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Ayako Sato

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NEPA AND CLIMATE CHANGE: MUCH NEEDED GUIDANCE FOR TRANSBOUNDARY ENVIRONMENTAL IMPACTS

by Ayako Sato*

The recent Supreme Court case *Massachusetts v. U.S. Environmental Protection Agency*¹ captivated those who follow the climate change debate. However, litigation regarding global climate change is not a recent trend, and lawsuits on this topic are on the rise.² One statute that has surfaced consistently in climate change litigation is the National Environmental Policy Act (“NEPA”).³

NEPA requires all federal agencies to prepare a detailed statement, or what is called an Environmental Impact Statement (“EIS”), for “major Federal actions significantly affecting the quality of the human environment. . . .”⁴ An EIS requires a federal agency to include the environmental impacts of the proposed action and to offer alternatives to the proposed action, including a “no action” alternative.⁵ While NEPA is one of the oldest environmental statutes in the United States, the issue of greenhouse gas (“GHG”) emissions reveals that clearer guidance is needed under NEPA regarding the regulation of transboundary impacts.

For example, in *Friends of the Earth v. Mosbacher*⁶ the United States District Court for the Northern District of California held that plaintiffs had standing to sue the Overseas Private Investment Corporation (“OPIC”) and the Export-Import Bank of the United States (“Ex-Im”) when they failed to undertake an environmental review of their actions pursuant to NEPA.⁷ OPIC and Ex-Im, both U.S. federal government corporations, offer insurance, loan guarantees, and financing support for projects in developing nations that emit large amounts of GHGs.⁸ The plaintiffs allege that the impacts of these foreign projects can be felt domestically within the United States because such projects contribute to GHG emissions that “increase the incidence and intensity of floods and droughts, raise sea levels enough to inundate up to 7,000 square miles of U.S. coastline,” and contribute to other domestic environmental problems.⁹ Because such impacts directly affect the United States, the plaintiffs argue that OPIC and Ex-Im were required to comply with NEPA.

This case is currently under appeal and a lingering question remains — does NEPA apply in an extraterritorial context? Typically, a presumption against extraterritoriality exists when U.S. statutes are applied abroad, mostly out of concern for foreign policy implications and national security, and this presumption applies equally to NEPA. Out of such concern, Executive Order 12,114 was written to generally exclude projects from NEPA review that have “significant effects on the environment *outside* the geographical borders of the United States and its territories and possessions. . . .”¹⁰ The projects funded by OPIC and Ex-Im take place on foreign soil; however, the effects that plaintiffs allege can be felt within the United States. Therefore, it is unclear whether Executive Order 12,114 would apply to the

OPIC and Ex-Im projects or whether the agencies have to comply with NEPA.

Projects that have extraterritorial impacts are treated differently, and such impacts generally fall into two categories: (1) proposed actions that take place within the United States, but the environmental impacts are felt in other countries; or (2) proposed actions that are conducted outside the United States and the environmental impacts are typically felt outside of the United States. For the former, the White House Council on Environmental Quality (“CEQ”)¹¹ has issued a memorandum¹² that provides guidance to federal agencies that is consistent with the Convention on Environmental Impact Assessment in a Transboundary Context and the North American Free Trade Agreement. For the latter, President Jimmy Carter issued Executive Order 12,114 in 1979, which provides special procedures for conducting an environmental review for major federal actions significantly affecting the environment outside of the jurisdiction of the United States.¹³ In addition, the CEQ has supplemented the Executive Order with guidance regarding environmental effects abroad.¹⁴

What is missing, however, is any guidance on federal actions that take place abroad but have domestic impacts.¹⁵ *Environmental Defense Fund v. Massey*,¹⁶ the leading case regarding NEPA and extraterritoriality, is equally of no assistance because in that case, the federal action took place in Antarctica, which is not a sovereign nation and does not have the same kind of foreign policy implications. As the world is becoming smaller and smaller, and environmental impacts can span across the globe, the time has come for clearer guidance in the area of transboundary impacts and NEPA.



Endnotes:

¹ *Massachusetts v. EPA*, 415 F.3d 50 (D.C. Cir. 2005), cert. granted 126 S. Ct. 2960 (2006).

² See generally ROBERT MELTZ, CONG. RESEARCH SERV., GLOBAL WARMING: THE LITIGATION HEATS UP (Apr. 3, 2006), available at <http://ncseonline.org/NLE/CRs/abstract.cfm?NLEid=173> (last visited Feb. 6, 2007).

³ See MELTZ, *id.*

⁴ 42 U.S.C. § 4332(C) (2000).

⁵ 40 C.F.R. § 1502.14 (2005).

⁶ The case was originally captioned *Friends of the Earth v. Watson*, 2005 WL 2035596 (N.D. Cal. Aug. 23, 2005), but was changed because of OPIC staff changes.

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* Ayako Sato is a JD candidate, May 2007, at American University Washington College of Law.

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⁷ See *Friends of the Earth*, 2005 WL 2035596, at *1.

⁸ See *Friends of the Earth*, 2005 WL 2035596, at *3 (finding that plaintiffs presented evidence that OPIC and Ex-Im are directly or indirectly responsible for approximately 1,911 million tons of carbon dioxide and methane emissions annually, which accounts for almost eight percent of the world's emissions).

⁹ Pl.'s Mot. for Summ. J., *Friends of the Earth v. Mosbacher*, 2005 WL 3971170 (N.D. Cal. filed Dec. 23, 2005).

¹⁰ Exec. Order No. 12,114 (Jan. 4, 1979).

¹¹ Congress established the Council on Environmental Quality through NEPA § 202. The CEQ has the power to issue regulations implementing NEPA, and court give deference to CEQ's interpretation of the statute. See Edward A. Boling, *Back to the Future with the National Environmental Policy Act: History, Purposes and Current Direction of NEPA*, SL063 ALI-ABA 217, 223 (Feb. 8–10, 2006).

¹² Memorandum to the Heads of Agencies on the Application of NEPA to Proposed Federal Actions in the U.S. with Transboundary Effects (July 1, 1997).

¹³ More specifically, major federal actions include those that: (1) significantly affect the environment of the global commons outside the jurisdiction of any nation; (2) significantly affect the environment of a foreign nation not participating with the United States or otherwise involved in the action; (3) provide a foreign nation with a product, emission, or effluent prohibited or strictly regulated by federal law in the United States because its toxic effects create a serious public health risk; and (4) significantly affect natural or ecological resources of global importance designated for protection by the President or Secretary.

¹⁴ Memorandum for Heads of Agencies with International Activities: Implementation of Executive Order 12,114 (Mar. 21, 1979).

¹⁵ See generally Dinah Bear, *Some Modest Suggestions for Improving Implementation of the National Environmental Policy Act*, 43 NAT. RESOURCES J. 931, 949-955 (2003).

¹⁶ *Env'tl. Def. Fund v. Massey*, 986 F.2d 528 (D.C. Cir. 1993).
