

DEPARTMENT OF THE AIR FORCE  
WASHINGTON 20330

OFFICE OF THE GENERAL COUNSEL



12 OCT 1972

MEMORANDUM FOR ACTING ASSISTANT SECRETARY OF THE AIR FORCE  
(INSTALLATIONS AND LOGISTICS)

SUBJECT: Present Posture of People of Enewetak vs. Laird  
(Project PACE)

The plaintiffs in this case, the people of Enewetak, are the former inhabitants of the Enewetak Atoll, Marshall Islands, Trust Territory of the Pacific Islands. They were removed in 1946 (under circumstances now disputed) in order to prepare for nuclear testing, which lasted until 1958. Project PACE (Pacific Cratering Experiments) is a series of high explosive cratering tests designed to expand the knowledge of nuclear weapons effects without atmospheric testing. Enewetak is the only area in the non-Communist world where megaton nuclear craters exist for comparison. PACE actually has two, somewhat divergent, parts: a careful study of the geology of the atoll and of the nuclear craters to increase the knowledge of nuclear weapons effects, and the conduct of the actual cratering tests. The former is required with or without the latter. However, both were included in the April 1972 draft environmental statement as part of an eight phase project. Phases one and two were preliminary surveys and test site selection; phase three, 1000 pound calibration or parametric shots; phase four, the Micro-atoll series of 5-one hundred ton tests; phase five, the geological study, via core drilling and seismic refraction surveys; phase six, the investigation by similar techniques of the geology of the old nuclear craters; phase seven, a high energy simulation event on the reef plate, and phase eight, a simulation test on Runit Island near the sites of the old Cactus and Lacrosse craters. These phases are not sequential and overlap very substantially, but this fact apparently was not clear to some readers of the draft statement.

DOE, John Rudolph's files, box

Plaintiffs made the following claims in their complaint:

(1) The Department of Defense had conceived, decided upon, and started to carry out Project PACE without filing a final environmental impact statement. This claim was based on internal evidence in the draft statement that it was prepared in 1971 and on the commencement of the 1000 pound parametric events in May, 1972, for which a 19 acre test bed was bulldozed, covering one third of the island of Aoman.

(2) The DOD had wrongfully refused to hold hearings on Ujelang Atoll, present abode of the Enewetakese, at which the Enewetakese could testify on their views as to the environmental and cultural impact of Project PACE. The Air Force did so refuse, believing that meetings held with the Enewetakese and their lawyers on Enewetak in May, 1972 were the equivalent of the informal hearings called for by DOD Directive 6050.1.

(3) The Air Force had refused to hold "interdisciplinary hearings" at which the scientists consulted on the project would exchange views and be subject to cross-examination.

(4) The Air Force failed to give timely notice of the Project or to consider alternate sites.

(5) The DOD regulations are inadequate in that they fail to require that the final environmental impact statement be completed and filed before any stage of the decision-making process begins.

(6) The plaintiffs were denied of Due Process of Law.

(7) The decision to conduct PACE on Enewetak is a violation of NEPA and of the Trusteeship Agreement.

Plaintiffs moved for a temporary restraining order and preliminary injunction with hearing set for September 29, 10 days after the suit was filed. The former was granted on September 21 as a condition of slipping the hearing date until October 5. Despite the Government's request to allow

core drilling and seismic refraction work to go on, Judge Pence declined to amend the TRO.

After consulting with the U.S. Attorney in Honolulu, it was agreed that no attempt would be made to litigate the issues of jurisdiction, standing, or past DOD actions with respect to PACE. Jurisdiction is well established by other NEPA cases. While standing could have been objected to under Sierra Club v. Morton, \_\_\_ U.S. \_\_\_, 3 ERC 2039 (1972), on the basis that plaintiffs did not use the Island, this would open up the question of legality of the 1946 expulsion, an extraneous and inflammatory issue. Moreover, since plaintiffs apparently are the legal owners of the Island and have a reversionary right to it when no longer required by the Government, it appears that their standing is proper under pre-Sierra Club standards. The question of applicability of NEPA to the Trust Territory is essentially moot since the DOD Directive implementing NEPA applies anywhere in the world not under the jurisdiction of another country.

To carry out the above decision, Dr. Billy E. Welch, Special Assistant for Environmental Quality, SAFILE, executed an affidavit stating that the Air Force would take the following actions:

- (1) Issue a new draft statement.
- (2) Hold informal hearings on Ujelang.
- (3) Hold further informal hearings on Hawaii.
- (4) Issue a final statement.
- (5) Have all aspects of the project, including military requirement and scientific merit as well as environmental impact, re-examined and a recommendation made by the Secretary of the Air Force and the Director, DNA to the Secretary of Defense.

Upon examining this, the Judge indicated that in his view the Government had essentially given plaintiffs what they asked for. He declined to order interdisciplinary hearings or cross-examination. He further ruled that evidence on DOD's past actions with respect to PACE would

not be relevant at the hearing on the motion for preliminary injunction. The only issue would be whether the Air Force could conduct seismic studies and core drilling during the injunction period.

At the hearing the Air Force Weapons Lab Test Director, Mr. Robert Henny, testified that the core drilling and seismic studies served multiple purposes and were desired whether or not the project PACE explosions were carried out. He stated that in his opinion there would be no environmental impact from the drilling. Plaintiff's counsel cross-examined extensively on past project PACE actions, over repeated but unsuccessful objections by Government counsel. On the legal issues, the plaintiffs argued essentially that all that was necessary was to show a violation of NEPA and an injunction would issue against all stages of the project, without exception, to avoid committing the Government to the course of conduct being assessed for environmental impact. They drew extensively on a highway case argued before the same judge one week earlier, where defendants had sought to continue engineering work having no environmental impact. They lost on "commitment" grounds.

The Government argued that the core drilling and seismic studies did not commit the Government to the PACE explosions. They were independently required and had no environmental impact of their own. While the Government conceded plaintiffs were entitled to an injunction, they were not entitled to one on this issue, not having satisfied the usual test for an injunction. They had shown no irreparable injury, no balance of equities in their favor, and no probability of success on the remaining issues.

Judge King started off his oral decision from the bench by pointing out that plaintiffs had shown a violation of NEPA and therefore were entitled to an injunction. The Government could not split the project up into harmful and non-harmful parts and thus find that none of the actions had any impact. He did not comment on our contention that the core drilling was separable, not integral. He further noted that we had drilled 200 holes already and that many holes, "in the fragile ecology of this small atoll", might already have had a significant impact. Accordingly, he enjoined PACE activities, including core drilling and seismic surveys, at Enewetak until trial, which was set for February 13.

The language of plaintiffs' proposed order seemed ambiguous as to actions off Enewetak atoll, and we requested clarification by changing the order of the words. We also requested an amendment authorizing "environmental and ecological studies not involving any of the named prohibited acts". Mr. King, one of plaintiffs' attorneys, accepted but he was overruled by Theodore Mitchell, head of the Micronesian Legal Services Corporation. Mitchell made it clear that in plaintiff's view no action would be permitted at Enewetak without first receiving his approval. Judge King signed the proposed injunction without amendment, but stated in the presence of the Assistant U.S. Attorney that the injunction only barred the named acts. It did not prohibit studies required to prepare the environmental impact statement, provided they did not involve any of the prohibited acts, nor work in the United States.

A proposed paragraph allowing radiological studies by the AEC in preparation for cleanup activities was deleted, since AEC was not a defendant. Some of plaintiffs' attorneys made it clear to Government counsel that they regarded any cleanup activities without a final environmental impact statement as a violation of NEPA and the subject of another law suit, while Mitchell indicated to Mr. Lewis of DNA that they would not hinder cleanup activities. Plaintiffs' real position on this point is thus in considerable doubt.

No amendment concerning DNA, as opposed to AEC, involvement in cleanup activities was offered. Plaintiffs' attorneys clearly would not accept, and it is most unlikely the Judge would have imposed it. It appears that he is very strongly inclined to the "purist" school of NEPA interpretation, that is, no action can be taken on a matter that may arguably have a significant adverse impact on the environment prior to filing a final statement. It appeared better to leave the issue of DNA participation in cleanup strictly alone. To have offered an exclusionary provision would have run a real risk that such participation would be included in the bar of the injunction, on the theory that such DNA activity offered an opportunity to conduct prohibited PACE activities by subterfuge.

The scope of the injunction is essentially as follows:

(1) Excavation of land, reef, or beach areas, core drilling, detonation of explosives of any kind, clearing of vegetation and construction of roads on Enewetak in connection with PACE are prohibited.

(2) PACE activities in the U.S. are not affected.

(3) Obligation of funds for PACE is not prohibited.

(4) Studies on Enewetak not involving the prohibited actions may go on.

(5) The base support activity may continue if desired.

(6) Backhoe excavating for PACE is prohibited, even in relatively minor quantities. Presumably such excavation for the purpose of repairing existing base facilities is permitted.

(7) Core drilling and seismic refraction studies of all types, whether or not we believe that they affect the environment in any way, are prohibited for purposes of PACE.

(8) The Court's understanding of Project PACE is the eight phases set out in the draft environmental statement. None of the named actions may be conducted on Enewetak if they have any connection with any of the eight phases.

Since Mitchell appears anxious to control activities on Enewetak, and evidently has sources of information there, it must be assumed that every attempt will be made to find violations of the injunction. No Air Force organizations should issue instructions or provide funds for any of the prohibited acts for whatever purpose they may be performed. The burden of proving that such acts are being carried out solely for non-PACE purposes will be on the Government (in fact, if not in law), and it will be an extremely difficult one to carry. How do we prove a negative? It is strongly recommended that DNA follow the same policy.

If AEC studies related to cleanup will involve any of the named acts, AEC should be required to enter into separate

contracts for the work, including base support. That this will involve excessive paperwork is understood, but the need to avoid contempt action is paramount. AEC should be informed of this injunction and urged to use methods other than the prohibited ones, at least until February 13. It should also be warned that Judge King is of the opinion that core drilling and seismic refraction activities have a "significant adverse impact" on the "fragile atoll environment". The best approach, in fact, would be for AEC to prepare an environmental assessment, showing in considerable detail the lack of significant adverse impact in the work they plan to do.



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Attachment