

THE INTERNATIONAL APPLICATION OF THE NATIONAL ENVIRONMENTAL POLICY ACT OF 1969: A NEW STRATEGY

Since its passage in 1969, the National Environmental Policy Act (NEPA)¹ has generated considerable controversy over the extent of its application outside the territorial jurisdiction of the United States.² The bulk of the controversy has centered around a provision in the Act³ that requires every federal agency to develop an environmental impact statement for each major action⁴ it proposes or undertakes.⁵

1. National Environmental Policy Act of 1969, §§ 1-209, 42 U.S.C. §§ 4321-4347 (1976).

2. The issue arose as early as 1970 when a House Merchant Marine and Fisheries Subcommittee criticized the State Department for its initial position that environmental impact statements were not required for foreign activities. See *Administration of the National Environmental Policy Act: Hearings Before the Subcomm. on Fisheries and Wildlife Conservation of the House Comm. on Merchant Marine and Fisheries*, 91st Cong., 2d Sess., pt. 2, 546-57 (1970).

3. NEPA § 102(2)(C), 42 U.S.C. § 4332(2)(C) (1976), requires that all agencies of the federal government

include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

- (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.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of Title 5, and shall accompany the proposal through the existing agency review processes.

4. On the problem of what is a "major" federal action, see generally *Hanly v. Kleindienst*, 471 F.2d 283 (2d Cir. 1972); F. GRAD, 2 ENVIRONMENTAL LAW § 8.03(2) (2d ed. 1978); B. SHAW, ENVIRONMENTAL LAW 203-20 (1976).

5. See Robinson, *Extraterritorial Environmental Protection Obligations of Foreign Affairs Agencies: The Unfulfilled Mandate of NEPA*, 7 N.Y.U.J. INT'L L. & POL. 257 (1974); Comment, *Forthcoming CEQ Regulations to Determine Whether NEPA Applies to Environmental Impacts Limited to Foreign Countries*, [1978] 8 ENVIR. L. REP. (ENVIRONMENTAL LAW INSTITUTE) 10,111; Note, *The Extraterritorial Scope of NEPA's Environmental Impact Statement*, 74 MICH. L. REV. 349 (1975); Note, *The Scope of the National Environmental Policy Act: Should the 102(2)(C) Impact Statement Provision Be Applicable to a Federal Agency's Activities Having Environmental Consequences Within Another Sovereign's Jurisdiction?*, 5 SYRACUSE J. INT'L L. & COM. 317 (1978).

Praised by environmentalists, but often cursed by the individual or agency responsible for its preparation, the environmental impact statement has been the most effective tool in establishing a national policy⁶ for the prevention of unnecessary damage to the environment.⁷

Preparation of an environmental impact statement is a complicated task.⁸ Even within the United States the process can be costly and time-consuming,⁹ but abroad, additional expenses and complications arise from the absence of basic environmental data and statistics that would be available in the United States, the barriers posed by differ-

6. NEPA § 2, 42 U.S.C. § 4321 (1976):

The purposes of this chapter are: To declare a national policy which will 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; to enrich the understanding of ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality.

7. See generally COUNCIL ON ENVIRONMENTAL QUALITY, ENVIRONMENTAL IMPACT STATEMENT: AN ANALYSIS OF SIX YEARS' EXPERIENCE BY SEVENTY FEDERAL AGENCIES (1976) [hereinafter cited as EIS EXPERIENCE BY SEVENTY FEDERAL AGENCIES].

8. An excellent summary of what should be included in the content of an EIS is presented in S. ROSEN, MANUAL FOR ENVIRONMENTAL IMPACT EVALUATION 36 (1976) ("Because of the wide variety of factors and relationships, there can be no literal 'cookbook approach' to the evaluation process."). See also Environmental Def. Fund v. Corps of Eng'rs (Tambigee River), 492 F.2d 1123 (5th Cir. 1974); Environmental Def. Fund v. Corps of Eng'rs (Gillham Dam), 470 F.2d 289 (8th Cir. 1972); Sierra Club v. Froehle, 359 F. Supp. 1289, 1341-45 (S.D. Tex. 1973); P. BLACK & L. HERRINGTON, WORKING WITH NEPA: ENVIRONMENTAL IMPACT ANALYSIS FOR THE RESOURCE MANAGER 48-57, 103-21 (1974); ENVIRONMENTAL IMPACT ASSESSMENT 37-39 (P. Hefferman & R. Corwin ed. 1975).

For examples of the variance in formats used, see PRACTICING LAW INSTITUTE, PREPARATION OF THE ENVIRONMENTAL IMPACT STATEMENT, 1976 (Criminal Law & Urban Problems, Course Handbook Series, No. 81, 1976).

9. See *Hearings Before the Subcomm. on Arms Control, Oceans, and International Environment of the Comm. on Foreign Relations on S. Res. 49*, 95th Cong., 1st & 2d Sess. (1977-1978) [hereinafter cited as *Hearings on S. Res. 49*]. Senator Claiborne Pell and Barbara D. Blum, Deputy Administrator of the Environmental Protection Agency, noted some of the problems inherent in the preparation of environmental impact statements:

Senator PELL. The U.S. impact statement process has been criticized frequently as a costly paper-shuffling exercise. . . . We have tremendous problems because of the length of time the domestic impact statements take. . . . [I]t takes not months, but years. The same criticism perhaps could be leveled at international environmental impact statements.

Ms. BLUM. This is possible. . . . I was in New York at our regional headquarters . . . when someone pulled out a flow chart of what it takes to do an environmental impact statement. It was 8 feet long. . . . We are now doing an evaluation to see where that can be shortened.

Id. at 80. For a detailed breakdown of the costs of preparing environmental impact statements, see EIS EXPERIENCE BY SEVENTY FEDERAL AGENCIES, *supra* note 7, at 29, 46; 124 CONG. REC. S16,841-42 (daily ed. Oct. 2, 1978) (remarks of Sen. Muskie).

ences in culture and language, and the need to obtain cooperation from foreign governments on both the national and regional or local level. Furthermore, the great number and wide variety of major agency actions taken abroad add to the difficulty of compliance with the impact statement requirement.¹⁰ Foreign projects range from the construction abroad of military facilities by the Department of Defense¹¹ to the licensure of nuclear technology in foreign countries by the Nuclear Regulatory Commission (NRC),¹² to the pesticide programs in the third world sponsored by the Agency for International Development (AID).¹³

Although conceding that these programs clearly would warrant environmental analysis if they occurred domestically, the respective agencies have claimed that physical removal of these projects from the United States also removes them from coverage by NEPA.¹⁴ Environmental groups and governmental agencies have debated the issue for nearly a decade, and the agencies, for the most part, have successfully resisted imposition of the environmental impact statement requirement for foreign projects.¹⁵

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

11. Domestic construction of military facilities routinely requires review in compliance with the requirements of NEPA. See Environmental Considerations in Department of Defense Actions, 32 C.F.R. § 214.7 (1977). The Defense Department specifies, however, that the same treatment generally does not apply to projects overseas. See *id.* at §§ 214.2(c), 214.6(b)(1) (1977). In addition, overseas projects generally will not be affected under new Defense Departments regulations for the implementation of environmental review of departmental actions that occur abroad. See *id.* at § 197 (1977). See also *Gemeinschaft zum Schutz des Berliner Baumeandes, e. v. Marienthal*, Civ. No. 78-1836 (D.D.C., decided Nov. 9, 1978).

12. Domestic regulations of the NRC generally require preparation of an environmental impact statement. See NRC Licensing and Regulatory Policy and Procedures for Environmental Protection, 10 C.F.R. § 51.5 (1978). The same is not true for international operations. See *Babcock & Wilcox*, 5 N.R.C. 1332 (1977), [1977] 7 ENVIR. L. REP. (ELI) 30,017.

13. Agencies commonly prepare impact statements for domestic pesticide programs. See *National Organization for the Reform of Marijuana Laws (NORML) v. United States Dep't of State*, 452 F. Supp. 1226, 1232 (D.D.C. 1978); *Citizens Against Toxic Sprays, Inc. v. Bergland*, 428 F. Supp. 908 (D. Or. 1977); *Wisconsin v. Butz*, 389 F. Supp. 1065 (E.D. Wis. 1975); *Lee v. Resor*, 348 F. Supp. 389 (M.D. Fla. 1972). The Agency for International Development, however, did not prepare environmental impact statements on foreign activities until 1976. See note 25 *infra*.

14. See notes 11-13 *supra*.

15. Governmental agencies have a history of varying degrees of noncompliance. See Comment, *Four Years of Environmental Impact Statements: A Review of Agency Administration of NEPA*, 8 AKRON L. REV. 545 (1975). This review of domestic environmental impact statement preparation found: "Agency resistance to NEPA goes much deeper than the problem of adequate consideration of alternatives. . . . Noncompliance ranges from deliberate concealment of known serious impacts to simple miscalculation of the magnitudes of effects." *Id.* at 559. The review also

A recent Executive Order¹⁶ designed to appease the various parties to the dispute offers one solution—or at least, a turning point—in the controversy. This new executive policy requires an environmental impact statement for some extraterritorial projects, but continues a trend in agency procedures and in the courts of nonenforcement of the stringent level of review required by NEPA¹⁷ when an extraterritorial project is under consideration.

This Note first examines treatment of the problem by the administrative agencies, the courts, and the Council on Environmental Quality, and then assesses the effectiveness of the President's proposed solution. In analyzing the new executive policy, the Note focuses primarily on the level of environmental review required for extraterritorial projects rather than on the merits of extraterritorial application of the Act.

I. THE PROBLEM OF EXTRATERRITORIALITY

A. *Administrative Treatment of Extraterritorial Projects*

Until recently, administrative response to NEPA largely determined the level of compliance in extraterritorial government actions¹⁸ because the Congress and the courts, in spite of numerous opportunities, were reluctant to face the issue. Left with no guidance other than an occasional judicial comment, the agencies formed their own policies, which resulted in a hodgepodge of agency procedures characterized by differing degrees of noncompliance with NEPA requirements.

found that purposeful noncompliance with NEPA could be maintained "with impunity for long periods of time." *Id.* at 561. The author concluded that "agency recalcitrance stands as the single most potent obstacle to the success of NEPA." *Id.* at 562. *See also* Comment, *Controlling the Environmental Hazards of International Development*, 5 *ECOLOGY L.Q.* 321, 347-48 (1976); text accompanying notes 18-44 *infra*.

16. 44 Fed. Reg. 1957 (1979).

17. *See* note 3 *supra*.

18. The term "extraterritorial" somewhat simplifies the problem. Within the list of projects that may be classified as occurring extraterritorially, further degrees of differentiation are useful for analyzing how NEPA may be applied abroad. Activities and their effects may occur: (1) solely within the "global commons" (*e.g.*, the oceans, Antarctica); (2) solely within a cooperating foreign nation; (3) within a foreign nation or global commons area, but also affecting the domestic environment of the United States; or (4) within a foreign nation or a global commons area, but also affecting the internal environment of an additional, uninvolved nation. *Cf. Hearings on S. 3077 Before the Subcomm. on Resource Protection of the Senate Comm. on Environment and Public Works*, 95th Cong., 2d Sess. 274-99 (1978) [hereinafter cited as *Hearings on S. 3077*] (remarks of Professor S. Whitney, William & Mary College of Law) (seven categories for analysis of extraterritorial activities).

A number of agencies with extensive foreign operations, including the Department of Defense,¹⁹ the Overseas Private Investment Corporation (OPIC),²⁰ the Nuclear Regulatory Commission (NRC),²¹ and the United States Export-Import Bank (Eximbank),²² have in the past simply refused to acknowledge any serious application of NEPA to their activities. These noncomplying agencies considered environmental review a hindrance to their operations,²³ and found support for their position in the language of the Act, its legislative history, and the meager case law on the question.

In *Babcock & Wilcox*²⁴ the NRC justified its position of noncompliance with NEPA through a thorough review of domestic and international law, which demonstrated that the Act was meant to apply only to activities within the United States.²⁵

19. See note 11 *supra*. See also *Hearings on S. 3077, supra* note 18, at 98-99. The Army Corps of Engineers, a component of the Department of Defense, takes the position that environmental impact statements "are only required where there is a significant impact on the quality of the human environment in the United States and its territories and possessions." *Id.* at 99. *But see* Environmental Effects Abroad of Major Department of Defense Actions, 32 C.F.R. § 197 (1979) (regulations promulgated in response to the President's order requiring environmental review of certain projects abroad, *see* note 93 *infra*).

20. See Coan, Hills & McCloskey, *Strategies for International Environmental Action: The Case for an Environmentally Oriented Foreign Policy*, 14 NAT. RESOURCES J. 87, 100-01 (1974).

21. See note 12 *supra*.

22. See *Natural Resources Defense Council v. Export-Import Bank*, No. 77-0080 (D.D.C., dismissed Feb. 23, 1979) (Eximbank vigorously opposed suit by NRDC to force Eximbank compliance with NEPA on all its projects; dismissed without prejudice pending Eximbank's compliance with Executive Order 12,114, *see* note 93 *infra*). *But see* Proposed Procedures for Compliance with the National Environmental Policy Act, 44 Fed. Reg. 28,823 (1979).

23. See notes 28-29 *infra* and accompanying text.

24. 5 N.R.C. 1332 (1977), [1977] 7 ENVIR. L. REP. (ELI) 30,017.

25. *Id. Babcock & Wilcox* involved a challenge to NRC procedures by a West German group that wanted the Commission to examine the environmental impact of a proposed nuclear reactor before the Commission granted an export license for the project. The NRC held that because the Energy Research and Development Administration had already prepared an environmental impact statement for the nuclear licensing program as a whole, NEPA "does not require . . . [the NRC] to prepare an individual environmental statement assessing the site specific impacts of the particular proposed nuclear reactor export on territory within the sovereign jurisdiction of a foreign government." *Id.* at 1336, [1977] 7 ENVIR. L. REP. at 30,018.

The NRC began its analysis of the problem with an examination of the language of the statute. Emphasizing Congress' repeated use of the words "nation," "Americans," and "national policy," the Commission concluded that Congress was preoccupied with the domestic application of the statute. The NRC also noted that Congress qualified its single explicit international reference in NEPA—§ 102(2)(F), which encouraged cooperation between nations on environmental problems—with language that required cooperation to be "consistent with the foreign policy of the United States." 5 N.R.C. at 1338, [1977] 7 ENVIR. L. REP. at 30,019. The NRC thus concluded that because no qualifying phrase accompanies the environmental impact statement re-

Eximbank was perhaps the strongest proponent of the nonapplication position.²⁶ With the support of major business groups and many members of Congress, Eximbank (unlike other federal agencies) refused to retreat even in the face of court fights.²⁷ Maintaining that its programs would be seriously impaired if environmental reviews were required, Eximbank emphasized practical rather than legal justifications for its refusal to conform to NEPA.²⁸ Specifically, it cited the increased costs to exporters of environmental reviews, the decreased competitiveness resulting from delays in making financial commitments, the lack of consensus within the government on the appropriate environmental procedures, and the general overburdening of Eximbank's programs that would result from additional restrictions.²⁹

quirement or any other section of NEPA, § 102(2)(F) was the only section that Congress intended to have international application. In addition to the statutory language, the NRC found that the legislative history revealed "a dominant concern with national problems and impacts." 5 N.R.C. at 1337, [1977] 7 ENVIR. L. REP. at 30,018. On a third level, the Commission outlined the manner in which international application of NEPA would interfere with the operation of United States foreign policy. The NRC viewed this interference as intolerable under the "fundamental principle of international law . . . that nations have a basic right to conduct their internal affairs free from interference by other nations." *Id.* at 1343, [1977] 7 ENVIR. L. REP. at 30,020. Finally, the Commission noted the presumption against statutory extraterritoriality, one of the more frequently advanced arguments against international application of NEPA:

Rules of United States statutory law, whether prescribed by Federal or state authority, apply only to conduct occurring within, or having effect within, the territory of the United States, unless the contrary is clearly indicated by the statute.

Restatement (Second) of the Foreign Relations Law of the United States, Section 38. The Federal Courts have frequently affirmed this presumption. *American Banana Co. v. United Fruit Co.*, 213 U.S. 347 (1909); *Foley Bros., Inc. v. Filardo*, 336 U.S. 281 (1949); *Reyes v. Secretary of HEW*, 476 F.2d 910 (D.C. Cir. 1973). A responsibility on the part of the U.S. government to assess impacts in nuclear export licensing would arise only if the principles militating against such an application of U.S. law were rebutted by clear statutory evidence. . . . The legislative history of NEPA fails to supply that clear evidence.

5 N.R.C. at 1345-46, [1977] 7 ENVIR. L. REP. at 30,021.

The NRC previously had indicated in *Edlow Int'l*, 3 N.R.C. 563 (1976), that NEPA does not apply to international operations, although that decision did not contain a detailed analysis of the issue.

But see Note, *The Extraterritorial Scope of NEPA's Environmental Impact Statement*, 74 MICH. L. REV. 349 (1975), which covers almost all the issues that the NRC covered in *Babcock & Wilcox*, but comes to the opposite conclusion.

26. See generally *Hearings on S. 3077*, *supra* note 18.

27. See *Natural Resources Defense Council v. Export-Import Bank*, No. 77-0080 (D.D.C., dismissed Feb. 23, 1977); *Sierra Club v. AEC*, 6 E.R.C. 1980, [1974] 4 ENVIR. L. REP. (ELI) 20,685 (D.D.C. Aug. 3, 1974).

28. SENATE COMM. ON ENVIRONMENT AND PUBLIC WORKS, EXPORT-IMPORT BANK ACT AMENDMENTS OF 1978, S. REP. NO. 1039, 95th Cong., 2d Sess. 7-11 (1978).

29. *Id.* at 9-11. The hostility of Eximbank to the application of NEPA to its actions is not

Other agencies exhibited varying degrees of compliance. The Department of State gradually softened its position from questioning *any* application of NEPA to its actions³⁰ to allowing preparation of environmental impact statements under certain circumstances.³¹ The Department, however, remains wary of having its foreign policy powers compromised and continues to oppose full compliance. Although the State Department presently prepares environmental impact statements on its actions "affecting the U.S. environment, the global environment and areas, such as the high seas and Antarctica, outside the jurisdiction of any country,"³² the Department still resists review of actions that occur within the territorial jurisdiction of another country. As recently as May 1978, a State Department spokesman told Congress, "We do not agree that NEPA should be applied extraterritorially."³³

AID, which began with the same position as the State Department's initial position,³⁴ now performs rather extensive environmental analyses of its programs abroad.³⁵ It is the only agency with extensive commitments in other nations that has independently developed a comprehensive framework for review of extraterritorial projects, but the Agency agreed to the procedures only after the Environmental Defense Fund filed suit in 1974 to enforce compliance with NEPA.³⁶ Offi-

surprising. Although Eximbank attempts to operate as an independent export-financing facility, its financial success has been limited as a result of a host of restrictions on the activities in which it can and cannot engage. According to testimony given by Jack Carlson of the United States Chamber of Commerce, the Eximbank is under "statutory obligations to consider scarce materials, human rights, domestic employment effects and even the size of projects." *Id.* at 10. Additionally, one might add to this host of restrictions the requirements of the Jackson-Vanik Amendment and the annual threat of numerous other limitations proposed each year in Congress. *See also Hearings on S. 3077, supra* note 18, at 77-85, 128-73; 124 CONG. REC. S16,864-65 (daily ed. Oct. 2, 1978) (remarks of Sen. Thurmond); Note, *The Scope of the National Environmental Policy Act: Should the 102(2)(c) Impact Statement Provision Be Applicable to a Federal Agency's Activities Having Environmental Consequences Within Another Sovereign's Jurisdiction?*, 5 SYRACUSE J. INT'L L. & COM. 338-39 (1978).

30. *See* Robinson, *supra* note 5, at 260-63 (1974).

31. U.S. Dep't of State, Issuance of Final Department Procedures for Compliance with Federal Environmental Statutes, 37 Fed. Reg. 19,167 (1972). *See also* 37 Fed. Reg. 3448 (1972).

32. *Hearings on S. Res. 49, supra* note 9, at 10 (statement of Robert C. Brewster, Acting Assistant Secretary of State for Oceans and International Environmental and Scientific Affairs).

33. *Id.* at 14.

34. *See* Strusberg, *The National Environmental Policy Act and the Agency for International Development*, 7 INT'L LAW. 46 (1973).

35. *See* AID Environmental Procedures, 22 C.F.R. §§ 216.1-8 (1978).

36. *Environmental Defense Fund v. United States Agency for Int'l Dev.*, 6 ENVIR. L. REP. (ELI) 20,121 (D.D.C. Dec. 5, 1975). The suit resulted in a court-approved settlement between the

cials of AID have since expressed a belief that the Agency's experience with environmental review has been a positive one.³⁷ Environmental groups frequently cite AID as an example of successful and productive environmental review of foreign projects.³⁸ The Agency's review procedures, which AID tailored to its special needs, provide for "environmental assessments,"³⁹ rather than environmental impact statements, under most circumstances.⁴⁰ An environmental impact statement is required only when an AID action affects the United States or the global environment outside the jurisdiction of any nation.⁴¹

A number of federal agencies attempt to comply fully with NEPA in all of their activities, regardless of location,⁴² and deem compliance to be beneficial.⁴³ The extraterritorial actions of these agencies, however, tend to be concentrated in the "global commons" (*e.g.*, the oceans and Antarctica) rather than within the boundaries of other nations.⁴⁴

B. *Judicial Treatment of Extraterritorial Projects*

The question of NEPA's international reach has surfaced with some regularity in the federal courts, but the courts have successfully avoided

parties. *See generally* Comment, *International Application of NEPA: Environmentalists Challenge Pesticide AID Program*, [1975] 5 ENVIR. L. REP. (ELI) 10,086.

37. *See Hearings on S. Res. 49, supra* note 9, at 31 (statement of Leonard Meeker, Sierra Club, quoting remarks by John Gilligan, AID Administrator):

We have learned that development in the LDC's [Least Developed Countries] can be effective—and worth the investment—only if it lasts.

We have learned that development lasts only if environmental considerations are a major part of a project's conception and implementation.

And we are learning that an impact assessment need not be as laborious, or as time consuming, as we once thought.

See also Hearings on S. 3077, supra note 18, at 224-25 (statement of Albert Printz, AID); 124 CONG. REC. S16,838-39 (daily ed. Oct. 2, 1978).

38. *Hearings on S. Res. 49, supra* note 9, at 34.

39. 22 C.F.R. § 216.1(c)(4) (1978) provides: "The Environmental Assessment is a detailed study of the reasonably foreseeable environmental effects, both positive and negative, of a proposed action and its reasonable alternatives carried out within or affecting specific developing countries."

40. *Id.* §§ 216.5-.6 (1978).

41. *Id.* *See also Hearings on S. 3077, supra* note 18, at 231-52.

42. Among these agencies are the National Oceanic and Atmospheric Administration, *see* [1979] 9 ENVIR. REP. (BNA) 1709, the National Science Foundation, *see* Environmental Impact Statement Policy and Procedures, 45 C.F.R. § 640.3(e) (1977), the National Aeronautics and Space Administration, *see* Environmental Quality and Control, 14 C.F.R. § 1204.1100-.1103 (1978), and the Environmental Protection Agency, *see Hearings on S. Res. 49, supra* note 9, at 23.

43. *See Hearings on S. Res. 49, supra* note 9, at 24-27.

44. *See* note 94 *infra* and accompanying text.

any direct and thorough confrontation of the issue. The cases, however, indicate a preference for foreign application,⁴⁵ in keeping with the general judicial preference for a liberal construction of NEPA's procedural requirements. In an early interpretation of NEPA, *Calvert Cliffs' Coordinating Committee v. Atomic Energy Commission*,⁴⁶ the Court of Appeals for the District of Columbia established that "the sweep of NEPA is extraordinarily broad, compelling consideration of any and all types of environmental impact of federal action."⁴⁷ Later opinions reemphasized this philosophy.⁴⁸

The first indication that the courts might extend NEPA's reach beyond the territorial jurisdiction of the United States appeared in *Wilderness Society v. Morton*.⁴⁹ The Court in this case acknowledged that foreign nationals may have a valid interest in the enforcement of NEPA to provide protection for their environment.⁵⁰ Courts shortly thereafter reemphasized the "extraordinary sweep of NEPA" in cases extending NEPA's applicability to the United States Pacific Island Trust Territories,⁵¹ despite the lack of any explicit intention of Con-

45. See notes 49-75 *infra* and accompanying text.

46. 449 F.2d 1109 (D.C. Cir. 1971) (courts have power to require agencies to comply with procedural directives of NEPA and to ensure realization of Act's purposes of protecting environment to fullest possible extent).

47. *Id.* at 1122.

48. See, e.g., *Cady v. Morton*, 527 F.2d 786, 791-92 (9th Cir. 1975) (actions involving American Indians and Bureau of Indian Affairs not immune from environmental review; NEPA applies to all Americans); *Davis v. Coleman*, 521 F.2d 661 (9th Cir. 1975) (purpose of environmental impact statement requirement is to ensure to the fullest extent possible that agency decisionmakers take proper account of project's environmental impact); see notes 56-75 *infra* and accompanying text.

49. 463 F.2d 1261 (D.C. Cir. 1972).

50. *Id.* This suit was one of several brought by environmentalists to challenge the Interior Department's compliance with NEPA before its issuance of permits for construction of the trans-Alaska pipeline. Canadian environmentalists, who advocated alternative methods and routes for transporting Alaskan oil to the continental United States, sought to intervene in the action to assert their interests. The district court denied their petition on the ground that counsel for the American plaintiffs adequately represented the potential claims of Canadians. The District of Columbia Court of Appeals reversed, however, reasoning that the potential damage to the Canadian environment from one of the proposed routes justified the Canadians' intervention into the suit to assert NEPA for their benefit. "It [is] quite clear that the interests of the United States and Canadian environmental groups [are] antagonistic." *Id.* at 1262-63. See also *People of Enewetak v. Laird*, 353 F. Supp. 811 (D. Hawaii 1973); Tarlock, *The Application of the National Environmental Policy Act of 1969 to the Darien Gap Highway Project*, 7 N.Y.U.J. INT'L L. & POL. 458, 464-65 (1974).

51. See *Guerrero v. United States Dep't of Interior*, 502 F.2d 90 (9th Cir. 1974), *cert. denied*, 420 U.S. 1003 (1975); *People of Saipan v. United States Dep't of Interior*, 356 F. Supp. 645 (D.

gress to have the Act so applied.⁵²

An interesting pattern has developed in more recent challenges by environmental groups of agency actions outside of the United States. In most cases, courts have not had to decide whether an environmental impact statement will be required because the agency-defendant either backed down and agreed to prepare an EIS or already had begun some kind of environmental review. Agency acquiescence to the principle of review abroad thus left the courts with only the task of determining the adequacy of the environmental review undertaken.

In *Sierra Club v. Adams*,⁵³ for example, the District of Columbia Circuit ended a four-year fight between environmentalists and the Federal Highway Administration over an allegedly deficient environmental impact statement. The agency prepared the document as part of its involvement in the construction of the final section of the Pan American Highway through the Darien Gap section of Panama.⁵⁴ In the initial 1975 challenge⁵⁵ the district court found the agency's statement to be inadequate because of its incomplete discussion of the risk of transmission of foot-and-mouth disease to the United States and, more interestingly, because of its failure to consider certain effects on the *Panamanian* environment.⁵⁶ The court granted an injunction at that time⁵⁷ and extended it in 1976.⁵⁸ On both occasions the district court stressed the importance of understanding and analyzing the project's impact on the *local* environment of the participating foreign nation.⁵⁹

Hawaii 1973), *modified on other grounds sub nom.* People of Enewetak v. Laird, 353 F. Supp. 811 (D. Hawaii 1973).

52. The significance of these decisions lies in the special nature of the trust territories. Federal statutes ordinarily do not apply to the trust territories unless Congress specifically intends otherwise. NEPA contained no such intention, yet the district court of Hawaii, after a review of the legislative history and the language of NEPA itself, found the intention implicit in the Act. "NEPA is framed in expansive language that clearly evidences a concern for all persons subject to federal action which has a major impact on their environment—not merely the United States' citizens located in the fifty states." People of Enewetak v. Laird, 353 F. Supp. 811, 816 (D. Hawaii 1973). The court, however, did not make a conclusive statement on the extraterritoriality application of NEPA. *Id.* at 817 n.10.

53. 578 F.2d 389 (D.C. Cir. 1978), *vacating* Sierra Club v. Coleman, 421 F. Supp. 63 (D.D.C.), *extending injunction granted*, 405 F. Supp. 53 (D.D.C. 1975).

54. See Tarlock, *supra* note 50; Note, *The Darien Gap Case—Can Mere Words Interfere with the Sovereignty of a Foreign Nation*, 10 LAW. AM. 589 (1978).

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

56. *Id.* at 55-56.

57. *Id.* at 53, 56.

58. Sierra Club v. Coleman, 421 F. Supp. 63 (D.D.C. 1975).

59. See *id.* at 66; 405 F. Supp. at 55-56. On both occasions the court expressed concern over

The lower court, in effect, demanded extraterritorial application of NEPA without consciously addressing the issue.⁶⁰ The court of appeals, however, found the agency's environmental impact statement adequate and vacated the injunction.⁶¹

Because of the appellate court's stamp of approval, it is difficult to determine what would have been minimally required to make the environmental impact statement acceptable. Perhaps those sections of the analysis which deal solely with the effects of construction on the Panamanian environment could have been omitted without destroying the document's acceptability. The court's discussion of the content of those sections goes only to their sufficiency, not to the basic question of their necessity under NEPA.⁶² Unlike the district court, however, the court of appeals recognized that the case raised the issue of extraterritoriality, even though it did not feel compelled to address the issue:

The effects of construction on the Indians as well as on flora and fauna . . . brings into question the applicability of NEPA to United States foreign projects that produce entirely local environmental impacts. . . . In view of the conclusions that we reach in this case, we need only assume, without deciding, that NEPA is fully applicable to construction in Panama.⁶³

This language is about as decisive a position as the federal courts have taken.

Judicial observation of the issue also occurred in *National Organization for Reform of Marijuana Laws (NORML) v. United States Department of State*.⁶⁴ NORML sought a declaratory judgment against several federal agencies⁶⁵ for failure to prepare an environmental impact statement on the United States' participation in the herbicide

the effect of the highway on the Cuna and Chaco Indians living in Panama and Columbia, an issue completely unrelated to what effect the highway would have on the United States.

60. See 421 F. Supp. at 65; 405 F. Supp. at 56.

[D]efendants propose to build the first major highway through a region until now almost wholly undisturbed by any encroachment of modern civilization, an area by all accounts constituting an ecosystem virtually unique to the world. A more paradigmatic example of the need for thorough and strict application of the requirements of NEPA could hardly be found

Id.

61. *Sierra Club v. Adams*, 578 F.2d 389 (D.C. Cir. 1978).

62. *Id.* at 395-96.

63. *Id.* at 391-92 n.14.

64. 452 F. Supp. 1226 (D.D.C. 1978). See generally 19 NAT. RESOURCE J. 213 (1979).

65. Defendant-agencies were the Department of State, the Drug Enforcement Administration, the Agency for International Development, and the Department of Agriculture.

(paraquat) spraying of marijuana plants in Mexico.⁶⁶ Plaintiff also demanded an injunction to prohibit the agencies' activities and specifically asked the court to address the question of NEPA's extraterritorial application.⁶⁷ Defendants responded at a preliminary hearing that plaintiff's allegations of harm could be separated into two groups: the effect of United States' participation on the environment of this country and the effect of the project on the environment of Mexico.⁶⁸ Announcing that they would prepare an environmental impact statement on the domestic impact of the spraying and a separate "environmental analysis" of the impact on Mexico, defendants claimed that plaintiff's request for a determination on the extraterritorial application of NEPA was moot.⁶⁹

The court issued a declaratory judgment against defendants for failure to prepare an environmental impact statement on the project's effects on the United States,⁷⁰ but accepted as sufficient the less stringent "environmental analysis" of the spraying's effect on Mexico.⁷¹

Although the court professed that "the extraterritoriality of NEPA remains an open question in this circuit,"⁷² its treatment of defendants' concessions reveals some implicit notions on the subject, if not a construction by default. By incorporating into its decree the nonstatutory⁷³ form of review—the "environmental analysis" of the program's effects

66. 452 F. Supp. at 1228.

67. *Id.* at 1229.

68. *Id.* at 1228-29.

69. *Id.* at 1229. It is questionable whether the court needed to confront any of the issues in *NORML*. As defendants contended, the case arguably became moot when the government agreed to perform the environmental review. Support for the mootness argument can be found in *Sierra Club v. AEC*, 6 E.R.C. 1980, 4 ENVIR. L. REP. (ELI) 20,685 (D.D.C. Aug. 3, 1974). Plaintiff brought suit to compel the Atomic Energy Commission, the Eximbank, and the State Department to prepare an environmental impact statement on the nuclear power export process. The court held the action moot as to the AEC and the State Department because they had begun to prepare a statement. *Id.* at 1981, 4 ENVIR. L. REP. at 20,686. The suit proceeded against the Eximbank, but the court held that NEPA required only the agency primarily responsible for the project or action to prepare an environmental impact statement. *Id.* Because the AEC was the primary agency, the court also dismissed against the Eximbank.

70. 452 F. Supp. at 1233. "The Court will render a declaratory judgment in favor of plaintiff *NORML* that defendants are in violation of NEPA for failing to prepare, circulate for comment, and consider a detailed environmental impact statement on the United States effects of the spraying program." *Id.* at 1235.

71. *Id.*

72. *Id.* at 1232.

73. Although an "environmental analysis" complies with the general purpose of NEPA, *see* note 6 *supra*, the statute makes no direct reference to this form of review.

on Mexico—the court acknowledged that NEPA's reach may extend transnationally. At the same time, the court implied that NEPA does not demand as much when applied to the effects of actions in another country as it does when applied to actions in the United States. This dual approach—dual in terms of the remedies imposed by the court—arguably constitutes a construction by default of NEPA's extraterritorial applicability. For the more detailed domestic review (the environmental impact statements), defendants received a reprimand in the form of a declaratory judgment citing them with a violation of NEPA, but for their proposal of a less-detailed, nonstatutory form of review (environmental analysis) of the project's effect on Mexico, defendants received no reprimand; rather, the court required defendants to complete only what they agreed to start.⁷⁴ For some reason, the court was not willing to say that NEPA demands the same level of review outside the United States as within. Whether this dichotomy implies that the level of review for matters not affecting the United States is actually less stringent, or whether it merely reflects a judicial reluctance to approach a difficult issue, remains uncertain.⁷⁵

C. *The Council on Environmental Quality*

The Council on Environmental Quality (CEQ), created by NEPA⁷⁶ and principally responsible for its implementation,⁷⁷ has been the lead-

74. *Id.* at 1233. "Defendants, of course, remain obligated by their own agreement at the hearing to prepare an 'environmental analysis' of the program's effects in Mexico, and [we] do not disturb that course of conduct." *Id.*

75. The most recent attempt to force NEPA compliance on a United States project abroad is *Gemeinschaft zum Schutz des Berliner Baumeistandes, e. v. Marienthal*, No. 78-1836 (D.D.C. Nov. 17, 1978). A West German environmental group sought to force the Department of Defense to prepare an environmental impact statement for a United States Army housing project under construction in West Berlin. The court did not reach the extraterritoriality issue, however, because plaintiffs failed to show that the housing project was a "federal" action within the meaning of the Act. *See* NEPA § 102(2)(C), 42 U.S.C. § 4332(2)(C) (1976). The issue arose primarily because of the extensive involvement of the West German government in the project. The court, nevertheless gave some indication that foreign policy implications also constituted a factor in its denial of plaintiffs' request for an injunction on the project. The case is significant for its uniqueness: it is the only decision on a suit brought to compel preparation of an environmental impact statement for an activity outside the United States that did not result in the preparation of a statement either through voluntary compliance or court order. That significance is heightened by defendants' extensive arguments during trial on the nonextraterritoriality of NEPA. *See* [1978] 9 ENVIR. REP. (BNA) 1300.

76. NEPA § 2, 42 U.S.C. § 4321 (1976).

77. *Id.* §§ 102, 201, 42 U.S.C. §§ 4332, 4341; CEQ Preparation of Environmental Impact Statements: Guidelines, 40 C.F.R. §§ 1500.1-.14 (1977).

ing governmental proponent of efforts to develop a uniform policy governing the extraterritorial reach of the Act.⁷⁸ CEQ not only has been a spokesman for international environmental controls and cooperation, but has consistently maintained that NEPA applies extraterritorially,⁷⁹ at least as a source of goals and guidelines for the behavior of United States agencies abroad.⁸⁰ Although practicalities have forced CEQ away from a policy of strict statutory enforcement toward one of selective application,⁸¹ the Council remains firm in its belief that foreign projects must comply with NEPA requirements.

Early in 1978, CEQ directed its efforts at obtaining general agency compliance with its position by issuing a set of proposed regulations that would have required full application of NEPA's environmental impact statement requirements for activities abroad.⁸² These regula-

78. "In 1971, the Council's Legal Advisory Committee specifically urged the Federal Agencies to apply NEPA to their actions in foreign countries. . . . The Council's 1973 guidelines require the assessment of both the national and international environment." Council on Environmental Quality, Memorandum on the Application of the EIS Requirement to Environmental Impacts Abroad of Major Federal Actions, Sept. 24, 1976, *reprinted in Hearings on S. Res. 49, supra* note 9, at 93.

79. *Hearings on S. Res. 49, supra* note 9, at 16 (statement of Charles Warren).

80. In working with AID following the court-approved settlement in *Environmental Defense Fund, Inc. v. United States Agency for Int'l Dev.*, 6 ENVIR. L. REP. (ELI) 20,121 (D.D.C. Dec. 5, 1975), CEQ helped to develop a set of regulations tailored to AID's special needs. Especially significant was the replacement in most situations of environmental impact statements with "environmental assessment." See notes 34-41 *supra* and accompanying text.

81. See note 64 *supra*.

82. See 124 CONG. REC. S16,852 (daily ed. Oct. 2, 1978); [1978] 9 ENVIR. REP. (BNA) 1493-95. The proposed regulations emerged from a general review and reform of NEPA procedures conducted by CEQ pursuant to Executive Order 11,991 issued by President Carter. See 42 Fed. Reg. 26,967-68 (1977). That order purports to authorize the CEQ to issue regulations (as opposed to guidelines) for the purposes of increasing the effectiveness of the environmental impact statement and reducing its complexity. See *Miscellaneous Hearings Before the Subcomm. on Fisheries and Wildlife Conservation and the Environment of the House Comm. on Merchant Marine and Fisheries*, 95th Cong., 1st & 2d Sess. 332-47 (1977-1978) (hearings on CEQ authorization, H.R. 10,884). It is interesting to note, however, that no apparent statutory authority supports either CEQ's issuance of regulations or Executive Order 11,991. NEPA only authorizes CEQ to "assist and advise" the President, and more generally, to review and make recommendations concerning the government's environmental programs. NEPA § 204, 42 U.S.C. § 4344 (1976) (governing "Duties and Functions" of the CEQ). Nothing in the statute directs CEQ to go beyond these data-gathering and analyzing functions. Although President Nixon provided that CEQ might "issue guidelines to Federal Agencies," see Exec. Order No. 11,514, Protection and Enhancement of Environmental Quality, 35 Fed. Reg. 4247 (1970), these guidelines have been held to be only advisory and without the force of law. *Hiram Clarke Civic Club, Inc. v. Lynn*, 476 F.2d 421 (5th Cir. 1973); see *Sierra Club v. Lynn*, 502 F.2d 43, *rehearing denied*, 504 F.2d 760 (5th Cir. 1974), *cert. denied*, 421 U.S. 994 (1975); *Greene County Planning Bd. v. FPC*, 455 F.2d 412 (2d Cir.), *cert. denied*, 409 U.S. 849 (1972); *Upper West Fork River Watershed Ass'n v. Corps of Eng'rs*, 414

tions circulated among federal agencies and, predictably, met with a storm of opposition.⁸³ Under pressure, CEQ later withdrew the draft regulations.

President Carter subsequently initiated negotiations between CEQ and the State Department, which had offered some of the strongest criticism of the regulations, in an attempt to develop a basis for an executive order to govern agency procedures.⁸⁴ The move to an executive order as an alternative to CEQ regulations was designed to appease the State Department and other agencies.⁸⁵ These agencies viewed an ex-

F. Supp. 908 (D.W. Va. 1976), *aff'd*, 556 F.2d 576 (4th Cir. 1977), *cert. denied*, 434 U.S. 1010 (1978); Continental Ill. Nat'l Bank & Trust Co. v. Kleindienst, 382 F. Supp. 107 (N.D. Ill. 1973).

Although regulations issued by CEQ pursuant to its newly designated powers under Executive Order 11,991 would also lack a statutory basis and thus the "force of law," they would receive serious attention, of course, by the affected governmental agencies. More importantly, the courts probably would show greater deference to regulations promulgated under an executive order and accord them significant weight. *See* Sierra Club v. Morton, 514 F.2d 856 (D.C. Cir.), *cert. dismissed*, 424 U.S. 901 (1975), *rev'd on other grounds sub nom.* Kleppe v. Sierra Club, 427 U.S. 390 (1976); Essex County Preservation Ass'n v. Campbell, 399 F. Supp. 208 (D. Mass.), *aff'd*, 536 F.2d 956 (1st Cir. 1976); Appalachian Mountain Club v. Brinegar, 394 F. Supp. 105 (D.N.H. 1975); Carolina Action v. Simon, 389 F. Supp. 1244 (D.N.C.), *aff'd*, 522 F.2d 295 (4th Cir. 1975); W. ROGERS, ENVIRONMENTAL LAW 708 (1977) ("courts regularly cite CEQ guidelines and treat them for all practical purposes as indistinguishable from agency regulations"; such guidelines "can be ignored only for the 'strongest reasons'"). Thus, CEQ regulations, though not legally binding on other agencies, would be formidable in their legal weight and the deference granted to them by the courts.

CEQ issued proposed regulations, pursuant to Executive Order 11,991, on NEPA's application to activities occurring abroad on January 6, 1978. They were circulated to 30 government agencies for comment, but were not made public until a later date. *See* W. ROGERS, *supra*, at 348-52.

83. *See* [1978] 9 ENVIR. REP. (BNA) 1462-63. Copies of several responses are contained in *Hearings on S. 3077, supra* note 18, at 87-127.

84. Selection of an executive order over regulations as the vehicle for governing extraterritorial application of NEPA does not necessarily diminish the legal weight of the directive. *See* note 82 *supra*; note 87 *infra*.

85. Both proponents and opponents of international environmental review stand to gain from the use of an executive order rather than CEQ regulations to implement this policy. For those who support review of activities conducted abroad, the executive order rests on a clear statutory basis, *see* notes 87, 93 *infra*, and clearly may carry the weight of law, but CEQ's power to issue binding regulations is untested and of questionable validity. *See* note 82 *supra*. In view of the strong resistance to the preparation of environmental impact statements exhibited by many governmental agencies and their private counterparts, it is quite possible that CEQ "regulations" (which might, in fact, have no more weight than "guidelines") would be followed only halfheartedly, at best, and ignored, at worst.

An executive order also allows much more opportunity for input into the final product from those agencies which favor limited and restricted review as the best form of an undesirable but unavoidable expansion of environmental review. By leaving the final decision to the President, rather than to CEQ, much more room is available for compromise between the two sides. *See* note 82 *supra*.

executive order as more "palatable"⁸⁶ because the President was much less likely than CEQ acting alone to go to extremes. In every other respect, an executive order would be no less effective than procedures promulgated by CEQ.⁸⁷

Despite several months of discussion, CEQ and the State Department failed to reach an agreement on a number of issues; rather, the draft order sent to the President in July 1978 contained eight sets of

86. [1978] 9 ENVIR. REP. (BNA) 360 (comment of Nicholas C. Yost, General Counsel of the CEQ; "other agencies would feel better about the President's telling them what to do" than they would about a CEQ directive).

87. The actual legal weight of an executive order is a complex issue that has been the subject of court opinions, Congressional studies, books, and law review articles. *See, e.g.*, Note, *Presidential Power: Use and Enforcement of Executive Orders*, 39 NOTRE DAME LAW. 44 (1963) ("no legal definition" of executive order). It is generally recognized, however, that the legal weight of an executive order depends primarily on the authority on which it is based. For instance, when founded upon specific statutory authority or upon the Constitution, an executive order has the force of law. "In such cases the courts have held that Executive Orders have the same effect as if they had been incorporated in an act of Congress." L. FISHER, *PRESIDENT AND CONGRESS* 52 (1972). *See* *United States v. Pink*, 315 U.S. 203, 230 (1942); *Farmer v. Philadelphia Elec. Co.*, 329 F.2d 3, 8 (3rd Cir. 1964). Because of the legal weight accorded executive orders, commentators have variously characterized them as "presidential legislation" and "presidential exercise of legislative power." 37 U. COLO. L. REV. 105 (1964).

Executive orders generally are aimed at the internal operations of governmental agencies (as is the case with President Carter's Order on the foreign application of NEPA). Because they are directed to governmental officials, executive orders have only an indirect effect on the individual. Note, *supra*, at 55. It should be observed that executive orders, despite their legal force, do not necessarily provide a cause of action to individuals who seek to enforce them. *Id.*; *see* 44 Fed. Reg. 1957 (1979).

There are, of course, limits to how far the Presidential power extends; hence, there are limits to the objectives to which an executive order may be constitutionally directed. The Supreme Court examined the problem in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). In a concurring opinion Justice Jackson developed three categories of authority upon which executive orders might be based and suggested that the likelihood that an order would be upheld depended on the category. When that authority is "an express or implied authorization of Congress," the executive order "personif[ies] the federal sovereignty" and will generally be upheld. When the asserted authority is the independent power of the President "in absence of . . . congressional grant . . . of authority," the executive order rests on more uncertain grounds, and the court may examine the extraneous circumstances. When, however, the President's order is "incompatible with the expressed or implied will of Congress, his power is at its lowest ebb," and his executive order is most likely to be invalidated. 343 U.S. at 635-38 (Jackson, J., concurring). Despite the courts' ability to invalidate executive orders, they rarely do so. "The courts have shown a marked reluctance to declare acts of the chief executive unconstitutional. When they do, it is largely a matter of good faith as to whether the President will accept the court's determination." 37 U. COLO. L. REV. 105, 117 (1964). *But see* *Panama Refining Co. v. Ryan*, 293 U.S. 388, 433 (1935).

Executive orders, like agency regulations, are printed in the Federal Register, the "central Publication of Presidential and agency made law." HOUSE COMM. ON GOVERNMENT OPERATIONS, 85TH CONG., 1ST SESS., *EXECUTIVE ORDERS AND PROCLAMATIONS: A STUDY OF A USE OF PRESIDENTIAL POWER* 1 (Comm. Print 1957); *see* Federal Register Act § 4, 44 U.S.C. § 1501 (1976).

alternative provisions in areas in which the two agencies were unable to compromise.⁸⁸ The CEQ approach favored broader foreign application, used stronger language,⁸⁹ covered more potential activities,⁹⁰ and placed greater emphasis on the use of environmental impact statements as opposed to less encompassing forms of environmental review.⁹¹ The State Department proposals granted agencies much more flexibility and provided more relaxed compliance procedures.⁹²

II. THE PRESIDENTIAL "SOLUTION"

The President's release in early 1979 of Executive Order 12,114, *Environmental Effects Abroad of Major Federal Actions*, is the first authoritative action taken toward resolving the extraterritoriality controversy since the passage of NEPA.⁹³ The major federal actions covered by the

88. Draft Executive Order on Reviewing Environmental Effects of Major Federal Actions Abroad, reprinted in [1978] 9 ENVIR. REP. (BNA) 568-70. The following sections contained alternative provisions: §§ 2-3(c), -4(b)(ii), -4(b)(iii), -4(d), -5(a)(v), -5(b), -5(c), and 3-1.

89. See, e.g., *id.* at 569, § 2-4(d). The CEQ version of § 2-4(d) would require that "agencies taking such action encompassed by this Order shall prior to taking such action, inform other federal agencies with relevant expertise of the availability of environmental documents prepared under this Order." *Id.* (emphasis added). Under the State Department's proposed alternatives, the agency taking foreign actions that required environmental review would be "encouraged to inform other Federal agencies with relevant expertise." *Id.* (emphasis added). The State Department's version also lacked the requirement proposed by CEQ that notification of other agencies occur before the action in question was taken.

90. See, e.g., *id.* at 568-70, §§ 2-3(c), -5(a)(v), -5(c). For example, CEQ proposed that the order cover actions involving "hazardous chemicals," but the State Department version only reached actions involving a "toxic chemical"—a potentially less inclusive category. Similarly, CEQ's version would have reached actions involving "radiological substances," but the State Department used the less sweeping term "radioactive hazards."

91. For certain categories of actions, e.g., *id.* at 568, § 2-3(b) (governing major federal actions significantly and adversely affecting the environment of a foreign nation not participating with the United States, and not otherwise involved in the action); *id.* at 568, § 2-3(c), the State Department wanted to limit the available forms of review to either "bilateral or multilateral environmental studies" or "concise reviews of the environmental issues involved." *Id.* CEQ, however, sought to incorporate the environmental impact statement as a third alternative form of review. *Id.* at 568, § 2-4(b)(ii).

92. See notes 89-91 *supra*.

93. 44 Fed. Reg. 1957 (1979). The statutory authority of the President to issue regulations implementing and governing NEPA appears to be much clearer than his authority to vest this power in CEQ. Executive Order 12,114 rests on much firmer ground than Executive Order 11,991. See note 82 *supra*. The language of the National Environmental Act, § 102, 42 U.S.C. § 4332 (1976), provides that authority: "Congress authorizes and directs that . . . all agencies of the Federal Government shall . . . develop methods and procedures . . . which will insure that presently unqualified environmental amenities and values may be given appropriate consideration in decisionmaking." *Id.* That the President is included within the term "agency of the Federal Gov-

Order fall into four general classes: (1) actions that significantly affect the environment of the "global commons,"⁹⁴ *i.e.*, all areas outside the territorial jurisdiction of any nation, including the oceans, Antarctica, and probably the upper levels of the atmosphere and outer space;⁹⁵ (2) actions that significantly affect "third-party" foreign nations,⁹⁶ *i.e.*, nations not participating in the project in any way, but affected because of their proximity to the project's location;⁹⁷ (3) actions that significantly affect "natural or ecological resources of global importance";⁹⁸ and (4) actions that significantly affect the environment of "host" nations, *i.e.*, nations cooperating with the United States on a program or project⁹⁹ designed to provide that nation with

(1) a product, or physical project producing a principal product or an emission or effluent, which is prohibited or strictly regulated by Federal law in the United States because its *toxic* effects on the environment create a serious public health risk; or

(2) a physical project which in the United States is prohibited or strictly regulated by Federal law to protect the environment against *radioactive* substances.¹⁰⁰

Instead of uniformly requiring an environmental impact statement in all four classes of activities, the Order establishes three forms of review. In addition to the conventional environmental impact statement, the Order allows for two new, and as of yet largely undefined, forms of

ernment" is well established. The United States Code defines the President as an agency in several chapters. *See, e.g.*, 44 U.S.C. § 1501 (1976).

94. Exec. Order No. 12,114, § 2-3(a), 44 Fed. Reg. 1957 (1979).

95. *See* Finch & Moore, *Outer Space Can Help the Peace*, 7 INT'L LAW. 881 (1973). *But see Hearings on S. Res. 49, supra* note 9, at 67 (testimony of Lindsey Grant, Deputy Assistant Secretary of State for Oceans and Environmental Affairs).

96. Exec. Order No. 12,114, § 2-3(b), 44 Fed. Reg. 1957 (1979).

97. A nonparticipating foreign country might be affected, for example, when: (1) a project confined solely to the United States affects its neighbors; (2) a United States' project on the high seas affects the coastal areas of nearby nations; or (3) a United States' project in a foreign country affects that country's neighbors.

98. Exec. Order No. 12,114, § 2-3(d), 44 Fed. Reg. 1958 (1979). What constitutes a resource of global importance is not yet clear, but examples might include the habitat of an endangered species, a significant archeological site, or a deposit of rare minerals.

99. Exec. Order No. 12,114, § 2-3(c), 44 Fed. Reg. 1958 (1979).

100. *Id.* (emphasis added). Under regulations promulgated by the Department of Defense pursuant to the Order, toxic substances include asbestos, vinyl chloride, acrylonitrile, isocyanates, polychlorinated biphenyls, mercury, beryllium, arsenic, cadmium, and benzene. Department of Defense, Environmental Effects Abroad of Major Department of Defense Actions, 32 C.F.R. § 197.6, Enclosure 2 Requirements of Environmental Considerations—Foreign Nations and Protected Global Resources, (B)(b) [hereinafter cited as Enclosure 2]; 44 Fed. Reg. 21,789 (1979).

review.¹⁰¹ The first form requires the United States to perform "bilateral or multilateral environmental studies"¹⁰² in cooperation with one or more foreign nations or international organizations. The second form calls for "concise reviews,"¹⁰³ a general term that describes reviews less complex than the environmental impact statement such as "environmental assessments, summary environmental analyses and other appropriate documents."¹⁰⁴

The form of review required corresponds to the class of federal activity in question.¹⁰⁵ For activities in the global commons, an environmental impact statement is required; for activities that affect global resources, any of the enumerated forms of review is permissible at the agency's discretion; and for activities that occur in or affect a foreign country, only "environmental studies" or "concise review"—the least stringent forms of review—are acceptable.¹⁰⁶ Thus, environmental review of actions in foreign countries, when provided for at all,¹⁰⁷ need

101. *But see* 32 C.F.R. § 197.6, Enclosure 2, *supra* note 100; 44 Fed. Reg. 21,789 (1979) (the Defense Department's regulations, the first to be promulgated under the order, offer lengthy working definitions of the various levels of review; *see* note 102 *infra*).

102. 44 Fed. Reg. § 1958, § 2-4(a)(ii). Defense Department regulations define an environmental study as "an analysis of the likely environmental consequences of the action. . . . It includes a review of the affected environment, significant actions taken to avoid environmental harm or otherwise to better the environment and significant environmental considerations and actions by the other participating nations, bodies or organizations." 32 C.F.R. § 197.6, Enclosure 2, *supra* note 100, at § (D)(1)(a); 44 Fed. Reg. 21,790 (1979). The regulations emphasize, however, that the "preparation, content, and distribution of environmental studies . . . must remain flexible." 32 C.F.R. § 197.6, Enclosure 2, *supra* note 100, at § (D)(6).

103. 44 Fed. Reg. 1958, § 2-4(a)(iii). Defense Department regulations define a (concise) environmental review as

a survey of the important environmental issues involved. It includes identification of these issues, and a review of what if any consideration has been or can be given to the environmental aspects by the United States and by any foreign government taking the action It does not include all possible environmental issues and it does not include the detailed evaluation required in an environmental impact statement [T]he content . . . may be circumscribed because of the availability of information.

32 C.F.R. § 197.6, Enclosure 2, *supra* note 100, at § (E)(1)(a), (4); 44 Fed. Reg. 21,790 (1979).

104. 32 C.F.R. 197.6, Enclosure 2, *supra* note 100, at § (E)(4); 44 Fed. Reg. 21,791 (1979). AID currently conducts "environmental assessments" according to a working definition for the term it developed. *See* note 39 *supra*.

105. CEQ argued originally that the environmental impact statement should be available as a form of review in all cases. The Department of State, however, objected, and on this issue its version prevailed in the Executive Order. *See* Draft Executive Order, *supra* note 88, at § 2-4(b)(ii), -4(b)(iii).

106. This category of actions includes any project in a nonparticipating country, but only projects involving nuclear or toxic substances in a cooperating country. *See* note 100 *supra* and accompanying text.

107. *See* note 123 *infra* and accompanying text.

conform only to a much less-stringent standard than review of other actions by the federal government. The apparent reason for this restriction on the environmental impact statement as an alternative form of review is to avoid infringement on the sovereignty of another nation.¹⁰⁸ An environmental impact statement, by its nature, demands such close scrutiny¹⁰⁹ that its execution could provoke accusations of interference with the internal affairs of a foreign country.

In addition to the wide range of activities implicitly exempted by the Order from any form of environmental review,¹¹⁰ the Order explicitly exempts a number of other activities.¹¹¹ The latter exemptions further limit the applicability of the Executive Order, and in some cases (*e.g.*, OPIC and Eximbank) the combination of exemptions effectively removes the operations of entire agencies from its coverage.¹¹² Explicitly exempted activities include Presidential actions,¹¹³ intelligence ac-

108. The Order allows for modification of an agency's procedures "where necessary to . . . avoid . . . infringement in fact or appearance on other nations' sovereign responsibilities." Exec. Order No. 12,114, § 2-5(b)(ii), 44 Fed. Reg. 1959 (1979).

109. See note 8 *supra*. Completion of an environmental impact statement is no simple task. According to CEQ guidelines, a properly prepared environmental impact statement demands the inclusion of at least the following items:

- (1) A description of the proposed actions, a statement of its purposes, and a description of the environment affected, including information, summary technical data, and maps and diagrams where relevant, adequate to permit an assessment of potential environmental impact by commenting agencies and the public. . . . The statement should also succinctly describe the environment of the area affected as it exists prior to a proposed action. . . . The interrelationships and cumulative environmental impacts of the proposed action and other related Federal projects shall be presented in the statement. . . . Agencies should also take care to identify, as appropriate, population and growth characteristics of the affected area. . . .
- (2) The relationship of the proposed action to land use plans, policies, and controls for the affected area. . . .
- (3) The probable impact of the proposed action on the environment. . . .

. . . .
(ii) Secondary or indirect, as well as primary or direct, consequences for the environment should be included in the analysis.

- (4) . . . A rigorous exploration and objective evaluation of the environmental impacts of all reasonable alternative actions.

CEQ Preparation of Environmental Impact Statements: Guidelines, 40 C.F.R. § 1500.8(a) (1978). The preparation of this document obviously requires careful examination of the local environment and extensive cooperation from local authorities. See *generally* EIS EXPERIENCE BY SEVENTY FEDERAL AGENCIES, *supra* note 7.

110. Exec. Order No. 12,114, § 2-3(c), 44 Fed. Reg. 1958 (1979), implicitly exempts virtually all projects within foreign countries other than those involving toxic or radioactive substances. See note 100 *supra*.

111. Exec. Order No. 12,114, § 2-5, 44 Fed. Reg. 1959 (1979).

112. See notes 125-37 *infra*.

113. Exec. Order No. 12,114, § 2-5(a)(ii), 44 Fed. Reg. 1959 (1979).

tivities,¹¹⁴ arms transfers,¹¹⁵ actions taken for reasons of national security or during armed conflict,¹¹⁶ disaster relief,¹¹⁷ votes in international organizations,¹¹⁸ and, perhaps most significantly, export licenses and approvals,¹¹⁹ including some export activities relating to nuclear materials.¹²⁰

The newly announced Presidential guidelines undoubtedly will fail to please all concerned parties. Although the Executive Order brings under scrutiny some significant areas of activities that previously had been among the most glaring instances of neglect of environmental review abroad, it merely restates pre-Order de facto procedures in other areas.¹²¹ The most serious weaknesses are the Order's liberal exemptions, its watered-down review provisions, and its failure to consider large portions of this country's foreign activities.

The extension of environmental review to projects that involve toxic and nuclear substances in nonparticipating neighboring countries is a positive step,¹²² but projects that involve the overseas use of toxic and nuclear substances are only a small portion of those financed by the United States. Despite the promise of expanded environmental review in the new Executive Order, most projects conducted by the United States within the boundaries of another country will require no

114. *Id.* § 2-5(a)(iv).

115. *Id.*

116. *Id.* § 2-5(a)(iii).

117. *Id.* § 2-5(a)(vii).

118. *Id.* § 2-5(a)(vi).

119. *Id.* § 2-5(a)(v).

120. The Order does not explicitly exempt nuclear fuel exports. Section 2-5(a)(v), however, exempts "actions relating to nuclear activities *except* actions providing to a foreign nation a nuclear production or utilization *facility* as defined in the Atomic Energy Act of 1954 [ch. 1073, § 1, 68 Stat. 921 (codified in scattered sections of 42 U.S.C.)], as amended, or a nuclear waste management *facility*." Exec. Order No. 12,114, § 2-5(a)(v), 44 Fed. Reg. 1959 (1979) (emphasis added). It seems fair to conclude, therefore, that this section implicitly exempts exports of nuclear fuels because of their conspicuous absence from the section's list of exceptions. *See also* Washington Post, Jan. 6, 1979, § A, at 3, col. 1.

121. For example, most agencies currently prepare environmental impact statements for the activities that they conduct in the global commons.

122. The recent actions of the United States in this area are representative of trends throughout the developed world. Sweden, France, Canada, Japan, Australia, New Zealand, Soviet Union, East and West Germany, Columbia, and Israel all have some form of environmental assessment processes for their government actions, and many other Western European countries presently have similar laws under consideration. *See Hearings on S. Res. 49, supra* note 9, at 39, 91 (testimony of Charles Warren, Chairman, CEQ); R. Lutz, Jr., *Foreign Country, Regional and International Environmental Assessment Required*, in ENVIRONMENTAL LAW: PRACTICE AND PROCEDURE HANDBOOK 95-107 (section of Natural Resources Law, ABA comp. 1976).

environmental review of the effects on the host country. Implicitly exempt under most circumstances, for example, are most water and irrigation projects, almost all types of construction, and most types of agricultural assistance.¹²³ The United States Government can literally move mountains in foreign countries without any consideration of the environmental impact of the action. Under the Order, a project as extensive as the Aswan High Dam in Egypt¹²⁴ would not occasion environmental review. The Executive Order's lack of effectiveness can be illustrated by examining the programs of two agencies that are among those most staunchly opposed to NEPA's extraterritorial application—OPIC and Eximbank.

OPIC seeks to encourage private investment in the developing world through a variety of programs, including direct loans, investment guarantees, and insurance.¹²⁵ In 1978 OPIC took part in ninety-six new projects,¹²⁶ which ranged from insuring commercial bank expansion in Pakistan¹²⁷ to financing a flour mill in Nigeria.¹²⁸ Of these projects, none of the direct loan agreements and only a handful of the insured investments¹²⁹ apparently would require any level of environmental re-

123. Those areas of environmental impact which require review under CEQ Guidelines but which do not command environmental analysis under the President's order, if they occur solely in a participating foreign nation, explicitly include: air quality; weather modification; water quality; waterway regulation and stream modification; fish and wildlife; solid waste; noise; electric energy development, generation, and transmission; petroleum development, extraction, refining, transport and use; natural gas development, production and use; coal and mineral development, mining and conversion, processing, transport and use; renewable resource development, production, management, and harvest; energy conservation; land use changes; redevelopment and construction in built-up areas; density and congestion mitigation; historic, architectural and archeological preservation; and soil and plant conservation and hydrology. Preparation of Environmental Impact Statements: Guidelines, 40 C.F.R., Part 1500, app. II (1978).

Guidelines areas that clearly would be covered under the Executive Order include the use of radiation, toxic materials, and pesticides. *See id.* The Guidelines arguably cover several other areas on the grounds that they affect "resources of global importance," including protection of environmentally critical areas such as floodplains, wetlands, beaches and dunes, unstable soils, and steep slopes, and in some instances, fish and wildlife, petroleum, natural gas and mineral development, and historic and archeological sites. *See id.* The "global importance" category could be useful in expanding environmental review of projects abroad; however, only time will tell how broadly this category will be interpreted.

124. *See generally* Comment, *Controlling the Environmental Hazards of International Development*, 5 *ECOLOGY L.Q.* 321, 322-27 (1976).

125. *See generally* [1976] OPIC ANN. REP. 1.

126. [1978] OPIC ANN. REP. 29-35.

127. *Id.* at 32.

128. *Id.* at 30.

129. *See id.* at 29-35. Projects to which the Order potentially applies include a pharmaceutical

view under the Order. Similarly, only five-to-ten percent of those projects assisted during 1976 and 1977 would have required environmental review.¹³⁰ Although OPIC has voluntarily undertaken environmental review of certain of its programs,¹³¹ the recent Executive Order will have little or no mandatory effect on OPIC's operations. Environmental review by the agency will remain discretionary.¹³²

The Eximbank, which provides loans, loan guarantees, and insurance for the purpose of encouraging exports by American companies,¹³³ also will have only minor obligations under the new Order's environmental review requirements. More of Eximbank's activities will be covered than in the case of OPIC because of Eximbank's significant involvement in the financing of nuclear reactor exports¹³⁴ and its assistance in the export of pesticides and other toxic substances.¹³⁵ Still, the large majority of its commitments—perhaps, seventy-to-ninety percent of Eximbank's total projects¹³⁶—will not necessitate en-

plant in Egypt and a proposal to manufacture low-density polyethylene in Taiwan. No assistance to any projects concerning radioactive substances occurred during the 1976-78 survey period.

130. [1977] OPIC ANN. REP. 19-24; [1976] OPIC ANN. REP. 42-49. Representative projects assisted in 1977, which could occasion environmental review in the future because they involve toxic substances, include the manufacture of ammonium chloride and sodium sulphate and the production of pharmaceuticals.

131. [1978] OPIC ANN. REP. 26:

During fiscal 1978, OPIC strengthened its environmental policy by withholding support for projects which might have a negative effect on endangered species and marine mammals, or the export of exotic varieties to the U.S. Monitoring trips were taken to examine mineral extraction and processing projects in Botswana and Kenya, and petrochemical projects in Korea and Taiwan; all chosen because they involved recognizable environmental risks. . . .

Project reviews will be increased during the coming months to provide on-site confirmation that environmental protection plans actually are in operation.

Id. This action is a rather minimal and selective concession to the principle of environmental review in view of the wide range of OPIC projects that have environmental impacts and that would undergo review if they occurred domestically.

132. *But see* Washington Post, Jan. 6, 1979, § A, at 3, col. 1. The *Post*, in reporting on the Order, came to the conclusion that OPIC "would be forced to document the environmental effects of their various international projects." *Id.* The *Post*, however, offered no support for its conclusion.

133. *See generally* [1976] EXIMBANK ANN. REP. 1, 22.

134. *See generally id.* at 14; [1977] EXIMBANK ANN. REP. 25, 35; [1974] EXIMBANK ANN. REP. 22-23.

135. *See generally* [1977] EXIMBANK ANN. REP. 24, 25.

136. Eximbank projects that would not require environmental review under the Order would include those concerning transportation, construction, communication, manufacturing, agriculture, and mining. A review of Eximbank credits authorized in fiscal year 1977 showed only two projects that would potentially require environmental review under the Order. Both were loans for nuclear power equipment; specifically, credits authorized for investment in the mid-to-late

environmental review.¹³⁷

The Executive Order's provision of different levels of environmental impact review for different types of actions further illustrates the Order's incomplete extension of NEPA to foreign activities. The Order, however, is not the first source to suggest that extraterritorial review demands a less-rigorous form of analysis than domestic review. That belief, as noted above, is evident in AID's environmental review regulations¹³⁸ and the District of Columbia Circuit's opinion in *NORML*.¹³⁹ The justification for the less-stringent form of review apparently rests on reasons of practicality such as the difficulty of doing full-scale environmental impact statements in foreign locations. No statutory provision allows for lesser review, and the courts have taken a very strict approach in the domestic application of NEPA.¹⁴⁰

All in all, the President incorporated suggestions of both the CEQ and the State Department into Executive Order 12,114, but made ex-

1980's for "Nuclear Powerplant Equipment" and "Nuclear Fuel Reloads" in Spain. Although these projects represent sizable commitments (almost 90 million dollars worth of financing), they constitute less than 15% of the value of credits authorized that year. Most of these credits provided assistance to manufacturing and industrial projects. *See id.* at 31-36.

137. [1976] EXIMBANK ANN. REP. 1, 14, 22. An exact figure is difficult to calculate because of year-to-year differences in the categorical breakdown of projects assisted. *See* CONG. REC. S16,842 (daily ed. Oct. 2, 1978) ("Eximbank representatives indicated concern that 40 percent of Eximbank's dollar volume would be subjected to NEPA review."); *cf. id.* S16,841 (statement of Sen. Muskie) ("It is likely that no more than 2 percent of all the projects financed by the Export-Import Bank would be covered under even the most comprehensive NEPA arrangement."). Senator Muskie based his figure, however, on the assumption that only direct financing of projects, as opposed to provision of guarantees and insurance, would be considered a major federal action; thus, he did not examine the other types of Eximbank projects.

138. *See* note 39 *supra*.

139. *See* notes 68-69, 72-73 *supra* and accompanying text.

140. The District of Columbia Circuit decision in *Calvert Cliffs' Coordinating Comm., Inc. v. AEC*, 449 F.2d 1109 (D.C. Cir. 1971), illustrates the courts' strict approach: "[T]he Section 102 duties [i.e., EIS preparation] are not inherently flexible. They must be complied with to the fullest extent. . . . Considerations of administrative difficulty, delay or economic cost will not suffice to strip the section of its fundamental importance." *Id.* at 1115. "The requirement of environmental consideration 'to the fullest extent possible' sets a high standard for the agencies, a standard which must be rigorously enforced by the reviewing courts." *Id.* at 1114. A "concise review" of the type provided by the Executive Order for United States' actions in foreign nations would surely fail to satisfy the requirement of *Calvert Cliffs'*. *See* *Environmental Defense Fund, Inc. v. Froehlke*, 473 F.2d 346, 350 (8th Cir. 1972) ("Nothing less than a complete impact statement can serve the important purposes of § 102(C)(iii) of NEPA."); *Greene County Planning Bd. v. FPC*, 455 F.2d 412, 421 (2d Cir.) ("But NEPA, which was a response to the urgent need for a similar approach in all federal agencies, went far beyond the requirement that the agency merely consider environmental factors and include those factors in the record subject to review by the courts."), *cert. denied*, 409 U.S. 849 (1972).

tensive concessions to the State Department's premise that NEPA should have only limited application abroad.¹⁴¹ Many, perhaps even the majority, of federal actions outside of the United States' jurisdiction will not be affected.¹⁴² Indeed, it is difficult to say that the Order extends anything more than the spirit of the Act to foreign activities. The seal of Presidential approval has been given to the State Department policy of espousing in principle the protection of the world's environment, but subordinating that goal in practice to considerations of administrative efficiency when its realization becomes too cumbersome.¹⁴³ Although a number of scholars and environmentalists have argued that the clear intent of Congress, as derived from the language of the statute and its legislative history, warrants nothing less than line-by-line application of NEPA to foreign projects,¹⁴⁴ the realities of international trade and foreign policy appear to have prevailed.

Despite its legal shortcomings and rather limited foreign application, it does not appear likely that the President's Order will be challenged either in the Congress or in the courts. The mood among pro-environment advocates appears to be one of minimal satisfaction. Although environmentalists have not generously praised the Order, they view it as an important step in the right direction—mainly because it affects United States foreign projects that could result in the most dire environmental consequences, *i.e.*, projects involving nuclear and toxic substances. To challenge the Order now in the hope of forcing even broader review could endanger the progress that has been achieved and send the entire issue back to ground zero.¹⁴⁵

There also has not been significant public comment from Congress

141. See note 87 *supra*. Executive Order Number 12,114 is based on the President's authority under the Constitution of the United States.

142. See notes 123-36 *supra* and accompanying text.

143. See, *e.g.*, 37 Fed. Reg. 19,167 (1972).

144. See, *e.g.*, Note, *Extraterritorial Scope of NEPA's Environmental Impact Statement*, 74 MICH. L. REV. 349 (1975). See also Council on Environmental Quality, Memorandum to Heads of Agencies on Applying the EIS Requirement to Environmental Impacts Abroad, Sept. 24, 1976, reprinted in *Hearings on S. Res. 49, supra* note 9, at 92.

145. A potential court challenge to the Order existed in an ongoing suit brought by the Natural Resources Defense Council (NRDC) against Eximbank to force environmental review by that agency. See *Natural Resources Defense Council v. Export-Import Bank*, No. 77-0080 (D.D.C. dismissed Feb. 23, 1979). That suit was held up for almost two years while the executive branch debated what form of extraterritorial application that NEPA should take. See [1979] 9 ENVIR. REP. (BNA) 1691. Following the issuance of Executive Order 12,114 and the subsequent agreement by Eximbank to comply with the Order and issue regulations pursuant to it, the parties reached a settlement. *Natural Resources Defense Council v. Export-Import Bank*, No. 77-0080

on the final version of the Order, despite earlier concerns that had been voiced by certain members over the international environmental responsibilities of the United States.¹⁴⁶ One very likely opponent of the Order in its final form, Senator Edmund Muskie, has been noticeably quiet since the release of the final version. Senator Muskie, Chairman of the Senate Environmental Pollution Subcommittee and one of the leading environmentalists in Congress, criticized several provisions in the draft order when it was originally released in 1978,¹⁴⁷ many of which were carried over into the final version.¹⁴⁸ In addition, Muskie expressed a general concern that the Order be viewed not as a final

(D.D.C. dismissed Feb. 23, 1979). Although the NRDC continues to monitor Eximbank's compliance, it does not feel that significant advances could be gained by pressing the suit at this time.

Any challenges to the Executive Order will not have an easy time of it in the courts. Assuming that they could overcome the problems of standing and of framing the case so that it clearly challenges the Order as inadequate in light of the statute, plaintiffs would still have to surmount the judiciary's customary deference to CEQ on issues of NEPA implementation (because of CEQ's significant participation in developing the Executive Order). See *Warm Springs Dam Task Force v. Gribble*, 417 U.S. 1301, 1310 (1974) ("[CEQ's] determination is entitled to great weight"); *Environmental Defense Fund, Inc. v. Froehlke*, 473 F.2d 346, 352 (8th Cir. 1972); *Greene County Planning Bd. v. FPC*, 455 F.2d 412, 421 (2d Cir.) ("[W]e would not lightly suggest that the Council, entrusted with the responsibility of developing and recommending national policies 'to foster and promote the improvement of the environmental quality,' . . . has misconstrued NEPA."), *cert. denied*, 409 U.S. 849 (1972). See also note 82 *supra*. *Warm Springs* and the other decisions, however, arguably can be distinguished from the instant situation on the basis that CEQ's limited input into the Executive Order is not comparable to the clear approval of an environmental impact statement. CEQ was not and is not "unequivocally" in favor of the Executive Order. Many of its suggestions were not incorporated into the Order. See notes 88-92 *supra* and accompanying text. See also note 82 *supra*.

If plaintiffs can, on the basis of legislative history and statutory construction, demonstrate that NEPA applies extraterritorially, they can argue that the Executive Order falls short of effectuating the congressional intent behind the statute. They can even argue that the Order contradicts NEPA by providing exemptions and exceptions that the statute, as interpreted by the courts, specifically disallows. When conflict arises between an executive order and congressional intent, the courts generally favor the latter. See note 87 *supra*. As the Fifth Circuit recently stated in *Weber v. Kaiser Aluminum & Chem. Corp.*, 563 F.2d 216 (5th Cir. 1977), *rev'd on other grounds*, 99 S. Ct. 2721 (1979), "[E]xecutive action [that] conflicts with the express or implied will of Congress . . . is most vulnerable to challenge." 583 F.2d at 227.

146. See S. Res. 49, 95th Cong., 2d Sess., 124 CONG. REC. S11,522 (daily ed. July 21, 1978); SENATE COMM. ON BANKING, HOUSING AND URBAN AFFAIRS, EXPORT-IMPORT BANK ACT AMENDMENTS OF 1978, S. REP. NO. 844, 95th Cong., 2d Sess. 9 (1978). But see 124 CONG. REC. S16,843 (daily ed. Oct. 2, 1978) (remarks of Sen. Stevenson) ("[A]pplication of the Environmental [Policy] Act to foreign countries and to the global commons is . . . counterproductive. . . . [T]his is . . . a well-intentioned effort, but one that will produce no material benefits for the environment and will result in significant damage to our economy and to our political authority in the world.")

147. [1978] 9 ENVIR. REP. (BNA) 665-66.

148. Among the items to which Senator Muskie most strongly objected were the categorical exemptions of such actions as export licenses, see Exec. Order No. 12,114, § 2-5(a)(v), 44 Fed.

resolution of the problem, but only as a step "towards furthering the goals of NEPA."¹⁴⁹ The Order's claim to be the "exclusive and complete determination"¹⁵⁰ of the issue particularly disturbed him. The Senate Committee on Environment and Public Works expressed a desire for review of the Executive Order in July 1978 when it voted down a proposal that would have exempted the Eximbank's operations from NEPA,¹⁵¹ but has taken no action since then.

III. CONCLUSION

Because strict extraterritorial application of NEPA presents so many problems, a satisfactory solution to the issue of worldwide environmental review may have to take some other form. An environmental impact statement simply may not be the right tool for international environmental review—a philosophy that seems to have prevailed in the final version of Executive Order 12,114. The United States acting alone through review of its major foreign projects cannot accomplish real protection of the world's environment. Arguably, countries that benefit from American assistance should assume some responsibility for performing the environmental review necessitated by that assistance.

Perhaps the answer lies in greater cooperation among nations rather than reliance on a purely American solution. Congress recognized this possibility when the Senate called for an international treaty to require flexible environmental reviews.¹⁵² The developed nations in general share a growing concern about environmental issues,¹⁵³ and the United Nations should continue to spearhead attempts at international cooperation in this area.¹⁵⁴

Reg. 1959 (1979), and the provisions that barred rights of action to enforce the Order, *see id.* § 3-1, 44 Fed. Reg. at 1960-62.

149. [1978] 9 ENVIR. REP. (BNA) 666.

150. Exec. Order No. 12,114, § 1-1, 44 Fed. Reg. 1957 (1979).

151. SENATE COMM. ON ENVIRONMENT AND PUBLIC WORKS, EXPORT-IMPORT BANK ACT AMENDMENTS OF 1978, S. REP. NO. 1039, 95th Cong., 2d Sess. 2 (1978).

152. S. Res. 49, 95th Cong. 2d Sess., 124 CONG. REC. S11,522 (daily ed. July 21, 1978).

153. *See* note 122 *supra*.

154. *See Hearings on S. Res. 49, supra* note 9, at 17, 63. The United Nations Environmental Program (UNEP) has been the leading forum for international environmental discussions. In addition to the efforts of UNEP, proposals for environmental assessments have been topics of discussion at the United Nations Law of the Sea Conference, and the final Treaty probably will include a provision requiring some kind of review for activities that "adversely affect the marine environment." *Id.* at 63 (testimony of Patsy Mink, Assistant Secretary of State for Oceans and

Environmental regulation and review require that difficult choices be made. Although the nation solidly approves of the goals of NEPA, it cannot achieve the Act's benefits without paying a price in increased governmental regulation and decreased governmental efficiency. Apparently, the President and other responsible officers throughout the government are not willing to pay the full price for complete review of United States projects abroad; indeed, that price may be too high, especially when measured in terms of foreign policy implications, national security concerns, and restrictions on the President's freedom of action in the international sphere. Although the Order might not withstand a fair and sincere judicial analysis of the extraterritoriality issue in NEPA, the Order is a practical approach under the circumstances, for it is an attempt to appease both sides of a heated issue and it appears to have done so with mild success.

Although the Order is a step in the right direction, the issue now becomes one of how the affected federal agencies should implement it. AID has demonstrated that sophisticated environmental review not only is possible, but can yield positive results.¹⁵⁵ The AID approach can be the model for a growing pattern of governmental compliance with the mandates of NEPA.

Christopher G. Lehmann

International Environmental and Scientific Affairs). A number of other international organizations also have made significant efforts at bringing about international cooperation on environmental review. See *id.* at 9; R. Lutz, II, *supra* note 122, at 100-03; *Organization for Economic Co-Operation and Development, Legal Aspects of Transfrontier Pollution* 11-34 (1977).

155. See notes 34-41 *supra* and accompanying text.