

*Center for Biological Diversity v. National Science Foundation*, [No. C 02-5065 JL, 2002 WL 31548073 \(N.D. Cal. 2002\)](#).

Location: Gulf of California, inside Mexico's Exclusive Economic Zone

Applicable Laws: [National Environmental Policy Act](#) (NEPA) ([42 U.S.C. §§ 4321 et seq.](#))

Where Laws Apply: Under NEPA all Federal agencies "shall . . . 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 . . ." (42 U.S.C. §4332(F)).

The application of NEPA beyond U.S. territory has often been litigated in the federal courts. The key issue is in such cases is whether there are substantial environmental effects within U.S. territory. Where the effects are primarily found to be within the territory of a foreign country or would not affect existing U.S. treaty rights, courts generally have held that NEPA does not apply. A factor considered by some courts is whether the decision that led to the environmental effects was made within the territory of the U.S. Notably, the Circuit Court of Appeals for the D.C. Circuit has held "that the presumption against the extraterritorial application of statutes . . . does not apply where the conduct regulated by statute occurs primarily, if not exclusively, in the United States, and the alleged extraterritorial effect of the statute will be felt in . . . a continent without a sovereign, and an area over which the United States has a great measure of legislative control" (e.g., Antarctica). *Environmental Defense Fund Inc. v. Massey*, [986 F.2d 528 \(D.C. Cir. 1993\)](#).

Holding: NEPA applies to acoustical research being conducted by the National Science Foundation in the Gulf of California while in the Exclusive Economic Zone of Mexico.

*Overview:*

The plaintiff, Center for Biological Diversity, filed a motion for a Temporary Restraining Order against the National Science Foundation (NSF) to prevent NSF from using seismic airguns to produce sound waves which travel into and through the seabed, presenting a significant danger of injury to and harassment of marine mammals in violation of the Marine Mammal Protection Act (MMPA) and NEPA. Plaintiff contends that NSF violated NEPA because the activity was undertaken without following NEPA requirements. To be successful in obtaining a TRO, the moving party must demonstrate the probability of success on the merits as well as irreparable harm; or that serious questions are raised and the balance of harm tips sharply in favor of issuing a TRO.

The Court held that requiring NSF and similar agencies to consider the environmental consequences of its decisions made in the United States affecting projects outside the United States but not within the territory of other countries would not affect the enforcement of other statutes and regulations, as defendant contended, because they failed to identify any foreign policy implications. United States law considers the Gulf of California waters, including those that are part of Mexico's Exclusive Economic Zone, to be the high seas or global commons territory that belongs to all nations but is subject to the sovereignty of none. The court relied on *Environmental Defense Fund, Inc. v. Massey*, [986 F.2d 528 \(D.C. Cir. 1993\)](#), which held that a Federal agency project taking place in Antarctica was subject to NEPA. Therefore, the Court found that imposing NEPA requirements on NSF would not impinge upon the sovereignty of Mexico as most of the research takes place outside of Mexican territorial waters and the decision making process for funding and planning the project took place in the United States. The court thus found that NSF had violated NEPA requirements.