power Plant Working Group v. Dep't of Energy* was brought, the Department of Energy prepared an EA analyzing the effects in the United States of the power plants in Mexico. The court found that the EA was inadequate. The Court denied plaintiff's injunction motion, and denied plaintiff's request to set aside the Presidential permits at least until July 2004. The Department of the Energy issued a draft EIS in May 2004 and held public meetings regarding the draft in July 2004. Notice of Availability for Imperial-Mexicali 230-kV Transmission Lines Draft Environmental Impact Statement (Baja California Power - Termoeléctric U.S. Draft EIS, 69 Fed. Reg. 26,818 (May 14, 2004); Draft EIS: Imperial-Mexicali 230-kV Transmission Lines, Dep't of Energy & U.S. Dep't of Interior, BLM, May 2004, available at <http://web.ead.anl.gov/bajatermoeis/documents/drafteis/index.cfm>; Baja California Power, Inc, *Environmental Impact Statement: News and Events*, at <http://web.ead.anl.gov/bajatermoeis/news/index.cfm> (May 14, 2004).

101. The author represents the government of Canada in this case.

102. *Manitoba v. Norton*, No. 02-cv-02057 (RMC) (D.D.C. Nov. 14, 2003) (denying judgment on the pleadings).

103. *Id.* at 2.

Waters Treaty between the U.S. and Canada is the sole dispute resolution mechanism. In particular it notes, “Defendants do not concede that NEPA’s EIS requirement would ever apply to extraterritorial impacts of U.S. actions.”<sup>104</sup> In a decision dated November 14, 2003, the district court denied the U.S. government’s motion to dismiss the case, finding that it involved an action within the United States that could be challenged by a Canadian province.<sup>105</sup> The case has now been briefed on cross-motions for summary judgment; it was argued before federal district court Judge Rosemary Collyer on July 29, 2004 and is awaiting decision.

### B. *Contextualizing NEPA’s Challenges*

The United States’ recent positions are evidence of concerted cutbacks on the application of NEPA—in their sights, the old girl ain’t what she used to be. NEPA is aging in a globalized world where many countries have adopted EIS-like requirements.<sup>106</sup> Indeed, NEPA’s ripening into that world provides a good resolution of how to apply NEPA to impacts abroad of decisions made in the U.S. The analysis seems sound that NEPA does not actually present a question of extraterritorial application of the laws, since most decisions take place entirely within the United States.<sup>107</sup> Within this framework of finding that NEPA applies, wherever the project may occur, some latitude can be given to agencies as they seek to obtain environmental information from other countries, but it is helpful to keep in mind that many countries, through their own laws and the rules of organizations like the World Bank, are familiar with developing and using such environmental information in government decision-making.<sup>108</sup> Finally, as in *Hirt*, courts can, and indeed do, effectively take into account foreign policy and national security considerations as they evaluate whether injunctions are appropriate.<sup>109</sup>

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104. Defendants’ Memorandum in Support of Defendants’ Motion for Judgment on the Pleadings, April 25, 2003, at 18 n.9. The brief essentially ignores the CEQ guidance of July 1, 1997.

105. *Manitoba*, No. 02-cv-02057.

106. Harvey Black, *Imperfect Protection*, ENVTL. HEALTH PROSPECTIVES, April 2004, available at <http://ehp.niehs.nih.gov/members/2004/112-5/spheres.html> (noting that over 100 countries, 35 states, and the District of Columbia have NEPA like statutes).

107. *See* *Envtl. Def. Fund, Inc. v. Massey*, 986 F.2d 528, 531 (D.C. 1993).

108. *Defenders of Wildlife v. Norton*, 257 F. Supp. 2d 53, 66 (D.D.C. 2003) (concluding that the presumption against the extraterritorial application of U.S. statutes generally, and the Endangered Species Act in particular, is “inapplicable . . . to federal agency actions within the United States that have extraterritorial effects”).

109. *Hirt v. Richardson*, 127 F. Supp. 2d 833, 848 (W.D. Mich. 1999).

#### IV. CONCLUSION

So where has NEPA arrived in mature middle age? Inside the United States, it faces new and treacherous an obstacle from the Bush Administration, including limiting regulations, lack of funding, and occasionally being jilted at the courthouse door. Outside the United States, NEPA has taken on the status of role model to many countries and international organizations but may be shriveling behind this important role-model face. An example of obstacles inside the U.S. that affect its image outside the U.S. is the statute's application to agency decisions that cause impacts outside the U.S. or that cause impacts that flow across U.S. boundaries into other countries. This review reveals NEPA's narrowing over time, becoming particularly thin in the past several years. A better approach, particularly in a world that has globalized over NEPA's lifetime, is to interpret NEPA inside the U.S. so that it can present a proud face, backed by a strong body, as a role model throughout the world.