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The Extraterritorial Application of NEPA Under Executive Order 12,114

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THE EXTRATERRITORIAL APPLICATION OF NEPA UNDER EXECUTIVE ORDER 12,114

> Environmental problems do not stop at national boundaries. In the past decade we . . . have come to recognize the urgency of international efforts to protect our common environment.
>
> - President Carter's Environmental Message to Congress, May 23, 1977[1]

On January 5, 1977, President Carter issued Executive Order No. 12,114[2] (Executive Order) describing the scope of United States federal agencies' obligations to consider the environmental consequences of proposed agency actions abroad. In so doing, Carter purported to establish the sole legal authority governing agency response to the concern for the global environment. Moreover, the Executive Order was intended to resolve a heated debate over the extraterritorial applicability of the National Environmental Policy Act [NEPA][3] which had concerned federal agencies, courts, Congress, and the Executive Branch during three successive administrations.

The controversy focused on whether NEPA's requirement that an environmental impact statement (EIS)—prepared for all "major Federal actions significantly affecting the quality of the human environment"[4]—applied to actions having an effect on the natural environment beyond United States borders. NEPA's applicability to actions beyond the United States borders depended on interpretation of the term "human environment" as used in the Act.

The era of federal environmental legislation is only one decade old, and the intertwining of new legal doctrine with foreign policy considerations has raised unprecedented problems for parties on both sides of the NEPA debate. First, this Note will describe the magnitude of international concern for the environmental effects of economic development, the differing domestic interpretations

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1. I PUB. PAPERS 983 (1977).
2. Exec. Order No. 12,114, 44 FED. REG. 1957 (1979).
3. National Environmental Policy Act of 1969, 42 U.S.C. § 4322 (1976) [hereinafter cited as NEPA].
4. NEPA, § 102(2)C, 42 U.S.C. § 4332(2)C.

of NEPA, and the history of the debate within the United States government and courts concerning the Act's extraterritorial effect. Next, the Note will analyze President Carter's attempted resolution of the controversy under Executive Order 12,114, the extent to which the Order accommodates opposing viewpoints, and the Order's practical enforceability in light of the agencies' primary role in developing the implementing regulations of self-governance.

I. BACKGROUND TO THE DEBATE OVER NEPA'S FOREIGN APPLICABILITY

A. *International Recognition of the Environmental Effects of Economic Development*

In recent years, there has been growing recognition of the global ramifications of individual nations' activities on the environment. During Senate debates on NEPA in 1969, a spokesman for the State Department issued the following word of caution:

> [T]he objective of the bill [NEPA] or, for that matter, of any proposition dedicated to the protection of the national environment, cannot be effectively achieved unless it recognizes that existing ecosystems are interrelated by nature or by the activities of man, and that the environmental forces affecting our national resources disregard political and geographical frontiers.[5]

Additionally, in 1977, the United Nations Conference on Desertification issued a disturbing report[6] regarding the consequences of man's use and unwitting abuse of the natural environment.[7]

While many of the industrialized countries have reached the stage of refining environmental laws adopted in the early 1970's, the burden of initially implementing such protective measures often appears to outweigh the relative benefits when viewed from

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5. Letter from William B. Macomber, Jr., Ass't Sec'y for Cong. Rel. for the Dep't of State, to Senator Henry Jackson, *reprinted in* S. REP. No. 296, 91st Cong., 1st Sess., 43 (1969) [hereinafter cited as Macomber letter].

6. Report of the United Nations Conference on Desertification, Nairobi, Aug. 29 - Sept. 9, 1977, U.N. Doc. A/Conf. 74/36.

7. The Conference defined "desertification" as the "diminution or destruction of the biological potential of the land [which] can lead ultimately to desert-like conditions." *Id.* at 3. "In general, the quest for ever greater productivity has intensified exploitation and has carried disturbance by man into less productive and more fragile lands." *Id.*

the perspective of developing third world countries.[8] This perception generates problems at two levels. First, indiscriminate practices affecting any one nation's environment will likely affect other countries, either by degradation of the "global commons,"[9] or by direct effects within the borders of the acting country spilling over territorial boundaries.[10] Second, of more immediate concern to countries now experiencing rapid technological growth, are the potentially disastrous internal effects of unchecked development on the physical environment, and consequently on their economies. In a 1978 report to the President's Council on Environmental Quality, the Worldwatch Institute described the danger as follows: "Less developed countries, their governments intent upon promoting radid economic growth but lacking the scientific and bureaucratic capacities to regulate industries and products adequately, are especially vulnerable to *avoidable tragedies.*"[11] Perhaps the most spectacular international environmental disaster in part attributable to large-scale construction lacking preliminary environmental planning resulted from the completion of the Aswan Dam in Egypt,[12] although other less dramatic problems of a similar nature have been documented.[13]

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8. THE GLOBAL ENVIRONMENT AND BASIC HUMAN NEEDS 2, 29 (1978) (report to the Council on Enviornmental Quality by the Worldwatch Institute) [hereinafter cited as Worldwatch Report].

9. The term "global commons" refers to geographical areas beyond the jurisdiction of any nation, such as the oceans and Antarctica, in which all nations have a common but nonpossessory interest. *See generally* Hardin, *The Tragedy of the Commons,* 162 SCIENCE 1243 (1968).

10. There are indications that pesticides used abroad contaminate exported goods. For example, Dieldrin used in Colombian teak forests remains in shavings which are exported to Canada for cow litter. Cows eat these shavings, resulting in an unacceptable level of Dieldrin in their milk. Comment, *Controlling the Environmental Hazards of International Development,* 5 ECOLOGY L.Q. 321, 353 (1976) (emphasis added).

11. Worldwatch Report, *supra* note 8, at 21 (quoting E. ECKHOLM, THE PICTURE OF HEALTH: ENVIRONMENTAL SOURCES OF DISEASE (1977)).

12. The dam reduced the salinity of the water in the Eastern Mediterranean, nearly destroying the sardine industry. The project also created a health menace by increasing the number of disease-bearing aquatic snails. Strausberg, *The National Environmental Policy Act and the Agency for International Development,* 7 INT'L LAW. 46, 51 (1973). Construction of the dam also reduced the productivity of the Nile River bottomlands, where farmers traditionally had relied on annual flooding to ensure essential fertilization and irrigation. H.R. REP. No. 316, 92d Cong., 1st Sess. 33 (1972).

13. *See* Comment, *supra* note 10, at 322-37.

International awareness of the conflict between the growth patterns of developing countries and the need to control adverse environmental consequences was manifest at the 1972 United Nations Conference on the Human Environment. One hundred and thirteen countries attending the Conference endorsed "Principle 21," which recognized both the fundamental right of states to exploit their own resources and their correlative responsibility to ensure that activities within their own jurisdiction or control do not cause damage to the environments of other states or to the golbal commons.[14]

The United States occupies a peculiar international position as both the recognized leader in the area of environmental safeguards[15] and a major contributor of environmental hazards by means of its export policies. The Worldwatch Report drew attention to "[t]he practice, common in the United States and other developed countries, of legally exempting exports from the health regulations and standards that are imposed on domestic products . . . ."[16] This practice has been repeatedly denounced by commentators within the United States as well as by critics in developing countries who label such policies "economic imperialism."[17] In addition to attacks directed at United States export policies,

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14. The full text of Principle 21 reads as follows:

> States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other states or of areas beyond the limits of national jurisdiction.

Report of the United Nations Conference on the Human Environment, Stockholm, June 5-16, 1972, U.N. Doc. A/Conf.48/14/Rev. 1,5.

15. "No one country can unilaterally maintain the health of the biosphere, but the U.S. presence is so pervasive throughout the world, and so many nations are influenced by U.S. policy directions, that we cannot ignore our pivotal role in protecting and improving world environmental health." Coan, Hillis & McCloskey, *Strategies for an Environmentally Oriented Foreign Policy,* 14 NAT. RESOURCES J. 87, 88 (1974); *accord,* Worldwatch Report, *supra* note 8, at 21.

16. Worldwatch Report, *supra* note 8, at 22.

17. "At present, environmentally unsound products may be freely marketed abroad even though their use in the United States has been prohibited or made subject to strict control . . . at least a thorough warning and recommendations for their safe use should be given to foreign countries importing them." Coan, Hillis & McCloskey, *supra* note 15, at 90. *See also* Note, *The Concorde Debate: International Trade Versus the National Environment,* 9 L. AND POL'Y IN INT'L BUS. 959, 983 (1977).

criticism has been leveled at the lack of preliminary environmental planning in projects undertaken by United States developmental aid agencies, such as the State Department's Agency for International Development and the Export-Import Bank. "[Environmental] . . . problems may be caused by American efforts to make progress abroad occur in quantum leaps. For example, simultaneous . . . development of water resources, power transportation, and agriculture often has widespread and unforeseen, *but not unforeseeable,* effects on population, public health, wildlife and climate."[18]

B. *NEPA: The Environmental Impact Statement (EIS) and Agency Responsibilities*

1. Actions Affecting the Domestic Environment

The National Environmental Policy Act of 1969 declared a "national policy which will encourage productive and enjoyable harmony between man and his environment . . . [and] promote efforts which will prevent or eliminate damage to the environment and biosphere . . . ."[19] Rather than prescribe a compendium of specific practices or goals, Congress sought to improve indirectly the quality of the environment by requiring that agencies consider the environmental effects of their actions at the preliminary planning stages of a project.[20]

Section 103 of the Act directs all federal agencies to review their present statutory authority, regulations, policies, and procedures in order to identify potential roadblocks to compliance with NEPA. Considerable reliance has thus been placed on the agencies to adapt their procedures to new environmental considerations, and to cooperate in making good faith efforts to comply

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18. Comment, *supra* note 10, at 322 (emphasis added).
19. NEPA, § 2, 42 U.S.C. § 4321 (1976).
20. NEPA § 102 has been interpreted to require agencies to build into their decisionmaking process, beginning at the earliest possible point, an appropriate and careful consideration of the environmental aspects of proposed action in order that adverse environmental effects may be avoided or minimized . . . [and] to insure that unquantified envivonmental values be given appropriate consideration in decisionmaking along with economic and technical consideration.

Council on Environmental Quality Guidelines on Preparation of Environmental Impact Statements, 40 C.F.R. § 1500.1(a),(b) (1978) [hereinafter cited as CEQ Guidelines].

with the spirit of NEPA. Section 102 embodies the primary statutory mechanism for achieving agency compliance with the Act. This section requires the preparation of an environmental impact statement prior to a decision to undertake any "major Federal [sic] actions significantly affecting the quality of the human environment."[21] As part of the drafting process, agency officials must consult with and obtain the comments of any federal agency having special expertise on the potential environmental impact of the proposed project.[22] Copies of the final statement, along with views of consulting agencies, must be made available to the President, the Council on Environmental Quality (CEQ or Council), and the general public by publication in the Federal Register.[23] CEQ Guidelines[24] interpreting NEPA make clear that preparation of an EIS should include consideration of numerous alternatives to the proposed action, ranging from postponement of action to permit study of different technical designs, to taking no action at all.[25] This underscores perhaps the most significant characteristic of the EIS requirement: impact statements are not intended to yield quantifiable data resulting in either approval or veto of a proposed project. Rather, the function of the EIS is to ensure that agencies include environmental considerations among the many factors determining whether and how a project should be undertaken.

Title II of the Act established the CEQ as a branch of the executive office of the President assigned to formulate and recommend national policy aimed at improving the quality of the environment.[26] Among its various investigative and advisory

21. NEPA § 102(2)C, 42 U.S.C. § 4332 (1976) requires consideration of:
(i) The environmental impact of the proposed action,
(ii) Any adverse environmental effects which cannot be avoided should the proposal be implemented,
(iii) Alternatives to the proposed action,
(iv) The relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

22. *Id.*

23. *Id.; see also* Administrative Procedure Act, 5 U.S.C. § 552 (1976).

24. Council on Environmental Quality Guidelines on Preparation of Environmental Impact Statements, 40 C.F.R. § 1500 *et. seq.* (1978).

25. *Id.* § 1500.8(a)(4).

26. NEPA § 202, 42 U.S.C. § 4342 (1976).

functions, the Council must review the programs designed by federal agencies according to the policy and procedural requirements of NEPA and must make recommendations to the President regarding the agencies' achievements.[27] While most courts granted a fair measure of deference to CEQ's Guidelines interpreting the language and policy of the Act,[28] the Council's role was limited by statute to an advisory position which courts were ultimately free to ignore.[29] This limitation, subsequently perceived as a handicap to implementation of NEPA, was eliminated under President Carter's Environmental Message of 1977,[30] which gave the CEQ the power to issue binding regulations governing acceptable satisfaction of the procedural provisions of NEPA by federal agencies.[31]

2. Actions with Effects Beyond United States Borders

The text of NEPA does not positively indicate whether Congress intended the Act to have extraterritorial application. Although the broad mandate of the Act encompasses "all" federal agencies,[32] including those conducting activities beyond United States borders, it is not clear to which projects the EIS requirements of section 102 apply. That section directs that "to the fullest extent possible . . . all agencies of the Federal government shall [prepare impact statements for] major Federal actions significantly affecting the quality of the human environment."[33] Because the scope of the term "human environment" is not defined by the Act, debate has centered around its interpretation in light of the statute's language and legislative history.

Because NEPA contains no express geographic limitation, environmentalists argue that Congress' use of the term "human environment" indicates an intent that the Act apply to United States

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27. NEPA, § 204(3), 42 U.S.C. § 4344(3) (1976).

28. *See, e.g.*, Warm Springs Dam Task Force v. Gribble, 417 U.S. 1301 (1974).

29. In the Matter of Babcock & Wilcox, No. 50-571, 7 ELR 30017 (Nuclear Regulatory Comm'n, June 27, 1977).

30. *Supra* note 1.

31. As part of his Environmental Message to Congress, President Carter issued an Executive Order directing the CEQ to issue regulations governing federal agency implementation of the procedural provisions of NEPA. Exec. Order No. 11,991, 42 Fed. Reg. 25967 (1977).

32. NEPA, §§ 102(2), 103, 42 U.S.C. §§ 4332(2), 4333 (1976).

33. NEPA, § 102(2)C, 42 U.S.C. § 4332(2)C (1976).

agency actions wherever they occur. Conceding that some sections of NEPA implicitly refer to the "national" environment,[34] proponents of the Act's extraterritorial application argue that their reading is more consistent with language in the preamble and other sections of the Act.[35] Section 102(E) provides the most direct support for a broad interpretation of the EIS requirement by indicating that all agencies must "recognize the worldwide and long-range character of environmental problems."[36] The merit of this interpretation was tested in a running debate between the CEQ and the State Department which continued until the issuance of Executive Order 12,114.

(a) *Intragovernmental Debate Between the CEQ and State Department, and Scholarly Reaction.*—As early as 1970, CEQ stressed the requirement in section 102(E) of NEPA that all agencies "[r]ecognize the worldwide and long-range character of environmental problems."[37] Five months after the enactment of NEPA, the State Department and its semiautonomous subagency, the Agency for International Development (AID),[38] submitted a Memorandum[39] to CEQ rejecting the suggestion that environmen-

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34. NEPA, § 101(b), 42 U.S. § 4331(b) (1976).

35. The preamble to the Act declares as NEPA's purpose "[to] encourage productive and enjoyable harmony between *man and his environment,* to promote efforts which will prevent or eliminate damage to *the environment and biosphere* and stimulate the health and welfare of man [emphasis added]." Section 101 explicitly regcognized "the profound impact of man's activity on the interrelations of *all components of the natural environment,*" NEPA, § 101, 42 U.S.C. § 4331 (1976) [emphasis added]. *See generally* Memorandum to Heads of Agencies on Applying the EIS Requirement to Environmental Impacts Abroad, by Russell W. Peterson, Chairman, Council on Environmental Quality (Sept. 24, 1976) [hereinafter cited as 1976 CEQ Memo], *reprinted in Hearings on CEQ Authorization: Hearings on H.R. 10884 Before the Subcomm. on Fisheries and Wildlife Conservation and the Environment of the Comm. on Merchant Marine and Fisheries,* 95th Cong., 2d Sess. at 353 (1978) [hereinafter cited as CEQ Authorization Hearings].

36. NEPA, § 102(2)E, 42 U.S.C. § 4332(2)F (1976).

37. 1 CEQ ANN. REP. 200 (1970).

38. The Agency for International Development is an independent body within the Department of State, established by statute in the Foreign Assistance Act of 1961, PUB. L. No. 87-195, 75 Stat. 719, (codified at §§ 2151 *et seq.* (1976)).

39. Memorandum from Christian J. Herter, Special Ass't to the Sec'y for Envt'l Aff., Dep't of State, to Russell Train, Chairman, CEQ [hereinafter cited at 1970 State Dep't Memo], *reprinted in Hearings on the Ad. of the Nat'l Envt'l Pol'y Act Before the Subcomm. on Fisheries and Wildlife Conservation of the House Comm. on Merchant Marine and Fisheries,* 91st Cong., 2d Sess.,

tal impact statements were required for projects having foreign environmental impacts. While the Memorandum acknowledged the applicability of the section 103 requirement that agencies review their internal procedures for consistency with the policies embodied in NEPA,[40] it rejected the suggestion that section 102(C) mandated preparation of impact statements for actions occurring outside jurisdiction of the United States. The Memorandum stressed that the "international elements present" in State Department and AID projects would make compliance with section 102(C) "much more difficult than would be the case in actions occurring within the United States,"[41] and concluded that application of NEPA's EIS requirement to projects laden with sensitive foreign policy considerations would be "very difficult, if not impossible."[42] The State Department pointed out that NEPA itself tempered the section 102(E) requirement that all agencies lend support to initiatives designed "to maximize international cooperation in anticipating and preventing a decline in the quality of mankind's world environment"[43] with the clause "where consistent with the foreign policy of the United States."[44] Similarly, the broad policy statement embodied in section 101(b) of the Act calling on the federal government to "use all practicable means"[45] to support the underlying policies of NEPA was qualified by the acknowledgement that such means must be "consistent with other considerations of national policy."[46] Although the Memorandum conceded certain language in the Act might be taken as indicative of congressional intent that the phrase "actions significantly affecting the human environment" be applied to agency actions abroad,[47] the Memorandum concluded that the

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546 app. (1970) [hereinafter cited as 1970 *Merchant Marine Hearings*].

40. The Memorandum reported that, in keeping with section 103 of NEPA, the State Department and AID undertook "a thorough review of their policies, regulations and procedures . . . to assure that proper consideration [was] given to environmental factors by the United States and foreign officials involved in each concerned action, even in the case of actions occurring within the territory of some other country." 1970 State Dep't Memo, *id.* at 547.

41. *Id.* at 551.

42. *Id.* at 555.

43. NEPA, § 102(2)E, 42 U.S.C. § 4332(2)F (1976).

44. *Id.*

45. *Id.* at § 101(b), 42 U.S.C. § 4331(b) (1976).

46. *Id.*

47. 1970 State Dep't Memo, *supra* note 39, at 553.

Act did not on its face compel such an interpretation.[48]

The most convincing argument of the State Department-AID Memorandum, however, came from sources beyond NEPA itself. The Memorandum called attention to section 38 of the *Restatement (Second) of Foreign Relations Law,* which states that "[r]ules of United States statutory law . . . apply only to conduct within, or having effect within, the territory of the United States, unless the contrary is clearly indicated by the statute."[49] Since the ambiguous language of NEPA did not "clearly indicate" that Congress intended it to have international effect, the Memorandum concluded that the *Restatement* presumption against extraterritorial application governed interpretation of NEPA's scope.

The State Department Memorandum sparked cricitism from government sources and legal commentators. A Report on the Administration of NEPA issued by the House Committee on Merchant Marine and Fisheries unequivocally rejected the State Department's general conclusion that NEPA should not be interpreted as having extraterritorial effect: "Stated most charitably, the Committee disagrees with this interpretation of NEPA. The history of the Act makes it quite clear that the global effects of environmental decisions are inevitably a part of the decision-making process and must be considered in that context."[50]

The CEQ consistently adhered to its original contention that Congress intended NEPA's EIS requirement to apply to actions with impact abroad. The 1971 Report of the Council's Legal Advisory Committee urged the agencies to employ full NEPA procedures in assessing proposed actions in foreign countries.[51] The Council's 1973 Guidelines explicitly directed the agencies to evaluate the positive and negative effects of a proposed action in light of both national and international environmental impact.[52] In 1976, CEQ Chairman Russell Peterson issued a "Memorandum to the Heads of Agencies on Applying the EIS Requirement to Envi-

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48. For an excellent critical analysis of the 1970 State Dep't Memo, see Robinson, *Extraterritorial Environmental Protection Obligations of Foreign Affairs Agencies: The Unfulfilled Mandate of NEPA,* 7 N.Y.U.J. OF INT'L AND POL. 257, 258-62 (1974).

49. RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW, § 38 (1965).

50. HOUSE COMM. ON MERCHANT MARINE AND FISHERIES, ADMINISTRATION OF NEPA, H.R. REP. No. 316, 92d Cong., 1st Sess. 33 (1971).

51. REPORT OF THE STATE DEP'T LEGAL ADVISORY COMM. TO THE CEQ 13-17 (Dec. 1971).

52. CEQ Guidelines, 40 C.F.R. § 1500.8(a)(3)(i) (1978).

ronmental Impacts Abroad,"[53] setting forth arguments supporting full international application of NEPA.

Scholarly and congressional commentators unanimously joined with CEQ's rejection of the State Deparement's interpretation.[54] Some commentators evidenced a distrust of the State Department's sincerity, as well as disagreement with its legal analysis.[55] Proponents of the Act's extraterritorial interpretation cited the favorable language in the Act to support their contention that the term "human environment" should be interpreted to embrace the global environment.[56] In response to widely expressed fears that integration of environmental considerations into foreign assistance programs would prove offensive to foreign sovereigns, proponents pointed out that United States aid was often "tied" to conditions affecting the behavior of recipient countries.[57] The Report of the House Committee on Merchant Marine and Fisheries went so far as to suggest that no foreign country "could or properly would object to such an analysis."[58] In response to objections raised regarding the special need for confidentiality accompanying delicate trade and foreign assistance negotiations, it was ar-

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53. 1976 CEQ Memo, *supra* note 35.

54. *See generally* Comment, *supra* note 10; Robinson, *supra* note 48; Strausberg, *supra* note 12; Note, *The Extraterritorial Scope of NEPA's Environmental Impact Statement Requirement*, 74 MICH. L. REV. 349 (1975-76).

55. One commentator charged that the State Department's position "was based not so much on legal authority as it was prompted by a desire not to be burdened with the Section 102(2)C requirement of preparing a detailed statement of environmental impact." Robinson, *supra* note 48, at 259.

56. NEPA, § 102(2)E, 42 U.S.C. § 4332(2)F (1976).

57. One commentator drew an analogy to foreign assistance programs:

> When the United States provides financial or technical assistance to foreign countries, it is standard practice for the federal agency to require financial and technical information from the recipient country . . . . The United States will not supply the aid unless it is satisfied with the recipient's ability to use it and that the use conforms to American foreign policy. The same may be said about requiring information on the possible environmental effects of proferred assistance. Foreign countries have no inherent or vested right to receive American assistance . . . .

Renewed Controversy Over the Internationl Reach of NEPA, 7 ELR 10205, 10209 (Nov. 1977).

58. "In the first place, it seems elementary that this country may properly impose conditions upon the granting of unilateral aid to any country, and if it chooses to consider environmental implications in the definition of those conditions, no one can legitimately object to them." H.R. REP. No. 316, *supra* note 50, at 47.

gued that NEPA exhibited sufficient flexibility to accommodate foreign policy concerns to the requirements regarding preparation and circulation of draft EIS's.[59] One commentator dryly observed: "The [State Department] memo emphasizes that NEPA does not apply to foreign aid because those *projects* are located in other countries. But NEPA regulates agencies, not projects."[60] Moreover, critics of the State Department's reasoning noted that the filing of an EIS does not compel automatic approval or disapproval of a project,[61] and that integration of environmental considerations in the planning process might even be welcomed by foreign governments cognizant of the long-term dependence of economic growth on sound environmental planning.[62]

To counter the State Department's reliance upon the *Restatement*'s presumption against an implied extraterritorial application of statutes, advocates of a broad interpretation of NEPA's scope sought to buttress the statute's ambiguous language with persuasive references to the legislative history of the Act. Proponents of extraterritoriality sought support from statements made

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59. "[T]he instrumentalities of American foreign policy—confidential communications, negotiations and the like—will continue to be protected under NEPA by the Congressional direction that NEPA be implemented only to the fullest extent possible." Robinson, *supra* note 48, at 263. *See also* 1976 CEQ Memo, *supra* note 35, at 361, which points out that "[s]ection 102(2)C provides exceptions to public circulation of documents by incorporating the Freedom of Information Act and its exemptions by reference."

60. Comment, *supra* note 10, at 349 (emphasis in original).

61. "Impact statements do not dictate actions on foreign soil or impose U.S. requirements on foreign countries; instead, they guide U.S. decisionmakers in determining U.S. policies and actions." 1976 CEQ Memo, *supra* note 35, at 360.

62. [T]he requirement of 102 impact statements operates primarily to inform both the aid grantor and the aid recipient of just what environmental consequences may properly be expected as a result of the program, and what alternatives may be available to minimize the adverse effects. Surely, no foreign country could or properly would object to such an analysis; it can only improve their own informational base, and avoid what might be serious problems in the future.

H.R. Rep. No. 316, *supra* note 50. *See also* Letter from John J. Gilligan, Administrator of AID, to Charles Warren, Chairman of CEQ (Dec. 9, 1977), *reprinted in* CEQ Authorization Hearings, *supra* note 35, reporting that in its experience with EIS, "[w]e have discovered that developing countries themselves have come increasingly to recognize the inter-related nature of environment and development and to seek to ensure that environmental considerations are adequately addressed in development projects." *Id.* at 363.

by Senator Henry Jackson during debates over NEPA,[63] and from contemporaneous statements made by a State Department spokesman that evidenced an awareness that efforts to safeguard the domestic environment could not be divorced from influences on the global environment.[64]

This legislative history, however, fails to provide sufficient support for an extraterritorial interpretation to rebut the section 38 presumption. Although statements made by Senator Jackson and other evidence pertaining to NEPA's passage indicate congressional awareness of the insiginficance of national boundaries in the biological environment, the precise question of NEPA's foreign application never received the focused attention of the bill's drafters. Moreover, reflecting upon the EIS provision and its potential international scope, one of NEPA's authors remarked: "I am not sure what I had in mind when this language was included."[65] In sum, the inconclusive legislative history of the Act falls short of providing an authoritative mandate for the international application of NEPA.

(b) *Judicial Decisions on Extraterritoriality.*—While a number of agencies voluntarily adopted procedures in compliance with NEPA, assuming its extraterritorial application,[66] several of those conducting extensive foreign activities refused to countenance that basic assumption. As a result of such agency resis-

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63. The 1976 CEQ Memo referred to Senator Jackson's comments on two occasions. The first quotation is an explanation of NEPA's statement of policy:

> [NEPA] is a congressional declaration that we do not intend, as a government or as a people, to initiate actions which endanger the continued existence of the health of mankind: That we will not intentionally initiate action which will do irreparable damage to the air, land and water which support life on earth.

1976 CEQ Memo, *supra* note 35, at 356. The second quotation from Jackson's statements during the floor debate over NEPA also indirectly supported an international interpretation of the Act: "Although the influence of the U.S. policy will be limited outside its own borders, the global character of ecological relationships must be the guide for domestic activities." *Id.* at 355.

64. Macomber letter, *supra* note 5.

65. Statement of Congressman John Dingell before the *Merchant Marine Hearings, supra* note 39, at 1143. While Congressman Dingell indicated that he saw no exemptions in the Act to exclude foreign affairs agencies, he could not identify evidence of explicit congressional intent that NEPA have extraterritorial effect.

66. Arms Control and Disarmament Agency, 38 Fed. Reg. 6321 (1973); National Aeronautics and Space Administration, 14 C.F.R. § 1103 (1978); Coast Guard, 38 Fed. Reg. 34, 135-46 (1973).

tance, the broad question of NEPA's application to federal agency actions having significant environmental impacts beyond United States borders was raised, directly or inferentially, in at least ten separately litigated cases prior to issuance of Executive Order No. 12,114.[67] Although two of those cases "assumed," but did not decide, that NEPA fully applies to projects abroad,[68] and two others were mooted when the defending agency agreed to prepare an EIS for the project at issue,[69] the question of whether and when NEPA applies to agency actions with extraterritorial impacts has never been formally decided by a court of law.[70] A brief survey of the relevant cases, however, serves to highlight the foreign policy concerns which underlie the courts' reluctance to tackle the question of NEPA's extraterritorial applicability.[71]

In analyzying these cases it is necessary to distinguish the several categories of "extraterritorial" environmental impacts which developed as the agencies refined their defenses to the charge of extraterritoriality. Environmental impacts with extraterritorial effects can affect a variety of jurisdictions: (1) effects confined to the global commons;[72] (2) impacts affecting both the United States and the global commons; (3) impacts affecting the environments of the United States and a foreign country; and (4) impacts the effects of which are felt solely in a foreign country. Neither the court nor the agencies initially approached the issue with

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67. One case, Natural Resources Defense Council v. Export-Import Bank of the United States, No. 77-0080 (D.D.C. Jan. 14, 1977) (order granting motion for a stay of proceedings), involved a series of judicial stays pending an Executive Branch opinion on the question of extraterritoriality.

68. Sierra Club v. Adams, 578 F.2d 389 (D.C. Cir. 1978); National Organization for the Reform of Marijuana Laws v. Department of State, 452 F. Supp. 1226 (D.D.C. 1978); Sierra Club v. AEC, No. 1867-73, 4 ELR 20685 (D.D.C. 1974).

69. Environmental Defense Fund v. Agency for Int'l Development, 6 ELR 20121 (D.D.C. 1975); Sierra Club v. AEC, No. 1867-73, 4 ELR 20685 (D.D.C. 1974).

70. One administrative decision by the Nuclear Regulatory Commission, however, explicitly rejected the position of the CEQ and held that NEPA was not applicable to United States export activities with impacts limited to a foreign state. In the Matter of Babcock & Wilcox, 7 ELR 30017 (1977).

71. One student of the extraterritoriality conflict suggested that "the courts are reluctant to review, because 'in the field of foreign relations . . . the important, complicated, delicate, and manifold problems incident thereto are confided solely to the judgment and discretion of the President.' " Strausberg, *supra* note 12, at 63 (quoting Rose v. McNamara, 252 F. Supp. 111 (D.D.C. 1966)).

72. Harding, *supra* note 9.

such categories firmly in mind, but through litigation the distinctions took on greater significance. These distinctions were ultimately integrated into the provisions of Executive Order No. 12,114.

The first case concerning the preparation of impact statements for United States agency actions abroad was *Wilderness Society v. Morton.*[73] In *Wilderness,* the court allowed intervention by Canadian environmentalists in a suit challenging the Secretary of the Interior's obligation under NEPA to consider the potential environmental impacts of certain proposed routes for the Alaska pipeline through Canada. It was not clear whether the court's grant of standing to the foreign interest group was because of the project's possible domestic effects, or was based instead on the agency's independent duty under NEPA to assess potential impacts on Canada alone. The CEQ interpreted the court's action as a recognition that the "Canadians' interests in the environmental impact in Canada were within the zone of interests protected by NEPA."[74] Opponents of NEPA's extraterritorial application read the opinion more narrowly, arguing that "[a] finding that NEPA encompassed an examination of potential impacts in Canada . . . could flow from the obligation to prevent harm to the 'human environment' from domestic action independently requiring an impact statement . . . ."[75]

The following year, the United States District Court of Hawaii twice held NEPA applicable to United States agency actions in United States trust territories.[76] In *People of Enewetak v. Laird,*[77] the court, without directly confronting the issue of NEPA's foreign applicability, observed that NEPA "clearly evidences a concern for all persons subject to federal action which

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73. 463 F.2d 1261 (D.C. Cir. 1972).

74. Memorandum to Heads of Agencies on Application of the National Environmental Policy Act to Federal Activities Abroad, by Charles Warren, Chairman, Council on Environmental Quality (Jan. 19, 1978), *reprinted in Hearings on CEQ Authorization: Hearings on H.R. 10884 Before the Subcomm. on Fisheries and Wildlife Conservation and the Environment of the Comm. on Merchant Marine and Fisheries,* 95th Cong., 2d Sess. at 349 (1978) [hereinafter cited as 1978 CEQ Memo].

75. In the Matter of Babcock & Wilcox, 7 ELR at 30020.

76. People of Enewetak v. Laird, 353 F. Supp. 811 (D. Hawaii 1973); People of Saipan v. United States Dep't of Interior, 356 F. Supp. 645 (D. Hawaii 1973), *aff'd as modified,* 502 F.2d 90 (9th Cir. 1974), *cert. denied,* 420 U.S. 1003 (1975).

77. 353 F. Supp. 811 (D. Hawaii 1973).

has a major impact on their environment—not merely United States citizens located in the fifty states."[78] It is not surprising that this language was seized upon by proponents of extraterritoriality as clear judicial support for their position.

In 1974, the question of NEPA's application to foreign assistance programs was raised directly in a suit brought by the Sierra Club against the Atomic Energy Commission (AEC) and the Export-Import Bank.[79] This case, however, was mooted by the AEC's voluntary decision to prepare a final generic EIS[80] on United States nuclear export activities in conjunction with the Energy Research and Development Agency.[81] This was the first in a series of cases in which the court assumed, implicitly or explicitly, that governmental actions abroad were covered by the Act.[82]

The effective settlement of the AEC case with regard to the Export-Import Bank's role opened the door to further consideration of NEPA's application to United States agencies' foreign assistance programs. A 1975 case brought against the Agency for International Development (AID)[83] resulted in a court-approved settlement[84] in which AID agreed to comply with NEPA by preparing both generic and site-specific impact statements for its international pest management program. AID also agreed to issue internal regulations to guide the agency's compliance with NEPA in other activities abroad.[85] AID's concession to NEPA's require-

78. *Id.* at 816.

79. Sierra Club v. AEC, 4 ELR 20685.

80. An impact statement might be required for projects with either "generic" or "site-specific" foreign environmental impacts. The generic EIS is prepared to cover a number of potential impacts in different locales which might result from a variety of actions taken under a broad single agency program or where more than one agency participates in such a program.

81. Energy Research and Development Agency, Final Statement on U.S. Nuclear Power Export Activities (ERDA-1542, Apr. 1976). Because the AEC was designated "lead agency" in the project, its agreement to prepare an impact statement effectively settled the case on behalf of the Export-Import Bank as well. *See also id.* on site-specific and generic impact statements.

82. Sierra Club v. AEC, 4 ELR 20685.

83. Environmental Defense Fund v. AID, 6 ELR 20121.

84. AID's agreement to issue agency regulations complied with section 103 of NEPA, which required agencies to formulate "such measures as may be necessary to bring their authority and policies into conformity with the intent, purposes and procedures" of the Act. NEPA § 103, 42 U.S.C. § 4333 (1976).

85. The agreement stipulated that in preparation of impact statements, "AID recognizes its responsibilities to conduct its operations in a manner that mitigates or avoids any potential short- or long-term deleterious environmental

ments was especially encouraging to environmentalists because AID is a subagency of the State Department, albeit invested with considerable autonomy.[86]

Despite its forced compliance with NEPA, the Administrator of AID reported in a letter to the Chairman of CEQ written eighteen months after the settlement, "that [AID] had no significant reservations about the preparation of environmental analyses for programs conducted abroad."[87] Significantly, the agency head reported that fears that preparation of impact statements would invade the sovereign prerogatives of recipient countries were not borne out in practice:

> Many of the AID's projects involve delicate negotiations with foreign governments and/or private organizations in foreign countries . . . . We have been able to undertake environmental analyses without strain on the relations between the United States and foreign countries. In fact, we have found that environmental analysis is no more intrusive, or potentially upsetting, than other reviews, *e.g.*, those for social soundness or women in development that are routinely undertaken by the Agency.[88]

If the AID settlement raised hopes within the environmental community that other agencies would follow AID's lead in conceding NEPA's extraterritorial application by issuing compliance regulations, such hopes were short-lived. A series of judicial and administrative decisions followed which made it clear that the question of extraterritorial application was still unresolved. Two decisions requiring preparation of impact statements assumed, but did not decide, that NEPA fully applied to agency actions abroad.[89] Other courts and an administrative decision by the Nuclear Regulatory Commission, however, exemplified continuing

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effects of local, regional or global proportions." Environmental Defense Fund v. AID, 6 ELR 20121. AID's regulations for environmental assessment procedures are found at 22 C.F.R. § 216 (1979).

86. *See* note 38 *supra*.

87. Letter of Dec. 9, 1977, *supra* note 62.

88. *Id.* at 364. The letter also noted that three other "potential negative impacts hypothetically associated with the conduct of environmental analyses" failed in practice to pose significant problems for AID: (1) achievement of the Agency's mandate by the conduct of environmental analyses, (2) loss of United States jobs through cancellation of projects deemed environmentally unsound, and (3) costs of preparing impact statements. *Id.* at 364-65.

89. Sierra Club v. Adams, 8 ELR at 20283 n.14; NORML v. Department of State, 8 ELR at 20514.

opposition to international application of the Act.[90]

In June 1975, the Sierra Club and other environmental groups brought suit against the Secretary of Transportation and the Administrator of the Federal Highway Administration,[91] alleging failure to prepare an EIS assessing the impact of United States participation in construction of the Darien Gap Highway in Panama and Columbia. Plaintiffs' request for an injunction barring defendants' further participation in the project pending preparation of an appropriate impact statement was granted following a hearing in October.[92] One year after suit was filed, the Government filed a "Notice of Compliance with Terms of Injunction," attaching a copy of its final EIS, and proposed the resumption of construction assistance in July 1976. The district court refused to approve the Government's statement, and instead continued the preliminary injunction because of certain substantive deficiencies in the impact statement.[93] The court found the statement inadequate in three respects:[94] (1) control of aftosa, or foot-and-mouth disease, which it was feared might travel north on the new highway from South America to the United States, (2) possible alternative routes for the highway, as required by section 102(2)C(iii) of NEPA, and (3) the effect of construction on certain Indian tribes living in the vicinity of the proposed highway.[95] In March 1978, the Court of Appeals vacated the injunction against continued construction and approved the Government's redrafted impact statement. The court, however, took notice of "evidence which indicates that the government may be a bit too anxious to complete this project"[96] and remanded the case to District Court for review of the Department of Agriculture's certification regard-

90. Environmental Defense Fund v. AID, 6 ELR 20121; In the Matter of Babcock & Wilcox, 7 ELR 30017.

91. Sierra Club v. Coleman, No. 75-1040 (D.D.C. filed June 27, 1975).

92. Sierra Club v. Coleman, 405 F. Supp. 53 (D.D.C. 1975).

93. Sierra Club v. Coleman, 421 F. Supp. 63 (D.D.C. 1976).

94. *Id.* at 65-67.

95. The requirement that environmental impact statements assess potential socio-economic effects stemming from major federal actions significantly affecting the physical environment arose in cases involving purely domestic impacts, typically in urban settings. *See* Hanley v. Kleindienst, 471 F.2d 823 (1972). Consideration of such effects of agency actions, however, becomes mandatory only when the environment has been significantly affected. Absent the environmental effect, even startling socio-economic impacts cannot trigger preparation of an impact statement under NEPA.

96. Sierra Club v. Adams, 8 ELR at 20286.

ing aftosa control. The Court of Appeals remarked: "While we recognize that oversights can occur in an undertaking as vast as preparing a $500 billion budget, we must also recall that vitally important environmental concerns are present in this case."[97] The case is a poignant example of the repeated delay and judicial entanglement that certain agencies feared would interfere to an unacceptable degree with the execution of sensitive foreign policy-related projects abroad.

Although CEQ immediately seized on the issuance and continuance of the preliminary injunction as evidence supporting the Council's belief that "an environmental statement is required whenever United States actions would have significant environmental impacts on the United States, on global commons, or on foreign countries,"[98] other commentators read the case more narrowly. Such observers felt that although the court was clearly aware of the environmental impacts of the highway project outside the United States,[99] the CEQ's contention that such effects triggered the EIS requirement was not completely accurate. While the District Court's concerns regarding alternative routes and the effects of highway construction on Indian tribes were limited to effects solely within foreign countries, the third basis of the injunction regarding aftosa control limited the requirement of an impact statement to potential significant effects within the United States. A conservative reading of *Sierra* suggested that in "a case where a major federal project outside the United States has significant impacts both on the United States and on foreign countries . . . [there is] clear precedent for requiring consideration of foreign as well as domestic impacts."[100] The *Sierra* decision, however, stopped short of a clear statement that United States agency actions having environmental impacts confined to foreign territorial boundaries required preparation of an impact statement. The court remarked in a footnote: "We need only assume, without deciding, that NEPA is fully applicable to construction in Panama. We leave resolution of this important issue

97. *Id.* at n.43.

98. 1976 CEQ Memo, *supra* note 35, at 358, n.13. The CEQ based this conclusion on its perception that "[s]ince the significant impacts of corrider alternatives lay exclusively in Panama and Columbia, the case necessarily holds that impacts in foreign national territory are within the scope of section 102(2)(C)." *Id.*

99. 1 HARV. ENVT'L L. REV. 125 (1976).

100. *Id.* at 126.

to another day."[101] Although *Sierra* clearly required preparation of an EIS for projects significantly affecting the domestic environment, either alone or combined with effects on a foreign country's environment, it is not clear whether environmental effects confined to a foreign nation or impacts on the global commons require preparation of such a statement.

Following the *Sierra* decision, commentators criticized the concept that preparation of NEPA statements concerning the potential impact of agency actions on the environment of foreign countries or on the global commons depended upon a "triggering" impact within the territorial United States. One critic called this the "boomerang" interpretation of NEPA, noting that adverse environmental impacts are not confined to national boundaries and that protection of the United States environment depends on a concern for the effects of agency actions in other countries.[102] Another commentator, critical of the domestic trigger concept, observed:

> [T]here is no rational basis for considering foreign impacts when a particular project has an additional significant impact on the United States environment, but ignoring foreign impacts when there is no such domestic impact . . . . Both the practical and policy arguments for or against consideration of foreign impacts in environmental impact statements would be identical regardless of whether an additional domestic impact is present.[103]

Authorities within the federal government continued to differ on the question of extraterritoriality, offering little guidance to courts facing the issue. Despite its issuance of minimal compliance regulations in 1972,[104] the State Department maintained its early view that NEPA did not bind the agencies to full compliance in cases involving sensitive foreign policy considerations.[105] Agencies opposed to the extraterritorial interpretation relied on the views of the State Department in defending against suits brought to compel agency compliance with NEPA.

Prior to the President's grant of regulatory authority to the CEQ in 1977, the Council's opinions had only advisory effect,

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101. Sierra Club v. Adams, 578 F.2d 389, 8 ELR at 20283, n.14.

102. Comment, *supra* note 10, at 353.

103. *See* note 99 *supra*.

104. Dep't of State Procedures for Compliance with Federal Envt'l Statutes, 37 Fed. Reg. 19167 (1972).

105. *See* In the Matter of Babcock & Wilcox, 7 ELR at 30021.

which courts were free to ignore. For example, the Nuclear Regulatory Commission (NRC) chose to ignore the guidelines in the 1977 administrative decision, *In the Matter of Babcock & Wilcox.*[106] In *Babcock,* the NRC held that NEPA did not require preparation of site-specific impact statements as a prerequisite to the licensing of a proposed nuclear reactor to be exported to West Germany. The Commission openly disagreed with CEQ's view that NEPA requires assessment of impact confined to a foreign country, and cited the existence of a generic EIS prepared for the same nuclear export program as being sufficient to comply with NEPA. The opinion cited two primary sources in support of this conclusion: the language of NEPA itself and the State Department's views opposing extraterritoriality. The Commission cited the "very conspicuousness of the foreign policy qualification" in section 102(2)E as indicative of congressional "concern for the practical problems of conducting foreign policy and responding to the vicissitudes of international relations."[107] Although the NRC termed the CEQ's guidelines "useful in implementing NEPA,"[108] the Commission found neither the 1976 CEQ Memorandum nor its interpretation of the *Sierra* case persuasive. Noting the connection between construction of the Darien Gap Highway and the potential damage to United States livestock posed by aftosa contagion, the Commission interpreted the *Sierra* case narrowly:

> The Darien Gap case does not present, nor do the two opinions address, the question whether a NEPA impact statement is required on a project without significant domestic impacts. Nor do the two opinions deal squarely with the question whether NEPA requires the assessment of the purely foreign impacts of a project which also has domestic impacts.[109]

The Commission concluded that the EIS requirements prescribed by NEPA "cannot be met in the foreign context in a manner equivalent to domestic practice without seriously intruding on a foreign state's sovereignty."[110] The NRC relied heavily on the State Department's view that site-specific assessments of environmental impacts within the territory of another country would

106. *Id.* at 30019.
107. *Id.*
108. *Id.*
109. *Id.* at 30020.
110. *Id.* at 30021.

have "major adverse political consequences."[111] Although an administrative decision, the NRC opinion was merely the expression of one agency's viewpoint. The decision served, however, to highlight the CEQ's lack of authority and the State Department's continuing influence in opposing a full extraterritorial interpretation of NEPA.[112]

In June 1978, the District Court for the District of Columbia followed the lead of the D.C. Court of Appeals in *Sierra,* by assuming that NEPA applies fully to United States agency actions abroad. In *NORML v. Dep't of State,*[113] the National Organization for the Reform of Marijuana Laws (NORML) charged the State Department, the Drug Enforcement Administration, the Department of Agriculture and AID with failure to prepare a required EIS on the potential effects of the agencies' herbicide spraying assistance program for the eradication of marijuana and poppy fields in Mexico. Although the court held the defendants in violation of NEPA for failure to prepare a statement on the effects of spraying on the United States environment, it refused to decide the question of whether NEPA required an EIS assessing the impacts of the spraying program on the Mexican environment alone.[114] The plaintiff's desire for an unequivocal declaration of NEPA's extraterritorial application was further eroded by the court's refusal to enjoin the defendant's participation in the program pending preparation of an EIS. Noting the conflict between NEPA's emphasis on environmental factors and the Congress' equally legitimate concern with envorcement of federal narcotics policy through actions such as the spraying program, the court weighed the "strong overtones of foreign policy" implicit in the defendants' cooperation with the Mexican government, and concluded that on balance the facts mitigated the necessity for an

111. Letter from Louis V. Nosenzo, Deputy Ass't Sec'y, Bureau of Oceans and Int'l Envt'l Aff., Dep't of State, to James J. Shea, Dir. of Int'l Programs, Nuclear Regulatory Comm'n (May 31, 1977), *reprinted in part in id.* at 30021.

112. For an interesting critique of the NRC's position, see Renewed Controversy Over the International Reach of NEPA, *supra* note 57 at 10208.

113. 452 F. Supp. 1226.

114. Prior to the court's decision, the agency defendants agreed to prepare an EIS with respect to the domestic effects of the spraying program and to prepare an "environmental analysis" of the effects in Mexico. 8 ELR at 20574. The out-of-court settlement of April 24, 1979 formally included this agreement. New York Times, May 13, 1979, at 36, col. 3.

injunction.[115] Because it could decide the case without ruling on the larger issue, the District Court stated that, in accordance with its decision in *Sierra Club v. Adams,* "the extraterritoriality of NEPA remains an open question in this circuit."[116]

II. Continued Controversy and Proposed Solutions

A. *The Export-Import Bank Controversy*

As stipulated in the court approved settlement of *EDF v. AID,*[117] AID issued regulations in 1976[118] to ensure full compliance with NEPA regarding its actions abroad. Other federal agencies voluntarily adopted procedures for filing impact statements assessing the environmental effects of their foreign activities.[119] Even the nongovernmental World Bank established guidelines for consideration of environmental factors in the conduct of its international assistance programs.[120] As the Natural Resources Commission decision in *In the Matter of Babcock & Wilcox*[121] demonstrated, however, this trend toward compliance with NEPA's presumed international scope was not universal among federal agencies. Most notably, the State Department maintained its stance that NEPA did not require preparation of an impact statement for agency actions affecting only the environment of a foreign country.[122]

In 1977, the Natural Resources Defense Council (NRDC) brought suit to test the Export-Import Bank's (Bank or Eximbank) contention that NEPA was not applicable to Bank assis-

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115. NORML v. Dep't of State, 452 F. Supp. at 1226.

116. 8 ELR at 20574.

117. 6 ELR 20121.

118. 22 C.F.R. § 216 (1978). AID's regulations presume full applicability of NEPA to its foreign activities, requiring site-specific impact statements for all projects significantly affecting the environment of any nation or the global commons.

119. *See* note 66 *supra. See also* State Dep't Draft EIS, New Panama Canal Treaty Between the United States and the Republic of Panama, CEQ No. 71057 (Aug. 1977); Dept. of Commerce, EIS on Importation of South African Seal Skins, Moratorium, CEQ No. 60209 (Feb. 12, 1976).

120. *See* Int'l Inst. for Environment and Development, Multilateral Aid and the Environment: A Study of the Envt'l Procedures and Practices of Nine Development Financing Agencies 19-23 (Sept. 1977).

121. 7 ELR 30017.

122. *Supra* note 111.

tance activities.[123] The Bank had previously been the target of a NEPA enforcement suit in *Sierra Club v. Atomic Energy Commission.*[124] The issue of NEPA's application to the Bank's activities escaped judicial decision in *Sierra,* however, when the AEC as "lead agency" agreed to prepare a generic impact statement covering the Bank's role in the activity in question. Not only did the NRDC suit focus attention directly upon the Bank's independent activities, it also provided the first opportunity since *EDF v. AID*[125] to force a decision about NEPA's applicability to impacts of agency actions confined to a foreign country. Plaintiffs NRDC charged that NEPA's provisions applied to "all federal agency actions, whether they are undertaken within the U.S., in other countries, or outside the jurisdiction of any country."[126] Observers speculated that plaintiffs might settle for less than a judicial declaration of NEPA's international scope should the Bank agree to a settlement similar to that reached in the AID case.[127] The resurrection of the controversy regarding the Bank's purported coverage under NEPA, however, set off a fresh round of debate in both Congress and the Carter Administration as to the yet unresolved question of NEPA's foreign application. Four months after the suit was filed, the President issued Executive Order No. 11,991 granting the CEQ authority to issue regulations requiring that federal agencies implement the procedural provisions of the Act.[128] In anticipation of CEQ regulations dealing with the question of extraterritoriality, the district court granted the defendant's motion for a stay of proceedings pending a policy statement from the executive branch.[129]

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123. NRDC v. Eximbank, No. 77-0080 (D.D.C. Jan. 14, 1977). The Export-Import Bank provides financial assistance to foreign sources for purchase of United States products and services to support development projects overseas.

124. 4 ELR 20885.

125. 6 ELR 20121.

126. NRDC v. Eximbank, No. 77-0080 (D.D.C. filed Jan. 14, 1977), Complaint, *reprinted at* 7 ELR 65444 (May, 1977).

127. *Reinvigorating the NEPA Process: CEQ's Draft Compliance Regulations Stir Controversy,* 8 ELR 10045, 10046 (March, 1978).

128. *See* note 31 *supra.* The D.C. district court specifically noted in its order that "judicial resolution of [the] issue will have important foreign policy implications." The court concluded that a stay to allow the Carter Administration to address these considerations was appropriate.

129. NRDC v. Eximbank, No. 77-0080 (D.D.C. Jan. 14, 1977).

B. *Congressional Reaction*

1. Senate Bill 3077

As CEQ circulated draft regulations for agency comment in early 1978,[130] Congress reacted to fears within the business community that application of NEPA to Eximbank's assistance programs would undermine the United States' competitive position abroad.

In April 1978, the Senate Committee on Banking, Housing and Urban Affairs (Committee) favorably reported S. 3077, a bill exempting the Eximbank's export activities having no domestic impact from the dictates of NEPA.[131] The Committee characterized the bill as a response both to the suit against Eximbank and to "the premature issuance by the Council on Environmental Quality of draft regulations" requiring all federal agencies to prepare environmental impact statements for actions having no environmental consequences within the United States.[132] The Committee observed that "the mere discussion of the draft regulations appears to have generated great uncertainty in the business community [and that] many exporting firms express concern that imposing such requirements on the Bank [will] lead to a significant loss of business to foreign competitors."[133] Without taking a stand on the legal issue of NEPA's extraterritorial application, the Committee expressed its hope that S. 3077 would encourage Congress to accept the responsibility for settling sensitive public policy choices rather than leaving such choices "to be settled through interagency bargaining by executive branch bureaucracies."[134]

The following month, the Senate Committee on Environment and Public Works[135] responded to a referral of S. 3077 by issuing a Report[136] containing a letter to President Carter encouraging formulation of an Administration opinion on the extraterritorial-

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130. CEQ circulated its proposed regulations on Dec. 13, 1977, followed by the 1978 CEQ Memo released January 19, 1978, *supra* note 74 at 348.

131. S. REP. No. 844, 95th Cong., 2d Sess. 9 (1978).

132. *Id.*

133. *Id.*

134. *Id.*

135. The Senate Committee on Environment and Public Works has jurisdiction over NEPA. The Committee was granted referral of S. 3077 at its own request. S. REP. No. 1039, 95th Cong., 2d Sess. 2 (1978) [hereinafter cited as S. REP. No. 1039].

136. *Id.*

ity issue prior to further Senate debate over the bill.[137] The Report also included a statement from the Chamber of Commerce of the United States (Chamber)[138] which cited the business community's disappointment with the competitiveness of the Bank's programs and the negative impact which would result from application of EIS requirements to the Export-Import Bank.[139] Along with other business interests, the Chamber warned that the efforts of CEQ and other extraterritorial proponents to impose United States environmental standards on other countries "would raise important foreign policy considerations that appear to go far beyond the intent of Congress in enacting NEPA."[140]

The debate surrounding S. 3077, coupled with agency reaction to CEQ's draft regulations on foreign impact statements, stirred expressions of anti-extraterritorial sentiment both within and outside the government. When the Administration circulated a draft executive order on the matter in July 1978,[141] sponsoring Senator Adlai E. Stevenson dropped the bill before the Senate could vote on the proposal.

2. Senate Resolution 49

Concurrent with the Senate debates concerning S. 3077, a proposal from the Senate Committee on Foreign Relations drew agency attention to environmental impact statements of a different nature.[142] Senator Claiborne Pell, reversing the usual proce-

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137. *Id.* at 3-4 (letter from Chairman Jennings Randolph to President Carter).

138. *Id.* at 7-11 (statement of Jack Carlson, Vice President and Chief Economist, U.S. Chamber of Commerce).

139. The concerns of the Chamber of Commerce were representative of those expressed in later hearings on S. 3077. The Chamber focused on the increased cost involved in the preparation of foreign impact statements and the likelihood that EIS preparation would lead to lengthy delays which might undermine the Bank's competitive position in bidding against other international financing organizations. *Id.* at 10-11. *See Hearing Before the Subcomm. on International Finance of the Senate Comm. on Banking, Housing and Urban Affairs,* 95th Cong., 2d Sess. part 4, at 229-30 (1978) (letter from the Secretary of Commerce to Richard Lesher, President, United States Chamber of Commerce); *see also Hearing Before the Subcomm. on Resource Protection of the Senate Comm. on Environmental and Public Works,* 95th Cong., 2d Sess. 9-11 (1978) (statement of Jack Carlson).

140. S. REP. No. 1039, *supra* note 135 at 8.

141. [1978] 9 ENVIR. REP. (BNA) 539.

142. S. Res. 49, 95th Cong., 1st Sess. (1977) was introduced by Senator Clai-

dure for creating international treaties, introduced Senate Resolution 49, which urged the executive branch to endorse a treaty requiring the preparation of an "international environmental impact statement"[143] for actions by signatory countries adversely affecting the physical environment of another nation or the global commons. At a hearing on the proposal, officials from the Department of State,[144] the Environmental Protection Agency[145] and the Council on Environmental Quality[146] voiced their support of the concept. All three government witnesses, however, expressed reservations concerning terms of the proposed treaty which would permit either a single nation or a block of nations to veto a project.[147] After consultation with concerned agencies, the proposed treaty was amended to satisfy this objection and was passed by voice vote on July 21, 1978.

Although the proposed treaty, based on independent authority and focusing exclusively on environmental impacts outside United States boundaries, was distinguishable from NEPA, many of the agencies supporting Senate Resolution 49 were also proponents of an extraterritorial interpretation of NEPA. The State Department, however, was a notable exception to that position. Because the treaty requires preparation of impact statements for

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borne Pell on January 24, 1977. Hearings on the resolution continued into the summer of 1978. *See Hearing Before the Subcomm. on Arms Control, Oceans and Int'l Environment of the Senate Comm. on Foreign Rel. on S. Res. 49, 95th Cong., 2d Sess. 9 (1978).*

143. *Hearings Before the Subcomm. on Arms Control, Oceans and the Int'l Environment of the Senate Comm. on Foreign Rel. on S. Res. 49,* 95th Cong., 1st Sess. 9 (1977).

144. *Id.* at 10 (statement of Hon. Patsy Mink, Assistant Secretary of State for Environmental and Scientific Affairs).

145. *Id.* at 23 (statement of Hon. Barbara Blum, Deputy Administrator, EPA).

146. *Id.* at 36 (statement of Hon. Charles Warren, Chairman, CEQ).

147. Speaking on behalf of the Environmental Protection Agency, Deputy Administrator Barbara D. Blum explained:

> The treaty which is proposed under this resolution appears to incorporate a requirement that signatory nations must pledge themselves not to move ahead with the projected activities without international consultations . . . . The fear that UNEP or other states might be able to block their projects could deter nations from signing the treaty . . . . The Treaty, we think should seek to assure that significant environmental impacts are properly considered by the decision-makers, but stop short of giving or seeming to give a veto power to other states.

Id. at 26.

actions by signatory nations which affect the internal environment of a foreign country and the global commons, the State Department's support of Senate Resolution 49 is surprising, given its repeated opposition to a similar requirement of an extraterritorial application of NEPA. It is arguable that the State Department's support of a multi-lateral treaty under which nations assume such responsibilities is consistent with its criticism of unilateral imposition of such requirements under NEPA. As long as signatory nations agree voluntarily to prepare EIS's for impacts limited to other signatory nations' boundaries, no threat is posed to any state's sovereignty. It is unclear, however, whether the State Department's support of Senate Resolution 49 would extend to application of the treaty's EIS requirement to similarly localized impacts affecting the environments of non-signatory nations.

C. *CEQ Draft Regulations*

At the time of the issuance of Executive Order No. 11,991, which supplanted CEQ's advisory authority with the power to "issue regulations to Federal agencies for the implementation of the procedural provisions of NEPA,"[148] CEQ's extant guidelines on environmental impact statements did not apply to projects outside the United States. The agencies had long been aware, however, of CEQ's interpretation of NEPA's extraterritorial application and consequent belief that impact statements were required for major federal actions abroad significantly affecting the environment.[149] The conferral of regulatory power by Executive Order No. 11,991 gave CEQ its first opportunity to enforce this viewpoint on the agencies. The Council thus began drafting regulations which would be both consistent with the demands of NEPA and acceptable to those agencies with extensive activities abroad.

In January 1970, the CEQ circulated among the agencies a draft of its proposed international NEPA regulations as merely a "discussion trigger."[150] In a memorandum to agency heads[151] issued the following week, CEQ Chairman Charles Warren stressed that the proposed draft regulations acknowledged the "unusual

148. *See* note 135 *supra.*

149. *See* 1976 and 1978 CEQ Memo's, *supra* notes 35 & 74.

150. [1978] 8 ENVIR. REP. (BNA) 1372 (statement of CEQ General Counsel Nicholas Yost).

151. 1978 CEQ Memo, *supra* note 74.

and exceptional circumstances which may be recognized in the application of NEPA to governmental agency action abroad."[152]

The draft directed that the much debated NEPA reference to the "human environment" be interpreted broadly and added that the term did not describe an area "confined to the geographical borders of the United States."[153] The proposed regulations, however, limited applicability of the standard EIS procedure to major federal activities abroad having a significant impact upon the environment of one or more of the following areas: (1) the United States and its trust territories, (2) the global commons, and (3) Antarctica.[154] By contrast, major federal actions affecting only the environment of one or more foreign nations need only be assessed in an abbreviated "Foreign Environmental Statemen[FES]."[155] Agencies were directed to work with the Council in fitting the Act's requirements without compromising national security or individual agency mandates."[156] The CEQ proposal reflected special concern that FES procedures ensure consideration of activities contrary to or strictly regulated by United States health and safety laws, or actions which might pose a threat to environmental resources of global importance. The proposal, however, permitted agencies to establish criteria for exemption of foreign environmental statements (FES) or portions thereof from public comment "when such review would be inconsistent with the accomplishment of the agency's statutory objective."[157]

Despite its attempt to quiet the fears of those agencies opposed to application of NEPA abroad, the CEQ's draft of international regulations provoked a storm of opposition from government agencies. These agencies warned that adoption of the regulations

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152. CEQ Draft Regulations on Applying NEPA to Significant Foreign Environmental Effects [1978] 8 ENVIR. REP. (BNA) at 1494.

153. *Id.* at 1495.

154. *Id.*

155. *Id.*

156. *Id.*

157. The CEQ draft permitted agencies to take the following factors into account in developing compliance procedures:

(1) Diplomatic considerations,
(2) Availability of information,
(3) Commercial competition,
(4) Commercial confidentiality, and
(5) Extent of agency role in the proposed activity.

Id. at 1494.

might adversely affect foreign trade, international relations, and national security.[158] The Council's swift issuance of a placating memorandum to agency heads evidenced its anticipation of such objections. The Council must have been stung, however, by complaints from other sources that the FES proposal might "in fact do more damage to NEPA's integrity than simply finding that the statute does not apply to federal agency actions with wholly foreign environmental impacts."[159] These critics argued that NEPA itself contained no such exception for foreign environmental impacts,[160] and that, in cases where NEPA arguably conflicted with an agency's foreign policy mandate, case law permitted the Act to be disregarded only if there was "a clear and irreconcilable conflict."[161] Perhaps the most disturbing loophole in the CEQ draft regulations was the section permitting agencies under certain circumstances to forbid public review of all or part of an FES. Environmentalists were understandably fearful that such a concession to foreign policy and national security concerns could serve as a means of circumventing public and congressional scrutiny of agency compliance with the FES requirement.

D. *Draft Executive Order: The CEQ-State Department Clash Renewed*

In the months following issuance of CEQ's proposed international regulations, it became clear that the draft had done more than serve as a "discussion trigger." Despite the Council's admonition that it was not "locked into any position,"[162] it became apparent that the Council's consultation with affected agencies as

158. *Id.* at 1463.

159. *Forthcoming CEQ Regulations to Determine Whether NEPA Applies to Environmental Impacts Limited to Foreign Countries,* 8 ELR 10111, 10113 (June, 1978).

160. One editorial interpreted the reference in section 102(2)E concerning use of means "consistent with other essential considerations of national policy" as modifying *only* section 102(2)E's directive that agencies affirmatively foster international environmental programs, and *not* as a qualification of the remainder of the Act. *Id.*

161. *Id.*

162. *Supra* note 150. CEQ General Counsel Nicholas Yost specifically sought to assure the agencies of his forthcoming cooperation, stating: "We want to work this out in a manner we can all live with, that will protect the environment without hurting our relations with other countries." *Id.*

required by Executive Order No. 11,991[163] was unlikely to result in a consensus regarding NEPA's application to environmental impacts of agency action in foreign countries. It was clear that resolution of the issue would have to be resolved by higher authority in the Carter Administration. In early August 1978, the CEQ and State Department submitted a draft Executive Order to the Administration, federal agencies, and the public, outlining areas of consensus and disagreement on impact statements for overseas actions.[164]

The purpose clause of the Order recited an intention "to further the purpose and policy of the National Environmental Policy Act consistent with the foreign policy and national security policy of the United States . . . ."[165] Moreover, the Government characterized the draft Order as the "exclusive and complete determination" of agency responsibility to further the policy of NEPA with respect to the environment outside the territorial United States.[166] Both the CEQ and State Department agreed that full EIS requirements ought to apply to major federal actions significantly and adversely affecting the environment of the global commons, including the oceans and Antarctica.[167]

The CEQ-State consensus broke down, however, upon consideration of other categories of environmental impacts. Though both drafters agreed to adopt two less stringent forms of environmental analysis as alternatives to the standard NEPA impact statement,[168] the two parties had differing opinions of when affected agencies ought to be freed from consideration of preparing a regular EIS. The State Department proposed that, for actions affecting the environments of foreign program participants or uninvolved "bystander" countries, the agencies should develop procedures for the preparation of one of the two less stringent alternatives.[169] CEQ, on the other hand, contended that agencies should consider preparation of full impact statements for such ef-

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163. Exec. Order No. 11,991, 3 C.F.R. 124 (1978), *reprinted in* 42 U.S.C. § 4321 (Supp. 1979). Section 3(h) of Executive Order No. 11,991 required that regulations for implementation of NEPA be "developed after consultation with affected agencies and after such public hearings as may be appropriate."

164. [1978] 9 ENVIR. REP. 568 [hereinafter cited as CEQ/State Draft].

165. *Id.* § 1-1.

166. *Id.* at § 1-1.

167. *Id.* §§ 2-3(a), 2-4(b)(i) at 568, 569.

168. *Id.* § 2-4(a) at 569.

169. *Id.* §§ 2-3(b), (c), 2-4(ii), (iii) at 568, 569 (State Dep't version).

fects on foreign participants and bystanders.[170] Concerning major federal actions involving materials regulated under United States health and safety laws, the CEQ proposed a provision requiring considerations of all three analyses[171] by agencies providing a product or physical project prohibited or strictly regulated by United States federal law concerning hazardous chemicals or radioactive substances.[172] The counter proposal from the State Department suggested that agencies employ one of the lesser two methods in evaluating structures or physical facilities prohibited or strictly regulated under United States laws concerning radiological hazards or the use of non-radiological toxic chemicals.[173] Both CEQ and the State Department agreed, however, that agencies should consider the use of all three documents in developing procedures for assessing potential adverse effects on "natural or ecological resources of global importance,"[174] as designated by the President or protected under international agreements binding on the United States.

In the controversial area of export policy, the State Department proposed exempting all nuclear product exports, except reactors, from any environmental review.[175] The CEQ alternative advocated that environmental review procedures be applied to all nuclear exports except nuclear fuel exports.[176]

On procedural matters, the State Department proposed allowing agencies at their discretion to grant categorical exclusions from NEPA's requirements.[177] CEQ, by contrast, restricted such exemptions to "emergency circumstances, situations involving exceptional foreign policy sensitivities and other special circumstances."[178] The two split on the breadth of non-categorical exemptions for emergency or foreign policy reasons.[179]

Perhaps the most dramatic indication of the CEQ-State De-

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170. *Id.* (CEQ version).

171. The three are: (1) the standard EIS, (2) bilateral or multilateral environmental studies, and (3) concise reviews of environmental issues involved. *Id.* § 2-4(a) at 569.

172. *Id.* § 2-3(c) (CEQ version).

173. *Id.* (State Dep't version).

174. *Id.* § 2-3(d).

175. *Id.* § 2-5(v) (State Dep't version).

176. *Id.* (CEQ version).

177. *Id.* § 2-5(c) (State Dep't version).

178. *Id.* (CEQ version).

179. *Id.* § 2-5(b).

partment disagreement concerning NEPA's proper application to projects involving foreign policy considerations was demonstrated by their conflict over rights of action created under the Order. Both the CEQ and State Department agreed that the Order would not affect such review as might be available under NEPA with regard to actions affecting the global commons, for which full NEPA impact statements would be required.[180] CEQ added that, with respect to other categories of impacts, "[n]othing in this Order shall be construed to create a new cause of action."[181] CEQ thus effectively exempted only the Executive Order itself, not agency regulations thereunder, from judicial review. The corresponding State Department proposal exempted the Order, agency procedures adopted pursuant to the Order, and resulting agency actions thereunder from judicial review.[182]

Thus, by means of the Executive Order, the State Department sought to achieve what could not be done under any other interpretation of NEPA's international applicability: *i.e.*, to fully insulate actions affecting the environments of foreign countries from judicial review. This obvious ploy drew the greatest criticism from environmentalists. Proponents of an extraterritorial interpretation of NEPA labeled as illegal under both NEPA and general administrative law this attempt to preclude judicial review.[183] In a letter to President Carter,[184] Senator Edmund Muskie expressed both his support for an appropriate Executive Order and his concerns regarding the draft proposal:

> [A]n Executive Order on this subject would be a useful and needed step forward in furthering the goals of [NEPA]. But such an order would not be the exclusive and complete fulfillment of the Act. The draft Order makes such a statement and attempts to bar rights of action in the courts.[185]

Muskie urged the President "[i]n every case . . . to support the alternative advanced by the Council," and characterized the State Department alternatives as "less than the law requires."[186] The

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180. *Id.* § 3-1 at 570.
181. *Id.* (CEQ version).
182. *Id.* (State Dep't version).
183. Legal Times of Washington, Aug. 7, 1978, at 3, col. 1.
184. Letter from Senator Edmund Muskie to President Carter (August 3, 1978), *reprinted in* [1978] 9 ENVIR. REP. (BNA) 665, 666.
185. *Id.*
186. *Id.*

Senator expressed concern, however, that even some of the mutually adopted portions of the Order fell short of NEPA's requirements.[187] He concluded that "the proposed Executive Order . . . accomplishes far too little."[188]

III. EXECUTIVE ORDER No. 12,114

During the fall and early winter of 1978, concerned public interest groups, affected agencies, and parties to the *Export-Import Bank* case[189] anxiously awaited the issuance of the President's final Executive Order concerning environmental review of proposed United States agency actions abroad. Announcement of the Order occurred on January 4, 1979, at a hearing on the *Export-Import Bank* case in United States District Court in Washington, D.C.[190] While the Order incorporated elements of both the CEQ and State Department proposed orders, it stunned environmentalists by adopting some of the most strongly criticized aspects of the State Department's version.

A. *Scope of the Final Order: No Cause of Action*

The declared purpose of Executive Order No. 12,114 is: "To enable responsible officials of Federal agencies having ultimate responsibility for authorizing and approving action . . . to be informed of pertinent environmental considerations and to take such considerations into account, with other pertinent considerations of national policy, in making decisions regarding such actions."[191] It appears that in drafting the final text of the Order, the White House staff made a conscious effort to minimize the connection between the purposes of the Order and those of NEPA itself. Whereas the preamble to the CEQ-State Draft pro-

187. In particular, Muskie objected to the proposal that agencies be given a choice between two or three forms of environmental assessment for actions affecting the United States or global commons. Rather, Muskie felt "the burden should be on the agency to demonstrate why anything less than a full environmental impact statement is needed." *Id.*

188. *Id.* at 665.

189. No. 77-0080 (D.D.C. filed Jan. 14) *reprinted in* 7 ELR 65444. By the time Executive Order 12,114 was issued, the case had been continued thirteen times in anticipation of the Final Order. [1979] 9 ENVIR. REP. (BNA) 1691.

190. [1979] 9 ENVIR. REP. (BNA) 1691.

191. Exec. Order No. 12,144 *supra* note 2, § 1-1 (hereinafter cited as Final Order).

nounced its intention to "further environmental objectives consistent with the foreign policy and national security policy of the United States and the *purpose and policy of the National Environmental Policy Act* [emphasis added],"[192] the preamble to the final Order deleted all reference to NEPA. Similar language in the purpose clause underscores this conscious distinction between NEPA and the policies which the Order was intended to promote.[193]

For those who, with Senator Muskie, had hoped that the final Order would adopt the CEQ viewpoint, the final Order was acutely disappointing. The final draft retained the State Department's much-criticized characterization of the Order as the "exclusive and complete determination of . . . actions to be taken by Federal agencies to further the purpose of NEPA."[194] Moreover, the final Order added an explicit caveat that whatever role the Order might play in advancing the goals of NEPA, the Order itself was "based on independent authority."[195] Notably, the Order offered no explanation of what that "independent authority" might be. This somewhat confusing pronouncement was further complicated by a warning that "nothing in this Order shall be construed to create a cause of action."[196] This statement confirmed environmentalists' worst fears that the Order might totally insulate agency actions abroad from judicial review. Not only did the Order purport to be the "exclusive determination of agency obligations under NEPA," albeit based on authority "independent" of NEPA and its congressional mandate, but it also in effect established its own presence as the only impetus for the agencies' consideration of extraterritorial environmental impacts.

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192. CEQ/State Draft, preamble, *supra* note 164.

193. Whereas the draft preamble announced that the "order is intended to further the purpose and policy of the National Environmental Policy Act consistent with the foreign policy and national security policy of the United States," CEQ/State Draft § 1-1, *supra* note 164, the same section in the Final Order merely noted that the Order passively "furthers the purpose of the National Environmental Policy Act," and several other environmental acts of significantly lesser importance than NEPA. Final Order, *supra* note 2, § 1-1. The source of this "independent authority" was apparently expressed in the preamble, which declared the Order to arise "[b]y virtue of the authority vested in me by the Constitution and the laws of the United States, and as President of the United States . . . ." *Id.* at preamble.

194. *Supra* note 164 (State Dep't version).

195. *Id.*

196. Final Executive Order, *supra* note 2, § 1-1.

The Order declared that there would be no legal cause of action available for the enforcement of either the Order or the international ramifications of the National Environmental Policy Act.

The result of this administrative puzzle is that compliance with the letter and spirit of both the Order and NEPA is entirely dependent on the good-will of the affected agencies and political pressures within the bureaucracy. One observer aptly summed up the situation: "the degree to which the Order will result in enhanced environmental analysis or improved decision-making in international activities depends almost entirely on the form of the implementing regulations drawn up by the agencies."[197]

B. *Agency Obligations Under Executive Order 12,114—Major Provisions*

The Order requires every federal agency taking major actions which significantly affect the environment beyond United States territorial borders to have implementing procedures in effect by September 1979.[198] A brief analysis of requirements under the Order serves both to illustrate the framework under which the agencies will be drafting compliance procedures and the areas in which either CEQ or the State Department prevailed.

The most controversial aspect of the Order relates to the relegation of different types of environmental documents to the varying categories of impacts outlined by the Order. The Executive Order adopted the CEQ-State Draft's hierarchy of three types of environmental documents[199] for assessment of foreign impacts: (1) standard environmental impact statements;[200] (2) bilateral or multilateral studies;[201] and (3) concise reviews of the environmen-

197. *President Orders Environmental Review of International Action,* 9 ELR 10011, 10015 (Jan. 1979. It is worth noting that the Order specifically disclaimed any intention to invalidate existing regulations adopted by an agency pursuant to court orders or prior judicial settlements, or to prevent an agency from supplanting the environmental review standards prescribed by the Order with more stringent measures designed to further the purposes of NEPA. Final Order, [1979] 9 ENVIR. REP. (BNA) 1691, § 2-1.

198. Final Order, *id.* § 2-1.

199. *Id.* § 2-4(i), (ii), (iii). Except in the case of impacts affecting only the global commons, the Executive Order permits agencies to choose between two or more forms of environmental documents in order to evaluate potential impacts.

200. *Id.* § 2-4(i), including generic, program and site-specific statements.

201. *Id.* § 2-4(ii), to be prepared by the United States and one or more foreign countries, or by an international organization in which the United States is

tal issues involved in an agency action.[202] In terms of the types of environmental impacts for which each individual environmental document might suffice, the viewpoint of the State Department draft was clearly the victor. For major federal actions significantly affecting the global commons, a standard EIS is required.[203] In the second impact category, however, agencies whose actions significantly affect the environment of a nation not participating with the United States, the so-called "innocent bystander" nation, must prepare only one of the two lesser forms of review.[204] Similarly, agency actions providing products or physical projects causing health-endangering toxic or radioactive effects which are prohibited or strictly regulated in the United States require analysis under one of the two lesser standards.[205] Finally, with regard to impacts affecting natural or ecological resources of global importance designated under the Order by the President or Secretary of State for protection, agencies may choose to prepare any one of the three forms of environmental assessment.[206]

Environmentalists and proponents of the extraterritorial interpretation of NEPA itself were understandably dismayed by the Order's summary denial of NEPA's international application, and by the Order's subsequent failure to require preparation of full environmental impact statements for the majority of agency actions. This disappointment was compounded by the final section of the Order, which provides that where an agency action necessitating the preparation of a standard EIS because of significant effects on the United States or global commons also affects the environment of a foreign nation, the EIS need not include consideration of the latter impact.[207] Thus, environmental impacts within the borders of foreign countries culd not be subjects of a full EIS triggered by a related extraterritorial effect, and would never require more intensive consideration than that provided by one of the two lesser types of documents.

Another source of disappointment for environmentalists lies in the section of the Order entitled "Exemptions and Considera-

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202. *Id.* § 2-4(iii), including environmental assessments, summary environmental analyses or other appropriate documents.

203. *Id.* § 2-4(b)(i).

204. *Id.* § 2-4(b)(ii).

205. *Id.* § 2-4(b)(iii).

206. *Id.*

207. *Id.* § 3-5.

tions."[208] One commentator has observed that "it is difficult to hypothesize a federal action posing significant environmental effects outside the United States which is not arguably subject to at least one exemption."[209] The highly criticized State Department provisions permitting an agency to adopt categorical exclusions for "situations involving exceptional and other such special circumstances"[210] were adopted by the Order. Because these guidelines included such broad factors as "avoiding adverse impacts on foreign relations" and "infringements in fact or appearance of other nations' sovereign responsibilities,"[211] they arguably provide classic "loopholes" for recalcitrant agencies unwilling to comply with the spirit of the Order in formulating compliance procedures. On the other hand, the Order adopted without alteration the CEQ's more restrictive guidelines for agency provisions for modification of the contents, timing, and availability of documents to other affected agencies and nations in special, limited circumstances.[212]

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208. *Id.* § 2-5. In addition to other exclusions, section 2-5 exempted:

(i) actions not having a significant effect on the environment outside the United States as determined by the agency;

(ii) actions taken by the President;

(iii) actions taken by or pursuant to the direction of the President or Cabinet officer when the national security or interest is involved or when the action occurs within the course of an armed conflict;

(iv) intelligence activities and arms transfers; and

(v) votes and other actions in international conferences and organizations; and

(vi) disaster and emergency relief action.

209. 9 ELR at 10015.

210. Final Order, *supra* note 197 § 2-5(c).

211. *Id.* § 2-5(b)(ii).

212. *Id.* § 2-5(b)(i)-(iii). "Agency procedures . . . may provide for appropriate modifications in the contents, timing and availability of documents to other affected Federal [sic] agencies and affected nations, where necessary to:

(i) enable the agency to decide and act promptly as and when required;

(ii) avoid adverse impacts on foreign relations or infringement in fact or appearance of other nations' sovereign responsibilities, or

(iii) ensure appropriate reflection of: (1) diplomatic factors; (2) international commercial, competitive and export promotion factors; (3) needs for governmental or commercial confidentiality; (4) national security considerations; (5) difficulties of obtaining information and agency ability to analyze meaningfully environmental effects of a proposed action; and (6) the degree to which the agency is involved in or able to affect a decision to be made."

Id.

Amidst the uncertainty created by the myriad exemptions to the Order, resolution of at least one controversy was achieved. The Order exempted all export licenses, permits, and approvals except actions related to nuclear production, utilization, or waste management facilities.[213] This passage quieted fears of the business community which had instigated the introduction of S. 3077 during the preceding summer. An important postscript to the blanket exemption of non-nuclear exports was unobtrusively supplied in a separate section of the Order, however. This exemption provides that the term "export approvals" does not include direct loans to finance exports.[214] Thus, the question of the Order's, and correlatively of NEPA's, application to the funding activities of the Export-Import Bank was finally and affirmatively resolved.[215]

C. *Procedural and Definitional Provisions*

The final Order adopted many of the jointly approved sections of the CEQ-State draft Order verbatim. The State Department must coordinate all communications between federal agencies and foreign governments concerning environmental agreements made in compliance with the Order.[216] As in the case of domestic impact statements under NEPA, actions or programs involving more than one federal agency must be reviewed in one environmental document by a mutually designated "lead agency."[217] The CEQ and State Department, in collaboration with other interested federal agencies and foreign nations, must conduct on a continuing basis "a program for [the] exchange . . . of information concerning the environment"[218] in order to provide information for use by decision-makers and to facilitate international environmental cooperation.

On a slightly more controversial level, the final order adopted the CEQ-State requirement that federal agencies having expertise relevant to an action be notified of the preparation and availabil-

213. *Id.* § 2-5(v).
214. *Id.* § 3-4.
215. As a result of section 3-4 of the Final Order, the United States District Court of the District of Columbia on February 23, 1979, approved a stipulation of dismissal without prejudice in *NRDC v. Eximbank*, No. 77-0080 (D.D.C. filed Feb. 23, 1979).
216. Final Order, *supra* note 197, § 3-2.
217. *Id.* § 3-3.
218. *Id.* § 2-2.

ity of documents prepared by an agency pursuant to the Order.[219] This section also directs the agencies to develop procedures for determining when an affected nation will be informed of the availability of environmental documents. The Order has been criticized in this respect for its failure to provide for public review of draft impact statements or for access to finalized foreign environmental documents,[220] both of which are striking departures from NEPA's emphasis on public participation and disclosure in the EIS process.[221]

The final Order made one other significant departure from NEPA and judicial interpretations thereunder in adopting the narrow CEQ-State definition of the term "human environment," which was interpreted to refer solely to the "natural and physical and environment."[222] Under this definition, consideration of the social and economic impacts of agency actions would not be triggered by environmental impacts stemming from a joint agency action. It is probable that CEQ acceded to this limitation out of a pragmatic recognition that requiring the agencies to delve into such effects on foreign states would be too egregious an impingement upon foreign states' sovereignty.

D. *Conclusion: Assessment of Executive Order No. 12,114*

The question of NEPA's application to federal agency actions abroad has bedeviled environmentalists, the agencies, the courts and occasionally Congress for nearly a decade. Many observers in both the Government and business communities had hoped that Congress would take the initiative to clarify the question of NEPA's extraterritorial applicability through further legislation, thereby relieving the courts of the difficult task of divining Congress' original intent in the absence of clear legislative history. That initiative was not forthcoming, except for the abortive attempt in the Senate to exempt the Export-Import Bank from potential coverage under NEPA.

Absent legislative response to the increasingly frequent ques-

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219. *Id.* § 2-4(d).

220. 9 ELR at 10016.

221. In response to this departure from NEPA, one critic commented: "[a]ppropriate exception must be made, of course, for legitimate conflicts with foreign policy and national security considerations, but this does not preclude the striking of a fair balance." *Id.*

222. Final Order, *supra* note 197, § 3-4.

tion of whether NEPA applied to agency actions abroad, some action by the executive branch was necessary. Many welcomed the conferral of regulation-making authority upon the Council on Environmental Quality by Executive Order No. 11,991 as a vehicle for resolving the issue after years of near-miss judicial decisions which left parties on both sides of the debate unsatisfied. In preparing draft foreign EIS regulations, however, the CEQ was apparently unable to strike a balance between competing environmental and foreign policy concerns which the State Department and other anti-extraterritoriality agencies were willing to accept. Without the blessing of the State Department, CEQ could not hope to receive the level of agency cooperation necessary to put NEPA's policies into effect on an international scale.

It is unclear why the White House chose to intercede at the time it did, or why it determined to push for a resolution of the issue by means of an Executive Order rather than either spurring congressional or agency action. In view of the administrative problems that the final Order generates, either of these less dramatic methods of achieving a workable resolution of the controversy would have been preferable.

The Order, which has been described as a "patchwork Executive Order which seems unlikely to achieve the objectives of any of the principles,"[223] has the unfortunate effect of further complicating the issue. Indeed, resolution of the controversy regarding NEPA's possible extraterritorial application seems further away than ever. The Order was clearly intended to subsume NEPA with respect to United States agency actions abroad because the Order claims to be "the exclusive and complete determination of . . . actions to be taken by Federal agencies to further the purpose of the National Environmental Policy Act, with respect to the environment outside the United States."[224] As the Order is based on "independent authority" other than NEPA, presumably the constitutional and judicially recognized prerogatives of the President to conduct matters of foreign policy,[225] the Order makes clear its purpose to occupy the field of United States inter-

223. 9 ELR at 10016.

224. Final Order, *supra* note 197 § 1-1.

225. Presidential power to conduct foreign policy is traditionally regarded as stemming from the Constitution, Art. II, §§ 1 and 2. Courts have long deferred to this executive prerogative in the field of foreign affairs, *e.g.*, United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1886).

national environmental policy.

Unfortunately, the intentions of the drafters of the final Order do not preclude the possibility that their attempted administrative displacement of NEPA in the international arena is wrong from both a legal standpoint and with regard to legislatively decreed national environmental policy. The drafters failed to realize that NEPA's environmental impetus did not recognize the traditional segregation of domestic and foreign policy, and that its intrusions into the arena of foreign policy were not the result of inadvertant drafting. As a State Department spokesman pointed out during the congressional debate over NEPA, "the environmental forces affecting our natural resources disregard political and geographical frontiers."[226] It should not be surprising then that environmental legislation overlaps with the otherwise compartmentalized conduct of foreign policy. In an era when the international community is increasingly aware of the ecological interdependence of individual nations' environments, the policies of NEPA cannot realistically be promoted without regulation of agency actions wherever they impact on the world environment. The exemption in the final Order of agency actions which are arguably "confined" to the borders of one foreign country ignores overwhelming evidence that environmental hazards are never confined to the national boundaries within which they originate. From a purely environmental standpoint, the scientific policies supporting NEPA's EIS requirement are undercut by the unqualified exemption of any type of environmental impact from the category of actions requiring preparation of a full EIS prior to taking any major federal action significantly affecting the environment.

It is, of course, necessary to recognize that the conduct of national environmental policy beyond United States borders must be reconciled with the competing necessities of foreign policy. It is difficult, however, to see why foreign policy considerations should ever be allowed to preclude the preparation of an environmental impact statement. The State Department's deep-seated determination to avoid the appearance of impinging on another state's sovereignty is not contradicted by NEPA's requirement that agencies prepare impact statements for major federal actions significantly affecting any part of the world environment. If the

226. Macomber letter, *supra* note 5.

United States can "tie" its foreign and military assistance programs to certain expectations regarding recipient nations' behavior, it can also "tie" conduct of major agency actions abroad to a national policy decision not to unwittingly harm the world environment. It is fallacious to argue that environmental impacts initially "limited" to an individual nation's borders are any less harmful in the long run than those that immediately affect the global commons. While foreign policy considerations often impose certain limitations on both the methods by which information for an EIS is gathered and on the decisions to be made in balancing environmental and foreign policy issues, the presence of foreign policy considerations should not be permitted to relieve agencies of the duty to anticipate the environmental consequences of their activities abroad through preparation of effective impact statements. It is one thing to debate the question of how closely foreign policy considerations should cut into the environmental margin of error; it is quite another to contend that such considerations should preclude determination of just what that margin of error is. The multitude of exceptions and exemptions built into Executive Order No. 12,214 leaves much room for circumvention of the Order's environmental study requirements by agencies wishing to avoid the difficulty and expense of preparing impact statements, or even of one of the less rigorous alternative studies authorized by the Order. More damaging from a policy standpoint is the lack of any enforcement mechanism for the Order and, if the Order is taken at face value, for NEPA itself. In the final analysis, the Order leaves potential plaintiffs with no means of enforcing either the Order's or NEPA's policies for agency actions abroad.

If Executive Order No. 12,114 is unwise from a policy standpoint, it is disasterous from an administrative point of view. Rather than resolving an already aggravated statutory controversy, the Order compounds the problem by engrafting new and difficult administrative and judicial dimensions onto the issue of NEPA's extraterritorial application. If the Executive Order had been more closely patterned after NEPA, it would probably have been accepted as the "exclusive and complete determination" it purports to be regarding agency actions abroad. The fact that the Order's obligations are so much less stringent that those of NEPA and are so obviously susceptible to circumvention through agency manipulation of its multiple exemptions, almost certainly guarantees future litigation for the agencies. Although 12,114 declares

that "nothing in this Order shall be construed to create a cause of action,"[227] it is not clear that the Order completely immunizes agency implementation procedures from suits brought on the basis of purported agency obligations under NEPA.[228] If the agencies elect to fully comply with the spirit of the Order, both in developing and in executing implementation procedures, they will likely escape NEPA attacks in the courts.[229] It is probable, however, that some agencies will attempt to minimize compliance with the Order by either utilizing its many loopholes, or by haphazardly adhering to their own compliance procedures. Such behavior is certain to result in litigation on the very issue that stimulated the promulgation of Executive Order No. 12,114: whether federal agencies must comply with NEPA's EIS procedures in their conduct of actions abroad.

It is unfortunate that the Executive Order failed to finally resolve the NEPA controversy. Courts, private litigating groups, and the Government have been unnecessarily condemned to continue expensive litigation to settle the issue. Moreover, the presence of this ill-considered compromise Order leaves all parties in a worse position than before its issuance. Assuming that environmental groups are dissatisfied with at least some agencies' compliance procedures under the Order, such groups will probably await an especially egregious example of agency nonfeasance in order to sue on the basis of failure to comply with NEPA. Courts will thus be faced with even more delicate problems than in the past as they attempt to reconcile agency obligations under Executive Order No. 12,114. It is unclear whether the "no cause of action" provision in section 3-1 of the Order was intended to preclude judi-

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227. Final Order, *supra* note 197, § 3-1.

228. The final language of § 3-1 represents a compromise of uncertain effect between the less restrictive CEQ version ("Nothing in this Order shall be construed to create a *new* cause of action") and the relatively more restrictive version proposed by the State Department ("It is not intended that this Order *or the agency procedures pursuant to it* provide grounds for a cause of action or basis for a lawsuit with regard to agency decisions or actions . . . .") [emphasis added]. CEQ/State Draft, *supra* note 164.

229. In addition to the inhibiting influence of litigation costs on would-be enforcers, it must be noted that NEPA only requires consideration of environmental factors along with other concerns, such as foreign policy, in deciding whether and how to conduct agency actions. If an agency attempts in good faith to integrate environmental considerations into its decisionmaking process, the primary objective of the Act is satisfied.

cial review of the Order *per se,* or whether the provision was also intended to immunize agency compliance procedures as well. Courts will therefore be faced with several difficult choices: (1) whether to sever agency procedures from the Order itself, thereby permitting judicial review of agency actions under NEPA, which would not, however, solve the issue of NEPA's international application; or (2) resolving a constitutional deadlock between NEPA and the capacity of an Executive Order, and agency regulations issued thereunder, to subsume an Act of Congress. Consideration of the latter alternative would force a court to decide a constitutional and political dilemma it would probably prefer to avoid.[230] Nor are the alternatives for avoiding such an impasse particularly attractive. If the court chooses simply to circumvent the constitutional issue by holding that the Executive Order merely "occupied" a field not covered by NEPA, it inevitably must address the fundamental question of NEPA's extraterritorial application.[231] On the other hand, even if the court simply upholds the authority of the Executive Order to displace or modify any international application of NEPA, it will be thrust by plaintiffs' arguments into at least some consideration of the relatively unsettled nature and effect of the Executive Order's mechanism.[232]

In sum, Executive Order No. 12,114 does little to promote either United States environmental policy or to resolve the longstanding debate over NEPA's extraterritorial applicability. It attempts to prevent the application of NEPA to agency actions abroad without filling the resulting void with an enforecable compromise mechanism better suited to the necessities of foreign policy. From an administrative standpoint, it presents courts with far more difficult questions than those encountered prior to the issuance of the Order. Perhaps the only explanation for this ill-considered exercise of executive power was that the Order was a

230. For an interesting discussion of the history of Executive Orders and Presidential foreign policy prerogatives, *see* Levinson, *Presidential Self-Regulation Through Rulemaking: Comparative Comments on Structuring the Chief Executive's Constitutional Powers,* 9 VAND. J. TRANSNAT'L L. 695 (1976).

231. Perhaps the simplest means of doing so would be to cite section 38 of the RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW, *supra* note 48, and pertinent case law for the proposition that, where ambiguous, a statute is presumed to have solely domestic application.

232. *See, e.g.,* In the Matter of Babcock & Wilcox, No. 50-571 (NRC, filed June 27, 1977) *reprinted in* 7 ELR 30017.

too hastily assembled response to a heated intragovernmental dispute.

Sue D. Sheridan