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Brief for Appellant Secretary, United States Department of Defense: Fourth Annual Pace National Environmental Moot Court Competition

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CIV. NO. 91-27

IN THE
UNITED STATES COURT OF APPEALS
TWELFTH CIRCUIT

SECRETARY, UNITED STATES DEPARTMENT OF DEFENSE
Appellant,

v.

ENVIRONMENTAL FRIENDS, INC.
AND
DEFENSE CONTRACTORS ASSOCIATION
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

BRIEF FOR APPELLANT SECRETARY, UNITED STATES DEPARTMENT OF DEFENSE*

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QUESTIONS PRESENTED

I. Whether Environmental Friends, Inc., or the Defense Contractors Association, or both, has standing to challenge the Defense Department's cleanup plan for the Venice, Italy, missile site?

II. Whether the National Environmental Policy Act applies to Defense Department actions to be taken outside the United States

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STATEMENT OF THE CASE

I. NAMED PARTIES

Appellee Environmental Friends, Inc. (EF) is a special interest group of 75,000 members of which only four (4) live in or near the city of Venice. (R. 4). EF filed affidavits from six members. (R. 4). Bernard Brown of Virginia and Cathy Conorado of Maryland filed affidavits stating vague plans to eventually visit Venice but they have never made efforts to solidify these plans. (R. 4). David and Dorothy Downs filed affidavits stating they are American citizens renting an apartment four (4) miles from the missile site. (R. 4). On average they hike once a month in the immediate vicinity of the Venice missile site. (R. 4). Equalia Emelia of Venice, and Franco Francisco of Rome, also filed affidavits. (R. 4). Emelia is a teacher in a local public school in Venice, who owns her own home about half a mile from the Venice site. (R. 4). Francisco, an Italian government worker, visits Venice on holiday about once a year and has stayed three times in a motel adjacent to the Venice missile site. (R. 4).

Appellee Defense Contractors Association (DCA), headquartered in Arlington County, Virginia, has a membership of approximately 3000 defense contractors, which account for nearly seventy percent (70%) of the Defense Department's contracting budget. (R. 5). No DCA member has employees who live or work near the Venice base. DCA asserts that although conventional technologies are more expensive than Biocore, well proven for effectiveness and safety.

DCA filed affidavits from two members, Grant General Services, Inc., and Hisson EarthClean, Inc. (R. 5). Both stated that they are capable of bidding on and performing a contract to use conventional technology at the Venice missile site, but since Biocore is owned by the United States, no private contractor can apply Biocore. (R. 5). Grant General Services is a large, long-established contractor which provides a wide range of services to the Defense Department, including soil purification. (R. 5). Hisson EarthClean, is a relatively new company, specializing nearly exclusively in cleaning hazardous waste from contaminated military sites. (R. 5).

II. RELEVANT EVENTS

The facts are not in dispute. The US Army plans to leave its base in Venice, Italy except for a skeleton staff to care for the buildings and prevent vandalism, because the site is no longer needed even for the limited function as a storage site. (R. 2). Eventually, the Army plans to turn control of this base, and other similar bases located throughout Italy over to the Italian government. (R. 2). However, discussions between the two governments on how to accomplish this goal are ongoing. (R. 2)

A 1989 Army investigation of environmental conditions at the Venice missile site revealed high levels of toxic missile fuel contamination in the topsoil, generally down to a level of about 24 inches from the surface. (R. 3). In order to clean the contaminated soil, the Army plans to apply Biocore, a strain of genetically engineered microorganisms developed by Army laboratories. (R. 3). Army tests on Biocore suggest that the microorganisms will eat the contaminant and die for lack of food posing no further threat to the environment. (R. 3).

The Army plans for its employees to apply the Biocore and to conduct various tests on the soil in order to assess the effects of Biocore. (R. 3). Internal Army practice does not consider a decision to act "final" until it issue actual travel orders and it has not issued any travel orders to any personnel involved in the base clean-up. (R. 5-6).

The preceding information was reflected in a "Summary Environmental Analysis of the Venice, Italy, Missile Site Clean-up," which the Army completed in March 1990, in compliance with Executive Order 12114. (R. 3) As this was not a rulemaking procedure, nor a final agency action, the Army did not circulate the document for public comment. The Summary came to light at a September 1990 congressional hearing, when the Army announced its intent to use Biocore at the Venice missile site. (R. 4). The army also prepared an environmental assessment and "finding of no significant impact" on Biocore's laboratory development.

III. THE PROCEEDINGS BELOW

In October and November 1990, respectively, EF and DCA filed lawsuits in the District Court for the Eastern District of Virginia alleging the Army failed to comply with the National Environmental Policy Act (NEPA). (R. 4). The United States motioned for summary judgment under Rule 56 of the Federal Rules of Civil Procedure, asserting that neither EF no DCA had standing to challenge the clean-up plans, and that NEPA cannot be applied outside of the United States. In an opinion ruling on the motion for summary judgment, the District Court held: (1) EF and DCA do have standing to challenge the Army's decisions (R. 6), and (2) that NEPA does apply outside the United States. (R. 6). A timely appeal was filed by the United States to challenge the district court's decision.

SUMMARY OF ARGUMENT

In order to obtain judicial review of any government decision an appellee must meet standing requirements, under the U.S. Constitution and the Administrative Procedure Act. The purpose of standing is to assure that only those parties with a direct interest in the outcome of the controversy are permitted to resolve their dispute in the court. Because EF and DCA have failed to demonstrate the requirements necessary to challenge the agency action, this court should grant Appellant's motion for summary judgment.

First, both EF and DCA have failed to show an injury in fact which is redressable by the remedy sought. The affidavits submitted by EF are insufficient to show a distinct injury necessary for standing. Mere allegations that its members may come in the vicinity of the area is not enough to show injury in fact. Hisson EarthClean's failure to procure a contract to clean up the missile site cannot be an injury in fact because there is no evidence that they would have received the contract "but for" the Army's action.

Second, neither EF nor DCA can show that the remedy which they seek will redress their alleged injuries. Even if the Army was required to prepare an EIS, there is no guarantee

that this additional procedure will stop the Army from using Biocore. Furthermore, the Army's finding of "no significant impact will weigh heavily on their discretionary decision of whether to apply Biocore.

APA Section 704 allows standing only on those issue which are ripe for review. Under Army regulations, a decision is not final until actual orders are issued. The APA also requires that the interests sought to be protected must fall within the statutory zone of interest. NEPA was not enacted to protect economic interests therefore DCA does not have standing, and although EF does fall within NEPA's zone of interest, the affidavits they submitted fail to show they have been adversely affected of aggrieved.

Appellant further contends that NEPA does not apply to defense department actions outside the United States. Absent an express indication of intent by Congress, there is a presumption that legislation is to apply only within the territory of the United States. *Foley Bros. v. Filardo*, 336 U.S. 281, 284 (1949). The specific language of the statute as well as the legislative history clearly indicate that Congress did not intend for NEPA to apply outside the U.S.

Finally, because the decision of the Army to use Biocore is one that is committed to agency discretion, it is unreviewable by the courts. Generally, an agency's construction of the laws it administers is viewed with considerable deference, and the court will not be permitted to substitute its interpretation as long as the agency's interpretation is reasonable. *Chevron U.S.A., Inc. v. N.R.D.C.*, 467 U.S. 837, 844 (1984). As it is reasonable for the Army to interpret NEPA as not requiring it to prepare an EIS because of the extraterritorial restriction, this decision may not be second-guessed by the court.

ARGUMENT

I. THE AFFIDAVITS FILED BY ENVIRONMENTAL FRIENDS, INC. AND THE DEFENSE CONTRACTORS ASSOCIATION ARE INSUFFICIENT TO ESTABLISH STANDING TO CHALLENGE THE DEFENSE DE-

PARTMENT'S CLEANUP PLAN FOR THE MISSILE SITE.

Under the standard of review set forth in Rule 56(c) of the Federal Rules of Civil Procedure a party moving for summary judgment is entitled to judgment as a matter of law if the allegations contained in the pleadings, discovery documents and affidavits show that there is no genuine issue as to any material fact." The plain language of Rule 56(c) mandates the entry of summary judgment after adequate time for discovery and upon motion against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Further, "these standards are fully applicable when a defendant moves for summary judgment in a suit brought under Section 702 of the Administrative Procedure Act (APA) on the ground that the plaintiff has failed to show that he is adversely affected of aggrieved by agency action within the meaning of a relevant statute." *Lujan v. National Wildlife Federation* 110 S.Ct. 3177, 3186 (1990). Therefore, EF and DCA have the burden of proving that their organizations have standing before the court may address their complaints. Because neither party has met their burden, instead alleging only bare allegations of injury, the district court improperly granted them standing.

One of the purposes of the standing requirement is to assure that only those persons with a direct stake in the outcome of a dispute are permitted to invoke the jurisdiction of a court to resolve it. *Baker v. Carr*, 369 U.S. 186, 204 (1962). Standing also maintains the "crucial and inseparable" element of the separation of powers among the branches of government by providing a limit on the involvement of the courts in legislative and executive actions. *Warth v. Seldin*, 422, U.S. 490, 498 (1975) (See also, Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 Suffolk U.L. Rev. 881 (1983)).

The Supreme Court has broken down standing limitations into "constitutional" and "prudential" categories. Pru-

dential categories are judicial determinations of what persons Congress intended to be plaintiffs in cases where the grant of standing is not clear on the face of the applicable statute. *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464 (1982). (See Also Fletcher, *The Structure of Standing*, 98 Yale L.J. 221, 252 (1988-89).

Because NEPA does not allow citizen suits, any attempt to challenge the statute must be obtained through the requirements of the APA. In the instant case, neither EF nor DCA were able to satisfy the requirements necessary to bestow standing. As a result, neither should be permitted to have their complaint address in this court.

A. *Neither EF nor DCA have standing under the Constitution to challenge the Defense Department's decision to use Biocore at the Venice missile site.*

Article III, Section 2 of the U.S. Constitution limits the jurisdiction of all federal court to "cases and controversies," requiring federal courts to deal only with real and substantial disputes that affect the legal rights and obligations of parties having adverse interests, and that allow specific relief through a conclusive judicial decree. In order to demonstrate standing for purposes of Article III, a plaintiff must show (1) that he suffered an injury in fact (2) that this injury was caused or is likely to be caused by the conduct of the defendant, and (3) that the injury is fairly redressable by the remedy sought. *Valley Forge Christian College* at 472.

1. *EF And DCA failed to demonstrate that they suffered an injury in fact.*

The key case in the area of injury in fact is *Association of Data Processing Services Organizations v. Camp*, 397 U.S. 150 (1970), which abandoned the former legal interest test in favor of an injury in fact requirement. The Court in *Data Processing* emphasized that this injury in fact requirement is relatively lenient; it may include a wide variety of economic, aesthetic environmental and other harms. (See also *Sierra*

Club v. Morton infra stating that "particular environmental interests. . .shared by the many rather than the few does not make them less deserving of legal protection through the judicial process"). The consequence is that beneficiaries of government regulations, not merely those trying to fend off government action *could* have standing to sue. But this certainly does not mean there is or should be a universal grant of standing, and recent decisions of the United States Supreme Court indicate more restrictive requirements must be met to establish standing in NEPA cases. *Lujan v. National Wildlife Federation* at 3187 (requiring specific facts which would raise genuine issues of material fact in order to oppose a motion for summary judgment).

The case at bar is apposite to *Sierra Club v. Morton*, 405 U.S. 727, (1972) in which standing was denied on injury in fact grounds. *Sierra Club* involved an effort by an environmental special interest group to challenge construction of a recreation area in a national forest. The Sierra Club felt the construction would have violated federal law. The Court denied standing saying that the fact that an aesthetic, conservational or recreational harm would be sufficient did not mean that it would abandon the requirement that the party seeking review must have suffered an injury. In the present case EF has failed to show that it has or may suffer an injury in fact.

The high water mark for finding injury in fact came under *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669 (1973), in which the court held that environmental groups could challenge the Interstate Commerce Commission's failure to suspend a surcharge on railroad freight rates as unlawful under the ICC Act. The plaintiffs claimed that their members "used the forests, streams, mountains, and other resources in the Washington metropolitan area for camping, hiking, fishing, and sightseeing. The court in *SCRAP* found:

> the attenuated line of causation to the eventual injury of which the plaintiffs complained—a general rate increase would allegedly cause increased use of nonrecyclable commodities as compared to recyclable goods, thus resulting

> in the need to use more natural resources to produce such goods, some of which resources might be taken from the Washington area, and resulting in more refuse that might be discarded in national parks in the Washington area.

But as the Honorable Justice Scalia pointed out in his majority opinion of *Lujan v. National Wildlife Federation* the *SCRAP* opinion. . .has never since been emulated by this Court, and is of no relevance since it involved a Rule 12 (b) motion to dismiss on the pleadings as opposed to the case at bar which involves a Rule 56 motion for summary judgment. The Rule 12(b) motion, unlike summary judgment motion, presumes that general allegations embrace those specific facts that are necessary to support the claim. *Conley v. Gibson*, 355 U.S. 41 (1957).

In the case at bar, EF has failed to set forth specific facts needed to procure standing. EF's affidavit from its president, Alice Anderson, stating that its goals are respect for the environment and acknowledgment of how little we understand its complexities, is not specific enough to confer standing on the organization because long standing concern with environmental matters is not sufficient to establish standing. *Sierra Club v. Morton*, 405 U.S. 727, 739 (1972). Likewise, EF's six other affidavits from club members are insufficient to show injury in fact. David and Dorothy Downs filed affidavits which state that they are American citizens renting an apartment four (4) miles from the missile site where they are free- lance photographers. (R. 4). They state that on average once a month they hike in the "immediate vicinity" of the Venice missile site and can often take marketable photographs. (R. 4). While these affidavits may adequately allege adverse effect or aggrievement they fail to demonstrate that the interests of the individuals were actually affected by the specific agency action challenged. In *Lujan v. National Wildlife Federation* the court held that a claim that a person uses lands "in the vicinity" fails to show specific facts supporting the affiants' allegations. *Id.* at 3188. Because the Army base is completely enclosed and barred from public access, it would be impossible for a citizen to allege anything more specific than merely "in

the vicinity."

Similarly, DCA's affidavits failed to allege facts sufficient for organizational standing. DCA's statement of explanation for its mission lists "a safe and healthy environment as one of eight "social policies benefitted by private partnership." (R. 5). Other policies include, for example, striving for racial and sexual equality, assuring a safe workplace, and providing affordable care for dependents. (R. 5). Again, a mere interest in the environment will not be adequate to obtain standing. *Sierra Club v. Morton* at 739. Clearly, DCA's concern with the environment is secondary to the relevant portion of DCA's mission statement that "in the long run, the Nation's best defense is a 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, from weapons development to facility decommissioning." (R. 5). DCA is a business organization, with one thing in mind — profits. It is far from an environmental organization hoping to improve the quality of the environment. Therefore this court should find that neither DCA not its members have standing to bring suit.

2. *EF and DCA failed to show that the injury is redressable by the remedy sought.*

Finally, the case and controversy requirement of the Constitution demands that the injury complained of be redressable by the remedy sought. *Allen v. Wright*, 468 U.S. 737, 751 (1984). Assuming arguendo that both EF and DCA have fulfilled the injury in fact requirement, a ruling in their favor will not remedy the situation. The Army has already conducted an investigation pursuant to Executive Order 12114 which revealed no significant environmental impact. (R. 3-4). By ruling for Respondents this court would simply obligate the Department of Defense to produce an environmental impact statement which will only serve to duplicate the Army's findings. It makes little sense to waste taxpayers money on duplicate procedures that have value only for procedural sake.

Further, once an EIS is prepared, there is nothing that will require the Army to follow the findings of the EIS. NEPA

is a procedural statute, not a substantive statute. As long as the procedures are followed there is nothing guaranteeing that DCA or EF will receive the remedy for which they are looking. Therefore this court should find that neither DCA nor EF have standing under the mandates of the U.S. Constitution.

B. *Neither EF nor DCA have statutory standing to challenge the decision to use Biocore.*

Congress may eliminate the prudential requirement under the Constitution altogether and confer standing by statute. The most significant statutory grant of standing for purposes of environmental law is the Administrative Procedure Act. Sheldon, *NWF v. Lujan: Justice Scalia Restricts Environmental Standing to Constrain the Courts* 20 Envtl. L. 10557 (1990). Chapter 7 of the APA sets forth the procedure for judicial review of an agency action. First, under section 702, plaintiffs must allege that they are adversely affect or aggrieved by agency action and that their alleged injury falls within the "zone of interest" sought to be protected by the statute at issue. *National Wildlife Federation v. Burford*, 871 F.2d 849, 852 (9th Cir. 1989).

1. *The Army's decision to use Biocore is not a final order as required under APA Section 704.*

Section 704 of the Administrative Procedure Act provides that agency actions reviewable by statute and final agency action for which there is no other adequate remedy can be judicially reviewed. It states:

> agency action made reviewable by statute and *final agency action* for which there is no adequate remedy in a court are subject to judicial review. A preliminary, procedural or intermediate agency action ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or unless the

> agency otherwise requires by rule and provided that the action meanwhile in inoperative, for an appeal to superior agency authority.

Internal Army practice is not to consider a decision final until orders have been issued for employees to embark on travel, usually anywhere from 2 days to 30 days before travel actually takes place. While the Army employees designated to apply Biocore have been told orally by supervisors to expect to travel to Italy for this purpose during the summer of 1992, the fact remains that no travel orders have been issued.

In *FTC v. Standard Oil Co. of California*, 449 U.S. 232 (1980) the FTC issued a complaint against Oil Co. because the FTC "had reason to believe" that the statute had been violated. The Court refused to review the action based on the final order rule of APA section 704. They indicated that intervention before a final decision was made would deny the agency a chance to correct its own mistake and apply its expertise. It would lead to inefficient and perhaps unnecessary piecemeal review and would delay ultimate resolution of the controversy.

Further, in a concept closely related to finality, a plaintiff will be denied judicial review unless the case is "ripe" for review. Typically, ripeness issues involve an administrative policy that has not yet been specifically applied to the plaintiff, such as the case at bar. Plaintiffs nevertheless argue that the new policy will cause them severe harm even before it is specifically applied to the plaintiff.

The ripeness doctrine is designed to avoid litigating in the abstract— i.e. before the administrative policy has been applied in a concrete way to the plaintiff. They plaintiff may never actually be harmed; in which case costly judicial review can be avoided.

The court must consider two factor in determining whether an administrative decision is ripe for review: (1) the fitness of the issues for immediate review and (2) the hardship to the parties that would result if the court withheld review. *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967).

In weighing the fitness of these issues for review the court

must inquire whether the questions presented are of law rather than fact or discretion. Also, it must consider whether either the reviewing court or the agency would benefit from postponement of review until the agency action or policy has assumed a final or more concrete form. In particular, it is important that the agency action be *final.* (See discussion *supra.*) The court also weighs the extent to which the action is formal or informal. Early authority suggested that informal actions, such as the decision to use Biocore without first conducting an EIS, were never ripe for review in advance of actual application. *International Longshoreman's Union v. Boyd*, 347 U.S. 222 (1954). While a informal rule, such as the case at bar, will now be more likely to be reviewed, the plaintiffs still must show hardship from delay of review.

Clearly, EF and DCA cannot demonstrate hardship from a deferral of judicial review. In *Abbott Laboratories v. Gardner* an FDA rule required the brand name of drug labels to be accompanied every time it was used by the generic or common name of the chemical, and if a manufacturer failed to comply with the regulation, the Attorney General could confiscate its products and seek criminal penalties. The Court found that the hardship was that the plaintiffs were in a dilemma: either comply with the rule (which meant destroying labels and printing new ones, which was costly) or defy it (which entailed a risk of confiscation of their products as misbranded, of damages to goodwill, and even of criminal sanctions, and subsequently found the issue ripe for review. *Id.* Also in *Columbia Broadcasting Co. v. United States* the Court held ripe FCC rules banning certain contracts between licensees and networks. The court found that further delay would destroy the networks business. 316 U.S. 407 (1942). As compared with these cases, neither DCA nor EF can show hardship needed for the Court to find the matter ripe for review. There is no possibility that DCA or one of its members will go out of business if the action is not reviewed immediately. EF and DCA will have to wait until the issue becomes final and ripe before the courts should make a decision on the complaint.

2. *The interests sought to be protected must fall within the zone of interest of the statute.*

In order to be adversely affected or aggrieved within the meaning of a statute, the plaintiff must establish that the injury he complains of falls within the zone of interest sought to be protected by the statutory provision whose violation forms the legal basis for his complaint. See *Clarke v. Securities Industry Assn.*, 479 U.S. 388, 396-397 (1987).

The failure of an agency to comply with a statutory provision requiring "on the record" hearings would assuredly have an adverse effect upon the company that has the contract to record and transcribe the agency's proceedings; but since the provision was obviously enacted to protect the interest of the parties to the proceedings and not those of the reporters, that company would not be adversely affected with the "meaning of the statute." *Lujan v. National Wildlife Federation* at 3186.

DCA's purpose is to further the economic interests of its members not to serve as a protector of foreign environments. (For a full discussion of DCA's purpose see *supra*.)

NEPA was not enacted to protect economic interests therefore DCA does not have standing, and although the members of EF may fall within NEPA's zone of interest, the affidavits they submitted fail to show they have been adversely affected of aggrieved.

3. *EF and DCA failed to prove they have been adversely affected or aggrieved within the meaning the APA.*

The requirement that the plaintiff be "adversely affected or aggrieved" is equivalent to the constitutional "injury in fact" requirement. *Association of Data Processing Service Organizations v. Camp*, 397 U.S. 150 (1970). It is uncontested that the allegedly affected interests set forth in EF's affidavits—"recreational use and aesthetic enjoyment"—are sufficiently related to the purposes of respondents association that respondent meets the requirements of Section 702 of the APA if any of its members meet these requirements. *Hunt v.*

Washington State Apple Advertising Comm'n 432 U.S. 333 (1977). However, the affiants in the case at bar do not show sufficient evidence that they are adversely affected or aggrieved. One EF member lives near the missile site, two eventually hope to vacation somewhere in the city of Venice, and two take photographs in the vicinity of the site. This simply is not sufficient to grant standing to these individuals of EF. Under the standard set forth for summary judgment in *Lujan*, the court should find that EF and DCA do not have standing and grant summary judgment for the Appellant, Department of Defense.

II. NEPA DOES NOT APPLY TO DEFENSE DEPARTMENT ACTIONS TO BE TAKEN OUTSIDE THE UNITED STATES.

NEPA is essentially a procedural statute. *Half Moon Bay Fisherman Marketing v. Carlucci*, 857 F.2d 505, 508 (9th Cir. 1988) *quoting Oregon Environmental Council v. Kunzman*, 817 F.2d 484, 492 (9th Cir. 1987). As such, this court can set aside the Army's decision not to prepare an EIS only if it was undertaken without observing the statutory procedures or was "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with the law." *Id.*

EF and DCA contend that Secretary of Defense's decision that NEPA does not apply outside the United States is incorrect and that the Army must comply with the mandates of the statute in its decision to apply Biocore at the Venice missile site. However, this court cannot disturb the agency's decision if that agency has taken a "hard look" at the decision's environmental consequences. *Kleppe v. Sierra Club*, 427 U.S. 396, (1976). From the facts, the Army has conducted laboratory experiments on Biocore, and compared a complete "Summary of Environmental Analysis of the Venice, Italy, Missile site Clean-up." (R. 3) This 20-page document complies with Executive Order 12114, and summarizes the history of the Venice missile site and the procedures used to detect and confirm the presence of soil contamination, and its depth, the development of Biocore, and compares the various possible proce-

dures available to clean-up the missile site. It is clear from these undisputed facts that the Army has indeed taken a "hard look" at their decision and therefore this court should not disturb that decision.

Further, the Supreme Court has spoken definitively on the issue of an agencies interpretation of a statute in *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837.

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always is the question whether congress has directly spoken to the precise question at issue. Is the intent of congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction in the statue, as would be necessary in the absence of an administrative interpretation. rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

Id. at 842-843.

A. *The specific language of the statute indicates that Congress did not intend for NEPA to apply outside the U.S.*

Under the general rules of statutory construction, if the language of a statute is plain and the meaning is clear, courts must give effect to it, regardless of what it thinks of its wisdom. *Caminetti v. United States*, 242 U.S. 470, 485 (1917). A plain reading of NEPA shows a complete lack of congressional intent to apply its provisions extraterritorially. The language provides that federal government agencies shall:

> declare a *national policy*. . .to enrich the understanding of the ecological systems and natural resources important to the *nation*. . .use all practicable means, consistent

> with other essential considerations of *national* policy . . .that the *Nation* may. . . (3) assure for all *Americans* safe. . .culturally pleasing surroundings. . . (4) preserve important historic, cultural and natural aspect of our *national* heritage.

42 U.S.C. § 4331.

The lower court stated that the congressional declaration of purpose, states that NEPA is to "promote efforts which will prevent of eliminate damages to the environment and biosphere and stimulate the health and welfare of man. Judge Remus felt that "certainly the biosphere does not stop at the border, and congress showed interest in protecting the health of man as a species, whether in Italy or the United States." (R. 7). What the lower court did not recognize was that these words were simply boilerplate language that was not intended to illustrate an intent to apply NEPA abroad. While congress may have selected broad language to describe NEPA's purpose, Congress failed to provide a clear expression of legislative intent through a plain statement of extraterritoriality. *Equal Employment Opportunity Council v. Arabian American Oil Co.*, 111 S.Ct. 1227, 1234 (1991) (hereinafter *Aramco*). Therefore, this court does not need to examine the legislative history in order to devine Congressional intent. *Environmental Defense Fund v. Massey*, Civil Action No. 91- 1068 (D.D.C. Cir. Aug. 29, 1991)

B. *The legislative history of the statute indicates that Congress did not intend for NEPA to apply outside the U.S.*

Assuming *arguendo* that the court would find it necessary to peruse, there is nothing the legislative history of NEPA that indicates Congress wished the statute to have extraterritorial application. Without evidence of a clear and affirmative expression of Congressional intent, NEPA cannot overcome the well established presumption against statutory extraterritoriality. The United States Congress can outline national goals for Americans only. See 24 U.S.C. Section 4331(a) (1976) ("requirements of present and future generations of Ameri-

cans"). NEPA thus reflects the perception of a global problem from the American perspective, and offers a procedural remedy to assist in a solution for Americans. *Natural Resources Defense Council v. Nuclear Regulatory Commission*, 647 F.2d 1345, 1367 (1981). (hereinafter N.R.D.C. v. N.R.C.). Judge Wilkey concluded that NEPA's legislative history illuminated nothing in regard to extraterritorial application.

However, recently the House of Representatives passed H.R. 3847 which would have clarified NEPA by requiring "formal assessment in a manner that furthers the objective of the National Environmental Policy Act of 1969, of the significant effects of its major actions, including extraterritorial actions, on the environment outside the jurisdiction of the United States and its territories and possessions." 136 Cong. Rec. H1170. This legislation did not pass the Senate and NEPA stands as is, unamended as to extraterritorial application. The fact that the House proposed the amendment is determinative that Congress recognized NEPA previously did not apply extraterritorially. Because the Senate failed to pass the legislation, it is determinative that Congress does not intend NEPA to apply abroad. The fact that this issue was brought to the attention of the Congress and did not pass should allow this court to determine without hesitation that Congress had no intentions of allowing NEPA to apply abroad.

C. *The presumption against extraterritorial application of NEPA has not been overcome.*

Recently, the Supreme Court in *Equal Employment Opportunity Council v. Arabian American Oil Co.* 111 S.Ct. 1227 (1991) (hereinafter *Aramco*) concluded that legislation of congress, unless contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States. *Id.* at 1230 (quoting *Foley Bros. Inc. supra* at 285). This presumption against extraterritoriality is "based on the assumption that Congress is primarily concerned with domestic conditions." *Foley Bros* at 285. Based on the foregoing discussions of statutory language and legislative intent, this court cannot

find sufficient evidence to overcome the presumption against extraterritoriality.

In *Greenpeace USA v. Stone* 748 F. Supp. 749 (D. Haw. 1990), the District court refused to extend NEPA to actions taken in a territory under the control of the United States. The court's analysis did not rely upon the language of the statute, but rather, upon the foreign policy aspect of NEPA's possible extraterritorial application. The court stated that "arguments for the extraterritorial application of NEPA were outweighed by the "significant danger" of stopping specific activity as well as the serious disruption to foreign policy which might result." *Id.* at 754. The same is true in the case at bar. If this Court would hold that NEPA would apply there could be serious foreign policy implications.

Further, assuming *arguendo* that this court does specific language in NEPA to apply extraterritorially, there is a serious separation of powers issues involved. It is the responsibility of the Executive to develop foreign policy. There is no evidence showing that the Executive branch of government has considered the foreign policy implications of applying NEPA abroad. Without this clear evidence this court must overturn the decision of the lower court and grant Appellant's motion for summary judgment.

D. *The district court's analogy between NEPA and the Endangered Species Act was improper.*

The lower court erred in comparing the language in the Endangered Species Act (ESA) to the language and congressional intent behind NEPA. The Honorable Judge Remus found the 8th Circuits reasoning in *Defenders of Wildlife v. Lujan*, 911 F.2d 117, (1990) persuasive when applied to the text and legislative history of NEPA. (R. 7). This analogy was improper given the clear intent of Congress and unambiguous language of the ESA to apply outside the United States. Under the Congressional findings and declaration of purposes and policy in the ESA:

> the United States has pledged itself as a sovereign state in the *international* communityto conserve. . . facing ex-

> tinction pursuant to . . . Canada and Mexico. . .Japan. . .the Western Hemisphere . . . *International* trade . . . other *international* agreements . . . and programs which meet *national and international* standards . . . .

Endangered Species Act of 1973 Section 2(a)(4), as amended, 16 U.S.C. Section 1531(a)(4). [emphasis added].

The ESA also addresses foreign commerce and international cooperation including financial assistance, encouragement of foreign programs, and wildlife preservation in the Western Hemisphere.

This language is very different from the language in *National* Environmental Policy Act. The purposes of (NEPA) are to declare an *national policy*. . .to enrich the understanding of the ecological systems and natural resources important to the *nation*. 42 U.S.C. Section 4321. NEPA also directs the Federal Government to use all practicable means, consistent with other essential considerations of *national* policy . . .that the *Nation* may. . . (3) assure for all *Americans* safe. . .culturally pleasing surroundings. . . (4) preserve important historic, cultural and natural aspect of our *national* heritage. 42 U.S.C. Section 4331. Further, Section 4332 states: Congress authorizes..that to the fullest extent possible: (1) the policies, regulations, and public law of the *United States* shall be interpreted in accordance with this chapter. 42 U.S.C. Section 4332.

In comparing the specific language of the two statutes, Congress clearly intended ESA to apply extraterritorially, while the constant references specifically to national policy found in NEPA clearly indicate an intent of Congress that NEPA should only apply in the United States and its territories. This court must find that NEPA does not apply to agency actions abroad based upon vague references to a concern with the biosphere and man's environment. Therefore there is no need for the Army to prepare an EIS to support its decision to use Biocore.

III. THE ARMY'S COMPLIANCE WITH EXECUTIVE ORDER 12114 IS PRECLUDED FROM JUDICIAL REVIEW

In order to resolve the controversy over NEPA extraterritorial application and as part of his foreign policy, President Carter initiated Executive Order 12114 to further environmental objective consistent with the foreign policy and national security policy of the United States. Mandelker, *NEPA Law and Litigation* Section 5:18 (1984). If a major Federal action having effects on the environment of the United States or the global commons requires preparation of an environmental impact statement, and if the action also has effects on the environment of a foreign nation, an environmental impact statement need not be prepared with respect to the effect on the environment of the foreign nation. Executive Order 12114 Section 3-5.

Executive Order 12114 is the exclusive law governing evaluation of the environmental impacts of the clean-up procedure proposed for the Venice Missile Site. Executive Order 12114 provides, in part, as follows;

> 1-1 Purpose and Scope. The purpose of this Executive Order is to enable responsible officials of Federal agencies having ultimate responsibility for authorizing and approving actions encompassed by this Order to be informed of pertinent environmental considerations and to take such considerations into account, with other pertinent considerations of national policy, in making decisions regarding such actions. While based on independent authority, this Order *furthers* the purpose the National Environmental Policy.

Executive Order 12114, Section 1-1.

This court cannot conclude that Executive Order 12114 preempts application of NEPA to all federal agency actions taken outside the United States. *Greenpeace* at 762. Such an application of an Executive Order would be inappropriate. (See e.g. *Independent Meat Packers Association v. Butz* 526 F.2d 228, 236 (8th Cir. 1975), *cert denied, National Associa-*

tion of Meat Purveyors v. Butz, 424 U.S. 966 (1976). Nevertheless, this court must find under the specific facts of this case that the Army's compliance with Executive Order 12114 is to given weight in determining whether NEPA applies.

The Order mandates an EIS only in situations where a global commons is concerned. This clearly is not the case with the missile site. Further, there will be no global commons involved at all as was in the *Greenpeace* case. Therefore, this court must rule that NEPA does not apply and no EIS should be mandated.

IV. BECAUSE THE ARMY'S DECISION TO USE BIOCORE IS ONE THAT IS COMMITTED TO AGENCY DISCRETION, THE DECISION IS NOT REVIEWABLE

The Supreme Court has recently held that the rule in *Vermont Yankee* applies to informal adjudication. *Pension Benefit Guaranty Corp. v. LTV Corp.*, 110 S. Ct. _____ (1990). Therefore, the courts are not permitted to require agencies to provide hearing procedure when neither statute nor due process requires hearings. This holding renders *Independent U.S. Tanker Owners Commission v. Lewis*, 690 F.2d 908 (D.C. Cir. 1982) quite questionable. (Independent Tankers held that an agency must provide some form of notice to the parties and some opportunity for them to be informed of and comment on the evidence before the agency and that the agency must submit a reasoned explanation of its conclusions). In LTV, a government agency required LTV to restore its pension plan despite the bankruptcy laws, but provided no opportunity for hearings. No statute required hearings, and LTV did not argue that due process was violated. The Court of Appeals held that prior notice and hearing and administrative findings were required. The Supreme Court held that this violated the rule in *Vermont Yankee* barring the courts from requiring agencies to follow procedures beyond those provided for in the APA. *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519 (1978).

In *Vermont Yankee* the Court reasoned that if courts

could impose additional procedures, the hearing requirements would be so uncertain as to cause agencies to hold full trial-type hearings in all cases, which would stultify the administrative process. Furthermore, in *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 821 (1985), the Supreme Court resolved the conflict as to the reviewability of discretionary decisions by construing APA section 701(a) quite narrowly. Review of discretionary action will be precluded only in those "rare instances" when there is no law to apply [*ie.* where the statute provides no judicially manageable standards to detect abuse *Heckler v. Chaney*, 470 U.S. 821 (1985)].

In Overton Park a statute provided that federal funds should not be granted to construct highways through public parks if there was a feasible and prudent alternative route. The Secretary of Transportation nevertheless approved funding of such a highway, without stating a reason for doing so. In LTV the court held that *Vermont Yankee* and *Overton Park*, were not in conflict. The *Overton Park* decision is correct because an explanation is necessary for the court to review the decision to see whether it is arbitrary and capricious. In the present case the Secretary of Defense and the Army has stated a reason for the decision to apply Biocore. The Army's 20 page environmental summary described in detail the reasons for applying Biocore, including sociological, environmental and monetary reasons. Therefore the Army has complied with the rule in Overton Park.

Further, several types of administrative decisions have been held to lie entirely within the discretion of the agency, and therefore are exempt from review. The Court has refused to review an Army decision to call up a reservist, despite his claim of extreme hardship on the basis that granting such review would involve courts in military decision making and open a "floodgate" of similar petitions. *Unites States ex rel.* Schonbrun v. Commanding Officer, 403 F.2d 371 (2d Cir. 1968). If this court allows the decision- making function of the Army to be undermined in this case, the possible suits brought against the Army would be tremendous. Although NEPA allows review in any instance, the court should take into consideration the fact that this decision is within the De-

partment of Defense's discretion and must be given great deference.

B. *CONCLUSION*

Based on the foregoing reasons, Appellant respectfully requests that the judgment of the district court be reversed and Summary Judgment be entered in favor of the Appellant.