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Judges' Bench Brief: Fourth Annual Pace National Environmental Moot Court Competition

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IN THE UNITED STATES
COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

ENVIRONMENTAL FRIENDS, INC.,
Appellee

v.

SECRETARY, UNITED STATES DEPARTMENT
OF DEFENSE,
Appellant

DEFENSE CONTRACTORS ASSOCIATION,
Appellee

v.

SECRETARY, UNITED STATES DEPARTMENT
OF DEFENSE,
Appellant

Civ. No. 91-27

**JUDGES' BENCH BRIEF
QUESTIONS PRESENTED**

The Secretary of the United States Department of Defense, defendant below, acting in his official capacity, has appealed two controlling questions of law in this consolidated case from the district court below.

Each of the three parties is instructed to brief each of the following questions:

(1) Whether Environmental Friends, Inc., or the Defense Contractors Association, or both, have standing to challenge the Defense Department's clean-up plan for the Venice, Italy, missile site?

(2) Whether the National Environmental Policy Act ap-

plies to Defense Department actions to be taken outside the United States?

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I. INTRODUCTION

A. *Procedural posture of this case*

This case is properly in federal district court based on federal question jurisdiction. (R. 4.) The case comes to the Twelfth Circuit Court of Appeals on appeal from a decision of the lower court on the Respondent's (the Department's) mo-

tion for summary judgment on two controlling issues of law. (R. 1.) All parties concede venue in the Twelfth Circuit Court of Appeals is proper under 28 U.S.C. sections 127 and 1391(e).

B. *The statutes*

1. The National Environmental Policy Act

The National Environmental Policy Act of 1969 (NEPA)¹ "is this country's basic national charter for protection of the environment"² and requires federal agencies to "include in every recommendation or report on . . . major Federal actions, significantly affecting the quality of the human environment, a detailed statement by the responsible official . . . on the environmental impact of the proposed action."³ NEPA's two main purposes are: forcing agencies to consider the potential environmental impacts of any proposed actions and ensuring the public is informed "that [the agency] has considered environmental concerns in its decision making process."⁴

2. The Administrative Procedure Act

Because NEPA itself does not provide a right to review of agency actions performed under NEPA, persons seeking judicial review of agency actions in violation of NEPA are required to bring suit under the Administrative Procedure Act (APA).⁵

C. *Facts*

Respondent, Secretary of the United States Department of Defense (hereinafter "the Department") is in charge of Department of Defense sites both in the United States and

1. 42 U.S.C. §§ 4331-4370(b) (1988 & Supp. I 1989).

2. Council on Environmental Quality Regulations, 40 C.F.R. § 1500.1(a) (1991).

3. *Id.*

4. *Baltimore Gas & Elec. Co. v. Natural Resources Defense Council, Inc.*, 462 U.S. 87, 97 (1983).

5. 5 U.S.C. §§ 501-706 (1988). The APA allows judicial review only to those persons "suffering [a] legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute . . ." 5 U.S.C. § 702.

abroad. The United States Army, no longer in need of a missile base in Venice, Italy, plans to clean up the site and, perhaps, eventually turn the site over to the Italian government. (R. 2.) During its stint as a missile launching and storage base, the site, which is located in a one-hundred-year floodplain, (R. 3), became contaminated with missile fuel. (R. 3.) Considered toxic in high doses and possibly carcinogenic with long-term exposure, the missile fuel lies up to twenty-four inches below the surface of the soil. (R. 3.) The missile fuel is transported along with the soil when the soil is washed away by erosion. (R. 3.)

The Army plans to clean up this contamination by having its own employees apply Biocore, a genetically engineered microorganism, to the missile fuel. (R. 3.) The Army's testing to date, performed only at the Army's laboratories and controlled-environment greenhouses at the Aberdeen Proving Grounds in Maryland, indicates that Biocore will eat the missile fuel in the soil and will die off when the fuel is gone. (R. 3.) The Army claims that once dead, the microorganisms will pose no further threat to the environment. (R. 3.) To test this theory, Army personnel will test the soil following application of Biocore. (R. 3.)

The only documents ever prepared concerning the environmental effects of Biocore were a "Summary Environmental Analysis of the Venice, Italy, Missile Site Clean-up," (R. 3), and an "environmental assessment."⁶ (R. 4.) The "Summary Environmental Analysis" includes a statement of compliance with Executive Order 12,114;⁷ a history of the Venice missile site; statements about the methods used to detect the missile fuel contamination; statements about the laboratory use of Biocore at Aberdeen; and, statements about the cost of clean-up using Biocore versus the cost of clean-up using incineration of

6. An environmental assessment entails an agency making a threshold determination as to whether the effects of the agency's action on the human environment will be significant enough to trigger implementation of the environmental impact statement process or preparation of a finding of "no significant impact." Council on Environmental Quality Regulations, 40 C.F.R. § 1508.9 (1991).

7. E.O. 12,114, Environmental Effects Abroad of Major Federal Action, 3 C.F.R. 356 (1980), *reprinted in* 42 U.S.C. § 4321 (1988).

the contaminated soil versus the cost of leaving the contaminated soil where it is and performing periodic testing. (R. 3.) No public comment was ever solicited or received on this document. (R. 3.) The "environmental assessment" produced a "finding of no significant impact."⁸ (R. 4.)

In preparation for the Venice missile site clean-up, the Army has administratively set aside funds to cover project expenses and has orally informed personnel that they are to expect to travel to Italy in the Summer of 1992 for the purpose of applying Biocore at the site. (R. 6.) Respondent states that its policy is to consider orders "final" only after the Department's employees have received their travel orders (usually between two and thirty days before travel is to occur). (R. 6.) Although travel orders have not yet been issued, in his deposition, a Colonel Indigo stated that he would issue such orders "unless the judge stops me." (R. 6.)

Petitioner Environmental Friends, Inc. (hereinafter "Petitioner-EF") is an international environmental membership organization which charges dues and which has as its goals "respect for the environment and acknowledgement of how little we understand its complexities." (R. 4.) Response to a recent questionnaire showed that Petitioner-EF's members were especially concerned about "military toxics." (R. 4.)

Petitioner-EF filed suit in 1990 alleging that because "Biocore is still too experimental to be used outside the laboratory," (i.e., further investigation may show that it may have a severe negative impact on the human environment) the Army's failure to perform a full-fledged "Environmental Impact Statement"⁹ in accordance with the regulations of the

8. A "finding of no significant impact" (FONSI) is a "document by a Federal agency briefly presenting the reasons why an action . . . will not have a significant effect on the human environment and for which an environmental impact statement . . . will not be prepared. 40 C.F.R. § 1508.13.

9. An "environmental impact statement" (EIS), required by section 102(2) of NEPA, assures that when making decisions, an agency will have access to and will consider "detailed information concerning significant environmental impacts [by guaranteeing] that the relevant information will be made available to the" public and to other agencies. Essentially, an EIS provides full environmental disclosure. Guidelines and requirements for an EIS preparation are found in the regulations at 40 C.F.R. § 1500 (1991).

Council on Environmental Quality violates NEPA. (R. 4-5.) Petitioner-EF, with a total membership in the United States and abroad of approximately 75,000, has 500 members in Italy. (R. 4.) In support of its claim, Petitioner-EF has filed affidavits. (R. 4.) Summary of the affidavits is as follows: BERNARD BROWN and CATHY CORONADO someday plan to visit Venice but as of yet have not made reservations or purchased tickets for travel. (R. 4.) DAVID AND DOROTHY DOWNS, American citizens living in Venice, rent an apartment four miles from the missile base and "on average once a month" hike in the "immediate vicinity" of the base. On occasion they even hike along the base's border fences. (R. 4.) As free-lance photographers, these hikes afford them the opportunity to take marketable photographs. (R. 4.) EQUALIA EMELIA, a local school teacher, owns a home one-half mile from the site. (R. 4.) FRANCO FRANCISCO has vacationed in Venice, staying three times at a motel directly adjacent to the site, and states that he plans to return to that hotel on vacation in 1992. (R. 4.)

Petitioner Defense Contractors Association (hereinafter "Petitioner-DCA") is a membership organization representing approximately 3000 defense contractors which earns nearly 70% of the Department of Defense's contracting budget. (R. 5.) According to its mission statement, Petitioner-DCA seeks "partnership of the public and private sectors, which results in sustainable policies of all kinds — tactical, financial, social and logistical — in all aspects of defense [including] decommissioning." (R. 5.) A "safe and healthy environment" is listed, along with "racial and sexual equality," "a safe workplace," and "affordable care for dependents," as "social policies" which will be "benefitted" by partnership between the public and private sectors. (R. 5.)

Petitioner-DCA filed suit here claiming that Respondent's failure to prepare an "Environmental Impact Statement" under Council on Environmental Quality regulations prior to using Biocore for the Venice missile site clean-up constitutes an actionable violation of NEPA. (R. 5.) In support of its contentions, Petitioner-DCA has filed two affidavits.

The affidavits of members GRANT GENERAL SERVICES and HISSON EARTHCLEAN state that they could prepare and exe-

cute a contract to perform the Venice missile site clean-up using conventional technology but that they could not perform a clean-up using Biocore because the government owns Biocore. Grant is a well-established contractor with a history of providing janitorial, messenger, equipment cleaning, and soil purification services to the Department on bases in the United States and in northern Italy. Hisson EarthClean is a new contractor performing military site hazardous waste clean-up only at bases outside of Europe.

D. Summary of the issues

1. Are members of Petitioner-EF's and Petitioner-DCA's organizations "actually affected" (or injured in fact) within the meaning of the relevant case law by the Department's decision to apply Biocore at the Venice, Italy clean-up site without first preparing an Environmental Impact Statement (EIS) and does any effect or injury which Petitioner-DCA's members may suffer as a result of this decision fall within the "zone of interests" intended to be protected by NEPA, thereby conferring standing upon Petitioners-EF and -DCA sufficient to entitle them to have this decision reviewed by a court of law?
2. Is the Department's decision to apply Biocore at the Venice, Italy clean-up site without first preparing an Environmental Impact Statement (EIS) final agency action within the meaning of the Administrative Procedure Act such that the decision will be reviewable in a court of law?
3. Is the Department's decision to apply Biocore at a missile site outside the boundaries of the United States (i.e., at the Venice, Italy clean-up site) subject to the requirements of NEPA such that the Department is required to prepare an Environmental Impact Statement (EIS) prior to

applying Biocore?

E. *Summary of the arguments*

1. Actually affected (injury-in-fact) and “zone of interests”

Both Petitioner-EF and Petitioner-DCA filed suit against the Department alleging that the Department’s failure to perform an EIS prior to applying Biocore at the Venice, Italy missile site is a violation of NEPA. The Department claims, in its Rule 56¹⁰ motion for summary judgment, that both Petitioners lack standing to challenge the action here because they are not “actually affected” by the Department’s actions within the meaning of the relevant case law and because the injury to Petitioner-DCA’s members is not within NEPA’s zone of interests. Because this question arises in the context of a Rule 56 motion for summary judgment, the burden is on Petitioners to set forth facts sufficient to prove that the Army’s decision will cause injury-in-fact within the “zone of interests” of NEPA to members of the Petitioners’ organizations. (FULL ARGUMENT BEGINS ON PAGE 527.)

- a. Aesthetic, conservational, and environmental injury

Petitioner-EF may argue that its members’ aesthetic interests will be injured if the Department applies Biocore to the missile site without first preparing an EIS. The Department may counter that the injuries alleged by the Petitioners are insufficient to establish standing because the interest itself will not be actually affected. In addition, the Department may claim that the alleged injuries are insufficient to establish standing because they are not “palpable and distinct,” are “too abstract,” or are “too remote.” (FULL ARGUMENT BEGINS ON PAGE 527.)

10. FED R. CIV. P. 56.

b. Recreational injury

Petitioner-EF may argue that the evidence before the court demonstrates that its members' recreational interest in the land adjacent to the base may be injured by the Department's application of Biocore to the missile site without first preparing an EIS. The Department may assert that, although the Supreme Court has recognized recreation as a valid interest, the Petitioners cannot claim injury to a recreational interest unless they are more than mere trespassers or licensees with regard to any lands eventually affected by application of Biocore. If they are not more than licensees or trespassers, Petitioner-EF's members will not be possessed of any interest which is "capable of being affected by a proposed agency action" because their presence on the land may be terminated by the landowner on demand. Petitioner-EF may counter this argument by asserting the brief of member Equalia Emelia who stated in her affidavit that she owns property in the vicinity of the base. The Department may counter that the injuries alleged by the Petitioners are insufficient to establish standing because the interest itself will not be actually affected. In addition, the Department may claim that the alleged injuries are insufficient to establish standing because they are not "palpable and distinct," are "too abstract," or are "too remote." (FULL ARGUMENT BEGINS ON PAGE 528.)

c. Procedural injury

Both Petitioner-EF and Petitioner-DCA may argue that their members have been subjected to a "procedural injury" because of the Department's failure to prepare an EIS under NEPA. In making this argument, Petitioners must claim that failure to comply with NEPA by not preparing an EIS in this situation has created a "risk that serious environmental impacts [of Biocore's application and use] will be overlooked."

The Department may counter that even if such an injury exists, the Petitioners have failed to allege that they have the required "geographical nexus" to the site of Biocore's application such that they may suffer the environmental consequences of the project. Both Petitioners should argue that

their members will be in sufficiently close proximity to Biocore so that they are likely to experience its environmental consequences.

The Department may counter that the injuries alleged by the Petitioners are insufficient to establish standing because the interest itself will not be actually affected. In addition, the Department may claim that the alleged injuries are insufficient to establish standing because they are not "palpable and distinct," are "too abstract," or are "too remote." (FULL ARGUMENT BEGINS ON PAGE 530.)

d. Informational injury

Both Petitioners may argue that they, as organizations, have experienced informational injury to their programmatic activities. The claim of injury here will be based on the lack of information caused by the Department's failure to perform the EIS before using Biocore at the Venice missile site.

The Department may respond with the arguments that neither organization has been informationally injured by its failure to prepare an EIS and that the Department is not required to prepare an EIS simply to satisfy the informational needs of the Petitioners. It may also counter that the injuries alleged by the Petitioners are insufficient to establish standing because the interest itself will not be actually affected. In addition, the Department may claim that the alleged injuries are insufficient to establish standing because they are not "palpable and distinct," are "too abstract," or are "too remote." (FULL ARGUMENT BEGINS ON PAGE 531.)

e. Economic injury and the "zone of interest" issue

The Department may argue that Petitioner-DCA's *only* interest in bringing this action under NEPA is an economic interest based on the inability of Petitioner-DCA's members to bid on a clean-up contract employing Biocore because Biocore is owned by the federal government. The Department will note that because such an interest is not within the "zone of interests" of NEPA, Petitioner-DCA has no standing to sue here.

In response, Petitioner-DCA will argue that in addition to its economic interests it has environmental interests. Economic interests will not preclude a petitioner from falling within the "zone of interest" of NEPA so long as it also possesses viable environmental interests. (FULL ARGUMENT BEGINS ON PAGE 532.)

2. Final Agency action

In its Rule 56 motion for summary judgment, the Department asserts that this court does not have jurisdiction to review its preliminary decision to apply Biocore without first performing an EIS since this decision is not "final." Both Petitioner-EF and Petitioner-DCA assert that the Department has made a final decision to apply Biocore at the Venice missile site and that such decision constitutes agency action within the meaning of the Administrative Procedure Act. Since this issue appears in the context of a Rule 56 motion for summary judgment, the burden is on Petitioners to set forth facts sufficient to prove that the Army's decision is both agency action within the meaning of APA section 702 and final within the meaning of APA section 704. (FULL ARGUMENT BEGINS ON PAGE 534.)

a. Is this Agency action?

Petitioners will argue that the Army's decision to apply Biocore constitutes a formal order or regulation and thus constitutes agency action within the meaning of the APA section 702. The Department, however, will assert that its preliminary proposal to apply Biocore was not promulgated in a formal manner and therefore is not agency action for the purpose of judicial review under APA section 702.

In support of their argument that the Department's decision to apply Biocore is agency action, Petitioners will apply recent case law which finds agency action where there is an "actual and 'integrated plan.'" Thus, Petitioners will assert that the Army's specific plans to clean the soil by applying Biocore, as described in its "Summary Environmental Analysis," provides an actual and integrated plan. Petitioners may

also argue that the preparation of the "environmental assessment" constitutes agency action. (FULL ARGUMENT BEGINS ON PAGE 535.)

b. If Agency action exists - Is it final?

On the issue of finality, Petitioners-EF and -DCA will argue that the accumulation of the Department's activities constitutes "final" agency action. Petitioners should also assert that the Department's decision not to prepare an EIS creates an expectation that Biocore will be applied. This expectation raises the possibility of future injury which would cause Petitioners to immediately adjust their conduct.

The Department, however, will refute these arguments by claiming that before the Supreme Court recognizes agency action as final it has required a more immediate effect on the allegedly injured party than merely an expectation which may cause the party to alter their behavior. The Department will also argue that since it has not issued travel orders its decision is not final, but is instead merely a preliminary decision. (FULL ARGUMENT BEGINS ON PAGE 538.)

3. Extraterritorial application of NEPA

Petitioners claim that the Department of Defense must comply with NEPA before it can apply Biocore to its Venice missile base. The question is whether NEPA applies to federal agency actions occurring outside the borders of the U.S. when the effects of these actions are felt only within the country where the action occurs. (FULL ARGUMENT BEGINS ON PAGE 541.)

a. The presumption against NEPA's extraterritorial application

Petitioners may argue that the presumption against NEPA's extraterritorial application does not apply here. They will also argue that, even if it does apply, the presumption is rebutted by the words of NEPA, the Act as a whole, its legislative history and any evidence of congressional intent regarding NEPA's extraterritorial application.

The Department may counter with the argument that the

legislative history fails to rebut the presumption against extraterritorial application of NEPA. The Department will argue that Congress does not have authority to apply NEPA extraterritorially. The Department will further argue that even if Congress does have authority, Congress has not clearly expressed, within the words of NEPA, that it applies extraterritorially; therefore, Petitioners have failed to rebut the presumption against NEPA's extraterritorial application. (FULL ARGUMENT BEGINS ON PAGE 542.)

b. Agency interpretation of NEPA

Petitioners will also argue that if the statute and legislative history are found not to be clear, the court must defer to the CEQ interpretation which interprets NEPA as most likely being applicable extraterritorially. The Department will counter that the CEQ interpretation is not controlling. (FULL ARGUMENT BEGINS ON PAGE 552.)

c. Executive Order 12,114

Petitioners will argue that Executive Order 12,114 mandates that Federal agencies follow NEPA's requirements for extraterritorial actions. Petitioners will further argue that an executive order is reviewable by the court regardless of the President's attempt to proscribe review. The Department will respond that Executive Order 12,114 is not reviewable by its terms and does not create a private right of action to enforce the extraterritorial application of NEPA. (FULL ARGUMENT BEGINS ON PAGE 553.)

II. THE STANDING ARGUMENTS

- A. *Are members of Petitioner-EF's and Petitioner-DCA's organizations "actually affected" (or injured-in-fact), within the meaning of the relevant case law, by the Department's decision to apply Biocore at the Venice, Italy clean-up site without first preparing an Environmental Impact Statement (EIS), and does any effect or injury which Petitioner-DCA's members may suffer, as a result of the De-*

partment's decision, fall within the "zone of interests" intended to be protected by NEPA, thereby conferring standing upon Petitioners-EF and -DCA entitling them to have the Department's decision reviewed by a court of law?

1. Introduction

Both Petitioners-EF and -DCA filed suit against the Department alleging that the Department's failure to perform an EIS prior to applying Biocore at the Venice, Italy missile site is a violation of NEPA. The Department claims, in its motion for summary judgment, that both EF and DCA lack standing to challenge the Department's action because they are not "actually affected" by the Department's actions within the meaning of the relevant case law and because the injury to Petitioner-DCA's members is not within the "zone of interests" of the National Environmental Policy Act (NEPA).¹¹

To obtain standing to sue in a federal court, regardless of under which statute a suit is brought, the U.S. Constitution requires that the plaintiff allege an "injury-in-fact."¹² A successful showing of injury-in-fact requires an allegation of "a personal stake in the outcome of the controversy."¹³

11. 42 U.S.C. §§ 4321 et seq (1988 and Supp I 1989).

12. U.S. CONST., art III, § 2. Article III grants federal courts the jurisdiction to hear only those cases that constitute actual "cases" or "controversies." *Id.* To obtain judicial review, a petitioner or plaintiff, in addition to pleading "injury-in-fact," must also plead "causation," and "redressibility." *Baker v. Carr*, 369 U.S. 186, 204-208 (1962).

On the issue of causation (a showing that the other party is likely to or did cause the injury alleged) the court will not require a showing of absolute certainty before granting review. *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 79-81 (1978). On the issue of redressibility, the plaintiff must show that the injury suffered is "likely to be redressed by a favorable decision." *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 38 (1976). For a thorough statement of these three threshold requirements for standing see, *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 487-488 n.24 (1982).

13. *Baker v. Carr*, 369 U.S. 186, 204 (1962).

When an organization wishes to sue on behalf of others, it must show that these "others" are members of the organization and that at least some of the members were or will be injured by the defendant's action. See, e.g., *Save Our Wetlands, Inc. v. Sands*, 711 F.2d 634, 639 (5th Cir. 1983), *rehearing denied*, 718 F.2d 1096 (5th Cir.

Because NEPA does not itself provide for judicial review of agency actions, plaintiffs must seek judicial review under the Administrative Procedure Act (APA).¹⁴ Therefore, in addition to meeting the constitutional standing requirement of injury-in-fact, the plaintiff must satisfy the similar APA standing requirement of "adversely affected or aggrieved."¹⁵

In *Lujan v. National Wildlife Federation (NWF)*,¹⁶ the Supreme Court modified the APA requirement by holding that to obtain judicial review the plaintiff must allege that an interest has been "adversely affected or aggrieved" within the meaning of the APA and that the interest was "actually" affected.¹⁷ This change in wording makes the pleading require-

1983). In *Sierra Club v. Morton*, the Court initially rejected the Sierra Club's standing to sue as an organization acting as a representative of the general public. 405 U.S. 727, 739-741 (1972). However, the Court eventually granted the Sierra Club leave to establish standing by amending its complaint to show that some of its members would be harmed by the agency action at issue. *Id.*

14. 5 U.S.C. §§ 501-706 (1988). The APA, at section 702, provides a right of review to those persons "adversely affected or aggrieved by agency action within the meaning of a relevant statute." 5 U.S.C. § 702. The relevant statute here is the NEPA. 42 U.S.C. § 4321 et seq (1988).

15. To be "adversely affected or aggrieved" under the APA, the litigant must establish that the injury complained of falls within the "zone of interests" protected by the relevant statute. *Clarke v. Securities Industry Ass'n*, 479 U.S. 388, 396-97 (1987). The "zone of interests" of a statute is that group of interests which a statute was intended to protect. *Id.*

This "adversely affected or aggrieved" requirement is similar to the constitutional requirement of injury-in-fact, and has the same basic meaning as that term. *Sierra Club v. Morton* 405 U.S. 727, 732-733 (1972). The "adversely affected or aggrieved" requirement will be satisfied when the plaintiff shows that the agency's action "caused actual injury to an interest within the 'zone of interests' protected by the statute allegedly violated." *Committee for Auto Responsibility v. Solomon*, 603 F.2d 992, 997 (D.C. Cir. 1979). If the injury falls within the protected "zone of interests," the constitutional requirement of injury will automatically be satisfied. *City of Los Angeles v. National Highway Traffic Safety Admin.*, 912 F.2d 478, 483 (D.C. Cir. 1990).

16. 110 S. Ct. 3177 (1990).

17. *Id.* at 3186. In *Lujan*, plaintiffs sought to prevent certain public lands from being opened up to mining. *Id.* at 3182. In response to a motion for summary judgment, the petitioners presented affidavits attempting to allege injury-in-fact for purposes of standing and describing how and where members of the organization used the land in question. *Id.* at 3186-3187. Approximately 4500 acres, within a two million acre area, were proposed to be opened for mining. *Id.* at 3189. The Supreme Court held that members' use of land "in the vicinity" of the 4500 acres, with no showing that the members' use "extends to the particular 4500 acres" in question, was insuffi-

ment slightly more stringent. Merely claiming that the interests allegedly injured by agency action are "among the sorts of interests that [a] statute was specifically designed to protect"¹⁸ will be insufficient to meet the APA's requirement of "actually affected or aggrieved".¹⁹ Plaintiffs must now allege that their interests were "actually affected."²⁰

2. *Argument on "actually affected" (injury-in-fact) and the "zone of interests"*

Petitioners may argue, based on pleadings, depositions, and other evidence before the court when the motion for summary judgment was made, that they have alleged evidence sufficient to establish that their members were injured-in-fact in a variety of interests. The interests of Petitioner-EF's and Petitioner-DCA's members will be "actually affected" when the members come into contact with lands or other resources that have been (or may be) contaminated by Biocore. Biocore (which is as yet untested outside the laboratory and which may attack, destroy, or injure things other than missile fuel) may potentially migrate outside of its initial zone of application on the base and come into contact with Petitioners' members through their contact with contaminated land, air, or water. Biocore may migrate on its own (it is a living thing) or on tires, machinery or equipment, shoes, etc. It could also migrate through the air or water in the event of rain or a flood (the base is located in a 100-year floodplain).²¹

a. *Aesthetic, environmental, and conservational injury*

Petitioner-EF may argue that the evidence before the court demonstrates that its members' interest in the aesthet-

cient to establish injury in fact or actually affected. *Id.*

18. *Id.* at 3187.

19. *Id.* at 3189.

20. *Id.*

21. A one-hundred-year floodplain has been defined as an area which is, on average, likely to be flooded every 100 years. *Shanty Town Assoc. Ltd. Partnership v. Environmental Protection Agency*, 843 F.2d 782, 786 n.3 (4th Cir. 1988).

ics of the area surrounding the base may be injured by the Department's application of Biocore to the missile site without first preparing an EIS.²² The courts recognize injury to aesthetic interests as sufficient to confer standing.²³ The Department may counter that the aesthetic injuries alleged are insufficient to establish standing because they are not "palpable and distinct,"²⁴ are "too abstract,"²⁵ the occurrence of injury to that interest is "too remote"²⁶ or that, based on the facts, the aesthetic interest itself will not be injured.²⁷ According to this argument, the Petitioners have failed to allege their interests have been or will be actually affected as required.²⁸

b. Recreational injury

Since the Supreme Court recognizes recreation as a valid interest which may be injured by agency action,²⁹ Petitioner-

22. An example of an aesthetic injury would be loss of viewing the environment. See *Coalition for Env't v. Volpe*, 504 F.2d. 156, 167 (8th Cir. 1974).

23. The Court, in *Sierra Club v. Morton*, recognized that "[a]esthetic and environmental well-being . . . are important ingredients of the quality of life in our society." 405 U.S. 727, 734 (1972). The Court did "not question that this type of harm may amount to an 'injury-in-fact' sufficient to lay the basis for standing under . . . the APA." *Id.* In addition, a recent district court decision acknowledged, that "[t]here is no question but that ' . . . aesthetic enjoyment' [is] among the sorts of interests that . . . NEPA [was] specifically designed to protect." *Sierra Club v. Robertson*, 764 F.2d 546, 552 (W.D. Ark. 1991) (environmental group sought standing by alleging adverse effects on recreational use and aesthetic enjoyment of national forests due to logging activities).

24. *Warth v. Seldin*, 422 U.S. 490, 501 (1975) (petitioner must allege a distinct and palpable injury to himself, even if it is an injury shared by a large class of other possible litigants).

25. *Allen v. Wright*, 468 U.S. 737, 752 (1984); See also *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972) (holding that the plaintiff lacked standing to challenge the club's racially discriminatory membership practices since he had never applied for membership and therefore had never personally been discriminated against by the club).

26. *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 722-723 (1973) (White, J., dissenting in part). Plaintiff's environmental and aesthetic injuries were allegedly due to imposition of an ICC rate surcharge which would eventually result in reduced recycling which would in turn cause these injuries and thus, were "so remote, speculative and, insubstantial in fact that they fail to confer standing." *Id.*

27. *Lujan v. National Wildlife Fed'n (NWF)*, 110 S.Ct. 3177, 3187-3189 (1990).

28. *Id.*

29. The Court, in *Sierra Club v. Morton*, recognized that actions "impair[ing]

EF may argue that the evidence before the court demonstrates that its members' recreational interest in the land adjacent to the base may be injured by the Department's application of Biocore to the missile site without first preparing an EIS. Petitioner-EF may assert: (1) that since Biocore may be toxic to human, plant, or animal life if it should come into contact with the lands adjacent to the base, Petitioner-EF's members would be prevented from using local natural resources and (2) that such injury would be precluded by preparation of an EIS.

The Department may reply that, although the Supreme Court has recognized recreation as a valid interest, the Petitioner-EF cannot claim injury unless its members are more than mere trespassers or licensees with regard to any lands potentially impacted by application of Biocore.³⁰ If they are not more than trespassers or licensees, Petitioner-EF's members will not be possessed of any interest which is capable of being affected by a proposed agency action because their presence on the land in question may be terminated by the landowner upon demand.³¹ Petitioner-EF may counter this argument by putting forth proof, in the form of Equalia Emelia's affidavit, that at least one of its members in the immediate area of the Venice missile base is a property owner with interests capable of being injured by the Department's proposed action. In response, the Department may argue that residents of an area which is likely to be affected by an agency action do not have standing to challenge the agency action.³²

the enjoyment of the park . . . [were the] type of harm [that] may amount to an 'injury in fact' sufficient to lay the basis for standing under . . . the APA." 405 U.S. at 734. The Court in, *Lujan v. NWF*, also stated that it had "no doubt that 'recreational use' [is] among the sorts of interests [NEPA was] specifically designed to protect." 110 S.Ct. at 3187.

30. See *Conservation Council of North Carolina v. Costanzo*, 505 F.2d 498, 502 (4th Cir. 1974) (where owners of a site would probably not allow plaintiffs to continue to use the site, lack of the "possibility of future use [of] the challenged construction cannot harm the plaintiffs").

31. *Id.*

32. See *South East Lake View Neighbors v. HUD*, 685 F.2d 1027, 1034 n.6 (7th Cir. 1982)(plaintiffs challenging a HUD housing project did not have standing to challenge the Agency's actions since they did not apply to live in the building nor did

Finally, the Department may argue that the injuries alleged are insufficient to establish standing because they are not "palpable and distinct,"³³ are "too abstract,"³⁴ are "too remote,"³⁵ or that the interest itself will not be actually affected.³⁶

c. Procedural injury

Both Petitioner-EF and Petitioner-DCA may argue that the Department's failure to prepare an EIS under NEPA prior to applying Biocore at the Venice missile site will result in procedural injuries to the organizations and their members. To successfully make this argument, Petitioners must claim that failure to perform an EIS creates the risk that serious environmental impacts related to use of Biocore will be overlooked.³⁷ The Department may counter that, even if such a "procedural injury" exists, Petitioners have failed to allege that they have the required "geographical nexus to the site of the challenged project [so that they] may be expected to suffer whatever environmental consequences the project may have."³⁸

Petitioners-EF and -DCA may argue that their members will be sufficiently geographically close to Biocore to experi-

they even express an interest or intent to live in the building).

33. See *supra* note 24.

34. See *supra* note 25.

35. See *supra* note 26.

36. See *supra* notes 16-20 and accompanying text.

37. See *City of Davis v. Coleman*, 521 F.2d 661, 670-71 (9th Cir. 1975) and *City of Los Angeles v. National Highway Traffic Safety Admin.*, 912 F.2d 478, 483 (D.C. Cir. 1990). Procedural injury occurs when an organization's members' interest is injured as a result of an agency's failure to prepare an impact statement before implementing its plan. *Foundation on Economic Trends v. Lyng*, 943 F.2d 79, 83, n.3 (D.C. Cir. 1991). It is important to note that the alleged injury "arises directly from the agency's proposed action rather than from the agency's failure to create or consider an impact statement." *Id.* at 83.

38. *Friends of the Earth v. United States Navy*, 841 F.2d 927, 932 (9th Cir. 1988) (quoting *City of Davis v. Coleman*, 521 F.2d 661, 667 (9th Cir. 1975)); *Oregon Envtl. Council v. Kunzman*, 817 F.2d 484, 491 (9th Cir. 1987) (plaintiff's members live in a state which actually experiences the gypsy moth problem and thus, plaintiffs have standing to challenge a nationwide EIS that will allow pesticides to be sprayed on the gypsy moths within their state).

ence its environmental consequences. Petitioner-EF may argue sufficient nexus based on the facts found in its affidavits regarding its members' use of natural resources surrounding the edge of the base and the resulting potential contact its members will have with Biocore or Biocore's environmental consequences.

Since the Department has stated that if its use of Biocore in Venice is successful, it expects to use Biocore to clean up other bases, Petitioner-DCA may argue sufficient nexus based on the facts found in its affidavits regarding its members' presence on northern Italian and other bases. Finally, the Department may argue that the injuries alleged are insufficient to establish standing because they are not "palpable and distinct,"³⁹ are "too abstract,"⁴⁰ are "too remote,"⁴¹ or that the interest itself will not be actually affected.⁴²

d. Informational injury

Both Petitioners, as organizations, may argue that their programmatic activities have been subjected to an informational injury.⁴³ Informational injury results from the lack of information pertaining to a proposed agency action.⁴⁴ The lack of information is created by the Department's failure to perform an EIS before using Biocore at the Venice missile site.

To show informational injury-in-fact, Petitioners EF and DCA must assert more than mere "setback [of its] abstract social interests."⁴⁵ Petitioners must show: (1) that the information is "essential to the injured organization's activities; . . .

39. See *supra* note 24.

40. See *supra* note 25.

41. See *supra* note 26.

42. See *supra* notes 16-20 and accompanying text.

43. *Competitive Enter. Inst. (CEI) v. National Highway Traffic Safety Admin.*, 901 F.2d 107, 122-123 (D.C. Cir. 1990). "Petitioners must assert a plausible link between the agency's action, the informational injury, and the organization's activities." *Id.* at 122.

44. *Id.* "[O]rganizations must point to concrete ways in which their programmatic activities have been harmed." *Id.* at 123.

45. *Havens Realty Corp v. Coleman*, 455 U.S. 363, 378-79 (1982).

[and (2) that lack of such information] render[s] those activities infeasible; . . . [and, (3) that there is] a plausible link between the agency's action, the informational injury, and the organization's activities."⁴⁶ Petitioners must "point to concrete ways in which their programmatic activities have been harmed."⁴⁷ All of Petitioner-EF's and -DCA's arguments, here, will be based on creative use of the facts provided in their respective affidavits.

The Department may argue that neither organization is informationally injured by its failure to prepare an EIS. An EIS need not be prepared merely to supply information to an organization that feels such information would be useful or helpful to the organization.⁴⁸ The Department may also argue that the injuries alleged are insufficient to establish standing because they are not "palpable and distinct,"⁴⁹ are "too abstract,"⁵⁰ are "too remote,"⁵¹ or that the interest itself will not be actually affected.⁵²

e. Economic injury and the "zone of interests"

In *Association of Data Processing Service Organizations, Inc. v. Camp*,⁵³ the Supreme Court originated the two-pronged test for standing that incorporated the "zone of interests" test.⁵⁴ The "zone of interests" is that group of interests

46. *Competitive Enter. Inst.*, 901 F.2d. at 122.

47. *Id.* at 123.

48. The courts have "never sustained an organization's standing in a NEPA case solely on the basis of 'informational injury,' that is damage to the organization's interest in disseminating the environmental data an impact statement could be expected to contain." *Foundation on Economic Trends v. Lyng*, 943 F.2d 79, 84 (D.C. Cir. 1991).

49. *See supra* note 24.

50. *See supra* note 25.

51. *See supra* note 26.

52. *See supra* notes 16-20 and accompanying text.

53. 397 U.S. 150 (1970).

54. *Id.* The two-pronged test requires that there be an actual injury sufficient to satisfy both the constitutional "case" or "controversy" requirement and that "the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Id.* at 153.

In *Association of Data Processing Service Organizations*, a suit was brought to

which a statute has been created to protect.⁵⁵ Because NEPA's purpose is to provide protection for the environment by forcing federal agencies to consider the environmental consequences of their decisions,⁵⁶ NEPA's "zone of interests" encompasses "environmental interests affecting quality of the human environment."⁵⁷

The Department may claim that Petitioner-DCA's only interest in bringing this suit is an economic interest based on its inability to bid on a contract for the application of Biocore. Because purely economic interests are not protected by NEPA,⁵⁸ such an interest is not within NEPA's "zone of interest". Based on this chain of reasoning, the Department may argue that Petitioner-DCA lacks standing to sue here.

Petitioner-DCA may respond by arguing that it has environmental interests in addition to its economic interests. These environmental interests are evidenced by Petitioner-DCA's comments to its mission statement which assert Petitioner-DCA's desire to achieve a safe and healthy environment and safe workplaces for its employees. So long as an environmental interest is allegedly injured, standing will not be denied even if economic self-interest is the plaintiff's main goal in challenging the agency's action.⁵⁹

prevent the Comptroller of the Currency from authorizing banks to provide the same services that the organization's members provided. The organization claimed that its members would be economically harmed by such an authorization (an allegation of injury in fact) and that the statute in question was "arguably" meant to prevent companies from having to compete with banks in non-banking services (an allegation that its claim was within the "zone of interest" of the Bank Services Corporation Act). *Id.* at 151-153.

55. *Id.* at 153-154; *see also* Administrative Procedure Act, 5 U.S.C. section 702 (1988).

56. 42 U.S.C. § 4321 and 4331.

57. 42 U.S.C. § 4332(C) (1988); *see* Realty Income Trust v. Ekerd, 564 F.2d 447, 452-453 (D.C. Cir. 1977); *see also* Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 348-353 (1989).

58. Port of Astoria, Oregon v. Hodel, 595 F.2d 467, 475 (9th Cir. 1979). "[A]lleged injuries representing only pecuniary losses and frustrated financial expectations . . . [that are] outside of NEPA's zone of interests and are not sufficient to establish standing." *Id.*

59. The fact that the plaintiff's main interest in bringing the suit is economic self-interest will not bar the plaintiff if the economic interest is tied to an environmental interest. Realty Income Trust, 564 F.2d at 452; *see* Pack v. Corps of Eng'rs,

- B. *Is the Department's decision to apply Biocore at the Venice, Italy clean-up site, without first preparing an Environmental Impact Statement (EIS), final agency action within the meaning of the Administrative Procedure Act (APA) such that the decision is reviewable in a court of law?*

1. Introduction

In its motion for summary judgment, the Department asserts that this court does not have jurisdiction to review the Department's decision to forego preparation of an Environmental Impact Statement (EIS) prior to applying Biocore since this decision is preliminary and not "final."⁶⁰ Both Petitioner-EF and Petitioner-DCA (hereinafter "Petitioners") assert that the Department's decision to apply Biocore without first preparing an EIS constitutes final agency action within the meaning of the APA,⁶¹ and therefore is reviewable.

The doctrine of final agency action prevents the courts from becoming prematurely involved in administrative disputes.⁶² In addition to the "finality" requirement, in order to obtain judicial review a litigant must "exhaust all administrative remedies"⁶³ and ensure that the issues are "ripe"⁶⁴ for

428 F. Supp. 460, 465 (M.D. Fla. 1977) (economic interest in shrimping necessarily incorporates an environmental interest in conserving shrimp).

60. See *infra* note 54.

61. The Administrative Procedure Act (APA) defines agency action as including "the whole or part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." APA, 5 U.S.C. § 551(13) (1988).

62. *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148-149 (1967). The basic rationale of ripeness is to "prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties". *Id.*

63. Exhaustion requires the court to focus on the issue to be litigated and its location in the administrative process. Before seeking relief in the courts, a litigant must have used all administrative avenues available for relief or the court must dismiss the case. JAMES T. O'REILLY, ADMINISTRATIVE RULEMAKING § 14.06 (1983).

64. Even though a litigant has exhausted all administrative remedies, judicial review will still be denied if the issue is not ripe. VALERIE M. FOGLERMAN, GUIDE TO THE NATIONAL ENVIRONMENTAL POLICY ACT, § 6.4 (1983). Unlike exhaustion, ripeness focuses on the issue itself and its effect on the pleading party. "[R]ipeness goes beyond

review.

To survive a motion for summary judgment on the issue of final agency action, a litigant must put forth facts sufficient to prove the two elements of final agency action.⁶⁵ First, there must be an action or event which qualifies as "agency action" under APA section 702⁶⁶ and the applicable case law.⁶⁷ Second, the agency action must be "final" within the meaning of APA, section 704,⁶⁸ "as construed in judicial decisions."⁶⁹

2. *Is this agency action?*

Since this issue appears in the context of a motion for summary judgment, the burden is on Petitioners to set forth facts sufficient to prove that the Army's decision not to pre-

[exhaustion] to decide . . . 'whether rights or obligations have been determined or legal consequences will flow from the agency action'." O'REILLY, *supra* note 61 at § 14.06 (citing *Abbott Laboratories* at 148-150).

For example, the court here may find that without actual implementation, the effects of the agency's decision upon the litigant may be ambiguous. Thus, the court may decide to dismiss for lack of ripeness until the effects of the agency's decision are clearer. Determining the ripeness of an action requires the court to perform a two-step analysis and "evaluate both the [1] "fitness" of the issues for judicial decision and the [2] "hardship" to the parties of withholding court consideration." *Abbott Laboratories*, at 149. The first step of "fitness" refers to "finality" of the agency's decision. *Id.*

65. *Lujan v. National Wildlife Fed'n (NWF)*, 110 S. Ct. 3177, 3187-3189 (1990).

66. APA, 5 U.S.C. § 702 provides judicial review for "person[s] suffering legal wrong because of *agency action* within the meaning of a relevant statute . . ." (emphasis added).

APA § 551(13) defines agency action as including "the whole or part of an agency rule, order, license, sanction, relief, or the equivalent of denial thereof, or failure to act."

67. *Foundation on Economic Trends v. Lyng*, 943 F.2d 79, 82-83 (D.C. Cir. 1991). Citing the Supreme Court's decision in *Lujan*, the court held that "merely because agency activities are termed a 'program' does not mean there is 'identifiable final agency action for purposes of APA.'" *Id.* at 86 (quoting *Lujan*, 110 S.Ct. 3189-90 n.2 (1990)).

68. APA, 5 U.S.C. § 704 reads as follows:

Agency action made reviewable by statute and *final agency action for which there is no other adequate remedy in a court are subject to judicial review.*

A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action .

Id. (emphasis added).

69. *Abbott Laboratories v. Gardner*, 387 U.S. 136, 149 (1967).

pare an EIS is a final agency action and thus ripe for judicial review under the APA. Petitioners may argue that the Department's decision to apply Biocore without first preparing an EIS constitutes a formal order or regulation and thus constitutes agency action under APA, section 702. The Department, however, may assert that its preliminary proposal to apply Biocore was not promulgated in a formal manner and thus is not agency action for the purpose of judicial review under APA, section 702.

A strict application of the statutory definition of "agency action"⁷⁰ mandates that the action or decision at issue constitutes "the whole or part of an agency rule,⁷¹ order,⁷² . . . or the equivalent."⁷³ Although not specifically an "order" or a "rule" as defined in the APA, the Court has determined that a regulation is an agency action since it was "promulgated in a formal manner after announcement in the Federal Register and [after] consideration of comments by interested parties [was] quite clearly definitive."⁷⁴

More than twenty years later, the Supreme Court, in *Lujan v. National Wildlife Federation (NWF)*, once again attempted to define "agency action."⁷⁵ Supporting the *Abbott* Court's use of the term "regulation," the Court stated that agency action is "limited to actions taken pursuant to a specific regulation or order" and does not include the agency's general activities.⁷⁶ In *Lujan*, NWF challenged the activities

70. APA § 551(13); see *supra* note 54.

71. A "rule," as defined by the APA, "means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency." APA § 551(4).

72. An "order," as defined by the APA, "means the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing." APA § 551(6).

73. APA § 551(13).

74. *Abbott Laboratories*, 387 U.S. at 151. Although the Court did not engage in an extensive analysis of "agency action" within the meaning of the APA, it did suggest that regulations which were "informal" or "only the ruling of a subordinate official," or "tentative" would not be agency action under the APA. *Id.*

75. 110 S.Ct. 3177 (1990).

76. *Lujan*, 110 S. Ct. at 3181; see Lynn R. O'Donnell, *New Restriction in Environmental Litigation: Standing and Final Agency Action After Lujan v. National*

undertaken by the Bureau of Land Management (BLM) in accordance with the Federal Land Policy and Management Act (FLPMA).⁷⁷ The NWF labeled the Bureau's required activities as the "Land Withdrawal Review Program."⁷⁸ The Court held that this "program" was not an identifiable action or event, but instead merely a name given by the plaintiffs that "referred to the continuing . . . operations of the [BLM] . . . as required by the FLPMA."⁷⁹ Consequently, the Court found that the "program" was not an agency action or a regulation⁸⁰ as defined in the APA.⁸¹

In support of their argument that the Department's decision to apply Biocore without first preparing an EIS is agency action, Petitioners will assert that *Lujan* is distinguishable from recent case law finding an agency action where there is an "actual and 'integrated plan'."⁸² Thus, Petitioners may assert that the Army's specific plans to clean up the spilled missile fuel at the Venice missile site by applying Biocore, as described in its "Summary Environmental Analysis," provides an actual and integrated plan. Petitioners may also argue that the preparation of the "environmental assessment" constitutes agency action.⁸³

However, the Department may argue that the words of the Supreme Court in *Lujan* are controlling law. In support of

Wildlife Federation, 2 VILL. ENVTL. L.J. 227 (1991).

77. *Lujan*, 110 S.Ct. at 3182.

78. *Id.* at 3184.

79. *Id.* at 3189 n.2, 3194.

80. Exactly what is a "regulation" for the purposes of agency action under the APA after *Lujan* is unclear. Some authorities suggest that after *Lujan* "agency action pursuant to an informal program, that is a program which the agency has not set forth in a formal policy, does not constitute final agency action. Instead, final agency action is limited to action taken pursuant to a specific regulation or order promulgated by the agency." O'Donnell, *supra* note 76, at ____.

81. *Lujan* at 3189 n.2, 3194.

82. *Sierra Club v. Robertson*, 764 F. Supp. 546, 554 (W.D. Ark. 1991)(plan included "prescriptive measures and standards").

83. *Nevada v. Watkins*, 939 F.2d 710, 715 (9th Cir. 1991) (citing 42 U.S.C. § 10132(d)(1988)). The Court of Appeals held that promulgation of guidelines was not final agency action but instead was "preliminary decision-making activity" as defined in the Nuclear Waste Policy Act (NWPA). *Id.* at 715. Under NWPA, final agency action subject to judicial review occurred upon the issuance of an "environmental assessment." *Id.* at 715-716.

its claim that its activities are not agency action within the meaning of the APA, the Department may argue that the facts in the present case are similar to the facts in *Lujan*. The Department may argue that its activities regarding clean-up of the missile site are merely "continued operations" of the Army and do not constitute a decision, rule or regulation and thus are not agency action within the meaning of APA section 702.

3. *If agency action exists - Is it final?*

Petitioners may argue that the accumulation of Department activities leading up to Biocore's planned use constitutes final agency action. The Department may rebut that they have not yet reached a final decision regarding the application of Biocore at the missile site because they have not issued travel orders to Army personnel who will be responsible for applying the Biocore.

Since there is no statutory definition of "finality," the courts have construed the "finality" element of *final agency action* in a pragmatic way.⁸⁴ In 1967, the Supreme Court in *Abbott Laboratories v. Gardner*⁸⁵ found "finality" to exist where an agency's decision, although not yet implemented, created an expectation of conformity which *could* lead to a cognizable injury.⁸⁶ Where such an expectation is created, the Court will consider the action to be final and ripe for review.⁸⁷

84. *Abbott Laboratories v. Gardner*, 387 U.S. 136, 149 (1967). In *Abbott Laboratories* the FDA passed a rule requiring drug manufacturers to include the generic name of a drug every time the drug's trade name was used on a label. Prior to FDA's enforcement of the rule the drug companies sought judicial review of the agency's decision. *Id.* at 138-140. In analyzing the issue of finality the Court took a pragmatic and flexible approach holding that the FDA's regulation was final agency action subject to review because "the impact of the regulations upon the petitioners [was] sufficiently direct and immediate as to render the issue appropriate for judicial review at this stage." *Id.* at 152.

85. 387 U.S. 136.

86. *Id.* at 149-150 (citing *Columbia Broadcasting System v. United States*, 316 U.S. 407 (1942)).

87. *Id.* at 149-150. This holding is significant in its relation to ripeness since, as previously noted, ripeness requires some actual implementation of the agency's decision.

In 1990, in *Lujan*, the Supreme Court narrowed the *Abbott Laboratories* exception and stated that an agency's decision is not final where the future effects of the decision do not produce some sort of immediate harm to the plaintiff.⁸⁸ The Supreme Court described the "sufficiently direct and immediate"⁸⁹ harm requirement for finality, holding that "under the terms of the APA [the plaintiff] must direct its attack against some particular 'agency action' that causes it harm."⁹⁰

Focusing on the actual harm to the litigant in determining "finality,"⁹¹ the Court held that:

a regulation is not ordinarily considered the type of agency action 'ripe' for judicial review under the APA until the scope of the controversy has been reduced to more manageable proportions, and its factual components fleshed out, by some concrete action applying the regulation to the claimant's situation in a fashion that harms or threatens to harm [the claimant]."⁹²

Despite the requirement of actual (present or threatened) harm, the Court recognized the *Abbott Laboratories* decision and stated that agency action is ripe for review where, as a practical matter, the agency's actions require the litigant to "adjust his conduct immediately."⁹³

Therefore, in the present case, Petitioners may assert the holding in *Abbott Laboratories*⁹⁴ and allege that the Depart-

88. *Lujan v. National Wildlife Federation* (NWF), 110 S.Ct. 3177 (1990).

89. *Abbott Laboratories*, 387 U.S. at 152.

90. *Lujan*, 110 S. Ct. at 3190. The court did acknowledge that some statutes (other than the APA) may allow broad regulations to be considered "agency action" even though the "concrete" effects required by the APA have not been felt. *Id.* This exception, however, does not apply to the present situation since the applicable statute is the APA and not another statute.

91. Although a regulation may be considered agency action for purposes of judicial review, unless the regulation causes specific harm or has "concrete" effects it would not be considered ripe for judicial review. *Lujan*, 110 S.Ct. at 3190.

92. *Id.* Analyzing the specific language in the APA section 551(4), the Court focused on the required "future effect" stating that even if the action does fall within the definition of a "rule," such an action "will not be ripe for challenge until some further agency action or inaction more immediately harming the plaintiff occurs." *Id.*

93. *Id.* at 3190.

94. See *supra* notes 85-87 and accompanying text.

ment's decision to apply Biocore without first preparing an EIS creates an expectation that Biocore will be applied thus raising a future injury which would cause Petitioners to immediately adjust their conduct.⁹⁵ The Department, however, will refute this argument and apply *Lujan's* narrower requirement of a more immediate effect on the Petitioners. The Department will also argue that since it has not issued travel orders its decision is not final, but is instead merely a preliminary decision.⁹⁶

Even though it is the Department's standard practice not to consider a decision final until travel orders are issued, Petitioners may argue that failure to issue such orders is not determinative of finality since: (1) other actions create an expectation that Biocore will be applied;⁹⁷ (2) the travel orders are effectively issued because the official charged with that duty, Colonel Indigo, plans to issue the orders unless the judge stops him; and, (3) the Army employees designated to apply Biocore were told orally by their supervisors to expect to travel to Italy for this purpose during the summer of 1992.⁹⁸

95. A decision not to prepare an EIS is final agency action for NEPA purposes. *Portland Audubon Soc'y v. Lujan*, 712 F. Supp. 1456, 1483 (D. Ore. 1989) *aff'd in part and rev'd nonpertinent part*, 884 F.2d 1233 (9th Cir. 1989).

96. *See, Nevada, et al. v. Watkins*, 939 F.2d 710, 715 (9th Cir. 1991); (citing 42 U.S.C. § 10132(d)(1982)) (The Court of Appeals for the Ninth Circuit held that under the Nuclear Waste Policy Act (NWPA) a promulgation of guidelines was not final agency action but was instead only a "preliminary decision making activity"); and J.T. O'REILLY, ADMINISTRATIVE RULEMAKING § 14.08 (Supp. 1991).

97. For example, the Army announced at a congressional hearing that it intended to apply Biocore, it completed a "Summary Environmental Analysis of the Venice, Italy, Missile Site Clean-up;" it set aside \$500,000 to cover the project's expenses; a deputy assistant secretary of defense gave congressional testimony describing the Venice plans as the "Department's program for fiscal year 1992;" and it prepared an Environmental Assessment and a "finding of no significant impact" on Biocore's laboratory development.

98. *Sierra Club v. Robertson*, 764 F.2d 546 (W.D. Ark. 1991) The District Court held that even though the plaintiff's standing would be at best tenuous because the agency could withdraw its decision, it does not mean that there is no finality. *Id.* To hold otherwise would contradict the purpose of judicial review by allowing agencies to change their positions whenever they were threatened by a suit. *Id.*

III. THE EXTRATERRITORIAL APPLICATION OF NEPA

- A. *Is the Department's decision to apply Biocore at a missile site outside the boundaries of the United States (i.e. - at the Venice, Italy clean-up site) subject to the requirements of NEPA such that the Department is required to prepare an EIS prior to applying Biocore at the Venice clean-up site?*

1. Introduction

First, Petitioner's may argue that the Department is bound to comply with NEPA in this matter. In response, the Department may claim that Congress does not have authority to apply NEPA extraterritorially. In order for Congress to legislate extraterritorially, an internationally recognized basis must exist. Petitioners may reply that Congress has the authority to apply NEPA extraterritorially because United States citizens will be affected and because NEPA proscribes the actions of United States agencies which are persons under section 402 of the Restatement.⁹⁹

The Department may argue against the extraterritorial application of NEPA, claiming that such application would be unreasonable under the principles of international law because it would infringe upon the sovereignty of foreign nations by dictating the environmental considerations the foreign nations should consider when acting in conjunction with United States federal agencies. Petitioners may oppose the Department's claim of unreasonableness by contending that NEPA controls only federal agencies and does not place any burden or affirmative duties on foreign nations.

If Congress has the authority to proscribe NEPA extraterritorially, the Department will argue that the presumption against extraterritorial application of United States statutes applies and that NEPA may not be applied extraterritorially unless the Petitioners successfully overcome the presumption.

99. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 402.

Petitioners may argue the presumption does not apply here since NEPA is concerned with world, rather than just domestic problems.

If the presumption against extraterritorial application is found to apply here, the next issue which may arise is that of the proper showing the Petitioners must make to rebut the presumption. The Department may argue that the presumption can only be rebutted through a "clear expression" of Congress' intent to have the statute apply extraterritorially. Petitioners may counter that rebuttal of the presumption requires a "clear expression" only if the statute threatens to conflict with the laws of a foreign nation.

Regarding the issue of Executive Order 12,114, Petitioners may argue that the Executive Order is reviewable, that it requires federal agencies follow NEPA when carrying out extraterritorial actions, and that it is enforceable. However, the Department may argue that the Executive Order, by its language, is neither reviewable nor enforceable.

Finally, Petitioners may claim that the Department acknowledged that NEPA applies when it created its Finding of No Significant Impact (FONSI), and is now trying to escape review for its inadequate assessment by claiming that NEPA does not apply. The Department may defend that it completed the FONSI despite its belief that NEPA does not apply and that, nevertheless, the FONSI satisfies its responsibilities under NEPA.

B. Congress' authority to apply NEPA extraterritorially and the presumption against extraterritorial application of United States statutes.

1. Congress' authority to apply NEPA extraterritorially.

In response to the Petitioners' argument that the Department is bound to comply with NEPA in this matter, the Department may claim that Congress does not have the authority to apply NEPA extraterritorially because in order for Congress to legislate extraterritorially, an internationally recognized legal basis must exist. The Department will claim that

no basis exists because the Department's action does not take place in the United States, will have no effects within the United States, and will not affect United States citizens.¹⁰⁰ The basis for extraterritorial application of United States statutes are enumerated in the Restatement (Third) of the Foreign Relations Law of the United States.¹⁰¹

Petitioners may reply that a basis exists for Congress to apply NEPA extraterritorially because United States citizens will be affected and because NEPA proscribes the actions of United States agencies, which are persons under section 402 of the Restatement. Arguing by analogy, the Petitioners may cite Supreme Court cases which support their view that Congress could properly intend that NEPA be applied extraterritorially because it merely proscribes the actions of United States agencies. For example, in *Equal Employment Opportunity Comm'n v. Arabian American Oil Company (Aramco)*,¹⁰² the Court stated, without explanation, that Congress' authority to enforce its laws beyond the territorial boundaries of the United States was an issue which the parties "must" concede.¹⁰³ Petitioners also noted that the Department intends to use Biocore at other bases in Europe and within the United States. Therefore, failure to perform an EIS is an action of which effects may be felt within the United States or may affect other United States citizens.

The Department may argue against the extraterritorial

100. See *Tamari v. Bache & Co.*, 730 F.2d 1103, 1107-08 (7th Cir. 1984) (holding that Congress' authority depends on whether the conduct occurred within the United States (the conduct test) or, if it occurred outside the United States, whether it had effects within the United States (the effects test)).

101. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 402 (1987).

Subject to § 403, a state has jurisdiction to prescribe law with respect to

(1)(a) conduct that, wholly or in substantial part, takes place within its territory; . . .

(c) conduct outside its territory that has or is intended to have substantial effects within its territory;

(2) the activities, interests, status, or relations of its nationals outside as well as within its territory

Id. § 402.

102. 111 S. Ct. 1227 (1991) [hereinafter *Aramco*].

103. *Id.* at 1230.

application of NEPA claiming that such application would be unreasonable under the principles of international law. The Department would claim that the application would infringe upon the sovereignty of foreign nations by dictating the environmental considerations of actions in conjunction with U.S. federal agencies. In order for Congress to intend extraterritorial application of an act, the exercise of authority must also be *reasonable* under the principles of international law as expressed in the RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES.¹⁰⁴ The Supreme Court has stated that the United States can govern its own citizens if the "rights of other nations or their nationals are not infringed."¹⁰⁵

The Department may support its argument by stating that the general principle of international law, as expressed in Principle 21 of the Stockholm Declaration of 1972, of which

104. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 403 (1987). Section 403 provides that:

(1) Even when one of the bases for jurisdiction under § 402 is present, a state may not exercise jurisdiction to prescribe law with respect to a person or activity having connections with another state when the exercise of such jurisdiction is unreasonable.

(2) Whether exercise of jurisdiction over a person or activity is unreasonable is determined by evaluation all relevant factors, including, where appropriate:

(a) the link of the activity to the territory of the regulating state, i.e., the extent to which the activity takes place within the territory, or has substantial, direct, and foreseeable effect upon or in the territory; . . .

(c) . . . the character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted; (h) the likelihood of conflict with regulation by another state.

(3) . . . a state should defer to the other state if that state's interest is clearly greater.

Id. § 403. See *id.* at comment a (explaining that courts generally interpret statutes not to apply where to do so would be unreasonable); *id.* at cmt. g (explaining that courts will prefer the construction of a statute which will avoid conflict with the law of another state); *id.* at Reporter's Notes para. 2 (explaining that it is more plausible to find extraterritorial application when the law has international focus); *id.* at Reporter's Notes para 3. (explaining that "the principle of reasonableness calls for limiting the exercise of jurisdiction so as to minimize conflict with the jurisdiction of other states").

105. *Steele v. Bulova Watch Co.*, 344 U.S. 280 at 285-286 (1952) (quoting *Skiriotes v. Florida*, 313 U.S. 69, 73 (1941)).

the United States is a signatory, is that all nations have the right to apply their own environmental analysis policies when conducting projects which will affect the environment.¹⁰⁶ It may strengthen its argument by explaining that acceptable clean-up of the Venice missile base should be an issue for the Italian Government since it is the Italian Government that will be affected by project delay, the impacts of other treatment methods, and by the possibility that it may have to compensate the Department for the costs of a clean-up.

Petitioners may oppose the Department's claim of unreasonableness by contending that NEPA's extraterritorial application is a reasonable extension of the statute and, within the authority of Congress because NEPA controls only federal agencies, which constitutes a reasonable exercise of Congress' authority. Petitioners may also argue that the extraterritorial applications of NEPA is reasonable because it does not place any burden or affirmative duties on foreign nations, because its requirements are procedural, not substantive, and pertain only to federal agency actions in foreign nations. Because NEPA contains language that requires compliance with NEPA "to the fullest extent possible,"¹⁰⁷ agencies implementing NEPA can consider any conflicts with other nations as part of their usual NEPA procedures, thus mitigating any possible unreasonableness. Finally, Petitioners may suggest that the application of NEPA would not be unreasonable because Principle 21 proclaims that all nations have the "responsibility to ensure that activities within their . . . control

106. Declaration of the United Nations Conference on the Human Environment, adopted June 16, 1972, U.N. Doc. A/Conf. 48/14 and Corr. 1, 11 I.L.M. 1416, 1420 (1972) [hereinafter Stockholm Declaration]. Principle 21 states:

States have, in accordance with the Charter of the United Nations and the principle of international law, the *sovereign right to exploit their own resources pursuant to their own environmental policies*, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits on national jurisdiction.

Id.; See Joan Donoghue, *A Poor Fit with Foreign Policymaking, in Should NEPA Apply Abroad?*, (Nov./Dec. 1991) ENVTL. FORUM 27.

107. 42 U.S.C. § 4332 (1988).

do not cause damage to the environment of other States. . . ."¹⁰⁸ Therefore, Petitioners may claim that the Department should be responsible, under Principle 21, for ensuring that the application of Biocore does not cause damage to natural resources either on or off the Venice missile site. NEPA's application would provide such assurance by forcing the Department to consider the impacts of the application of Biocore.

Congress has authority to intend to apply NEPA extraterritorially and courts reviewing NEPA have not questioned Congress' authority to extend NEPA extraterritorially. The courts have, instead, proceeded to the issue of whether Congress intended the Act to be applied extraterritorially.¹⁰⁹

2. Congress' intent to apply NEPA extraterritorially.

If Congress has authority to enforce NEPA extraterritorially, the question then becomes whether Congress has in fact intended to exercise this authority.¹¹⁰ The Department will most likely begin with the premise that laws of the United States are presumed only to apply to domestic conditions.¹¹¹

108. Stockholm Declaration, at 1420. See Nicholas A. Robinson, *Extraterritorial Environmental Protection Obligations of Foreign Affairs Agencies: The Unfulfilled Mandate of NEPA*, 7 N.Y.U. J. INT'L L. & POL. 257, 270 (1974)(stating that Principle 21 articulates the need for Congressional attention to the extraterritorial application of NEPA).

109. See *infra* pp. 55-59.

110. The issue of whether the Venice missile base, as a United States possession, is in fact extraterritorial will not significantly alter the arguments of the parties. No general policy exists regarding the application of United States statutes to possessions. Therefore, the issue will still turn on the congressional intent to apply the statute to the possessions. In *United States v. Spelar*, 338 U.S. 217 (1949), the United States Supreme Court ruled on the application of the Federal Tort Claims Act to a United States air base in Newfoundland. The Court held that, based on the lease between Great Britain and the United States, Great Britain still retained sovereignty over the base and thus was a "foreign country." The court examined the intent of the statute and held that the military base was excluded from the Act because the Act specifically excluded foreign countries. *Id.* at 219. In the present case, if Congress can prescribe NEPA to extend extraterritorially, then the question still turns on the specific intent of the statute to cover the Venice missile base.

111. *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 286 (1949); *Benz v. Compania Naviera Hidalgo, S.A.*, 353 U.S. 138, 143 (1957).

The presumption exists to prevent unintended clashes between United States laws and the laws of foreign nations and because Congress is primarily concerned with domestic conditions.¹¹² In *Aramco*, the Supreme Court echoed the *Foley* Court and affirmed the existence of this presumption.¹¹³

Generally, before courts will apply NEPA or any other act of Congress extraterritorially, Petitioners must overcome this presumption by showing a "clear expression" of Congress' intent to legislate extraterritorially. Petitioners may argue that the presumption against extraterritorial application does not apply here since NEPA is concerned with international, rather than just domestic, conditions. To support this argument, Petitioners may assert that NEPA's purpose unequivocally expresses Congress' concern for conditions beyond United States borders,¹¹⁴ and may cite to *United States v. Bowman*¹¹⁵ for the proposition that "[t]he necessary locus [of a statute's reach], when not specially defined, depends upon the purpose of Congress. . . ."¹¹⁶ Petitioners may also argue that the underlying basis of the presumption - that Congress is primarily concerned with domestic conditions -¹¹⁷ is explicitly negated by the words of NEPA.¹¹⁸ In response, the Department may note that courts reviewing the extraterritorial

112. *Aramco*, 111 S. Ct. 1227, 1230 (1991). See also *Tamari*, 730 F.2d 1103, 1107 (citing the rule that where Congressional intent is unclear, the court can infer Congressional intent from the "effects" test and the "conduct" test).

113. *Aramco*, 111 S. Ct. 1227, 1230 (citing *Foley*, 336 U.S. 281, 284-285, and *Benz*, 353 U.S. 138, 147).

114. 42 U.S.C. 4321 (1970). "The purposes of this chapter are: To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man" *Id.*

115. 260 U.S. 94 (1922).

116. *Id.* at 97-98 (holding that a criminal statute was applicable to U.S. citizens outside U.S. territory because it concerned the right of the U.S. government to protect itself, as opposed to the protection of individual rights).

117. *Foley*, 336 U.S. 281, 285 (1948).

118. NEPA uses the term "worldwide" in expressing the scope of its concern for the environment and this indicates that Congress created the Act to deal with more than just domestic conditions. 42 U.S.C. § 4332(2)(F) (1988).

application of NEPA have subjected the Act to the presumption and have recognized that NEPA could interfere with foreign policy activities of federal agencies, and could adversely impact the activities of foreign nations.¹¹⁹

a. Is a "clear expression" required?

If the presumption against extraterritorial application of United States statutes is found to apply, the next issue which may arise is that of the proper showing the Petitioners' must make to rebut the presumption. While Petitioners may claim that the presumption does not apply, the Department may argue that it does. In addition, the Department may argue that based on *Aramco*, the Petitioners can only rebut the presumption by showing a clear expression within the statute's language of Congress' intent to apply NEPA extraterritorially.¹²⁰

The Department may claim that Congress has not clearly expressed, within the words of NEPA, that it intends NEPA to apply extraterritorially. Therefore, Petitioners cannot successfully rebut the presumption against extraterritorial application. The Department may cite *Environmental Defense Fund (EDF) v. Massey*¹²¹ as persuasive authority that the clear expression must exist within the statutory language.¹²² The district court in *EDF v. Massey* held that NEPA did not apply extraterritorially because Congress did not express intent within the statute. As a result, the court concluded that

119. See *infra* pp. 55-59.

120. The Supreme Court in *Aramco* stated that a "clear expression" was necessary to rebut the presumption of an exclusively domestic application of Title VII of the Civil Rights Act of 1964. *Aramco*, 111 S. Ct. 1227, 1230 (1991). The court in *Aramco* stated that "we look to see whether 'language in the [relevant act] gives any indication of a Congressional purpose to extend its coverage beyond places over which the United States has sovereignty or has some measure of legislative control.'" *Id.* at 1230 (quoting *Foley*, 336 U.S. 281, 285 (1948)). The Court held that the broad language of Title VII failed to rebut the presumption that the statute only applies to domestic conditions. *Id.* at 1234.

121. 772 F. Supp. 1296 (D.D.C. 1991).

122. See *id.* at 1297. The District Court for the District of Columbia held that *Aramco* required a clear expression of Congress' intent to apply NEPA to National Science Foundation actions in Antarctica. The court based its decision on Congress' primary concern with domestic conditions. *Id.*

an examination of the legislative history was not necessary.¹²³

Petitioners may counter that a rebuttal of the presumption against extraterritorial application of a United States statute requires a "clear expression" only if the statute threatens to clash with the laws of a foreign nation. The Supreme Court explained in *National Labor Relations Board (N.L.R.B.) v. Catholic Bishop of Chicago*¹²⁴ that "it is incumbent on us to determine whether the Board's exercise of its jurisdiction here would give rise to serious constitutional questions. If so, we must first identify 'the affirmative intention of the Congress clearly expressed' before concluding that the [National Labor Relations Act] grants jurisdiction."¹²⁵ Petitioners might contend that because no such "serious constitutional question" exists, the "clear expression" requirement is inapplicable. In addition, even if a clear expression was required, the court may infer Congress' intent though not clearly expressed in the language of the statute.

In addition, Petitioners may attempt to distinguish *Aramco* from the present case by arguing that if the Court in *Aramco* required a "clear expression," it was only because it recognized that the extraterritorial application of Title VII "would raise difficult issues of international law by imposing this country's employment-discrimination regime upon foreign corporations operating in foreign commerce."¹²⁶ Petitioners may insist that NEPA does not pose the threat of a clash with the laws of other nations because it only applies to federal agencies, which are already under the control of the United States government. Petitioners may also note that NEPA is solely procedural and does not contain substantive requirements which burden the governments of foreign nations. Therefore, the court need not require Petitioners to show a "clear expression" when attempting to rebut the presumption.

123. *Id.*

124. 440 U.S. 490 (1979).

125. *Id.* at 501 (quoting *Benz*, 353 U.S. 138, 147 (1957)).

126. *Aramco*, 111 S. Ct. 1227, 1234 (1991).

b. Examination of NEPA's language to determine whether a "clear expression" exists

Petitioners may attempt to demonstrate that the language of NEPA does provide a clear expression that Congress intended to apply the statute extraterritorially. In support of this argument, Petitioners might point to the purposes of NEPA.¹²⁷ The Petitioners may also point to the requirement that agencies prepare statements concerning the significant effects of their actions on the "human environment"¹²⁸ and the recognition of the "worldwide and long-range character of the environmental problems"¹²⁹ when preparing an EIS. The Department may respond that Petitioners have failed to rebut the presumption against extraterritorial application since, although NEPA contains broad language concerning the "human environment," it contains no clear expression that federal agencies outside of the United States must comply with its provisions.

Petitioners and the Department may present a cornucopia of excerpts from NEPA's text in arguing the issue of whether Congress' intent can be gleaned from the statute's text. Courts reviewing NEPA's text have not been persuaded that Congress clearly expressed an intent that NEPA should be applied extraterritorially.¹³⁰

c. Examination of NEPA's legislative history to determine whether a "clear expression" exists

Petitioners may argue that, although the Court in *Aramco* stated that a "clear expression" of Congressional intent in the statute is required, *Aramco* should not be interpreted as abolishing the Court's long-standing practice of applying additional tools of construction when determining

127. NEPA's purposes are to "encourage productive and enjoyable harmony between man and his environment . . . and to "promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; . . ." 42 U.S.C. § 4321 (1988).

128. 42 U.S.C. § 4332(2)(C) (1988).

129. 42 U.S.C. § 4332(2)(F) (1988).

130. See *infra* pp 53-54.

Congressional intent. Under the case law relied on in the *Aramco* holding, the traditional tools of statutory construction were used.¹³¹ In the *Aramco* holding, the Court analyzed the statute as a whole, examining the degree of deference due to the EEOC and reviewing Congress' expression of extraterritorial application in additional statutes.¹³² In *Chevron U.S.A. v. Natural Resources Defense Council, Inc.*,¹³³ the Supreme Court held that if a statute does not provide a clear expression of Congress' intent, a court must then determine whether the agency's interpretation is a permissible statutory construction.¹³⁴ Petitioners may attempt to rely upon *Defenders of Wildlife v. Lujan*,¹³⁵ which examined the Endangered Species Act to determine whether it applied extraterritorially. The court in *Defenders of Wildlife* analyzed the statutes legislative history in an attempt to find evidence of Congressional intent.¹³⁶

Both Petitioners and the Department may offer a series of excerpts from NEPA's legislative history in persuading the court that Congress either did or did not intend NEPA to apply extraterritorially. Neither the language of NEPA nor its legislative history are conclusive. Commentators reviewing the statute and legislative history have reached opposite conclusions.¹³⁷

131. See, e.g., *Foley*, 336 U.S. 281, 285 (1940) (the Court examines the legislative history of the Eight Hour Law); *Benz*, 353 U.S. 138, 142-45 (1957) (the Court examines the legislative history of the Labor Management Relations Act of 1947).

132. See *Aramco*, 111 S. Ct. 1227 at 1235-36 (1991).

133. 467 U.S. 837, 842-43 (1984).

134. *Id.*

135. 911 F.2d 117 (8th Cir. 1990). Similarly, the United States District Court for the District of Hawaii, relying on the Supreme Court's analysis in *Foley*, 336 U.S. 281, 285-86 (1949), stated that the proper analysis of whether NEPA applies extraterritorially includes a consideration of the legislative history. *People of Saipan v. United States*, 356 F. Supp. 645, 650 (D. Haw. 1973).

136. *Defenders of Wildlife*, 911 F.2d at 125.

137. Comment, *NEPA's Role in Protecting the World Environment*, 131 U. PA. L. REV. 353, 360 (1982); see Note, *The Extraterritorial Scope of NEPA's Environmental Impact Statement Requirement*, 74 MICH. L. REV. 349, 360-71 (1975); Charles N. Brower, *Is NEPA Exportable?*, 43 ALB. L. REV. 513 (1979); Nicholas A. Robinson, *Extraterritorial Environmental Protection Obligations of Foreign Affairs Agencies: The Unfulfilled Mandate of NEPA*, 7 N.Y.U. J. INT'L L. & POL. 257 (1974).

d. The CEQ interpretation of NEPA's extraterritorial applicability

Petitioners may contend that if the statute and legislative history are not clear in showing whether Congress intended to have NEPA apply extraterritorially, the court must defer to the interpretation of the Council on Environmental Quality (CEQ). The CEQ appears to interpret NEPA as having extraterritorial applications regarding actions with effects outside the United States borders.¹³⁸ In support of this argument, Petitioners may note that the Supreme Court, in *Chevron*, held that when a statute and its legislative history are unclear regarding an issue, courts should defer to the statutory interpretation offered by the agency charged with implementing the statute.¹³⁹

In addition, the Petitioners may argue that the Supreme Court has repeatedly ruled that in the context of NEPA, the CEQ's interpretations are entitled to "substantial deference"¹⁴⁰ and that where "administrative guidelines conflict with earlier pronouncements of the agency, . . . substantial deference is nonetheless appropriate if there appears to have been good reason for the change. . . ."¹⁴¹ The Department may counter that the CEQ interpretation is not controlling because foreign relations are implicated. The Department may also argue that as an agency required to promulgate regulations pur-

138. Memorandum on the Application of the EIS Requirement to Environmental Impacts Abroad of Major Federal Actions, 42 Fed. Reg. 61,068 (1977). The CEQ points out that agencies can maintain control of foreign policy and national security information. *Id.* at 61,069.

139. *Chevron*, 467 U.S. 842-43 (1984).

140. See *Andrus v. Sierra Club*, 442 U.S. 347, 358 (1979); *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 355 (1989).

141. *Robertson v. Methow Valley Citizens Council*, 109 S. Ct. 1835, 1848 (1989).

For example, in *Aramco* the Supreme Court examined three factors which led it to conclude that it would not defer to the EEOC's position on whether Title VII of the Civil Rights Act of 1964 should be applied extraterritorially. The court examined the thoroughness of the Agency's interpretation, the validity of the Agency's reasoning, and the consistency of the Agency's position. *Aramco*, 111 S. Ct. 1227, 1235 (1991). The Court also noted that the EEOC has no authority to promulgate regulations and has inconsistently interpreted the statute. *Id.*

suant to NEPA, its interpretation is also controlling.¹⁴²

e. Subsequent congressional action.

The parties may present examples of congressional action occurring subsequent to the enactment of NEPA to support their positions on the extraterritorial applicability of NEPA. Several times Congress has considered bills to clarify NEPA's extraterritorial applicability, but it did not pass any of them.¹⁴³ Subsequent congressional actions, however, may not be very persuasive indications of past congressional intent. These actions offer little in terms of Congress' present understanding of a statute because they are interpreted as either an attempt to reinforce or an attempt to reverse the meaning of a statute.

C. *Executive Order No. 12,114 requires federal agencies to follow the mandates of NEPA when carrying out extraterritorial actions.*

Executive Order No. 12,114¹⁴⁴ presents two important issues. The first issue presented is whether courts can review this Executive Order. The second issue presented is whether Petitioners can enforce this Executive Order.

The Department may argue that because Executive Order 12,114 explicitly states that its sole purpose is to establish internal procedure and not intended to provide a reviewable cause of action, it is therefore not reviewable.¹⁴⁵ Petitioners may assert, however, that an executive order is reviewable by the court regardless of the President's attempt to proscribe review.¹⁴⁶

In support of their position that the Executive Order 12,114 is reviewable despite restrictions on review contained

142. Brower, *supra* note 137 at 515 n.8.

143. Brower, *supra* note 137, at 516.

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

145. *See id.*

146. *United States v. Wayte*, 549 F. Supp. 1376, 1387 (C.D. Cal. 1982), *rev'd on other grounds*, 710 F.2d 1385 (9th Cir. 1983), *aff'd*, 470 U.S. 598 (1985).

in the order itself, Petitioners may cite *Sierra Club v. Peterson*,¹⁴⁷ in which the Ninth Circuit Court of Appeals held valid a claim to enforce an executive order that directed federal agencies to comply with the Federal Insecticide, Fungicide and Rodenticide Act of 1972 (FIFRA).¹⁴⁸ The Department could counter that *Peterson* is distinguishable from the present case because the executive order at issue in *Peterson* did not contain a restriction on review, whereas, Executive Order No. 12,114 does contain such a restriction. In addition, since Petitioners in the present case are relying on the enforcement mechanisms of the APA, review of Executive Order 12,114 may be precluded since the APA does not provide for review if precluded by other statutes (i.e. Executive Order 12,114).¹⁴⁹

The Department may also point out that, although the court in *Wayte* held that executive orders were reviewable, it also held that without legislative foundation, an Article III court cannot enforce executive orders.¹⁵⁰ Petitioners may counter with the argument that the Executive Order is enforceable and may support a claim mandating federal agencies to follow NEPA requirements for extraterritorial actions. The Executive Order 12,114 states that it was created "[b]y virtue of the authority vested in [the President] by the Constitution and the laws of the United States, . . . in order to further environmental objectives consistent with the foreign policy and national security policy of the United States. . . ."¹⁵¹ and "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 [NEPA], with respect to the environment outside the United States, its territories and possessions."¹⁵² Petitioners could argue that, rather than creating new law, the Executive Order 12,114 simply "directs that a Congressional policy be executed

147. 705 F.2d 1475 (9th Cir. 1983).

148. 7 U.S.C. §§ 136-136y (1988).

149. 5 U.S.C. § 701(a)(1)(1988). This argument assumes that Executive Order 12,114 has the force of a statute.

150. *Wayte*, 549 F. Supp. 1376, 1387-90 (C.D. Cal. 1982).

151. Exec. Order No. 12,114 at pmb1.

152. *Id.* at § 1-1.

in a manner prescribed by Congress.”¹⁵³ Thus, Petitioners may reason that the creation of the Executive Order 12,114 is within the President’s power and is enforceable.

The Department could counter that Executive Order 12,114 does not create a private right of action to enforce the extraterritorial application of NEPA. The Department may cite *Manhattan-Bronx Postal Union v. Gronouski*,¹⁵⁴ which stated that executive orders are not judicially enforceable if not created pursuant to an act of Congress.¹⁵⁵ In the context of NEPA, the District Court for the District of Columbia upheld the rule against judicial enforcement of executive orders in *Environmental Defense Fund (EDF) v. Massey*,¹⁵⁶ which held that Executive Order 12,114 does not provide a right of action.¹⁵⁷ The Department may also argue that the President explicitly stated in the Executive Order that “[t]his Order is solely for the purpose of establishing internal procedures for Federal agencies . . . and nothing in this Order shall be construed to create a cause of action.”¹⁵⁸

Finally, Petitioners may argue that the Department acknowledged that Executive Order 12,114 requires it to follow NEPA mandates when carrying out extraterritorial actions when it prepared its “finding of no significant impact” (FONSI).¹⁵⁹ Petitioners may claim that the Department is now simply trying to escape having to prepare an EIS. In defense, the Department may argue that it completed the FONSI despite its belief that Executive Order 12,114 does not mandate that it follow NEPA’s requirements when carrying

153. Cf. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952) (holding that an executive order which directed that the executive take possession of private enterprise was without constitutional authority and invalid).

154. 350 F.2d 451 (D.C. Cir. 1965), *cert. denied*. 382 U.S. 978 (1966).

155. *Id.* at 456-57.

156. 772 F. Supp. 1296 (D.D.C. 1991).

157. *Id.* at 1298.

158. Exec. Order No. 12,114 at § 3-1.

159. An environmental assessment entails an agency making a threshold determination as to whether the effects of the agency’s action on the human environment will be significant enough to trigger implementation of the environmental impact statement process or preparation of a finding of “no significant impact” (FONSI). Council on Environmental Quality Regulations, 40 C.F.R. § 1508.9 (1991).

out extraterritorial actions. Even if Executive Order 12,114 does apply, by issuing the FONSI, the Department has satisfied its responsibilities.

D. *Judicial interpretations of NEPA's extraterritorial applicability.*

Several court decisions have found NEPA inapplicable extraterritorially, based on specific facts. *Natural Resource Defense Council, Inc. (NRDC) v. Nuclear Regulatory Commission*.¹⁶⁰ In *NRDC*, the District of Columbia Circuit Court held that NEPA does not apply *in the context of nuclear export licensing decisions*.¹⁶¹ The court reasoned that the Atomic Energy Act of 1954, as amended by the Nuclear Non-Proliferation Act of 1978, permits the Nuclear Regulatory Commission (the "Commission") to disregard foreign impacts when it licenses nuclear exports.¹⁶² Basing its decision on a previous United States Supreme Court decision, the *NRDC* court held that "NEPA's requirement of preparation of a detailed EIS must yield where a clear conflict in statutory authority is unavoidable."¹⁶³ The court explicitly restricted its decision to nuclear export licensing decisions, recognizing that the will of Congress was that the Commission rely on the evaluation and foreign policy judgment made by the executive branch."¹⁶⁴

The district court in *Greenpeace USA v. Stone*,¹⁶⁵ stated that, although Congress may have intended NEPA to apply extraterritorially under certain circumstances, it failed to clearly express its intent in a way that was significant enough to cause this court to interfere with an agreement between the President and the West German government. The agreement

160. 647 F.2d 1345 (D.C. Cir. 1981).

161. *Id.* at 1366.

162. *Id.* at 1363. Section 2153e requires the President to "negotiate bilateral or multilateral agreements 'for cooperation between the parties in protecting the international environment.'" *Id.* (quoting 42 U.S.C. § 2153(e)(Supp. II 1978)).

163. *Id.* at 1385 (quoting *Flint Ridge Dev. Co. v. Scenic Rivers Assoc.*, 426 U.S. 776 (1976)) (Robinson, J., concurring).

164. *Id.* at 1363-66.

165. 748 F. Supp. 749 (D. Haw. 1990).

regarded the transport of nerve gas stockpiles from Germany to the United States for incineration. Because this agreement implicated serious foreign policy concerns, the court determined that it would not require compliance with NEPA absent a clear expression of congressional intent.¹⁶⁶

Several courts have also held NEPA applicable to trust territories. In *People of Enewetak v. Laird*,¹⁶⁷ residents of the Enewetak Atoll in the Pacific Ocean alleged that several branches of the U.S. military had failed to properly assess the effects on the atoll of nuclear defense testing which involved simulated nuclear blasts. The District Court of Hawaii considered both the broad language of NEPA and the fact that the territory in question was not under the jurisdiction of any other nation. The court held that, under NEPA, the term "nation" includes trust territories and all areas under United States control, and that NEPA applied to the trust territory.¹⁶⁸

In *People of Saipan v. United States*,¹⁶⁹ the District Court of Hawaii, in deciding the issue of whether NEPA applies to trust territories, explained that the Supreme Court in *Foley* looked at NEPA as a whole, its legislative history, and at administrative interpretations.¹⁷⁰ The court also concluded that NEPA applies to all areas which the United States controls and that the Mariana Islands was not a "foreign country."¹⁷¹

Although the district court in *People of Saipan* was presented with the issue of whether NEPA applies extraterritorially, the court did not reach a decision. The court merely held that the trust government's action was not a "federal agency" action. Therefore, the action was specifically exempted from review under the APA.¹⁷²

166. *Id.* at 763.

167. 353 F. Supp. 811 (D. Haw. 1973).

168. *Id.* at 814-19.

169. 356 F. Supp. 645 (D. Haw. 1973).

170. *Id.* at 650.

171. *Id.* at 655-56.

172. *Id.* at 655; see APA, 5 U.S.C. § 701(a), (b) (1988).

*Sierra Club v. Adams*¹⁷³ involved a challenge by an environmental organization to the EIS prepared and processed by the Secretary of Transportation and the Administrator of the Federal Highway Administration as it related to the use of United States funds for the construction of a 250-mile section of the Pan American Highway spanning the Darien Gap in eastern Panama and adjacent Colombia.¹⁷⁴ Environmental organizations claimed that the Government failed to adequately address several issues regarding the highway's impacts including: 1) the spread of hoof-and-mouth disease (Aftosa) to the U.S.; 2) alternatives to the proposed highway; and 3) the effects of the road on indigenous peoples.¹⁷⁵ The District of Columbia Court of Appeals "agreed" that NEPA required assessment of the spread of Aftosa into the United States, which the Government said it "never questioned."¹⁷⁶ The court held that NEPA also required assessment of alternatives because this was an extension of the Aftosa discussion.¹⁷⁷

The court also decided that since the environmental organizations established standing to challenge the EIS on at least one ground, in the "public interest" they should be able to challenge it on other grounds.¹⁷⁸ The court held that the EIS complied with NEPA yet never reached the issue of whether NEPA applied to the "purely local" effects the highway would have on indigenous peoples. The court stated, "[I]n view of the conclusions that we reach in this case, we need only assume, without deciding, that NEPA is fully applicable to construction in Panama. We leave resolution of this important issue to another day."¹⁷⁹

In *Wilderness Society v. Morton*,¹⁸⁰ Canadian applicants sought to intervene in a NEPA action brought by United States petitioners based on effects the trans-Alaska pipeline

173. 578 F.2d 389 (D.C. Cir. 1978).

174. *Id.* at 390.

175. *Id.* at 391.

176. *Id.* at 394-95.

177. *Id.* at 395-96.

178. *Id.* at 391-92.

179. *Id.* at 392 n.14.

180. 463 F.2d 1261 (D.C. Cir. 1972).

would have in Canada. The court only decided the issue of intervention, holding that intervention was proper since the interests of the intervenors were sufficiently antagonistic to the interests of the United States petitioners. The court did not address whether NEPA required an assessment of the Canadian effects of the action taken in the United States, but stated that "[w]hether the Secretary [of the Interior] complies with . . . NEPA . . . is a question which will be decided [later] in this litigation."¹⁸¹

*National Organization for the Reform of Marijuana Laws v. United States (NORML)*¹⁸² involved a challenge by a non-profit corporation to the United States' participation in Mexican spraying of toxic substances on marijuana. They claimed injuries to themselves from the toxic substances due to both their personal presence in Mexico and to their use of marijuana imported from Mexico. On the issue of the extra-territorial application of NEPA the court stated:

*in view of defendant's willingness to prepare an 'environmental analysis' of the Mexico effects of United States support of that nation's narcotics eradication program, together with the EIS required by NEPA as to the impact of that program upon the United States, the Court need not reach the issue and need only assume without deciding, that NEPA is fully applicable to the Mexican herbicide spraying program.*¹⁸³

IV. SUMMARY AND CONCLUSION

For a brief summary of the arguments refer to page six.

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181. *Id.* at 1262.

182. 452 F. Supp. 1226 (D.D.C. 1978).

183. *Id.* at 1233 (emphasis added).