Potential Ramifications of Environmental Defense Fund v. Massey Illustrated by an Evaluation of United States Agency for International Development Environmental Procedures

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Since the enactment of the National Environmental Policy Act (NEPA) in 1969, legal scholars have disagreed as to whether Congress intended for NEPA to apply extraterritorially. The debate pivots on the presumption that absent a clear Congressional intent to the contrary, a United States law should apply only within the United States. Because legislative history and statutory construction are inconclusive on this issue, courts have been reluctant to hold that NEPA applies abroad.

The Federal Court of Appeals for the District of Columbia recently parted from the traditional debate in Environmental Defense Fund v. Massey. The Massey Court decided that NEPA's application to the activities of the National Science Foundation (NSF) in Antarctica did not present a question of extraterritoriality. The court based its decision on the fact that the decisionmaking occurred within the United States, that NEPA is a process-oriented statute and that foreign policy concerns were not implicated. The decision marks environmentalists' first court victory on the application of NEPA to the activities of federal agencies abroad.

This Article briefly discusses NEPA's environmental impact statement requirement and the ensuing debate over its territorial impact. It then analyzes the D.C. Circuit's decision in Massey. Although the court limited its decision to NSF's activities in Antarctica, its underlying rationale can and should be used to extend NEPA's coverage to include...
federal agency activities having environmental effects in foreign nations. An examination of the environmental procedures used by the United States Agency for International Development (A.I.D.) illustrates NEPA's far reaching impact. This Article concludes by suggesting that the broad application of NEPA's requirements is necessary and timely given the global impact of environmental problems.

I. NATIONAL ENVIRONMENTAL POLICY ACT AND THE ENVIRONMENTAL IMPACT STATEMENT, SECTION 102(2)(C)

NEPA was passed in response to Congressional recognition that federal agency decisionmaking processes often lead to environmentally devastating consequences. NEPA's provisions have been challenged and refined via voluminous litigation. Recognizing the importance of its provisions, several federal agencies have voluntarily modified or foregone projects as a result of the environmental analysis required by NEPA.

NEPA has been praised for being one of the most successful environmental protection statutes in the world. Using NEPA as a model, more than seventy-five jurisdictions have required environmental impact assessments by law.

A. Statutory Requirements

8. See, Paul G. Kent and John A. Pendergrass, Has NEPA Become a Dead Issue? Preliminary Results of a Comprehensive Study of NEPA Litigation, 5 TEMP. ENVT'L. L. AND TECH. J. 11 (1986). Through a LEXIS computer search, the authors found that "[approximately 1200 cases involving NEPA issues were reported from 1970 through June 1985." Id. at 11 - 12.
NEPA's purpose is to ensure that federal agencies fully consider the environmental consequences of proposed actions in the decisionmaking process. Through NEPA, it is the policy of the federal government:

[T]o use all practicable means and measures, including financial aid and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.

Although NEPA does not create a substantive policy, it requires federal agencies to comply with a particular procedure. The procedural mandate may only be bypassed if there is a "clear and unavoidable conflict in [the] statutory authority" of the agency responsible for the proposed action. But as long as the agency considers the environmental effects of a proposed action, it may proceed with that action, even though negative environmental consequences may result.

Before undertaking any proposed action with environmental concerns, a federal agency must prepare an Environmental Assessment (EA) to determine whether an Environmental Impact Statement (EIS)

13. NEPA, § 101(a).
15. The benefit of a procedural statute is that it provides a win-win solution. The agency is allowed to proceed with its project, and the environmentalist achieves agency consideration of environmental consequences. On the other hand, process alone will not clean up the environment; environmentalists are forced to depend on the good faith of the agency employees. See, William H. Rodgers, NEPA at 20: Mimicry and Recruitment in Environmental Law, 20 Env'tl. L. 485, 493-94 (1990).
16. Jones, 499 F.2d at 512.
17. The Council on Environmental Quality (CEQ) has defined "Environmental Assessment" according to its Guidelines:

(a) Means a concise public document for which a Federal Agency is responsible that serves to:
is required. An EA is not required if an EIS automatically will be prepared or if a proposed action categorically is excluded from both the EA and EIS requirements. Environmental agencies, applicants and the public must be involved, to the extent practicable, in the agency’s preparation of an EA.

All federal agencies must prepare an EIS for “major Federal actions significantly affecting the quality of the human environment . . . .” The EIS must identify: 1) the environmental impact of the proposed action, 2) any unavoidable environmental effects of the proposed action, 3) alternatives to the proposed action, 4) the relationship between short-term uses and long-term maintenance of the environment, and 5) any irretrievable and irreversible commitments of resources. In preparing the EIS, the federal agency must consult other agencies, and it must consider public comment. If the agency determines an EIS is not required, it must prepare a Finding of No Significant Impact (FONSI).

Although NEPA does not provide for a private right of action, judicial review of an agency’s decision to forego an EIS or review of the

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(1) Briefly provide sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact.

(2) Aid an agency’s compliance with the Act when no environmental impact statement is necessary.

(3) Facilitate preparation of a statement when one is necessary.

(b) Shall include brief discussion of the need for the proposal, of alternatives as required by NEPA sec. 102(E), of the environmental impact of the proposed action and alternatives, and a listing of agencies and persons consulted.

18. The CEQ Guidelines define an “Environmental Impact Statement” as “a detailed written statement as required by NEPA sec. 102(2)(C).” Id. at § 1508.11.
19. See id. §§ 1501.3, 1501.4.
20. Id. § 1501.4(a)(1)-(2).
21. Id. § 1501.4(b).
22. NEPA, § 102(2)(C).
23. Including a no action alternative. CEQ Guidelines, 40 C.F.R. § 1508.25.
24. NEPA, § 102(2)(C).
25. Id.
27. CEQ Guidelines, 40 C.F.R. § 1501.4(e).
adequacy of a final EIS is maintained through private suits brought under Section 702 of the Administrative Procedure Act.  

B. The Debate Over the Territorial Reach of NEPA's Mandate

There is continuing debate between federal agencies and environmentalists as to whether NEPA's requirements apply to federal actions with environmental impacts outside the United States. It is unclear from a reading of the statute whether NEPA's EIS requirement was intended to apply abroad. The statutory language is confusing and irresolute; the language of various sections voices a concern for "future generations of Americans" and "our national heritage," which tends to imply a domestic application, while the language in other sections refers to the "human environment" and "man's environment," which suggests a global application.  

The legislative history is equally inconclusive on the issue, allowing legal scholars to draw different conclusions as to whether NEPA's EIS requirement applies abroad.

Although the Supreme Court has never heard a case involving the extraterritorial application of NEPA, lower courts' decisions skirt the issue. "Construing the equivocal reach of NEPA abroad . . . is a judicial endeavor oft-encountered, but not yet fully realized by any court." In past decisions applying NEPA to federal agency activities abroad, the courts either assumed NEPA applied without directly addressing the issue.

28. Administrative Procedure Act, § 702, 5 U.S.C. § 702 (1988). "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." Id.
29. This dichotomy is illustrated best in §§ 101 and 102. Compare § 101(a) (last phrase) and § 101(b)(2) and § 101(b)(4) with § 101(a) (initial phrases) and § 102(2)(A) and § 102(2)(C) and § 102(2)(F). NEPA, §§ 101, 102, 42 U.S.C. §§ 4321, 4322 (1988).
30. Compare Scott C. Whitney, Should the National Environmental Policy Act Be Extended to Major Federal Decisions Significantly Affecting the Environment of Sovereign Foreign States and the Global Commons, 1 VILL. ENVTL. L.J. 431, 442-46 (1990) (NEPA's legislative history shows that Congress did not intend NEPA to apply to federal decisions outside the territory of the United States), with The Extraterritorial Scope of NEPA's Environmental Impact Statement Requirement, 74 MICH. L. REV. 349, 365-71 (1975) (the legislative history supports the conclusion that NEPA's EIS requirement applies to activities of federal agencies abroad).
of extraterritoriality or the agency previously agreed to prepare an EIS.\(^3\)

Only two courts have directly confronted the issue of NEPA’s application to activities of federal agencies in foreign sovereign territories or in the global commons. Neither case held NEPA applicable to federal agency activities abroad.\(^3\) In NRDC,\(^3\) the D.C. Circuit Court held that an EIS was not required for a nuclear export license where the environmental effects are confined to the recipient country.\(^3\) In Greenpeace, U.S.A. v. Stone,\(^3\) the Federal District Court for the District of Hawaii refused to require NEPA’s application to the intra-German removal of American chemical weapons or to the transoceanic shipment of those chemical weapons.\(^3\) Both courts limited their decisions to the unique factual situations presented and recognized that in other circumstances NEPA may apply to a United States agency’s actions abroad.\(^3\)

Because the statutory language, the legislative history and the judicial interpretations of NEPA do not provide a conclusive answer to the question of NEPA’s extraterritorial application, federal agencies and environmentalists hold opposing positions. Federal agencies employ a purely domestic application of NEPA, while environmentalists argue for an extraterritorial application of NEPA.

1. The Purely Domestic Application of NEPA

34. 647 F.2d 1345.
35. Id. at 1347, 1348.
36. 748 F. Supp. 749.
37. Id.
38. Id. at 761; NRDC, 647 F.2d at 1366.
It is generally accepted that absent evidence of clear congressional intent to the contrary, a federal statute should be construed as applying only within the territorial jurisdiction of the United States.\textsuperscript{39} The purpose of the presumption against extraterritoriality is "to protect against the unintended clashes between our laws and those of other nations which could result in international discord."\textsuperscript{40} Because nothing in NEPA's statutory language or legislative history shows a clear congressional intent to extend NEPA's coverage beyond places where the United States has sovereignty,\textsuperscript{41} federal agencies argue that NEPA only applies to environmental effects within the United States.

Two assumptions form the basis of this presumption against the extraterritorial application of federal statutes. First, Congress probably intends legislation to apply only within the United States, since it is primarily concerned with domestic issues.\textsuperscript{42} Second, Congress probably does not intend legislation to contravene basic principles of the laws of other nations.\textsuperscript{43}

In addressing the environmental effects of a proposed action within a foreign sovereign,\textsuperscript{44} federal agencies argue that they need only comply with section 102(2)(F) of NEPA.\textsuperscript{45} Section 102(2)(F) requires federal agencies to "recognize the worldwide and longrange [sic] character of environmental problems and, where consistent with the foreign policy of the United States, lend appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind's world environment."\textsuperscript{46} This provision limits authority under NEPA by requiring "cooperation, not unilateral action, in a manner consistent with [United States] foreign policy."\textsuperscript{47} To require more encroaches upon the executive

\begin{footnotes}
\item[40] Aramco, 111 S. Ct. at 1230.
\item[41] See supra notes 30-31 and accompanying text.
\item[43] Id. at 292 (Frankfurter, J., concurring).
\item[44] "Foreign Sovereign" used in this context refers to the recipient nation.
\item[46] Id.
\item[47] NRDC, 647 F.2d 1345, 1366 (D.C. Cir. 1981).
\end{footnotes}
branch’s authority over foreign affairs.\textsuperscript{48}

Federal agencies argue that they are to follow Executive Order 12,114 in assessing the environmental impact of their activities on a sovereignless area, such as the oceans or Antarctica.\textsuperscript{49} Under the Order, agencies that undertake activities having environmental effects on sovereignless areas are required to prepare an EIS.\textsuperscript{50} While the Order furthers NEPA’s purposes, it is based on independent authority.\textsuperscript{51} Unlike NEPA, the Order does not create a cause of action whereby private citizens may challenge the sufficiency of the EIS; the Order only establishes internal procedures for federal agencies.\textsuperscript{52}

2. \textit{The Extraterritorial Application of NEPA}

Environmentalists argue for an extraterritorial application of NEPA based on section 102(2)(C), the action-forcing provision in NEPA. Section 102(2)(C) provides that all federal agencies shall

\[\text{[I]}\text{Include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on - (i) the environmental impact of the proposed action, (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented, (iii) alternatives to the proposed action, (iv) the relationship between local short-term uses of man’s environment and the maintenance and enhancement of long-term productivity, and (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it}\]

\textsuperscript{49} \textit{See} Exec. Order No. 12,114, § 2-3, 3 C.F.R. § 356 (1980). The Order “represents the United States government’s exclusive and complete determination of the procedural and other actions to be taken by Federal agencies to further the purpose of the National Environmental Policy Act, with respect to the environment outside the United States, its territories and possessions.” \textit{Id.} § 1-1.
\textsuperscript{50} \textit{Id.} § 2-4(b)(i).
\textsuperscript{51} \textit{Id.} § 1-1.
\textsuperscript{52} \textit{Id.} § 3-1.
be implemented.\textsuperscript{53}

Clearly, the language of this Section does not limit NEPA's EIS requirement to federal actions having significant environmental effects solely within the United States.\textsuperscript{54} Section 102(2)(C) specifically applies to major federal actions that affect the quality of the "human environment".\textsuperscript{55} Environmentalists argue that because Congress did not limit the EIS requirement to actions affecting the quality of our national environment, NEPA's application should be extended to actions having environmental effects outside the United States.

Environmentalists also argue that courts should give substantial deference to the Council on Environmental Quality's (CEQ's) interpretation of NEPA.\textsuperscript{56} The CEQ was created by Congress to oversee the implementation of NEPA.\textsuperscript{57} One of the CEQ's duties is:

\begin{quote}
[T]o review and appraise the various programs and activities of the Federal Government in the light of the policy set forth in [NEPA sections 101 - 105] for the purpose of determining the extent to which such programs and activities are contributing to the achievement of such policy, and to make recommendations to the President with respect thereto.\textsuperscript{58}
\end{quote}

It is the CEQ's position "that the impact statement requirement in § 102(2)(C) of NEPA 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."\textsuperscript{59}

\begin{itemize}
\item \textsuperscript{53} NEPA § 102(2)(C), 42 U.S.C. § 4332(2)(C) (1988).
\item \textsuperscript{54} The EIS requirement has been held applicable to a broad range of federal actions. See, e.g., Calvert Cliffs' Coordination Comm'n v. United States Atomic Energy Comm'n, 449 F.2d 1109, 1122 (D.C. Cir. 1971) ("The sweep of NEPA is extraordinarily broad, compelling consideration of any and all types of environmental impact of federal actions").
\item \textsuperscript{55} NEPA, § 102(2)(C).
\item \textsuperscript{56} See, e.g., Andrus v. Sierra Club, 442 U.S. 347, 358 (1979).
\item \textsuperscript{57} NEPA, § 202.
\item \textsuperscript{58} Memorandum on the Application of the EIS Requirement to Environmental Impacts Abroad of Major Federal Actions, 42 Fed. Reg. 61,068, 61,069 (Dec. 1, 1977) (statement of Russell W. Peterson, Chairman CEQ).
\item \textsuperscript{59} Id.
\end{itemize}
Any geographic limitation to the EIS requirement "would be inconsistent with the plain language of NEPA, its legislative purpose, the Council’s guidelines, and judicial precedents." The CEQ believes that applying NEPA to activities of United States agencies abroad represents a respect for foreign sovereignty, not a violation of it.

One argument against applying NEPA extraterritorially is that the United States’ ability to respond to foreign policy concerns will be compromised. However, NEPA is already well equipped to handle conflicts between the EIS requirement and foreign relations concerns. The introductory paragraph in section 102(2) requires all federal agencies to comply "to the fullest extent possible" with the requirements and policies set out in the Section, such that an agency may bypass the EIS requirement if there is an unavoidable conflict between its statutory authority and the EIS requirement. Environmentalists argue that this principle could be extended to cover conflicts between international law issues and the EIS requirement.

II. APPLICATION OF NEPA IN ENVIRONMENTAL DEFENSE FUND v. MASSEY

In Environmental Defense Fund v. Massey, the D.C. Circuit applied NEPA to the activities of the National Science Foundation (NSF) in Antarctica, holding that this invocation of NEPA did not involve a question of the extraterritorial application of United States law. The Massey decision marks the first time any court directly has held NEPA applicable to the activities of federal agencies abroad.
A. Factual Background

The Environmental Defense Fund (EDF) brought suit alleging that NSF violated section 102(2)(C) of NEPA by failing to prepare an EIS covering its plans to incinerate food and domestic wastes in Antarctica.68 For several years, NSF incinerated food and domestic wastes in an open landfill at its McMurdo Station research facility in Antarctica. NSF decided to cease burning food and domestic wastes in the open when it discovered asbestos in the landfill.69 From February 1991 to July 1991, until an alternative method of disposal could be implemented, NSF stored its food and domestic wastes.70 It then decided to resume incineration in an interim incinerator until a state-of-the-art incinerator was delivered.71 NSF’s decision to resume incineration led EDF to sue.72

The Federal District Court for the District of Columbia dismissed EDF’s action for lack of subject matter jurisdiction.73 Relying on the Supreme Court’s recent decision in Equal Employment Opportunity Commission v. Arabian American Oil Co.,74 the D.C. District Court held NEPA did not apply to NSF’s activities in Antarctica because it found no clear legislative intent to apply NEPA extraterritorially.75 It also held that Executive Order 12,114 does not create a cause of action for a plaintiff seeking agency compliance with its EIS requirement.76

B. The Court’s Analysis on Appeal

74. 111 S. Ct. 1227 (1991). The Supreme Court reaffirmed the generally accepted Foley Doctrine, that unless there is a clear legislative intent to the contrary, Congressional legislation only applies within the United States. Id.
75. Massey, 772 F. Supp. at 1298.
76. Id. at 1298.
The D.C. Circuit explained that NEPA regulates federal agency decisionmaking. In this case, the decision to incinerate waste in Antarctica was made in the United States, creating no extraterritorial application of domestic law.\(^77\) Further, NEPA is a process-oriented statute; it does not attempt to regulate conduct outside the United States.\(^78\) The court was reassured by the fact that no foreign policy concerns would be implicated by applying NEPA to NSF's activities in Antarctica, due to its status as a sovereignless territory.\(^79\)

1. Federal Agency Decisionmaking Occurs in the United States

The EIS requirement in NEPA is only binding on American officials.\(^80\) "Because the decision-making processes of federal agencies take place almost exclusively in [the United States] and involve the workings of the United States government, they are uniquely domestic."\(^81\)

The D.C. Circuit listed three situations where the presumption against extraterritoriality is not applicable.\(^82\) The third situation - - when the conduct regulated by the government occurs within the United States - - forms the basis of the court's decision.\(^83\) "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."\(^84\)

\(^78\) Id. at *4.
\(^79\) Id. at *6.
\(^82\) First, the presumption does not apply when there is a clearly expressed Congressional intent to extend the scope of the statute to conduct occurring within other sovereign nations. Second, the presumption does not apply when the failure to extend the statute to a foreign sovereign will result in adverse affects within the United States. Third, the presumption does not apply when the conduct being regulated occurs within the United States. Id. at *3.
\(^83\) Id. at *3-4.
\(^84\) Id. at *4 (citing Laker Airways, Ltd. v. Sabena, Belgian World Airlines, 731 F.2d 909, 921 (D.C. Cir. 1984), RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES, §§ 17, 38 (1965) and RESTATEMENT (THIRD) OF FOREIGN RELATIONS...
2. **NEPA is a Process-Oriented Statute**

The D.C. Circuit recognized that NEPA mandates a particular process that must be followed by federal agencies when undertaking an activity that significantly affects the quality of the human environment; it does not impose a substantive policy on federal agencies.\(^8^5\) The court held that it is a legitimate exercise of Congress' territorial-based jurisdiction to create legislation that forces American officials to consider environmental consequences in their decisionmaking process.\(^8^6\) "Moreover, NEPA would never require enforcement in a foreign forum or involve 'choice of law' dilemmas. This factor alone is powerful evidence of the statute's domestic nature..."\(^8^7\)

3. **Foreign Policy Considerations Not Implicated**

Antarctica's unique status in the international arena further persuaded the court that the traditional reason for applying the presumption against extraterritoriality was not implicated in *Massey*. The main reason for the presumption is to avoid clashes between nations that could lead to international discord.\(^8^8\) Antarctica is a sovereignless territory, over which the United States exercises some measure of legislative control; therefore, there is no potential conflict between United States laws and those of a foreign sovereign.\(^8^9\)

The court concludes that the application of NEPA's EIS requirement to federal agency activities in sovereignless territories does not hamper United States foreign policy.\(^9^0\) Where an EIS requirement is

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90. *Id.* at *8.*
incompatible with section 102(2)(F),\textsuperscript{91} which requires federal agencies to cooperate with other nations where consistent with United States foreign policy,\textsuperscript{92} federal agencies will not be forced to comply with the EIS requirement.\textsuperscript{93}

C. Potential Ramifications of Environmental Defense Fund v. Massey

The court in \textit{Massey} held that NEPA applies to federal agency decisions in Antarctica and arguably the global commons.\textsuperscript{94} It did not address how NEPA might apply to an action involving an actual foreign sovereign.\textsuperscript{95} In reaching its decision, the court relied on the fact that the decision-making at issue occurred in the United States, that NEPA is a policy-oriented statute, and that foreign policy considerations were not implicated.\textsuperscript{96}

The court's rationale can and should be extended to justify NEPA's application to federal agency activities having effects in foreign sovereigns. The only difference in applying NEPA to sovereignless territories and applying it to foreign sovereigns is the extent of the foreign policy concerns to be considered. While the potential for clash will necessarily be greater when applying NEPA to federal activities affecting foreign sovereigns, this in itself cannot explain why NEPA should not apply to these activities.

NEPA's composition is flexible enough to handle not only the foreign policy concerns that involve sovereignless territories but also the foreign policy considerations that arise when dealing with foreign sovereigns. Where the United States foreign policy interests espoused in section 102(2)(F) outweigh the benefits of the EIS requirement, the EIS requirement must yield.\textsuperscript{97}

In addition, applying NEPA to federal activities affecting foreign nations provides judicial review of federal agencies' decisions whether to prepare an EIS. The D.C. district court in \textit{Massey} dismissed the case for

\begin{itemize}
\item \textsuperscript{91} NEPA, § 102(2)(F), 42 U.S.C. 4332(2)(F) (1988).
\item \textsuperscript{92} Id.
\item \textsuperscript{93} \textit{Massey}, 1993 WL 11633 at *8 (citing Nuclear Resources Defense Council, Inc. v. Nuclear Regulatory Comm'n, 647 F.2d 1345, 1366 (D.C. Cir. 1981)).
\item \textsuperscript{95} Id. at *10.
\item \textsuperscript{96} See supra notes 78-94 and accompanying text.
\item \textsuperscript{97} \textit{Massey}, 1993 WL 11633 at *8.
\end{itemize}
lack of subject matter jurisdiction because it found that NEPA did not apply and because it recognized that Executive Order 12,114 does not create a cause of action. Therefore, unless NEPA is held applicable, there is no judicial review.

Extending Massey to federal activities in foreign sovereigns would have its greatest impact on the environmental processes applied to bilateral loan agreements between the United States and developing countries. The majority of United States loans to developing countries are made through A.I.D. A.I.D. is the leading donor in promoting sustainable agriculture, natural resource management and environmentally sound economic development in developing countries. Each year, A.I.D. commits billions of dollars in revenue to developmental assistance.

III. POTENTIAL IMPACT OF MASSEY ON UNITED STATES AGENCY FOR INTERNATIONAL DEVELOPMENT ENVIRONMENTAL PROCEDURES

A. Agency for International Development

A.I.D. is an independent body within the state department responsible for administering the United States' developmental assistance programs. The statutory authorization for A.I.D. is found in the Foreign Assistance Act (FAA) of 1961. Pursuant to the FAA, A.I.D. provides assistance to developing countries to address such problems as hunger, malnutrition, overpopulation, disease, disaster, deterioration of the environment and natural resource base, illiteracy and inadequate housing and transportation. For the purposes of this Note, it is especially

99. Id. at 1298; see also Exec. Order No. 12, 114, 3 C.F.R. 356 (1980) (furthering the goals of NEPA for environmental effects abroad).
101. For fiscal year 1990, A.I.D. obligated $ 2.5168 billion in developmental assistance.
important to realize that almost all A.I.D. decisions with respect to approval of proposed loan agreements are made in the United States.\textsuperscript{104}

Recognizing that sustainable economic growth is possible only through the management of natural resources, A.I.D.'s environmental objective is "to help developing countries conserve their natural resources and to promote long-term economic growth by managing exploited resources for sustainable yields."\textsuperscript{105} To reach this objective, A.I.D. attempts to fully integrate environmental review procedures in its loan approval process.\textsuperscript{106} The A.I.D. guidelines for evaluating the environmental effects of projects and activities seeking A.I.D. funding are set out in "Regulation 16."\textsuperscript{107}

B. Regulation 16

Regulation 16 has defined the environmental procedures of A.I.D. since 1976.\textsuperscript{108} Regulation 16 ensures that the environmental consequences of proposed activities are identified during the decisionmaking process, allowing for consideration of alternatives and mitigation of damages.\textsuperscript{109}

Implementation of Regulation 16 begins with the Initial Environmental Examination (IEE),\textsuperscript{110} where the originator of a proposed action submits a brief statement on the reasonably foreseeable environmental effects of the action.\textsuperscript{111} A.I.D. then reaches a Threshold

\textsuperscript{104} Comment, Controlling the Environmental Hazards of International Development, 5 ECOLOGY L.Q. 321, 347 (1976).
\textsuperscript{105} DEVELOPMENT COORDINATION COMMITTEE, supra note 101, at 65.
\textsuperscript{106} See id at 65-66.
\textsuperscript{107} See 22 C.F.R. § 216, 1992.
\textsuperscript{110} This assumes the proposed action is not exempt or categorically excluded from environmental review. See id. § 216.2(b)-(c). There are also some proposed actions that automatically trigger the Environment Impact Statement requirement or the Environmental Assessment requirement. Id. § 216.2(d).
\textsuperscript{111} Id. § 216.3(a)(1).
Decision with respect to the IEE.\textsuperscript{112}

If the Threshold Decision is positive, A.I.D. is required to prepare an Environmental Assessment (EA) or an Environmental Impact Statement (EIS), depending on the geographic impact of the proposed action.\textsuperscript{113} An EIS is required if the proposed action has environmental impacts on the territory of the United States or the global commons.\textsuperscript{114} But if the proposed action affects the environment of a foreign country, only an EA is required.\textsuperscript{115} The preparation of an EIS generally follows the CEQ Guidelines,\textsuperscript{116} while the preparation of an EA is based on a Scoping Statement,\textsuperscript{117} which includes the direct and indirect effects of the proposal on the environment.\textsuperscript{118}

The A.I.D. environmental procedures in Regulation 16 purport to be consistent with Executive Order 12,114 and to implement NEPA’s requirements as they affect the A.I.D. program.\textsuperscript{119} While the Regulation 16 EIS provision meets NEPA’s requirements, a close examination of A.I.D.’s EA provision reveals that NEPA’s mandate remains unfulfilled.

C. The NEPA EIS Requirement Versus The A.I.D. Environmental Assessment Provision

Three differences between NEPA’s EIS requirement and A.I.D.’s Environmental Assessment (EA) provision can be seen by contrasting the two procedures. The first difference is in the initial procedures for determining whether an EIS under NEPA or an EA under A.I.D. must be prepared. As previously discussed, NEPA requires a federal agency to prepare an EA to determine whether an EIS is required.\textsuperscript{120} The EA under NEPA includes a brief statement on the need for the proposal, the environmental impact of the proposed action, and the alternatives to it.\textsuperscript{121}

\begin{footnotesize}
\begin{itemize}
  \item \textsuperscript{112} Id. § 216.3(a)(2)(i).
  \item \textsuperscript{113} Id. § 216.3(a)(2)(iii).
  \item \textsuperscript{114} Id. § 216.7(a).
  \item \textsuperscript{115} Id. § 216.1(c)(A), .6.
  \item \textsuperscript{116} Id. §§ 216.7(b)-(c).
  \item \textsuperscript{117} Id. § 216.6(c).
  \item \textsuperscript{118} Id. § 216.3(a)(4)(a).
  \item \textsuperscript{119} Id. § 216.1(a).
  \item \textsuperscript{120} CEQ Guidelines, 40 C.F.R. §§ 1501.3, 1501.4(b) (1982).
  \item \textsuperscript{121} Id. § 1508.9(b).
\end{itemize}
\end{footnotesize}
Public involvement is required to the extent practicable. A.I.D.'s Initial Environmental Examination (IEE), similar to NEPA's Environmental Assessment procedure, is used by A.I.D. to determine whether it must prepare an EA. Unlike the NEPA EA procedure, the IEE only requires the originator of the proposed action to give a brief statement on the reasonable foreseeable environmental effects of the action. The need for the action and possible alternatives are not discussed. Furthermore, no public involvement is required in the preparation of the A.I.D. IEE.

A second difference between NEPA's EIS and A.I.D.'s EA is in the scope and content of the two. The CEQ Regulations provide detailed guidance on the range of actions, alternatives and impacts to be considered in a NEPA EIS. The NEPA EIS must include: 1) the environmental impact of the proposal, 2) any unavoidable environmental effects of the proposed action, 3) alternatives to the proposed action, 4) the relationship between short-term uses and long-term maintenance of the environment, and 5) any irreversible and irretrievable commitments of resources. In contrast, the A.I.D. EA is based on a Scoping Statement. The only guidance given to A.I.D. project originators regarding the Scoping Statement is that it should include "the direct and indirect effects of the project on the environment." The additional elements discussed with respect to the form and content of the Environmental Assessment are discretionary and are to be used "as appropriate."

A third and final difference in NEPA and A.I.D. environmental procedures is in the level of public participation required. In preparing an EIS under NEPA, the federal agency must consider public comment. One of the reasons for NEPA's success is the valuable information it receives from the public and incorporates into its consideration of the

122. Id. § 1501.4(b).
124. See supra notes 109-112 and accompanying text.
125. CEQ Guidelines, 40 C.F.R. § 1508.25.
127. A.I.D. Environmental Procedures, 22 C.F.R. § 216.6(c).
128. Id. § 216.3(a)(4)(i)(a).
129. Id. § 216.6(c). Discussion of alternatives is included within the additional discretionary elements. Id. § 216.6(c)(3).
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proposal.\(^1\) Under the A.I.D. procedures, draft EIS's are circulated to the public, but there is no requirement that the EA be circulated for public comment.\(^2\) The decision to circulate the Scoping Statement is left to the discretion of the Bureau Environmental Officer.\(^3\)

In summary, A.I.D.'s EA procedures do not meet NEPA's requirements or adequately address NEPA's concerns. By not providing detailed guidelines for the preparation of IEE's and EA's, the A.I.D. procedures leave important decisions regarding the environmental consequences of proposed actions to the discretion of the project originator. Project originators are biased, and more times than not they will de-emphasize the environmental effects of proposed activities unless stricter guidelines are imposed. By not requiring public participation, A.I.D. overlooks valuable information that could affect its decision to proceed with a proposed activity.

D. Extension of the Massey Rationale to A.I.D.'s Treatment of Proposed Actions Having Environmental Effects in Foreign Countries

The *Massey* rationale provides that, even if the environmental effects of federal agency activities occur outside the United States, as long as the decision-making for those federal activities occurs in the United States, applying NEPA is a proper application of United States law and does not present a question of extraterritoriality.\(^4\) This rationale is directly applicable to A.I.D.'s loaning procedures. As previously mentioned, almost all A.I.D. loan assistance decisions are made in the United States while executed in developing countries.\(^5\)

A.I.D. asserts that NEPA's EIS requirement does not apply to its activities in foreign countries.\(^6\) A.I.D. bases its position on the


\(^{132}\) See A.I.D. Environmental Procedures, 22 C.F.R. § 216.3(a)(5).

\(^{133}\) Id. § 216.3(a)(4)(d)(iii).

\(^{134}\) See supra notes 80-84 and accompanying text.


\(^{136}\) *Hearings on the Administration of the National Environmental Policy Act Before the Subcommittee on Fisheries and Wildlife Conservation of the House Comm. on Merchant Marine and Fisheries*, 91ST CONG. 2D SESS. 1123, 1131 (1970) (statement of Christian Herter, Jr., Special Assistant to the Secretary of State for Environmental Affairs and
presumption against extraterritoriality and the rationale behind it.\textsuperscript{137} A.I.D. does not apply NEPA to its activities in foreign countries because it believes that such an application will result in clashes between United States laws and those of foreign sovereigns.\textsuperscript{138}

This discrepancy between A.I.D.’s treatment of United States activities in foreign countries, on the one hand, and its treatment of similar activities in the United States or in the global commons, on the other hand, is no longer warranted. NEPA’s requirements can be applied to A.I.D. activities affecting the environment of foreign nations without inhibiting A.I.D.’s ability to address foreign policy interests.

First, foreign policy concerns over the encroachment on the sovereignty of foreign developing nations are not as pressing as they have been in the past because there is increasing awareness in developed as well as developing countries that sustainable resource use and long-term economic development are inextricably linked.\textsuperscript{139} Because developing countries do not have the experience or the technological expertise to properly address environmental issues, they are open to A.I.D. assistance in developing approaches to environmental management.\textsuperscript{140}

Second, NEPA provides enough flexibility to address any foreign policy concerns that might arise. If compliance with NEPA’s EIS requirement would be inconsistent with section 102(2)(F),\textsuperscript{141} which promotes United States cooperation with foreign nations where consistent with its foreign policy interests, then the agency may forego preparation of an EIS.\textsuperscript{142} A.I.D. should weigh the benefits of NEPA’s environmental analysis against the foreign policy concerns involved.

A.I.D. recognizes that the increasing awareness of the global impact of environmental problems will provoke necessary amendments to its

\begin{footnotes}
\item[137] See supra notes 39-43 and accompanying text.
\item[139] INITIATIVE ON THE ENVIRONMENT PROGRAM DOCUMENT, EXECUTIVE SUMMARY (A.I.D. Doc. No. PN-ABH-236) i (1990).
\item[140] Id. at 2.
\end{footnotes}
environmental procedures. The *Massey* decision is the catalyst for these amendments.

IV. CONCLUSION

As the twenty-first century approaches, it is naive to believe that environmental problems can be confined within national boundaries. The United States is responsible to its citizens for the protection and enhancement of the human environment. NEPA’s EIS requirement has proven to be an effective tool in recognizing and preventing environmental devastation. If the D.C. Circuit in *Massey* had not found NEPA’s EIS requirement applicable to the National Science Foundation’s activities in Antarctica, the agency would have been permitted to undertake environmentally destructive activities without being held accountable.

The next step in the United States global environmental awareness is to extend NEPA’s coverage beyond federal agency activities in Antarctica and in the global commons to activities that have significant environmental effects within foreign sovereigns. Foreign policy concerns should be dealt with on a case-by-case basis by balancing the benefits of an EIS against the foreign policy implications.