

# Administration Split Looms Over NEPA

A major battle is shaping up within the Carter Administration which will determine the future of high-technology exports from the United States. Strategically placed environmentalists with the Administration — notably in the Council on Environmental Quality (CEQ) and in sections of the Justice Department — are arguing for a policy which would apply the deadly and destructive procedures of NEPA (the National Environmental Policy Act) to any U.S. government financed or licensed projects in foreign countries.

This issue of whether NEPA should apply to overseas projects is now coming to a head on two fronts:

- (1) the CEQ will soon be issuing regulations which are expected to require all federal agencies to apply NEPA overseas, despite serious opposition to such a requirement from the Export-Import Bank, the Nuclear Regulatory Commission, and the State Department;
- (2) the Natural Resources Defense Council (NRDC) and the Audubon Society have brought suit against the Export-Import Bank to force the bank to apply NEPA procedures to its overseas activities; the Eximbank has been unable to obtain the support of the Justice Department to defend its ability to finance high-technology exports.

## *NRDC v. Eximbank*

In January 1977, Laurance Rockefeller's NRDC brought suit against the U.S. Export-Import Bank seeking (1) a declaratory judgement that NEPA applies with full force to the Bank's financing of "environmentally significant equipment and services," and (2) an injunction requiring the Eximbank to prepare and circulate Environmental Impact Statements for the re-financing of such exports. (1)

As examples of the types of projects where NEPA should apply, the NRDC complaint cited "offshore oil equipment, wetland dredging equipment, railroad construction equipment, and equipment for nuclear and other electric power generation facilities."

The application of NEPA to the construction and operation of commercial nuclear power plants has brought the planned construction of nuclear power reactors almost to a complete halt in the U.S. Now, the environmentalists want to use the same tactics with respect to all overseas energy and development projects — citing such countries as Zaire, Gabon, Indonesia, and Trinidad in their lawsuit.

Although the NRDC suit has been pending for almost a year, the Department of Justice, which represents the Eximbank in court, has yet to file an answer to the NRDC's complaint. According to attorneys in the Justice Department's Land and Natural Resources Division,

they are stalling until the CEQ issues its guidelines, expected in February. "We are just hoping we can postpone any action until the Executive makes a policy decision on the whole matter."

NRDC attorneys can hardly conceal their delight with the Eximbank's dilemma. "The government is trying to get its act together," commented an NRDC lawyer, "there are serious differences within the Administration." Meanwhile, the Eximbank, unable to obtain adequate legal representation, is left at the mercy of environmentalists within the Justice Department.

In fact, the only defense of the Eximbank is being conducted by the Mid-America Legal Foundation, which has intervened in the case as Intervenor-Defendants on behalf of a number of midwestern industrial and labor groupings. Mid-America has opposed the Justice Department's latest motion for an extension of time for the Eximbank to answer the suit until Feb. 6.

## *CEQ Sabotage*

The CEQ's effects to wipe out U.S. industrial exports began with its issuance in September 1976 of guidelines which stated its position that NEPA requires Environmental Impact Statements for federal projects "in the United States, in other countries, and in areas outside the jurisdiction of any county. President Carter's Environmental Message of last Spring announced an Executive Order (no. 11991) giving the CEQ the power to issue regulations which presumably will have a binding effect on all federal agencies. The CEQ has drawn up these proposed regulations, and is now circulating them for comment to other government agencies. They are expected to be issued in final form during February.

NRDC now has a direct foothold in the CEQ with the appointment of *Gustave Spaeth*, an NRDC attorney, to the three-man Council last Spring. Last week, an NRDC attorney commented on the Eximbank case, "We consider this as similar to the human rights issue. Why should the U.S. have a double standard on the impact of projects on the environment?"

## *NRC Rejects CEQ Advice*

Last summer, the U.S. Nuclear Regulatory Commission dealt a significant setback to the CEQ's "Guidelines" when the NRC refused to allow a West German environmentalist group to intervene in an NRC licensing proceeding for the export of a nuclear reactor for the Mulheim-Karlich Nuclear Power Station in West Germany. (2) The West German Burgeraktion Atomschutz Mittelrhein e.V. petitioned the NRC to be allowed to intervene and to have a hearing on the nuclear reactor export, after they had lost out in hearings and court cases in the Federal Republic of Germany.

(1) *NRDC v. Export-Import Bank of the United States*. U.S. District Court for District of Columbia. No. 77-0080. Jan. 14, 1977. Copies of the complaint and other documents referred to in this article are available from *The Executive Intelligence Review*.

(2) *In the Matter of Babcock and Wilcox*, NRC Docket No. 50-571. June 27, 1977.

The West German government filed a "demarche" with the State Department pointing out that the environmentalists had had a full hearing already in West Germany, and that any delay in the issuance of the export license would mean critical delays in the construction of the Mulheim-Karlich Station. The State Department stated the following in a letter to the Nuclear Regulatory Commission:

*It is the Department's judgment that any U.S. attempt to make site-specific assessments of environmental impacts within the territory of another country would have major, adverse political consequences. A majority, if not all, governments would be expected to take the position that, among other things:*

- decisions affecting primarily their natural environments are a matter of national sovereignty;*
- relatedly, the degree and means of public participation in the national environmental decision-making process, which involves a relationship between the government and its citizens, should not be substantially influenced by the actions of other governments; and*
- they have full competence to make the necessary analyses and judgments.*

After considering the CEQ position and other contrary but non-binding opinions, the NRC ruled that the West German environmentalists did not have standing to intervene, and that NEPA does not apply to site-specific environmental impacts in foreign countries.

#### *Previous Cases*

The first case in which the international implications of NEPA arose was in 1972 regarding the Alaska pipeline, in which the D.C. Court of Appeals gave Canadian environmentalists the right to intervene in proceedings over the siting of alternative routes for the pipeline.

In 1973, the Sierra Club sued the Atomic Energy Commission and the Export-Import Bank to compel them to comply with NEPA for the nuclear export program. The Atomic Energy Commission (later the NRC and ERDA)

agreed to produce a generic statement on the U.S. nuclear export program as a whole, and the issue was left unresolved as to the Eximbank.

The first court ruling applying NEPA to foreign activities came in *Sierra Club v. Coleman*, in which the D.C. District Court applied NEPA to the construction of the Pan-American highway. The Federal Highway Administration agreed that the possibility of the transmission of hoof-and-mouth disease *to the U.S.* through the Darien Gap in Panama meant that the project had a domestic, U.S. impact; however the court ruled that the EIS did not sufficiently consider the impact on some local Indian tribes in Panama and Colombia. The Highway Administration appealed, and the appeal is now pending in the D.C. Court of Appeals.

The Agency for International Development (AID) also recently agreed to consider under NEPA foreign impacts of its pesticide program, in the case of *Environmental Defense Fund v. AID*. However, this was agreed to in a stipulation and not in a court ruling.

In a 1976 case, NRDC asked the NRC for intervenor status in a proceeding involving the export of nuclear fuel to Tarapur, India. The NRC has appealed to the Washington, D.C., Court of Appeals, which has taken over a year to decide the case.

In sum, environmentalists both inside and outside the Administration have not yet succeeded in forcing their anti-technology and anti-scientific views on the government as a whole. If, as presently expected, the CEQ-NRDC position become Executive policy, it will take both political pressure on Congress and legal intervention in the courts by industrial and labor forces to prevent NEPA from being applied to such critical areas as nuclear exports and the development projects financed by the Eximbank. For, as has already been evidenced in the case of the U.S. domestic nuclear energy program, the application of NEPA would mean the virtual end of high-technology exports by U.S. industry.

— Edward Spannaus

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