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Brief for Appellee Defense Contractors Association: Fourth Annual Pace National Environmental Moot Court Competition

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CIV. NO. 91-27

In The
UNITED STATES COURT OF APPEALS
FOR THE 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 APPELLEE DEFENSE CONTRACTORS ASSOCIATION

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QUESTIONS PRESENTED

I. DOES AN ASSOCIATION OF DEFENSE CONTRACTORS WITH AN ENVIRONMENTAL AND FINANCIAL STAKE IN THE CLEANUP OF A U.S. MILITARY BASE IN ITALY, WHICH IS PROJECTED TO BE CARRIED OUT WITH A GENETICALLY-ENGINEERED MICROBE, HAVE STANDING UNDER THE NATIONAL ENVIRONMENTAL POLICY ACT ("NEPA") TO CHALLENGE THE DEPARTMENT OF DEFENSE'S ("DOD") FAILURE TO COMPLETE A FULL ENVIRONMENTAL IMPACT STATEMENT ("EIS") FOR THE CLEANUP?

II. DOES NEPA APPLY EXTRATERRITORIALLY TO REQUIRE DOD TO COMPLY WITH NEPA'S EIS REQUIREMENTS FOR THE CLEANUP, AND DO THE PROVISIONS OF EXECUTIVE ORDER 12,114 PRECLUDE NEPA APPLICATION TO THE PROJECT?

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OPINION BELOW

The opinion of the United States District Court for the Eastern District of Virginia is reported in the Record at page 2.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following constitutional provisions are set forth in the Appendix: U.S. Const. art. I, § 1; U.S. Const. art. II, § 1, cl. 1; U.S. Const. art. II, § 3; U.S. Const. art. III, § 2.

The following statutory sections are set forth in the Appendix: Administrative Procedure Act, 5 U.S.C. § 702 (1988); National Environmental Policy Act, 42 U.S.C. §§ 4321, 4331, 4332(2)(C), 4332(2)(F), 4332(2)(H), 4332(2)(I), 4344 (1988).

STATEMENT OF THE CASE

The United States Army, under the auspices of the Department of Defense ("DoD"), has embarked on a plan to decommission many of the nuclear missile bases it has maintained on the Italian peninsula since the end of World War II. (R.2). This plan includes a cleanup of substances which may have been placed on the sites through Army operations. *Id.* Though the program will render the selected bases completely inactive, the U.S. Government has no definite plans to relinquish control over the sites. *Id.* An Army custodial staff will remain to perform basic maintenance and deter vandalism. *Id.* The U.S. may eventually turn control over the decommissioned areas to the Italians, but the two governments are still working out the details of a transfer process. (R.2).

The first of these missile bases scheduled for decommissioning and subject of this action lies just outside Venice. (R.2). The Army has exercised exclusive control over the Venice base since 1945, and has never opened it to public access. *Id.* For the past two decades the Army has employed the site solely for missile storage. *Id.* A 1989 Army investigation of environmental conditions at the Venice base uncovered a high level of missile fuel contamination in the topsoil to a depth of two feet. (R.3). The fuel is toxic in high doses, and probably

carcinogenic after long-term exposure. (R.3).

The Army intends to rely solely on its own resources to clean the contaminated soil at the Venice site, which will preclude outside monitoring of the process. (R.3). It plans to have its own employees apply "Biocore" to the fuel-soaked soil. *Id.*Biocore is a genetically-engineered microorganism developed by the Army and thus far subjected only to its own tests in laboratories and at a government greenhouse. *Id.*Theoretically, Biocore subsists on missile fuel alone; once released into the soil it should multiply only until it exhausts the contaminant, at which time it should die and pose no further threat to the environment. *Id.* These findings, however, are not conclusive. (R.3).

The Army would like to treat the Venice site as a proving ground for Biocore in its first field test, and use the data it gathers to file its first pre-manufacturing notice as required by section 5 of the Toxic Substances Control Act ("TSCA"). (R.3). A successful test would also be indispensable to promoting the use of Biocore at similar sites around the world. *Id.* Because Venice is the first cleanup in the overall decommissioning plan, the methods and standards selected there will strongly influence those used at similar sites. (R.2).

In March 1990, the Army completed a twenty-page "Summary Environmental Analysis of the Venice, Italy, Missile Site Clean-up," to comply with sections 2-3(b) and 2-4(b)(ii) of Executive Order 12,114. (R.3). The Army never released the report for public comment, but it did make the document available to Congress after announcing the plan to use Biocore at Venice. (R.3-4). Beside the finding of no significant impact in the laboratory, this brief assessment constitutes the Army's only environmental investigation of the impact of using Biocore. (R.4).

Six pages of the document were devoted to a review the history of the Venice site and the detection of the contamination in the soil. (R.3). Another six pages described the development of Biocore and the Army's reports of success in the controlled environments of laboratories and government greenhouses. *Id.* In the remaining seven pages, the Army compared its cost estimates for three methods of dealing with the

contamination. (R.3).

For the first method, a Biocore cleanup, the Army claims a cost of only $500,000, despite the fact that it has never been used in an actual project. (R.3). The second alternative considered was to leave the contamination in place, which supposedly would entail only the minimal cost of periodic verification that the fuel has not leached away. *Id.* However, the Army's assessment omitted the fact that the fuel washes with the soil during heavy rains, and that the Venice base is located on a 100-year floodplain. *Id.* Lastly, the report examined the industry standard method of incinerating the tainted soil and replacing it with clean fill, at a cost of $5 million. *Id.* Incineration is the preferred means of cleanup for this type of contamination because of its safety and effectiveness. *Id.* In addition, the Army's total price tag for incineration should prove accurate in light of the abundant cost data for incineration cleanup at similar sites. (R.3).

Nevertheless, a DoD official testified before Congress that the Biocore cleanup is planned as part of the Department's program for fiscal 1992. (R.5). Army personnel have been selected to apply Biocore, and their superiors have told them to expect to do the job in the summer of 1992. (R.6). Though the Army usually does not consider a decision "final" until it issues travelling orders two to thirty days prior to departure, $500,000 has been budgeted for the administrative expenses. (R.5-6). Furthermore, the officer in charge of travelling orders said in deposition that only court intervention would prevent him from issuing them as planned. (R.6).

In the fall of 1990, the Defense Contractors Association ("DCA") and Environmental Friends, Inc. ("EF") challenged the Army's planned use of Biocore for the Venice cleanup, in separate actions filed in the United States District Court for the Eastern District of Virginia. (R.4-5). The Secretary of the DoD was the named defendant in his capacity as agency head. (R.2). Plaintiffs based jurisdiction on the Army's alleged violation of the National Environmental Policy Act ("NEPA"), in failing to publish a full Environmental Impact Statement ("EIS") for the use of Biocore in its cleanup program. (R.4-5). Specifically, DCA believes that the Army's summary assess-

ment cannot detail appropriately the ramifications of an uncontrolled release of Biocore into the environment. (R.5). Furthermore, they contend that a formal EIS, prepared according to Council on Environmental Quality regulations, would reveal that Biocore is still too experimental for the cleanup program. (R.5).

DCA is an association of over 3,000 defense contractors, with headquarters in Arlington County, Virginia. (R.5.). Seventy percent of DoD's annual contracting budget goes to DCA members. *Id.* In its mission statement, DCA advocates "a partnership of the public and the private sectors[] which results in sustainable policies of all kinds." *Id.* An associated "statement of explanation" details "a safe and healthy environment" as one of eight laudable social goals that benefit from such a private partnership. (R.5).

DCA has filed affidavits from two member companies, Grant General Services, Inc., and Hisson Earthclean, Inc. (R.5). Both companies have the resources and capacity to perform the Venice cleanup with conventional technologies. *Id.* For them, Biocore is not an option, because the U.S. Government's ownership of the microbe precludes application by private contractors. (R.5).

Grant General Services is a large contracting company of long standing that provides DoD with soil purification, among a variety of other services. (R.5). It is currently under contract with DoD to perform these services at several bases in northern Italy. *Id.* Hisson specializes in soil decontamination at military bases. *Id.* It is a relatively new company that intends to expand its operations to Europe. (R.5).

The District Court consolidated the actions brought by DCA and EF. (R.1). DoD moved for summary judgment under Rule 56(c) of the Federal Rules of Civil Procedure, alleging lack of subject matter jurisdiction in two respects. (R.5). First, DoD claimed neither plaintiff has standing to sue. *Id.* Second, DoD denied that NEPA applies outside the United States, and therefore cannot compel the Army to file an EIS prior to using Biocore. (R.6).

The District Court denied defendant's motion on both counts, ruling that both DCA and EF have standing, and that

NEPA applies extraterritorially to the Venice cleanup, a major action by DoD. (R.6-7). As a result, the court ordered DoD to perform the cleanup just as it would within the United States. (R.8). DoD now appeals the denial of summary judgment to the United States Court of Appeals for the Twelfth Circuit. (R.1).

SUMMARY OF ARGUMENT

The denial of the Department of Defense's ("DoD") motion for summary judgment must be affirmed, because Defense Contractor Association ("DCA") has standing under the National Environmental Policy Act ("NEPA"), and NEPA applies extraterritorially to the Venice base cleanup. Regarding standing, DoD's failure to file an Environmental Impact Statement ("EIS") under NEPA for the Venice site cleanup causes DCA an injury in fact to both environmental and financial interests. The threatened harm from the release of a genetically-engineered microorganism at the Venice site will occur in the region of northern Italy where employees of DCA member businesses work, and is injury in fact to an environmental interest which falls within NEPA's zone of interests.

DCA's financial stake in the cleanup method used at the Venice site in no way precludes DCA from asserting an environmental interest in the Venice site cleanup. Rather, such a stake in tandem with DCA's expertise in the area of toxic cleanup reinforces DCA's status as an appropriate party to the action. DCA's threatened harm is readily traceable to DoD's failure to file an EIS, since DoD would not undertake the cleanup using Biocore if adverse environmental consequences were brought to light by an EIS. The threatened harm to DCA is readily redressable by this court, since no serious effects from the use of Biocore will be overlooked if DoD prepares a complete EIS.

NEPA's procedural requirements do apply extraterritorially. Viewing the act as a whole, three statutory uses of broadly inclusive language indicate NEPA's extraterritorial applicability. First, sections 102(2)(C) and 102(2)(F) are mutually applicable, and require all agencies to recognize and

consider international environmental problems when implementing their programs. Second, section 102(2)(C) requires an EIS for all major federal actions affecting the human environment. This section's application is not limited to "the American environment." Third, NEPA Sections 2, 101(a), 102(2)(A), and 102(2)(C)(iv) define their requirements using the word "man." "Man" is defined as "the human race," not as "Americans."

Administratively, the Council for Environmental Quality ("CEQ") has the responsibility to interpret and administer NEPA. CEQ has consistently interpreted NEPA to apply extraterritorially. Finally, NEPA's legislative history is replete with notations concerning congressional intent to create an environmental statute with an international focus. There is no case law on point, but case law does indicate judicial interpretation of NEPA's provisions favors extraterritorial application.

Moreover, despite the Army's alleged compliance with Executive Order ("E.O.") 12,114, the Order does not modify NEPA's requirement of an EIS for the Venice base cleanup, for two reasons. First, the E.O. does not have the force of law, since it was promulgated as an exercise of the general executive power to further presidential environmental policies, and not pursuant to statutory authority. Because the rule of law is paramount, E.O. 12,114 cannot trump a duly enacted law such as NEPA. Second, even if E.O. 12,114 has exclusive effect outside of U.S. possessions, the degree of Army control over the base and the intended extraterritorial extent of NEPA makes the site a possession for purposes of NEPA. Thus, both NEPA and E.O. 12,114 cover the Venice base, and as law NEPA must control in any aspect the two diverge.

DCA therefore demonstrates both that it has standing to bring an action against DoD for non-compliance with NEPA's EIS requirement, and that NEPA properly applies extraterritorially to the Venice base. Because these issues of material fact are resolved in DCA's favor, the denial of DoD's motion must be affirmed.

ARGUMENT

Appellant Department of Defense's ("DoD") motion for summary judgment alleging lack of jurisdiction was properly denied, because Appellee Defense Contractors Association ("DCA") has the requisite standing to bring a cause of action under the National Environmental Policy Act ("NEPA") and because NEPA does apply to agency actions outside the United States. According to Rule 56(c) of the Federal Rules of Civil Procedure, a party is entitled to summary judgment in its favor "if the pleadings . . . together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c).

To defeat the motion, DCA first must demonstrate it has standing under NEPA to challenge DoD's failure to file an Environmental Impact Statement ("EIS") in compliance with NEPA. DCA's affidavits must set forth facts sufficient to demonstrate a genuine issue for trial, which here amounts to a showing of facts sufficient to confer standing. Fed.R.Civ.P. 56(e); *Lujan v. Nat'l Wildlife Federation*, 110 S. Ct. 3177, 3186-87 (1990). DCA must then show that NEPA applies extraterritorially as a matter of law, and therefore a genuine issue exists as to what extent DoD must comply with NEPA.

I. DCA HAS STANDING SINCE ITS ENVIRONMENTAL AND FINANCIAL INTERESTS IN THE VENICE SITE CLEANUP BRING IT WITHIN NEPA'S ZONE OF INTERESTS, THE HARM TO DCA'S INTERESTS IS TRACEABLE TO DOD'S FAILURE TO COMPLETE AN EIS ON THE CLEANUP, AND THAT HARM CAN BE REDRESSED BY THIS COURT.

The United States Supreme Court recently reaffirmed the showing necessary to establish standing in a case where an organization challenges the failure of an agency to file an EIS, contrary to the statutory mandate of NEPA. *Lujan v. National Wildlife Federation*, 110 S. Ct. 3177 (1990). To assert a right to judicial review under NEPA, a party must satisfy Section 10(a) of the Administrative Procedure Act ("APA"), since NEPA sets forth no explicit right to review. 5 U.S.C. § 702

(1988). Section 10(a) of the APA provides: "a person suffering any legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." *Id.* The Court in *Lujan* noted the "plaintiff must establish that the injury he complains of . . . falls within the 'zone of interests' sought to be protected" by the statute in question to establish that he has "suffer[ed] legal wrong" or that he is "adversely affected or aggrieved by that action within the meaning of the statute." *Id.* at 3186 (citing *Clarke v. Securities Industry Ass'n*, 479 U.S. 388, 396-397 (1987)).

Recently, the Court of Appeals for the District of Columbia Circuit acknowledged that "the need to fully assess potential harm *before* a project is undertaken is a major justification for the broad test courts have laid down for NEPA standing." *City of Los Angeles v. Nat'l Highway Traffic Safety Ass'n ("NHTSA")*, 912 F.2d 478, 492 (D.C.Cir. 1990) (citing *City of Davis v. Coleman*, 521 F.2d 661, 671 (9th Cir. 1975)). The D.C. Circuit also outlined the relationship between the zone of interests test and the constitutional standing inquiry in *NHTSA*, stating "[i]f a petitioner can establish that it has suffered an injury within the zone of interests, it will necessarily have satisfied the constitutional injury requirement as well." *Id.* at 483 (citing *City of Davis v. Coleman*, 521 F.2d 661, 671 (9th Cir. 1975)).

The constitutional showing necessary for standing was set forth in a three part test by the Supreme Court in *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.* 454 U.S. 464 (1982). In *Valley Forge*, the Court found Article III requires the party who invokes the court's authority " 'show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant," that the injury " 'fairly can be traced to the challenged action' " and " 'is likely to be redressed by a favorable decision.' " *Id.* at 472 (quoting *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 99 (1979) and *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 38, 41 (1976)).

A. *The Army's Failure To File An EIS Threatens DCA With Harm To Both Environmental And Financial Interests.*

In the context of NEPA, the D.C. Circuit in *NHTSA* called " 'the creation of a risk that serious environmental impacts will be overlooked'. . . sufficient to establish the injury necessary for standing, 'provided that this injury is alleged by a plaintiff that . . . may be expected to suffer whatever environmental consequences the [decision] may have.' " 912 F.2d at 483 (citing *City of Davis v. Coleman*, 521 F.2d 661, 671 (9th Cir. 1975)). DoD intends to have its personnel use Biocore, a genetically engineered microorganism ("GEM") it claims will "eat" toxic missile fuel and which has been evaluated only under the controlled environment of a government greenhouse, in an attempt to clean up the Venice site. The Army's failure to prepare an EIS in conjunction with the first release application of Biocore has caused DCA two distinct injuries in fact.

First, DCA's environmental interests are threatened with injury primarily due to DoD's failure to file an EIS as mandated under NEPA, since, in the absence of such an EIS, there has been no determination the use of Biocore is safe or effective beyond the "summary analysis" prepared by the Army. DCA's members who will work in the region of northern Italy near the Venice site in the summer of 1992 face possible harm from the Army's use of Biocore. There is no data available on how Biocore will react when released in the natural environment, or into the soil and air of the Venice site in particular. Additionally, since the only comparison of conventional soil purification techniques and the use of Biocore was made in terms of the monetary costs of the two techniques, no information on the overall social, environmental and health costs and benefits of each method were assessed. The Supreme Court has found that non-economic concerns like those of DCA in the present case, environmental interests, are well within the purview of NEPA and fall within the statute's zone of interest. *Sierra Club v. Morton*, 405 U.S. 727, 734 (1972). *See also Students Challenging Regulatory Agency Proce-*

dures (S.C.R.A.P.) v. United States, 412 U.S. 669, 686-90 (1973).

Though no precedent provides guidance on the risks attendant to a release of a GEM at the site of a toxic spill, an analogous situation exists in the area of experimental use permits required under the Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA"). 7 U.S.C. § 136(c) (1988). Since 1984, EPA has required "advance permission for [the] release of genetically engineered microbial pesticides," and before permitting experimental field use of GEM pesticides the EPA conducts a "thorough review of the risks and benefits of such an application." *Foundation on Economic Trends v. Thomas ("Economic Trends")*, 661 F. Supp. 713, 715 (D.D.C. 1986). This monitoring requirement, the District Court for the District of Columbia noted in *Economic Trends*, stems from EPA's belief that such pesticides raise "special testing concerns" since such pesticides can reproduce and spread beyond the application site. *Id.*

Obviously, GEM pesticides are regulated under FIFRA and there is no such applicable statute in the present case. But EPA's attention to monitoring in the use of GEM pesticides, presumably much more benign than Biocore, only highlights the need for stringent examination of the Army's proposed use of a genetically engineered microorganism to "eat" toxic missile fuel. Further, a second threat, though seemingly attenuated, may pose an even greater danger to DCA's members. In addition to the inherent risk of unforeseen environmental effects from a first release of Biocore, the second threat flows from the fact that one or more of DCA's member businesses very likely would be involved in the cleanup of the site in the event of an unforeseen toxic reaction flowing from the use of Biocore. Taking part in such a cleanup, though clearly a financial benefit, could have dramatic ramifications for the health and personal safety of DCA's members' employees. Just as there is no data available on how Biocore will react in the field, there is no indication from the record that the possible health consequences from contact with Biocore have been foreseen or will be treatable.

DCA's membership strives, as one of the "social policies"

outlined in the association's mission statement indicates, for "a safe and healthy environment." One impetus behind entering the field of toxic waste disposal shared by many of DCA's members is that of protecting the environment by utilizing methods of toxic waste cleanup proven to be effective and safe. Many of DCA's members have years of experience in handling soil purification work, much of that experience gained while performing cleanups for the Army similar to the cleanup needed at the Venice site. In contrast, Biocore has never been applied in actual use anywhere. Moreover, Biocore will be applied by Army personnel, without any outside party performing any quality control review.

DCA's membership will suffer financial injury as a result of DoD's failure to prepare an EIS, since Army personnel will handle the application, and post-application testing, of Biocore. DCA's members suffer the loss of the revenue which could be earned in performing the soil purification needed at the Venice site. Grant General Services already performs soil purification and other work for the Army in northern Italy and Hisson EarthClean, Inc. views Italy and the European market as a whole as a potential market in which to expand their cleanup activities. It is well established that pecuniary or economic harm to an association or business for profit which results from "agency action" may suffice as an injury in fact for the purposes of standing analysis. *See Clarke v. Securities Industry Ass'n*, 479 U.S. 388, 394 (1987).

B. *Federal Courts Consistently Hold That A Party With Genuine Environmental And Financial Interests In Challenging Agency Action Under NEPA Has Standing To Sue For Completion Of An EIS.*

Where a party establishes that it has a genuine environmental interest in a controversy that cannot be "disregarded altogether," in tandem with a financial interest for asserting the applicability of NEPA's mandate of an EIS, the federal courts have consistently afforded such parties standing. *Realty Income Trust v. Eckerd*, 564 F.2d 447 (D.C. Cir. 1977); *Robinson v. Knebel*, 550 F.2d 422 (8th Cir. 1977); *Port of As-*

toria, Oregon v. Hodel, 595 F.2d 467 (9th Cir. 1979); *National Helium Corp. v. Morton.* 455 F.2d 650 (10th Cir. 1971), *rev'd on other grounds* 486 F.2d 995 (1973). This line of cases dovetails with the Supreme Court's assertion in *Clarke v. Securities Industry Ass'n* that the zone of interests test will provide a right of review *unless* "the plaintiff's interests are so marginally related to or inconsistent with the purpose implicit in the statute that it cannot be reasonably be assumed that Congress intended to permit the suit." 479 U.S. at 399.

The Court of Appeals for the Tenth Circuit acknowledged that it was " 'passing strange' to see the giants of the oil and gas industry representing the public interest," yet the court granted the plaintiff companies standing to assert noncompliance with NEPA, concluding that the plaintiff companies were not "per se disqualified to occupy this role" in *National Helium Corp. v. Morton.* 455 F.2d 650, 654 (10th Cir. 1971), *rev'd on other grounds* 486 F.2d 995 (1973). In *National Helium*, the plaintiff helium supplier asserted standing to challenge the Secretary of the Interior's failure to file an EIS before cancelling the government's contracts to purchase helium. *Id.* The Tenth Circuit ruled that the action fell within NEPA since a concern for the proper use and conservation of depletable natural resources was encompassed by the statute. *Id.*

The Tenth Circuit reasoned that the expressed "environmental" concern of the company was not lessened by the fact that the company had a considerable financial stake in the matter. *Id.* Here, though DCA's membership does have a pecuniary interest in the manner in which the cleanup at the Venice site is performed, it also has a wealth of knowledge and expertise regarding the alternative methods of cleanup. DCA certainly comes within the *National Helium* standard for granting standing.

A recent case further strengthens DCA's argument for standing. In *Realty Income Trust v. Eckerd*, the D.C. Circuit upheld the District Court's finding that the appellant corporation, owner and operator of two buildings, had standing to challenge the General Services Administration's ("GSA") failure to file an EIS. 564 F.2d 447 (D.C. Cir. 1977). In *Eckerd*,

the appellant challenged a proposed project to acquire 277,000 square feet of space for a federal office building to be built in Jackson, Mississippi, where the appellant's two buildings, which housed a number of federal tenants, were located. *Id.* The appellant alleged that it would suffer environmental injury from the construction of the new building due to its impact on vehicular and pedestrian traffic. *Id.* at 451. The D.C. Circuit found that the appellant was not precluded from asserting an environmental injury in spite of its "obvious" monetary interest. *Id.*

"[A] party is not *precluded* from asserting cognizable injury to environmental values because his 'real' or 'obvious' interest may be viewed as monetary," the D.C. Circuit affirmed. *Id.* at 452. The court concluded that prohibiting private parties who may not be "pure of heart" from undertaking action to force the implementation of NEPA runs counter to the broad Congressional purpose of assuring that environmental values be weighed in federal decision-making. *Id.* at 452-53.

Though DoD's attempt to apply Biocore to the Venice site does amount to a form of competition for the market served by DCA's members, in *Eckerd* the building the GSA sought to construct was to house federal tenants, who at the time the suit was instituted, were already occupants of the appellant's two buildings. *Id.* In effect, the GSA's action in *Eckerd* would not only have closed off a market to the appellant, but would also have taken some of its tenants away. In contrast, DCA urges that its member businesses operating in northern Italy in the summer of 1992 will be injured by the first release of a genetically-engineered, "toxic eating" microbe that has never been tested in the natural environment. As well, they will suffer a loss of market share.

C. *DCA's Threatened Injuries Are "Fairly Traceable" To DoD's Failure To File an EIS And Are Readily Redressable By This Court.*

In *NHTSA*, the D.C. Circuit held that the Natural Resources Defense Council ("NRDC") had standing under NEPA to challenge NHTSA's failure to complete an EIS in

setting its Corporate Average Fuel Economy ("CAFE") standard for model year ("MY") 1989 on global warming grounds. 912 F.2d 478 (D.C. Cir. 1990). NRDC alleged that NHTSA's failure to complete an EIS in setting its CAFE standards "created the risk that it would overlook the global climate effects that may result from lower fuel efficiency standards for cars manufactured in MY 1989." *Id.* at 493. There is a similar danger in the present case that DoD's brief Summary Analysis will overlook the effects that may result from the use of Biocore.

NRDC established that its members used the coastal areas in California which would be flooded due to a rise in sea level brought on by global warming. *Id.* at 494. This showing, the D.C. Circuit noted, demonstrated that the failure to prepare the EIS, which could have addressed the effects of a lower CAFE standard on global warming, "present[ed] the risk of overlooking an environmental injury that will personally affect [NRDC's] members." *Id.* (citing *Lujan*, 110 S. Ct. 3177). DCA's members who work in northern Italy in the summer of 1992 are at risk of suffering comparable injury due to the application of Biocore at the Venice site.

The D.C. Circuit acknowledged that no prediction could be made on the timing or scope of the injuries brought on by global warming, adding that "the very risk that such uncertainty will remain unevaluated if NHTSA does not prepare an EIS makes the NEPA injury even greater." *Id.* The risk that potential environmental harms will remain unevaluated is central to the present case. In *NHTSA*, NRDC could marshal a wealth of data on global warming to support its claim of standing, though no consensus exists in the scientific community on global warming. In the case at bar, by contrast, no party except for DoD has any data on Biocore. What little data DoD has made available is contained in a summary analysis the Army completed in order to secure approval for the use of Biocore.

DCA need not prove that an EIS will result in a finding that the environmental hazards associated with the use of Biocore preclude its use. The D.C. Circuit recently noted that its precedents require only a showing of a "reasonable likelihood"

that the agency that has failed to file an EIS would "arrive at a different conclusion" regarding its proposed action if it were to complete an EIS. *NHTSA*, 912 F.2d at 497. The D.C. Circuit found that the prospect that an agency would rescind its proposed action if the environmental consequences of that action were "spelled out in more detail in an EIS," "provid[ed] the necessary showing for establishing a causal nexus" between the agency's failure to file an EIS and the petitioner's environmental injury. *Id.* at 496. In view of the paucity of data provided in the summary analysis, DCA meets the traceability test.

The redressability prong of the constitutional analysis is satisfied here, since the asserted environmental injury flows from the failure to file an EIS. In *NHTSA*, the D.C. Circuit found that the petitioner, NRDC, "need only show that an EIS would redress its asserted injury, i.e. that any serious effects in global warming will not be overlooked." Thus, DCA need only establish that the completion of an EIS would assure that no serious effects of the use of Biocore will be overlooked. A clear link between DCA's defining purpose and expertise in toxic cleanup and the environmental interest it asserts in this case establish that DCA has standing to challenge DoD's failure to complete an EIS.

II. NEPA APPLIES EXTRATERRITORIALLY AND THEREFORE REQUIRES THE DEPARTMENT OF DEFENSE TO COMPLY FULLY WITH NEPA'S ENVIRONMENTAL IMPACT STATEMENT REQUIREMENTS.

NEPA's procedural requirements apply extraterritorially. 42 U.S.C. § 4321 (1988). According to principles of statutory construction, absent a contrary intent, legislation is presumed to apply only territorially, that is, within the United States. *See generally Foley Bros. v. Filardo*, 336 U.S. 281 (1949); *Chevron U.S.A. v. Natural Resources Defense Council, Inc. ("Chevron")*, 467 U.S. 837 (1984); *Equal Employment Opportunity Commission ("E.E.O.C.") v. Arabian American Oil Co.*, 111 S. Ct. 1227 (1991). The presumption applies when, and only

when, indicia of legislative intent fail to answer the extraterritorial question. *People of Saipan v. United States Dep't of Interior*, 356 F. Supp. 645, 649-50 (D. Haw. 1973), *modified on other grounds* 502 F.2d 90 (9th Cir. 1974), *cert. denied* 420 U.S. 1003 (1975).

Three conclusions may be drawn from indicia of legislative intent in this case. First, NEPA's broadly inclusive environmental terminology indicates Congress intended broad environmental application. Second, the Council for Environmental Quality ("CEQ"), the administrative branch responsible for NEPA's interpretation, interprets NEPA to apply abroad. And third, NEPA's legislative history reflects congressional intent to draft NEPA's provisions to have international application. These three conclusions establish NEPA's extraterritorial applicability and denies application of the historical presumption against extraterritorial application of United States statutes.

A. *NEPA Applies Extraterritorially Since Congress Drafted NEPA In Broadly Inclusive Environmental Terms; CEQ Interprets NEPA To Apply Extraterritorially; And Since NEPA's Legislative History Indicates It Was Conceived And Drafted To Apply Internationally.*

Principles of statutory interpretation require a two tier investigation into ascertaining congressional intent to apply a United States statute extraterritorially. The first tier is to determine "whether Congress has directly spoken to the precise question at issue." *Chevron*, 467 U.S. at 842. Congressional intent which is unambiguously expressed "is the law and must be given effect." *Id.* at n.9. The court must look to the statute as a whole, its administrative interpretations, and its legislative history to determine if congressional intent is unambiguously expressed. *People of Saipan*, 356 F. Supp. at 649-50.

If the first tier investigation fails to establish conclusively congressional intent to apply the statute extraterritorially, the second tier of the investigation requires application of the statutory construction principle which states "legislation of

Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States." *E.E.O.C.*, 111 S. Ct. at 1230 (quoting *Filardo*, 336 U.S. at 285). The presumption applies when, and only when, the statute, as a whole, its administrative interpretations, and its legislative history do not indicate legislative intent. *People of Saipan*, 356 F. Supp. at 649-50.

DCA can positively establish the first tier investigation by showing NEPA's language, administrative proceedings, and legislative history unambiguously demonstrate NEPA was drafted, and is interpreted, to apply extraterritorially. The second tier investigation, and, hence, the presumption against extraterritoriality, does not apply to bar DCA from requiring Appellant to comply with NEPA's procedural requirements.

1. The first tier investigation reveals comprehensive language indicating Congress' intent to apply NEPA extraterritorially.

The first tier investigation into ascertaining congressional intent shows NEPA's express language reveals NEPA was meant to apply extraterritorially. *See* Daniel R. Mandelker, *NEPA Law and Litigation* § 5:16 (1984) ("Technically . . . NEPA does not require extraterritorial extension since agency actions that create extraterritorial impacts arise in the United States"). The CEQ, which is responsible for NEPA's interpretation, requires "[NEPA's] provisions . . . must be read together as a whole in order to comply with the spirit and letter of the law." 40 C.F.R. § 1500.3 (1990). Viewing the act as a whole, three statutory uses of broadly inclusive language indicate NEPA's extraterritorial applicability.

First, all provisions of section 102(2), including 102(2)(C), apply to all agencies. This statutory fact is evidenced by use of the conjunctive word "and" between sections 102(2)(H) and 102(2)(I). 42 U.S.C. §§ 4332(2)(H), 4332(2)(I) (1988). Additionally, section 102(2)(F) states "all agencies of the Federal Government shall . . . recognize the worldwide and long-range character of environmental problems. . . . 42 U.S.C. § 4332(2)(F) (1988). This language indicates all federal agencies

must recognize and consider international environmental problems when implementing their programs.

Since sections 102(2)(C) and 102(2)(F) both apply to federal agencies, these agencies must include international environmental impacts in their Environmental Impact Statements. *See generally* Note, *The Extraterritorial Scope of NEPA's Environmental Impact Statement Requirement*, 74 Mich. L. Rev. 349, 360-64 (1975).

Second, section 102(2)(C) states

> all agencies of the Federal Government shall . . . include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official. . . .

42 U.S.C. § 4332(2)(C) (1988). Significantly, Congress chose not to say "affecting the quality of the Nation's environment." If Congress had wanted to limit jurisdictionally section 102(2)(C)'s reach to national borders, it could have expressly so stated.

Third, NEPA section 2 states

> [t]he 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. . . .

42 U.S.C. § 4321 (1988). Section 101(a) states

> Congress, recognizing the profound impact of man's activity on the interrelations of all components of the natural environment . . . and recognizing further the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man, declares that it is the continuing policy of the Federal Government . . . to use all practicable means and measures . . . to create and maintain conditions under which man and nature can exist in [] harmony. . . .

42 U.S.C. § 4331(a) (1988). The word "man" is used in two other NEPA sections: 102(2)(A) (agencies must "utilize a systematic, interdisciplinary approach . . . in planning and decisionmaking which may have an impact on man's environment") and 102(2)(C)(iv) (an EIS must contain a statement on "the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity").

The word "man" is defined as "the human race." *Webster's New Collegiate Dictionary* 697 (1974). "Man" is not defined ethnocentrically as "Americans." And, again, if Congress had wanted to limit NEPA applicability to Americans, it could have so expressly stated. Further, "biosphere" is defined as "the part of the *world* in which life can exist." *Id.* at 111 (emphasis added). Thus, these words show Congress intended NEPA to assert the United States' responsibility to the world's environment.

Reading NEPA as a whole act, as CEQ regulations require, NEPA indicates 1) all federal agencies must recognize and consider international environmental problems when implementing their international programs; 2) NEPA requires EIS's for affects on the human environment, not only the American environment; and 3) NEPA requires an environmentally broad outlook, which encompasses the entire human race. DCA has positively established NEPA's express language reveals NEPA applies extraterritorially.

2. The first tier investigation shows CEQ consistently interprets NEPA to apply extraterritorially.

The first tier investigation into ascertaining congressional intent shows that the CEQ, the administrative agency responsible for NEPA's interpretation, consistently interprets NEPA to apply extraterritorially. 42 U.S.C. §§ 4341, 4344 (1988); 40 C.F.R. §§ 1500.1 and 1515.2 (1990). Judicial analysis of an agency's interpretation of a statute follows a two step process. *Chevron*, 467 U.S. at 842-45. First, if agency authority to regulate in the ambiguous area is explicitly authorized by statute, agency regulations are given significant weight in deciding the

issue unless the regulations are "arbitrary, capricious, or manifestly contrary to statute." *Id.* at 844. If agency authority to regulate in the ambiguous area is implicitly authorized by statute, the agency's interpretation of the statute will be awarded judicial deference "whenever decision as to the meaning or reach of a statute has involved reconciling conflicting policies, and a full understanding of the force of the statutory policy in the given situation has depended upon more than ordinary knowledge respecting the matters subjected to agency regulations." *Id.*

DCA stipulates NEPA has not explicitly delegated authority to CEQ to issue regulations concerning extraterritorial application of NEPA. However, NEPA Section 204(3) gives CEQ explicit authority to supervise NEPA's application. 42 U.S.C. § 4344(3) (1988). Commensurate with that responsibility is the implicit authority to interpret NEPA's provisions. *Natural Resources Defense Council, Inc. v. Nuclear Regulatory Commission* ("*NRDC v. NRC*"), 647 F.2d 1345, 1386 n.156 (1981). Therefore, CEQ interpretation of NEPA on the issue of extraterritoriality must be awarded judicial deference in this analysis.

CEQ has consistently interpreted NEPA to apply extraterritorially. Most importantly, in 1977, CEQ Chairman Russell W. Peterson released a public statement stating NEPA's extraterritorial application was conclusively established by the statute's express language. *Memorandum on the Application of the EIS Requirement to Environmental Impacts Abroad of Major Federal Actions ("Memorandum")*, 42 Fed. Reg. 61,068 (1977). Specifically, the Memorandum notes

> [NEPA] contains no express or implied geographic limitation of environmental impacts to the United States or to any other area. Indeed, such a limitation would be inconsistent with the plain language of NEPA, [and] its legislative purpose. . . .
>
> [T]he term 'human environment' in section 102(2)(C) reflects an intent to cover environmental impacts beyond U.S. borders. This interpretation is consistent with NEPA's stated purpose [contained in Section 101(a)]. . . .

> Applying the EIS requirement to impacts abroad also implements the mandate in section 102[(2)(F)] to all agencies to 'recognize the worldwide and long range character of environmental problems. In sum, the broad language of Section 102(2)(C) as well as the explicit congressional determination that our national environmental policy must have a global perspective gives section 102(2)(C) a wide scope. . . .
>
> The Council has consistently applied NEPA to U.S. international activities and has urged federal agencies to recognize [NEPA's] global perspective.

Id. See also Legal Advisory Committee, *Report to President's Council on Environmental Quality* at 13-17 (1971); *Memorandum from Charles Warren, Chairman, to Heads of Agencies*, 44 Fed. Reg. 18,722 (1979).

Agency interpretation shows NEPA was specifically designed to encompass an international environmental focus. DCA has positively established that CEQ affirmatively interprets NEPA to apply extraterritorially.

3. The first tier investigation shows congressional intent to provide an international environmental focus to NEPA's provisions.

The first tier investigation into ascertaining congressional intent shows NEPA's legislative history is replete with notations concerning congressional intent to create an environmental statute with an international focus. These notations begin with the 1968 *Congressional White Paper on a National Policy for the Environment* ("White Paper"). 115 Cong. Rec. 29,078 (1969). The White Paper stated "[e]nvironmental quality and productivity shall be considered in a worldwide context, extending in time from the present to the long-term future." *Id.* at 29,081-82. Later, testimony at Senate and House hearings produced pointed indications NEPA must take an international scope.

> The complexity of the earth's ecosystem and its component parts of individual ecosystems makes understanding

> it and the management of it a massive challenge. . . .
>
> Today we are manipulating an extremely complex system: The ecosystems of the earth . . . . We need to study ecosystems in advance and work out the strategies of living with the landscape.

H.R. Rep. No. 91-378, 91st Cong., 1st Sess. 5-6, *reprinted in* 1969 U.S.C.C.A.N. 2755-56. Additionally, H.R. Rep. No. 91-378 indicated

> testimony at the hearing also stressed the importance of the international aspects of the environmental problem. It is an unfortunate fact that many and perhaps most forms of environmental pollution cross international boundaries. . . . The international aspects are clearly a major part of the question which the [CEQ] would have to confront. . . .

H.R. Rep. No. 91-378, 91st Cong., 1st Sess. 7, *reprinted in* 1969 U.S.C.C.A.N. 2757.

Finally, congressional intent concerning NEPA's international scope is further demonstrated in the statement that "[i]mplicit in [Section 201, establishing an annual reporting requirement to Congress] is the understanding that the international implications of our current activities will also be considered, inseparable as they are from the purely national consequence of our actions." H.R. Rep. No. 91-378, 91st Cong., 1st Sess. 5-6, *reprinted in* 1969 U.S.C.C.A.N. 2759. Legislative history shows NEPA was contemplated as an international environmental statute. The drafters intended NEPA to be so applied. DCA has positively established NEPA's legislative history reveals NEPA applies extraterritorially.

Case law shows the courts have not addressed a situation similar to DCA's situation. However, case law does indicate judicial interpretation of NEPA's provisions is favorable towards extraterritorial application. Specifically, the courts have addressed extraterritorial application of NEPA in three basic areas.

First, NEPA does not have extraterritorial application where an international treaty signed by the United States and a subject country exists. Second, NEPA does not have extra-

territorial application where congressional mandate expressly preempts application of any secondary statutory provisions or regulations. Finally, NEPA does have extraterritorial application to a United States Trust Territory. None of these categories is dispositive on the issue before the court in this appeal.

In those cases holding NEPA does not have extraterritorial application where an international treaty signed by the United States and a subject country exists, the cases uniformly base their findings on the existence of the subject treaty. In *Greenpeace, USA v. Stone*, the district court refused to apply NEPA when a joint United States and Federal Republic of West Germany treaty agreement provided for elimination of the United States' unitary chemical munitions retaliatory stockpile by transporting it from German territory to Johnson Atoll, located 800 miles southwest of Hawaii. 748 F. Supp. 749, 752 (D. Haw. 1990). The district court noted "[t]he existence of this agreement . . . is an important consideration in determining whether [the Army] complied with NEPA under the specific facts of this case. . . ." *Id.* at 758 n.7.

In addition, the district court stated that any inquiry into NEPA's extraterritorial application "*must* take into consideration the foreign policy implications of applying NEPA within a foreign nation's borders to affect decisions made by the President in a purely foreign policy matter." *Id.* at 759 (emphasis in original). The court stressed its holding applied only to the specific facts presented in the case. *Id.*

Extraterritorial application of NEPA will not sabotage foreign policy. CEQ has stated "[EIS's based on wholly extraterritorial conduct] do not dictate actions on foreign soil or impose U.S. requirements on foreign countries; instead, they guide U.S. decisionmakers in determining U.S. policies and actions. . . ." *Memorandum on the Application of the EIS Requirement to Environmental Impacts Abroad of Major Federal Actions*, 42 Fed. Reg. 61,068 (1977). NEPA's regulations require compliance with the Freedom of Information Act and contain procedures that ensure the safety of information vital to foreign policy or national security concerns. 40 C.F.R. §§ 1515.5 and 1515.10 (1990). *See generally* 40 C.F.R. Part 1515 (1990).

Further, the Eighth Circuit in *Defenders of Wildlife, Friends of Animals and Their Environment v. Lujan*, in upholding extraterritorial application of the Endangered Species Act, which has interpretational problems similar to NEPA, stated "the [Endangered Species] Act is directed at the actions of federal agencies, and not at the actions of sovereign nations. Congress may decide its concerns for foreign relations outweighs its concern for foreign wildlife; we, however, will not make such a decision on its behalf." 911 F.2d 117, 125 (8th Cir. 1990).

This statement applies to NEPA as well. NEPA's environmental protection provisions apply to "major federal actions," not foreign nations. 42 U.S.C. § 4332(2)(C) (1988). If Congress wanted to curtail NEPA's application abroad, it would have so expressly stated. Congress' failure to curtail expressly extraterritorial application of NEPA requires DoD to perform its duty under section 102(2)(C). *Id.*

The seminal case which holds NEPA does not have extraterritorial application where congressional mandate preempts application of any secondary statutory provisions or regulations is *NRDC v. NRC.* 647 F.2d 1345 (D.C. Cir. 1981). The complex issue in this case, to determine if NEPA applied to require an EIS for sale of a nuclear reactor to the Philippines, was resolved against extraterritorial application because the court felt that "[w]ithin the language of the statute, solicitude for the President's prerogative in foreign relations dictates that NEPA's *putative* extra-territorial reach be curbed in the case of nuclear exports. . . ." *Id.* at 1348 (emphasis added). The court's use of the word "putative," however, indicates extraterritorial application of NEPA is commonly assumed. *Id.* Thus, the court's holding is an exception to a commonly assumed or accepted fact — NEPA applies extraterritorially.

Simply interpreted, the District Court concluded the Atomic Energy Act required the Commission to defer to the executive branch's decision in extending foreign export licenses for nuclear reactors. 42 U.S.C. § 2133(d) (1954), *amended by* The Non-Proliferation Act of 1978, 22 U.S.C. § 3201 (1978); *Id.* at 1359. Then, the court concluded NEPA itself requires deference to any executive branch decisions

firmly rooted in foreign policy considerations. *Id.* at 1366 (quoting NEPA Section 102(2)(F): "[all federal agencies must] . . . *consistent with the foreign policy of the United States*, lend appropriate support to . . . programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind's world environment." 42 U.S.C. § 4331(2)(F) (1988) (emphasis added).

In so holding, the court explicitly found "only that NEPA does not apply to NRC nuclear export licensing decisions — and *not necessarily that the EIS requirement is inapplicable to some other kind of major federal action abroad. Id.* (emphasis added). By its own words, *NRDC v. NRC*'s holding is an exception to the rule, and thus does not apply to the case at bar.

However, two conclusions may be drawn from the appellate court's language. First, courts "putatively" accept extraterritorial application of NEPA, and second, NEPA should bow to executive branch foreign policy considerations. This putative acceptance applies in the present case to require DoD's compliance with NEPA's EIS requirements. Further, the present case does not contain foreign policy considerations steeped in relations with foreign nations. It simply requires DoD to comply with procedural requirements in activities affecting the environment in areas which it controls.

In those cases holding NEPA applies to United States Trust Territories, *People of Enewetak v. Laird* establishes the first tier of the investigative framework for ascertaining if NEPA applies extraterritorially, determining express congressional intent. 353 F. Supp. 811 (D. Haw. 1973). In holding NEPA's EIS requirements extend to U.S. federal agency activities in a United States Trust Territory, the court stated "NEPA is framed in expansive language that clearly evidences a concern for all persons subject to federal action which has a major impact on their environment — not merely United States citizens located in the fifty states. . . ." *Id.* at 816-19. After noting, first, NEPA is written in expansive, or broad, language, and second, this broad language is found throughout NEPA's legislative history, the court concluded "it is reasonable to conclude that the Congress intended NEPA to apply in

all areas under its exclusive control." *Id.*

People of Saipan v. United States Dep't of the Interior establishes the second tier of the investigative framework for ascertaining if NEPA applies extraterritorially, determining application of the presumption against extraterritoriality. 356 F. Supp. at 649-50. The district court affirmed its earlier decision in *Enewetak* and noted "the language and legislative history of NEPA evidence[] a congressional intent to apply the statute to all areas under United States control." *Id.* at 648. This shows the canon of construction which requires a presumption against extraterritorial application of NEPA does not become an issue. *Id.*

Thus, according to *Enewetak* and *People of Saipan*, once DCA positively establishes NEPA's language and legislative history evidence congressional intent the statute applies extraterritorially, the first investigative tier, investigating express legislative intent, ends. The second tier, however, clamping the presumption against extraterritoriality down on the issues, never begins, since the analysis concludes in finding NEPA applies extraterritorially. In sum, DCA has shown that NEPA's express language viewed in the context of the act as a whole, administrative interpretation of its provisions, and NEPA's history all evidence congressional intent to apply NEPA extraterritorially.

B. *Executive Order 12,114 Cannot Be Construed Contrary To NEPA And Its EIS Requirements, Because The Order Does Not Have The Force Of Law And Does Not Apply Exclusively To The Venice Base As A U.S. Possession.*

Because NEPA does apply extraterritorially, Executive Order ("E.O.") 12,114 does not control the appropriate environmental evaluations for the proposed cleanup. Exec. Order No. 12,114, 3 C.F.R. 356 (1980), *reprinted in* 42 U.S.C. § 4321 (1988). President Carter promulgated this order, entitled "Environmental Effects Abroad of Major Federal Actions," by virtue of the authority vested in him by the Constitution and laws of the United States, and as President. Exec. Order No.

12,114 pmbl., 3 C.F.R. 356 (1980), *reprinted in* 42 U.S.C. § 4321 (1988). Despite this reference to the "laws," however, the order is based on authority independent of any statute. *Id.* § 1-1.

The executive power, aside from that associated with the President's role as Commander-in-Chief of the armed forces, derives from two separate provisions of the Constitution. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587-88 (1951). The first is the general grant of executive power in Article II, Section 1. U.S. Const. art. II, § 1, cl. 1. The second provision charges the President with the duty to "take Care that the Laws be faithfully executed," the "Laws" being those duly enacted by Congress, in which the Constitution vests all legislative powers. *Id.* art. II, § 3; *Id.* art. I, § 1. A valid exercise of executive power must be based on one of these constitutional authorities.

E.O. 12,114 cannot be construed to have the force of law. If the President issues an executive order under statutory mandate or a delegation of authority from Congress, it has legal effect; otherwise it is construed as a declaration of presidential policy. *Independent Meat Packers Ass'n v. Butz*, 526 F.2d 228, 234-36 (8th Cir. 1975), *cert. denied sub nom. Nat'l Ass'n of Meat Purveyors v. Butz*, 424 U.S. 996 (1976). *Butz* concerned a challenge to revisions in USDA beef grading regulations. *Id.* at 231. In part, the complaint alleged that the USDA had prepared an inadequate statement on the inflationary effect of the regulations, contrary to E.O. 11,821. *Id.* at 231. The Order was based on no specific source of authority other than the Constitution and laws of the United States, and was issued to manage agency action. *Id.* at 235. For this reason, the Eighth Circuit ruled that E.O. 11,821 was simply a means to implement the President's personal economic policies. *Id.* at 235-36. As such, the Order was not a "legal framework enforceable by private civil action," and could not be ascribed the force of law. *Id.* at 236.

E.O. 12,114 is an analogous statement of the President's personal environmental policies. Like E.O. 11,821, it draws its authority only from the Constitution and laws of the United States. Just as E.O. 11,821 related to economic policy, E.O.

12,114 was intended to reconcile the often competing concerns of environmental preservation, foreign policy, and export competitiveness. *See* Council on Environmental Quality, *Executive Order 12,114; Implementing and Explanatory Documents*, 44 Fed. Reg. 18,722 (1979); *see also* Sue D. Sheridan, Note, *The Extraterritorial Application of NEPA Under Executive Order 12,114*, 13 Vand. J. Transnat'l L. 173 (1980). E.O. 12,114 effects only a presidential policy and was not issued pursuant to statutory authority, so it does not have the force of law. Therefore, it does not fall under the president's power to execute the laws, but is part of an exercise of general executive power. U.S. Const. art. II, § 3; *Id.* art. II, § 1, cl. 1. This power does *not* include the power to legislate. *Youngstown*, 343 U.S. at 587.

NEPA, however, does have the force of law, and applies outside the United States to major federal actions. To ascribe to the E.O. any power to preempt, modify or exclude NEPA requirements would be tantamount to according the Order the force of law, and *a fortiori* the President legislative power. This contravenes fundamental notions of the separation of powers. *Youngstown*, 343 U.S. at 593 (Frankfurter, J. concurring). Therefore, E.O. 12,114 must defer to NEPA in any respect the two are incompatible, which mandates the preparation of an EIS for the Venice cleanup pursuant to NEPA requirements.

Even assuming for sake of argument that E.O. 12,114 is the "exclusive and complete determination of the procedural and other actions to be taken by Federal agencies . . . with respect to the environment outside the United States, its territories and possessions[,]" the Venice base would still be covered by NEPA because it is a U.S. possession within the ambit of that statute. E.O. 12,114 § 1-1. Localities outside the sovereign territory of the United States will be considered "possessions" for the purposes of a statutory scheme, if they are under U.S. control and the statute's coverage extends to such areas. *Vermilya-Brown v. Connell*, 335 U.S. 377, 386-90 (1948), *reh'g denied* 336 U.S. 928 (1949). Since NEPA does cover territory outside the U.S., the question remains as to the degree of control required to qualify the Venice base as a

"possession."

Vermilya-Brown concerned whether the Fair Labor Standards Act ("FLSA") could apply to U.S. citizens employed at a naval base in Bermuda, which the U.S. had leased from Great Britain. *Id.* at 378-79. The Court ruled extension of FLSA coverage did not depend on whether the U.S. held sovereignty in the political or any sense over the area in question, so long as the U.S. government did exercise control. *Id.* at 381. The Act, which was intended to protect Americans in their employment, could be rightly applied if not inimical to the laws and policies of host sovereign. *Id.* at 389. Thus, since the U.S. exercised exclusive control over the leasehold, and the Court was sure the Bermuda House of Assembly would not enact legislation to control labor relations on the base, the base qualified as a "possession" for FLSA purposes. *Id.* at 389-90.

U.S. control over the Venice base does qualify the site as a "possession" for the purposes of environmental policy. The lease in *Vermilya-Brown* was of fixed term, and conferred upon the U.S. "all the rights, power and authority within the Lease Areas which are necessary for the establishment, use, operation and defence thereof, or appropriate for their control." *Id.* at 382 n.4. The U.S. holds the Venice base under no specific agreement, for an indefinite term, and its control is so exclusive the site is closed to the public. Also, even after the base has been decommissioned no definite plans exist for returning control to the Italian government. Because the degree of U.S. control over the Venice base at least equals that granted by the leasehold in *Vermilya-Brown*, it suffices to make the site a possession. Therefore, the Venice base is a "possession" for the purposes of U.S. environmental policy.

By its plain language then, E.O. 12,114 is not the "exclusive and complete determination" of U.S. environmental policy at the Venice site, because the exclusivity applies only to territories that are not possessions. E.O. 12,114 § 1-1. Since NEPA has extraterritorial extent, and is not excluded from covering the Venice base as a U.S. possession, E.O. 12,114 and NEPA share coverage there. But it already has been shown that in this event, NEPA must prevail because it has the force

of law, and E.O. 12,114 is a nullity in any respect that it diverges from NEPA requirements. Because NEPA applies extraterritorially, and E.O. 12,114 in no way dulls its effect, DoD must comply with NEPA's EIS requirements.

CONCLUSION

For the foregoing reasons, the judgment of the United States District Court for the Eastern District of Virginia must be affirmed.

Respectfully submitted,

DEFENSE CONTRACTORS ASSOCIATION
December 2, 1991

APPENDIX

CONSTITUTIONS

U.S. Const. art. I, § 1.

All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

U.S. Const. art. II, § 1, cl. 1.

The executive Power shall be vested in a President of the United States of America.

U.S. Const. art. II, § 3.

[The President] shall from time to time give to the congress Information of the State of the Union, and recommend to their consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed; and shall Commission all the Officers of the United States.

U.S. Const. art. III, § 2.

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; — to all Cases affecting Ambassadors, or other public Ministers and Consuls; — to all Cases of admiralty and maritime Jurisdiction; — to Controversies to which the United States shall be a Party; — to Controversies between two or more States; — between a State and Citizens of another State; — between Citizens of different States; — between Citizens of the same State claiming Lands under the Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

STATUTES

Administrative Procedure Act,
5 U.S.C. §§ 1-706 (1988)

§ 702 Right of Review

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: *Provided*, That any mandatory or injunctive decree shall specify the Federal officer of officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

* * *

National Environmental Policy Act,
42 U.S.C. §§ 4321-4370(c) (1988)

§ 4321 Congressional declaration of purpose

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; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a

council on Environmental Quality.

§ 4331 Congressional declaration of national environmental policy

(a) The Congress, recognizing the profound impact of man's activity on the interrelations of all components of the natural environment, particularly the profound influences of population growth, high-density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances and recognizing further the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man, declares that it is the continuing policy of the Federal Government, in cooperation with State and local governments, and other concerned public and private organizations, to use all practicable means and measure, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.

(b) In order to carry out the policy set forth in this chapter, it is the continuing responsibility of the Federal Government to use all practicable means, consistent with the other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may —

(1) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;
(2) assure for all Americans safe, healthful, productive, and aesthetically and culturally pleasing surroundings;
(3) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;
(4) preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diver-

sity and variety of individual choice;
(5) achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; and
(6) enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.

(c) The congress recognizes that each person should enjoy a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment.

§ 4332 Cooperation of agencies; reports; availability of information; recommendations; international and national coordination of efforts

The Congress authorizes and directs that, to the fullest extent possible: . . .
(2) all agencies of the Federal Government shall — . .
.
(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on —
(i) the environmental impact of the proposed action,
(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
(iii) alternatives to the proposed action,
(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and comments and views of the appropriate Federal, State and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of Title 5, and shall accompany the proposal through the existing agency review processes;

* * *

(F) recognize the worldwide and long-range character of environmental problems and, where consistent with the foreign policy of the United States, lend appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind's world environment;

* * *

(H) initiate and utilize ecological information in the planning and development of resource-oriented projects; and
(I) assist the Council on Environmental Quality . . . .

* * *

§ 4344 Duties and functions [of the Council on Environmental Quality]

It shall be the duty and function of the Council — . . .

(3) to review and appraise the various programs and activities of the Federal Government . . . and to make recommendations to the President with respect [to the general policies of NEPA];

* * * *

EXECUTIVE ORDERS

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

ENVIRONMENTAL EFFECTS ABROAD OF MAJOR FEDERAL ACTIONS

By virtue of the authority vested in me by the Constitution and the laws of the United States, and as President of the United States, in order to further environmental objectives consistent with the foreign policy and national security policy of the United States, it is ordered as follows:

Section 1

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 of the National Environmental Policy Act and the Marine Protection Research and Sanctuaries Act and the Deepwater Port Act consistent with the foreign policy and national security policy of the United States, 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 the National Environmental Policy Act with respect to the environment outside the United States, its territories and possessions.

* * *

2-3 Actions Included.

Agencies in their procedures . . . shall establish procedures by which their officers having ultimate responsibility for authorizing and approving actions in one of the following categories encompassed by this Order, take into consideration in making decisions concerning such actions, a document described in Section 2-4(a):

(a) Major Federal actions significantly affecting the environment of the global commons outside the jurisdiction of any nation (e.g. the oceans or Antarctica);

(b) major Federal actions significantly affecting the environment of a foreign nation not participating with the United States and not otherwise involved in the action;

(c) major Federal actions significantly affecting the environment of a foreign nation which provide to that nation;

(1) a product, or physical project producing a principal product or an emission or effluent, which is prohibited or strictly regulated by Federal law in the United States because its toxic effects on the environment create a serious public health risk; or

(2) a physical project which in the United States is prohibited or strictly regulated by Federal law to protect the environment against radioactive substances.

(d) major Federal actions outside the United States, its territories and possessions which significantly affect natural or ecological resources of global importance designated for protection under this subsection by the President, or, in the case of such a resource protected by international agreement binding on the United States, by the Secretary of State. Recommendations to the President under this subsection shall be accompanied by the views of the Council on Environmental Quality and the Secretary of State.

2-4 Applicable Procedures.

(a) There are the following types of documents to be used in connection with actions described in Section 2-3:

(i) environmental impact statements (including generic, program and specific statements);

(ii) bilateral or multilateral environmental studies, relevant or related to the proposed action, by the United States and one or more foreign nations, or by an international body or organization in which the United States is a member or participant; or

(iii) concise reviews of the environmental issues involved, including environmental assessments, summary environmental analyses or other appropriate documents.

(b) Agencies shall in their procedures provide for preparation of documents described in section 2-4(a), with respect to actions described in section 2-3, as follows:

(i) for effects described in Section 2-3(a), an environmental impact statement described in Section 2-4(a)(i);

(ii) for effects described in Section 2-3(b), a document described in Section 2-4(a)(ii) or (iii), as determined by the agency;

(iii) for effects described in Section 2-3(c), a document described in Section 2-4(a)(ii) or (iii), as determined by the agency;

(iv) for effects described in Section 2-3(d), a document described in Section 2-4(a)(i), (ii) or (iii), as determined by the agency.

Such procedures may provide that an agency need not prepare a new document when a document described in Section 2-4(a) exists.

* * *

Sec. 3.

3-1 Rights of Action.

This Order is solely for the purpose of establishing internal procedures for Federal agencies to consider the significant effects of their actions on the environment outside the Unites

States, its territories and possessions, and nothing in this Order shall be construed to create a cause of action.

* * * *