

COMMENT LETTER

RESPONSES

Ms. Jayne Harkins
September 8, 2000
Page 5

B. NEPA does not cover actions taken in other sovereign nations.

The issue of whether NEPA may be applied extraterritorially has yet to come before the Supreme Court of the United States. However, as noted above, there is a strong presumption against extraterritorial application of statutes, which includes NEPA, unless Congress clearly expresses otherwise. Aramco, 499 U.S. 244, 248 (1991). A review of the lower courts' case law supports applying this presumption to NEPA.

Three cases are most instructive in concluding that NEPA should have no extraterritorial application here. The first is Natural Resources Defense Council, Inc. v. Nuclear Regulatory Commission ("NRDC"), 208 U.S. App. D.C. 216, 647 F.2d 1345 (D.C. Cir. 1981). NRDC concerned nuclear shipments to the Philippines, to which the court held that "NEPA does not apply" extraterritorially. *Id.* at 1366. While limited to nuclear export licensing decisions, the court explained "NEPA's legislative history illuminates nothing in regard to extraterritorial application." Thus, in the absence of any "clear evidence of congressional intent" the presumption against extraterritoriality will prevail. Smith v. United States, 507 U.S. 197, 204 (1993).

The second case regarding the extraterritoriality of NEPA is Environmental Defense Fund v. Massey ("EDF"), 300 U.S. App. D.C. 65, 986 F.2d 528 (D.C. Cir. 1993). The court in EDF held that the presumption did not apply, and consequently that NEPA did apply to the National Science Foundation's attempt to incinerate food wastes in Antarctica. However, the court relied heavily, if not entirely, upon Antarctica's sovereignless status and the potential "clashes between our laws and those of other nations." *Id.* at 532.

Most importantly, the court limited its holding to the specific facts of that case and did "not decide today how NEPA might apply to actions in a case involving an actual foreign sovereign..." *Id.* at 837. And EDF also preceded Chief Justice Rehnquist's reaffirmation in Smith, 507 U.S. at 204: "The presumption is rooted in a number of considerations, not the least of which is the commonsense notion that Congress generally legislates with domestic concerns in mind." Thus, the EDF holding is limited to its unique facts.

The third case that addresses extraterritorial application of NEPA also addresses the holding in EDF. In NEPA Coalition of Japan v. Aspin ("Aspin"), the court distinguished EDF, stating, "The [EDF] court expressly limited its ruling by refusing to decide whether NEPA might apply to actions involving an internationally recognized sovereign power." 837 F.Supp. 466, 467 (1993) (citing EDF, 986 F.2d at 537). The Aspin case asks whether NEPA requires the Department of Defense to prepare an EIS

5: NEPA does cover actions taken in the United States. The Executive Order 12114 is used to provide the decisionmaker complete information regarding the impact of the decision (See Section 1-1 of the EO in Attachment B). Additional guidelines on the applicability of NEPA to transboundary impacts that may occur as a result of proposed federal actions in the United States are contained in a memorandum prepared by the Executive Office of the President, Council on Environmental Quality. A copy of this document (CEQ Guidance on NEPA Analyses for Transboundary Impacts - July 1, 1997) is also provided in Attachment B.

COMMENT LETTER

RESPONSES

Ms. Jayne Harkins
September 8, 2000
Page 6

cont'd
for military installations in Japan. The court held that "the presumption against extraterritoriality not only is applicable, but particularly applies in this case because there are clear foreign policy and treaty concerns involving a security relationship between the United States and a sovereign power." 837 F. Supp. at 468. A similar result not involving a treaty was reached in *Greenpeace, USA v. Stone*, 748 F.Supp. 749 (D. Hawaii 1990), appeal dismissed as moot, 924 F.2d 175 (9th Cir. 1991). Therefore, because of the above-cited case law, NEPA remains subject to the presumption against extraterritoriality in other sovereign nations.

C. The Treaty implications here require restraint.

1. Water deliveries are not the only Treaty matters that can be impacted.

Treaty relations and relationships will be impacted even if water deliveries are not.

"[The] presumption [against extraterritorial application] has special force when we are construing treaty and statutory provisions that may involve foreign and military affairs for which the President has unique responsibility." *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155, 188 (1993) (quoting *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936)).

The DEIS states that treaty water deliveries to Mexico (1.5 MAF/year) will not be affected by the implementation of the ISC. Chapter 3, Subsection 3.16.3. However, availability of treaty surplus water is specifically excluded from the DEIS. Chapter 1, Subsection 1.1.4. That, in and of itself, impacts relationships governed by the 1944 U.S./Mexico Treaty and Minute 242. It is literally impossible to assess impacts in Mexico, presumably in the Mexican Delta, without affecting relationships in Mexico, including relationships with the Mexican government. What sort of separate consultations with the Mexican government through the International Boundary Water Commission (IBWC) result from IBWC cooperating agency status? Conduct of studies? Peer review? Where does it stop?

2. If there are no treaty water delivery impacts, then there is even less reason to invade Mexican sovereignty, especially for blatantly speculative analysis purposes.

Since water is the sine qua non for Mexican Delta impacts, if no changes in treaty water deliveries will result, an impact analysis is irrelevant, worthless, and a waste of scarce federal funds. Continued compliance with the treaty is the only relevant subject. Since that is a given, nothing else remains to be done.

6: Reclamation agrees. See Chapter 5 for further information regarding consultation with Mexico.

7: See response to Comments 22-4 and 22-5..

COMMENT LETTER

RESPONSES

Ms. Jayne Harkins
September 8, 2000
Page 7

cont'd

The DEIS notes that its analysis is keyed to the availability of "excess" water. However, the DEIS acknowledges that Mexico has no obligation to allow such water to flow through the Delta. Subsection 3.16.2. Indeed, the DEIS assumes consumptive use of such water. *Ibid.* Then the DEIS blithely goes on to model and discuss excess flows that are presumed to be targets of consumptive use demands as if they will flow through the Delta. This is sheer speculation and not required under NEPA. *Environmental Defense Fund, Inc. v. Hoffman*, 566 F.2d 1060 (8th Cir. 1977); *Life of the Land v. Brinegar*, 485 F.2d 460 (9th Cir. 1973); Forty Most Asked Questions, No. 18.

D. Executive Order 12114 does not support extraterritorial NEPA application.

8: See response to Comment 22- 4.

8

E.O. 12114 is cited as support for extraterritorial NEPA analysis. It cannot support studying the impacts of the ISC in Mexico for three reasons. First, it predates all of the relevant case law which contradict its basic premise, including *NRDC and Aspin*, as well as *Smith, Sale*, etc. Second, it exempts actions not having significant effect outside the United States. Third, it exempts "actions taken...pursuant to the direction of [a] Cabinet officer when the national...interest is involved...", i.e., when a treaty is implicated.

9: Reclamation notes that the cited CEQ guidance memorandum does not provide exemptions based on instances where treaties exist.

E. The memorandum entitled "Council on Environmental Quality Guidance on NEPA Analyses for Transboundary Impacts" does not justify extraterritorial NEPA application where, as here, a treaty is clearly implicated.

9

The CEQ Memorandum itself cautions that the scoping process should eliminate transboundary analyses if the information is not needed. Thus, here it would exclude Section 3.16 itself. But to the extent Reclamation relies on this document, we hasten to point out its two fatal flaws. First, it totally disregards the presumption against extraterritorial application. Second, it totally avoids discussion of applications of NEPA where treaty relationships are involved. Since the document recognizes that it has no force beyond existing case law, it provides no support here in the face of *NRDC* and *Aspin*.

EXTRATERRITORIAL APPLICATION OF ESA

II. ISC decisions cannot be based on analysis of ESA-related impacts, if any, to the Mexican Delta resulting from river operations conducted pursuant to the ISC.

COMMENT LETTER

RESPONSES

Ms. Jayne Harkins
September 8, 2000
Page 8

- 10 A. Using the EIS to examine extraterritorial impacts to endangered and threatened species is extraterritorial application of the ESA.
- By definition, any analysis which accounts for potential impacts beyond our borders necessarily is applying the Endangered Species Act extraterritorially. See: Lujan v. Defenders of Wildlife, 504 U.S. 555, 585-89 (1992) - Stevens, J., concurring in the judgment. Using a Mexican Delta endangered and threatened species analysis as part of the EIS extends the force of the ESA across the Southern International Border with Mexico, when that analysis is presented to the decision-maker, here the Secretary of the Interior.
- 11 B. There is a strong presumption against extraterritorial application of statutes absent clearly expressed Congressional intent. [See I.A., supra.]
- C. Section 7(a)(2) of the Endangered Species Act lacks any Congressional intent to apply these provisions extraterritorially.
1. Section 7(a)(2)'s silence on extraterritorial application requires a contrary conclusion.
- 12 In his concurring opinion, Justice Stevens addressed this precise point. He stated, "[T]he absence of any explicit statement that the consultation requirement is applicable to agency actions in foreign countries suggests that Congress did not intend that 7(a)(2) apply extraterritorially." Lujan v. Defenders of Wildlife, 504 U.S. 555, 588 (1992). The only geographic reference in Section 7(a)(2) is "affected States" as it applies to critical habitat. Clearly, Section 7(a)(2) lacks any explicit reference to application in foreign countries and thus, Congress did not intend that it apply extraterritorially. Moreover, in reviewing Title VII, the Court held that vague references such as "outside any State" were not sufficient to apply that statute extraterritorially. Aramco, 499 U.S. at 258. Thus, if written, albeit vague, references were not enough to warrant an expression of Congressional intent, surely silence on extraterritorial application must also fail.
2. Section 7's silence reflects Congressional intent.
- 13 As noted by Justice Stevens concurring opinion in Lujan v. Defenders of Wildlife, Sections 8 and 9 of the Endangered Species Act specifically address application of these sections abroad. 504 U.S. at 588. Section 7 does not. Thus, Congress clearly knew how to draft extraterritorial application of ESA provisions,

10: ESA consultation on this domestic action was completed between Reclamation and the Service and NMFS as directed by the Department of Interior Solicitor and the Commissioner of Reclamation. There is no final resolution of the legal question of application of the ESA to extraterritorial impacts. Reclamation and the Department recognize that this consultation may provide more information than the law requires. However, doing so provides the Secretary a better basis for his determinations and a better understanding of potential impacts.

11: Comment noted.

12: Comment noted.

13: Comment noted.