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SHOULD THE NATIONAL ENVIRONMENTAL POLICY ACT
BE EXTENDED TO MAJOR FEDERAL DECISIONS
SIGNIFICANTLY AFFECTING THE
ENVIRONMENT OF SOVEREIGN
FOREIGN STATES AND THE GLOBAL COMMONS?*

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I. INTRODUCTION

January 1, 1990, was the twentieth anniversary of the effective date of the National Environmental Policy Act (NEPA).¹ Empirical evidence garnered from the first two decades of its

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implementation suggests that NEPA, despite significant shortfalls and unresolved disputes as to its meaning, has achieved to a substantial extent the stated purposes for which it was enacted: i.e., to establish a national policy for the environment which would encourage productive and enjoyable harmony between man and his environment, to promote efforts to prevent or eliminate damage to the environment and biosphere, and to enrich public understanding of the ecological systems and national resources important to the Nation.

To encourage harmony between man and his environment, Congress passed NEPA which embraced the innovative function of regulating major federal agency decision making which was determined to significantly affect the quality of the human environment. This regulatory process imposes upon decision makers in the federal government specified nondiscretionary legal duties; the purposes of which are to produce a rigorous analysis and disclosure of the impacts of proposed decisions concerning the human environment and to consider less environmentally harmful alternatives to accomplish NEPA's goals. The nature and scope of the required environmental analysis has been the subject of nearly two decades of litigation. Nevertheless, significant issues remain unresolved.2 The addition of the "action forcing" provisions contained in section 102(2)(C) of NEPA, which came late in the legislative process, established specific requirements, including preparation of an environmental impact statement (EIS), which federal decision makers must satisfy before any agency proposal may lawfully be implemented.3

2. Many of the policy provisions of NEPA are phrased in general, aspirational language. As Judge Henry Friendly of the Court of Appeals for the Second Circuit put it, the language of NEPA is "so broad yet opaque that it will take even longer than usual to comprehend its impact." New York v. United States, 337 F. Supp. 150 (E.D.N.Y. 1972).

3. Even the "action forcing" provisions of NEPA are phrased in language that has required litigation to establish their meaning. Section 102(2)(C)(i) and (ii) explicitly require that the EIS contain a detailed statement of the environmental impacts of the proposed action and any environmental effects which cannot be avoided should the proposal be implemented. This statement of impacts must be made for all of the alternatives to the proposed action that section 102(2)(C)(iii) requires to be considered. See Natural Resources Defense Council v. Morton, 458 F.2d 827 (D.C. Cir. 1972). "A sound construction of NEPA, which takes into account both the legislative history and contemporaneous construction . . . requires a presentation of the environmental risks incident to reasonable alternative courses of action." Id. at 834. The analysis accorded each alternative is effectively a mini-EIS, which must not only address impacts, but conduct the analysis mandated by section 102(2)(C)(iv) and (v) pertaining to short-term uses of the environment and maintenance and enhancement of long
The use of litigation to clarify the meaning of NEPA and to impose its "action forcing" provisions upon the federal bureaucracy has contributed to the domestic success that NEPA has achieved. Unlike other environmental protection statutes enacted by Congress, NEPA contains no provisions specifically authorizing enforcement, judicial review, or citizens suits. Nevertheless, the courts have construed the "action forcing" provisions of NEPA to impose nondiscretionary duties upon federal decision makers which are judicially enforceable. NEPA litigation has been voluminous and promises to continue, in part because there remain significant unresolved issues concerning the nature and term productivity, as well as irreversible and irretrievable commitments of resources involved.

Similarly, courts have enforced use of the interdisciplinary methodology required by section 102(2)(A) to assure that the environmental impacts of the proposal are fully understood and competently considered on the merits by considering reasonable scientific opinions, Commission for Nuclear Responsibility v. Seaborg, 463 F.2d 783 (D.C. Cir. 1971); by coordinating interdisciplinary expertise within the proposing agency, Simmans v. Grant, 370 F. Supp. 5, 20 (S.D. Tex. 1974); by expanding agency staff to obtain interdisciplinary input, Harlem Valley Transp. Assn. v. Stafford, 500 F.2d 328, 337 (2d Cir. 1974); by sponsoring research on important issues outside the agency's competence, Environmental Defense Fund v. Hardin, 325 F. Supp. 1401, 1403 (D.D.C. 1971); and by consulting with other federal agencies to obtain interdisciplinary expertise, Akers v. Resor, 339 F. Supp. 1375 (W.D. Tenn. 1972).

Courts have also enforced section 102(2)(B) requiring federal decision makers to "identify and develop methods and procedures . . . which will ensure that presently unquantified environmental amenities and values may be given appropriate consideration in decision making along with economic and technical considerations." See, e.g., Calvert Cliffs' Coordinating Comm. v. AEC, 449 F.2d 1109, 1113 n. 9 (D.C. Cir. 1971).

The requirement imposed by section 102(2)(E) that federal decision makers "study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources . . ." has also been enforced by courts. See Environmental Defense Fund v. Corp of Engineers, 492 F.2d 1123 (5th Cir. 1974). The court stated, inter alia, that the requirement of section 102(2)(E) is not limited to "major federal actions" and is "supplemental to and more extensive in its commands than the requirements of 102(2)(C)(iii)." Id. at 1135.


5. For a detailed history of judicial enforcement of NEPA requirements during the first three years of NEPA's implementation, see F. ANDERSON, NEPA IN THE COURTS, A LEGAL ANALYSIS OF THE NATIONAL ENVIRONMENTAL POLICY ACT 15-48 (1973); see also LIROFF, A NATIONAL POLICY FOR THE ENVIRONMENT, NEPA AND ITS AFTERMATH 142-88 (1976).
scope of NEPA's requirements, but also because there are many unresolved disputes with respect to the application of NEPA to the multifarious new and ongoing programs of the federal government.

The extent to which NEPA has prevented or eliminated damage to the environment is impossible to determine with precision. Apart from the numerous cases in which courts have blocked government action that violated NEPA, there is no doubt that the existence of the judicially enforceable NEPA process has caused government decision makers to voluntarily abandon or modify environmentally harmful proposals. 6 Virtually every federal agency subject to NEPA jurisdiction has adopted its own NEPA regulations to conform its decision making processes to the requirements of NEPA. 7 These individual agency NEPA regulations may and often do exceed, in terms of environmental protectiveness, the literal requirements of NEPA. 8 An intangible component of compliance with the mandatory NEPA requirements has been the emergence of a consensus throughout the federal agencies subject to NEPA as to the need to accord appropriate consideration to environmental values along with economic and technical considerations in federal decision making.

There can be little doubt that the NEPA process has not only enriched public understanding of the ecological system and natural resources important to the nation, but also has been a powerful educational force for the American public as well as decision makers in the federal government. Moreover, the quality of the

6. The Council on Environmental Quality (CEQ) noted that the explicit requirements of NEPA which compel consideration of presently unquantified environmental amenities and values along with economic and technical considerations and the formal litigation are just the "tip of the iceberg" and that agencies have voluntarily modified and cancelled programs based upon the environmental analysis conducted by the agency in accordance with NEPA. Sixth Annual Report of the CEQ, 628-32 (1975). The CEQ was created by Congress in Title II of NEPA. For enumeration of the functions and duties of the CEQ, see NEPA § 204, 42 U.S.C. § 4344; Exec. Order No. 11,514, 3 C.F.R. 717 (1961-1981), amended by Exec. Order No. 11,991, 3 C.F.R. 123 (1977 compilation), reprinted in 42 U.S.C. § 4321 app. at 508 (1982).


8. For example, despite the Supreme Court's recent decision that NEPA does not impose a substantive duty on agencies to mitigate environmental impacts, Marsh v. Oregon Natural Resources Council, 109 S. Ct. 1851 (1989), some individual agency regulations nevertheless impose mitigation requirements on the agency which are legally binding and enforceable. 40 C.F.R. §§ 1502.14(f), 1502.16(h), 1503.3(d), 1505.2(c), 1505.3 & 1508.20 (1989).
environmental data generated and disseminated by the NEPA process, both technical and scientific, has steadily improved. NEPA not only has integrated environmental considerations into the federal decision making process but also has mandated public participation in this process. Thus, while recognizing that many important NEPA issues remain unresolved and the efficiency of the NEPA process may in the future be significantly refined and improved, NEPA has a record of achievement that qualifies it as one of the most successful of the environmental protection statutes enacted by Congress.


11. NEPA was recently described as follows: "[t]his landmark law, which originated 20 years ago in this Subcomm. stands today as the most important environmental statute in the world." Office of Environmental Quality Reauthorization, 1989: Hearings on H.R. 219 Before the Subcomm. on Merchant Marine and Fisheries, 101st Cong., 2d Sess. 1 (1989) [hereinafter House Hearing] (statement of Hon. G. E. Studds, Chairman, FWCE). NEPA has served as the model for legislation in 27 states and several foreign nations. Id. at 6.

The view of Congressman Studds is widely shared. See Culhane, Forecasts & Environmental Decisionmaking: The Content & Predicative Accuracy of Environmental Impact Statements 1 (1987) ("[a]cademic observers and participants in federal policymaking usually agree that the EIS process has been a beneficial reform . . . and has brought the technical precision of science to bear on resource decisionmaking, added environmentally sensitive officials to previous insensitive bureaus' staffs, or opened up otherwise parochial agency decision processes to public scrutiny"). Cf. Orloff, The Environmental Impact Statement Process: A Guide to Citizen Action 122 (1978) (provisions of NEPA and "design of the environmental impact statement process encourage an unprecedented level of citizen involvement in government decisionmaking"). "Impact analysis," similar to that mandated by NEPA for environmental values, has been adopted for other public concerns including "inflationary impacts," "arms control impacts," "urban impacts" and "judicial impact" (effects of new legislation on Federal court workload). Culhane, supra at 1. The most recent imitation of the NEPA model is the "Takings Implication Analysis" mandated by Executive Order 12,630, which requires assessment of takings impacts of proposed Federal regulatory decisionmaking.

Another expression of the NEPA achievement is that "[b]efore the National Environmental Policy Act, most federal agencies paid scant attention to environmental values. Since the advent of NEPA, environmental concerns have been officially incorporated into every agency charter." Taylor, Making Bureaucracies Think: The Environmental Impact Statement Strategy of Administrative Reform 251 (1984). See also Cheremisinoff and Morresi, Environmental Assessment & Impact Statement Handbook 3 (1980) (NEPA was not "first piece of environmental legislation, but it may turn out to be the most significant in terms of the quality of life in recent history"). Cf. Caldwell, Science & the National Environmental Policy Act: Redirecting Policy Through Proce-
It has long been settled that NEPA applies to federal decisions affecting the environment of the United States, its Territories and Possessions (hereinafter USTP). However, there appears to be both confusion and disagreement on the issue of whether NEPA applies to federal decisions affecting the environment outside the USTP. The question is complicated by the


In Guerrero plaintiffs sought to enjoin Continental Airlines from building a hotel on property leased to it by the trust territory government. The district court granted defendants’ motion to dismiss and noted that NEPA applied only to United States government action on trust territories. In this case the action objected to was undertaken by the trust territory government and not a Federal agency and therefore was excluded by Congress from judicial review under the Administrative Procedure Act. Guerrero, 356 F. Supp. at 653-58.


One category of cases addressing this issue deal with major federal decisions that produce impacts both in the United States and in a sovereign foreign nation. For example, in National Organization for the Reform of Marijuana Laws v. United States Department of State, 452 F. Supp. 1226 (D.D.C. 1978) the court held as follows:

[1] In view of defendants’ willingness to prepare an ‘environmental analysis’ of the Mexico effects of United States support of the nation’s narcotics eradication program, together with the EIS required by NEPA as to the impact of that program upon the United States, the Court need not reach the issue and need only assume without deciding, that NEPA is fully applicable to the Mexican herbicide spraying program.


The nuclear export cases are also inconclusive. The Atomic Energy Comm’n, predecessor of the Nuclear Regulatory Commission (NRC), originally voluntarily agreed to prepare a generic EIS on the global impacts of the nuclear export program. See Sierra Club v. Atomic Energy Comm’n, Civil No. 1867-73 (D.D.C. August 2, 1974); 4 Envtl. L. Rep. (Envtl. L. Inst.) 20865 (1974) (court failed to address whether EIS was required to consider environmental impacts of U.S. nuclear exports within sovereign foreign nations although EIS dealt solely with global and domestic United States impacts). Cf. In the Matter of Babcock &
fact that major federal decisions may significantly affect three different types of regions: (1) major federal decisions that significantly affect the global commons, i.e., the oceans outside the limits of sovereignty claimed by coastal states;\(^\text{14}\) (2) major federal

Wilcox, 5 Envtl. L. Rep. (Envtl. L. Inst.) 30017, 30019 (1977) (court distinguished Babcock from Sierra Club v. Adams, 578 F.2d 389 (D.C. Cir. 1978) and National Organization for the Reform of Marijuana Laws v. United States, 452 F. Supp. 1226 (D.D.C. 1975) on grounds that in NRC export licensing cases, “the Commission is faced with a single decision, namely whether the proposed export is inimical to the common defense and security of the United States or public health and safety of the United States... once the export leaves U.S. territorial jurisdiction, U.S. control over the items exported is quite limited”).

In Natural Resources Defense Council v. Nuclear Regulatory Comm’n, 647 F.2d 1345, 1365 (D.C. Cir. 1981) the court upheld a determination by NRC and United States Department of State that the proposed sale of nuclear technology to the Republic of Philippines would not produce any significant impacts on environment of United States or global commons. The court, with respect to “the material NEPA issue on appeal... [i.e.] whether the federal decision to export a reactor, causing no significant American or global impacts, nevertheless triggers the requirement of the site-specific environmental impact statement, solely because of the effects occurring in a foreign jurisdiction... [found] only that NEPA does not apply to NRC nuclear export licensing decisions - and not necessarily that the EIS requirement is inapplicable to some other kind of major federal action abroad.” Id. at 1366 (Wilkey, J.). Judge Ginsburg did not participate in the decision. Judge Robinson, who concurred in the judgment, wrote a separate opinion which emphasized, inter alia, foreign policy concerns (“arousing resentment of foreign governments by excessive intrusions for purposes of environmental assessments”) and “deference owed [to] the Commission’s interpretation of NEPA” plus the fact that the CEQ “did not insist upon an EIS addressing the effects of PNPP-I within the Philippines.” Id. at 1386 n.155-56. Both Judge Wilkey and Judge Robinson emphasized the obligation of all agencies to comply with the provisions of section 102(2)(F) of NEPA, which provides for multinational cooperation subject to the guidance of the Department of State. Id. at 1366 & 1387.

As evidenced by the foregoing, the case law on the issue of whether NEPA applies to impacts in foreign sovereign states is inconclusive.

14. Global Commons is erroneously defined in President Carter’s Executive Order No. 12,114, 3 C.F.R. 734 (1961-1981), reprinted in 42 U.S.C. § 4321 app. at 515 (1982), to include Antarctica as well as oceans outside the limits of sovereignty claimed by any nation. In fact, Antarctica is regulated under the Antarctic Conservation Act of 1978, 95 Pub. L. No. 541, 92 Stat. 2048 (codified at 42 U.S.C. §§ 4321-47 (1982)). The purpose of this Act is “to implement the ‘Agreed Measures for the Conservation of Antarctic Fauna and Flora’, an international agreement between the twelve nations which are parties to the Antarctic Treaty,” The President’s Environmental Program, p. F.Fs-34, May 23, 1977. Under the terms of the Antarctic Conservation Act, the National Science Foundation (NSF) and the Department of Interior (DOI) are authorized to promulgate and administer regulations to implement environmental protection and conservation mandated by the Act. For past handling of the EIS process by the U.S. Department of State for Treaties related to Antarctica, see Coan, Strategies for International Action: The Case for an Environmentally Oriented Foreign Policy, 14 Nat. Resources J. 87, 99-100 (1979). Decisionmaking by NSF and DOI under the authority of the Antarctic Conservation Act is subject to compliance with the provisions of NEPA under the same theory that applies NEPA to federal decisions affecting the environment of the Trust Territories. Accordingly, for pur-
decisions that significantly affect the environment within the territorial boundaries of another sovereign state;¹⁵ and (3) major federal decisions that significantly affect the environment within the boundaries of a third sovereign nation not directly involved in the federal decision.¹⁶

Despite a "long-standing policy to resist amendments... which would result in any departure from the original objectives and intent of the law," Congress has recently considered a number of amendments to NEPA.¹⁷ Extending NEPA to include "extraterritorial actions" is one of the amendments which Congress is considering.¹⁸ The different "extraterritorial" proposals poses of this analysis the term "global commons" will apply solely to oceans outside the sovereign limits of any nation.

¹⁵. This category includes situations in which the federal decision produces environmental impacts that are confined exclusively to foreign sovereign states. See, e.g., Natural Resources Defense Council v. Nuclear Regulatory Comm'n, 647 F.2d 1345 (D.C. Cir. 1981) (federal decision authorized export of nuclear technology to Republic of Philippines). However, this category does not include decisions that produce impacts in both the United States and the foreign country. See, e.g., Sierra Club v. Adams, 578 F.2d 389 (D.C. Cir. 1978) (federal decision authorized building of Pan American Highway which impacted terrain of foreign nations that highway traversed, but also facilitated traffic that could carry diseases from Latin America into United States). For purposes of this analysis it is assumed that in the latter case NEPA would be triggered because the Federal decision would significantly affect the environment of the United States. Whether foreign environmental impacts must be included in the NEPA analysis is conceptually identical to the issue of whether NEPA should apply at all in cases in which the impacts are confined to the foreign state.

¹⁶. This is the so-called "innocent by-stander" situation. An example would be a federal decision authorizing export of nuclear technology at the request of country A with the knowledge that the environment of neighboring country B would also be significantly affected. This situation is conceptually different from cases such as acid rain, impairment of the ozone shield, or enhancement of the greenhouse effect producing global warming, all of which significantly affect the environment of the entire planet, but are contributed to or caused by industrial and other activity in the United States and other industrialized nations, as distinguished from federal decisions which authorize activity (such as export of nuclear technology) that directly affect the environment of foreign nations but not that of the United States.

¹⁷. Senate Report, supra note 10. See also House Hearing, supra note 11, at 1. The Chairman of the House Subcommittee noted that amending NEPA "is akin to [amending] the Constitution." Id. at 10.

¹⁸. The amendments proposing to extend NEPA to include extraterritorial actions vary in scope. Proposed section 105 of Senate bill 1792 considered by the 100th Congress, would amend section 102(2)(C) to provide the following: "Include in every recommendation or report on proposals for legislation and other major Federal actions [including extraterritorial actions] significantly affecting the quality of the human environment, a detailed statement by the responsible official." This proposal was modified in section 1(b)(1) of Senate bill 1089 introduced in the 101st Congress in 1989 to insert after "major Federal actions" the following: "including extraterritorial actions (other than those taken in the course of an armed conflict, strategic intelligence actions, armament transfers,
presently pending before Congress are similar in one critical respect — they would extend NEPA to major federal decisions significantly affecting the quality of the human environment outside the USTP, i.e., in the global commons, within sovereign foreign nations as a result of transactions between the United States and the nation in question, and within sovereign foreign nations which are “innocent bystanders” to transactions between the United States and another country. The Senate Committee emphasized that it “intends that the clarification to section 102(2)(C) of NEPA be interpreted to mean that all major federal actions whether they occur within or outside the boundaries of the United States are subject to NEPA review.” Upon its enactment the proposed legislation would direct “CEQ [Council on Environmental Quality] to expeditiously issue guidance to assure that appropriate and conforming procedures are adopted to implement this provision.”

or judicial or administrative civil or criminal enforcement actions).” Senate bill 1089 would also rewrite section 102(2)(F) to read as follows: “[R]ecognize the global and long-range character of environmental problems and work vigorously to develop and implement policies, plans, and actions designed to support national and international efforts to enhance the quality of the global environment.”

House bill 1113, which was enacted by the House of Representatives on October 9, 1989, while also proposing to expand the present language “major Federal actions” to include “extraterritorial actions,” also proposes a further variation:

Sec. 5. REGULATIONS AND EXEMPTIONS
(a) Not later than one year after the date of enactment of this Act, the Council shall issue regulations requiring Federal agencies to modify their procedures for complying with section 102(2)(C) of the National Environmental Policy Act in order to ensure the full consideration of the environmental impacts of their actions on the oceans, the atmosphere, and other geographic areas outside the jurisdiction of the United States, its territories and possessions. The regulations shall include guidance for assessing the impacts, including the cumulative impacts, of proposed Federal actions on global climate change, depletion of the ozone layer, sea level rise, and other phenomena of international environmental concern.
(b) The requirements of section 102(2)(C) of the National Environmental Policy Act shall not apply to the following extraterritorial Federal actions:
(1) actions taken to protect the national security of the United States, or in the course of an armed conflict;
(2) intelligence activities and arms transfers;
(3) votes and other actions in international conferences and organizations; and
(4) emergency disaster and relief actions.


19. SENATE REPORT, supra note 10, at 5 (emphasis added).
20. Id.
All of the pending amendments raise the fundamental question whether Congress should disrupt the existing legal regime by amending NEPA to include federal decisions exclusively affecting the environment within sovereign foreign states and the global commons.  

Before undertaking to address this issue, two clarifications are necessary. First, there appears to be disagreement and confusion about the present scope of NEPA with regard to extraterritorial impacts of federal decision making. The Senate Committee on Environment and Public Works refers to the need to clarify "the application of the environmental impact statement process to major Federal actions beyond the boundaries of the United States." The Senate Report states that although the Senate believes "[section] 102(2)(C) of NEPA applies to all major Federal actions without distinction as to where they occur," it nevertheless believes the proposed amendment to be necessary because "there has been litigation and confusion over the years as to NEPA's extraterritorial applications."  

Part II of this article undertakes to show that the plain language of NEPA and its legislative history indicate that, contrary to the opinion expressed in the Senate Committee Report and the House Hearing, Congress included a single provision in NEPA which addressed the extraterritorial impacts of United States decision making. This provision narrowly limits the extent to which NEPA may apply to extraterritorial environmental impacts.

Both the Senate and House Hearings compound confusion by indiscriminately mingling discussion of the need to cope with global warming, tropical deforestation, preservation of the ozone shield and acid rain with the narrow and precisely articulated

21. This article will not address international law issues such as whether these amendments would violate the Stockholm Declaration on the Human Environment or any multilateral or bilateral United States treaties. The text of the Stockholm Declaration is published in 67 Dep't State Bull. 116 (1972). For a discussion of such issues, see Almond, The Extraterritorial Reach of United States Regulatory Authority over The Environmental Impacts of Its Activities, 44 ALB. L. REV. 739 (1980). For a discussion of global commons, see supra note 14.


23. Id. The House analysis suffers from similar confusion. Chairman Studds claimed it was necessary to enact H.R. 1113 to apply NEPA "to Federal actions of whatever type, wherever taken. It [H.R. 1113] makes it clear that NEPA applies not just to some but to all Federal agencies and regulatory commissions . . . [a]nd it requires our Government to consider the reasonably foreseeable environmental impacts of our actions, not just on areas within our jurisdiction, but on the atmosphere, the oceans, and in other lands." House Hearing, supra note 11, at 2.
question of whether NEPA should be amended to expand its jurisdiction to include major federal actions which impact the human environment exclusively within the boundaries of sovereign foreign nations and in the global commons.

The second issue which Congress has yet to address is how the proposed amendments would relate to the regime of law created by President Carter in 1979 through Executive Order 12,114 which established "the United States government's exclusive and complete determination of the procedural and other actions to be taken by federal agencies to further the purposes of the National Environmental Policy Act, with respect to the environment outside the United States, its territories and possessions." Part III of this article describes this regime of law and addresses its relationship to NEPA and the proposed "extraterritorial" amendments.

This article seeks to establish three propositions:

First, Congress, when it enacted NEPA, explicitly declared that federal decision makers who address environmental impacts outside the USTP shall act in a manner consistent with the foreign policy of the United States.

Second, the United States presently has in force a comprehensive system of environmental protection provisions which apply to federal decisions affecting the environment outside the USTP: (1) Executive Order 12,114 which by its terms is the "exclusive and complete" set of rules determining "the procedural and other actions to be taken by federal agencies to further the purposes of the National Environmental Policy Act;" (2) Bilateral International Environmental Processes: The United States Agency for International Development; and (3) the United States environmental process governing its participation in the Multinational Development Banks programs.

Third, amending NEPA to apply to major federal decisions significantly affecting the environment within sovereign foreign states would not only impermissibly encroach upon their sovereignty and thereby adversely affect the President's conduct of foreign affairs, but also would be counterproductive in terms of attaining NEPA's objectives and would disrupt existing environmental regulatory systems.

II. NEPA REQUIRES THE ACTION OF FEDERAL DECISION MAKERS UNDER NEPA TO BE CONSISTENT WITH THE FOREIGN POLICY OF THE UNITED STATES

It is important to commence this analysis with a clear understanding of the jurisdictional scope of NEPA as enacted by Congress in 1969 — the NEPA that is presently in force. There is a significant difference between consciously and forthrightly considering whether to expand the original scope of NEPA, on the one hand, and changing NEPA by pretending to “clarify” its original intent.

The plain language of NEPA and its legislative history show that Congress did not intend NEPA and its “action forcing” provisions to apply to federal decisions outside the USTP. Congress enacted a single provision in the NEPA that explicitly addresses extraterritorial environmental problems, i.e., impacts occurring outside the USTP:

The Congress authorizes and directs that to the fullest extent possible . . . all agencies of the Federal government shall . . . recognize the worldwide and long-range character of environmental problems and, where consistent with the foreign policy of the United States, lend appropriate support to initiatives, resolutions and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind’s world environment.25

This provision has been interpreted to explicitly restrict the authority of federal decision makers under NEPA by requiring that agency action shall be “consistent with the foreign policy of the United States.”26 Executive Order 11,514 also provides that agency activity related to “achieving international cooperation for dealing with environmental problems” shall be done “under the foreign policy guidance of the Secretary of State.”27

A second explicit limitation on the extraterritorial application of NEPA relates to the nature of the activity that may lawfully be undertaken if the threshold consistency determination has been made by the Secretary of State. In this situation, the federal

27. Id.
agency is confined to lending "appropriate support to initiatives, resolutions and programs designed to maximize international cooperation." This language apparently refers to bilateral or multilateral environmental agreements and cooperation between the United States and other sovereign states to attain "international cooperation" in dealing with international environmental problems.

Although section 102(2)(F) is included within section 102 of NEPA, it differs from the "action forcing" provisions contained in sections 102(2)(A), (B), (C), (D), (E), (G), (H) and (I). Section 102(2)(F), unlike the other provisions of section 102, does not impose any nondiscretionary categorical duties. Whenever an international dimension is "recognized" in a proposed major federal decision, the decision maker's conduct is governed by the Secretary of State and is subject to the restriction that it must be "consistent with the foreign policy of the United States." These restrictions enacted in section 102(2)(F) indicate that Congress recognized the need for confining NEPA to the United States, its territories and possessions in order to avoid encroachment upon executive branch authority over foreign affairs.

This deference to the executive branch whenever extraterritorial impacts within foreign sovereign nations are involved is evident from the language used in other NEPA provisions. For example, section 2 states three environmental purposes to be achieved by NEPA: (1) to declare a national policy which will encourage productive and enjoyable harmony between man and his environment; (2) to promote efforts which will prevent or eliminate damage to the environment and stimulate the health and welfare of man; and (3) to enrich the understanding of ecological systems and natural resources important to the nation.

The use of the expressions "man and his environment" and "the health and welfare of man" could conceivably be construed as making NEPA applicable to "all mankind and his environment" and "the health and welfare of all mankind." Such a construction is not necessarily negated by the phrase "ecological systems and natural resources important to the nation." Ecologists have stressed and Congress was aware of the transborder and global impacts of certain environmental macrophenomena.

However, several factors indicate that such a construction of

29. Id.
30. Id. § 101(a)-(c), 42 U.S.C. § 4331(a)-(c).
section 2 of NEPA is erroneous. First, the relevant legislative history states, "[t]he purpose of the bill, as hereby reported, is to create a Council on Environmental Quality [CEQ] with a broad and independent overview of current and long-term trends in the quality of our national environment."31

Second, section 101(a) which refers to the "critical importance of restoring and maintaining environmental quality to the overall welfare and development of man" and the need to "create and maintain conditions under which man and nature can exist in productive harmony" concludes with a phrase which limits the application of the term "man" to "present and future generations of Americans."32 This indicates that Congress was using the term "man" interchangeably with "Americans.

Moreover, section 101(b), which enumerates six policy goals that NEPA seeks to attain, does not make any reference to any extraterritorial dimension.33 The corresponding legislative his-

32. 42 U.S.C. § 4331(a) provides as follows:
(a) The Congress, recognizing the profound impact of man's activity on the interrelations of all components of the natural environment, particularly the profound influences of population growth, high-density urbanization, industrial expansion, resource exploitation, and new expanding technological advances and recognizing further the critical importance of restoring and maintaining environmental quality to overall welfare and development of man, declares that it is the continuing policy of the Federal Government, in cooperation with State and local governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.

Id.
33. Id. § 4331(b). This section provides the following:
In order to carry out the policy set forth in this Act, it is the continuing responsibility of the Federal Government to use all practical means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may —

(1) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;
(2) assure for all Americans safe, healthful, productive, and aesthetically and culturally pleasing surroundings;
(3) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;
(4) preserve important historic, cultural, and natural aspects of our national heritage, and maintain, whenever possible, an environment which supports diversity and variety of individual choice;
(5) achieve a balance between population and resource use which
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The goals expressed in section 101(b)(2) and (4) are explicitly domestic. Furthermore, the goals stated in sections 101(b)(5) (population control) and (6) (maximize recycling) clearly involve matters beyond Congress' power to regulate in foreign countries because to do so would infringe upon a foreign nation's sovereignty.

In addition, section 102 clearly restricts the CEQ Annual Report to various environmental matters related to the "Nation." Section 202, which creates the CEQ, provides, inter alia, that it is "to appraise programs and activities of the Federal government in the light of the policy set forth in Title I of the Act: to be conscious of and responsive to the scientific, economic, social, aesthetic and cultural needs and interests of the Nation." Moreover, section 204, which enumerates the duties and functions of the CEQ, does not list a single duty or function that mentions extraterritorial application of NEPA. The legislative history of section 204 similarly fails to contain any such reference.

Finally, as noted above, NEPA expressly restricts the extraterritorial environmental role that Congress intended agencies of the federal government to perform, i.e., to "recognize the worldwide and long-range character of environmental problems and, where consistent with the foreign policy of the United States, lend appropriate support to initiatives, resolutions and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind's world environment." This language shows that when Congress intended to will permit high standards of living and a wide sharing of life's amenities; and
(6) enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.

Id.

34. Id. § 4331(b)(2) (referring to "Americans" and subsection (4), which refers to "our national heritage").
35. Id. § 4331(b)(5) & (6).
36. Id. § 4331.
37. Id. § 4342 (emphasis added).
39. NEPA § 102(2)(F), 42 U.S.C. § 4332(2)(F) (emphasis added). See Brower, Is NEPA Exportable? 43 Alb. L. Rev. 513, 514-15 (1979) (noting that dual requirement "to recognize the worldwide and long-range character of environmental problems" and to lend appropriate support, "consistent with the foreign policy of the United States" to maximize international cooperation to protect world environment, fall short of imposing EIS requirement and other
address extraterritorial environmental problems it used the phrase "mankind's world environment." Consequently, it would be impermissible to attribute extraterritorial connotations to the terms "man's environment" or "human environment" in other NEPA provisions.

Given that section 102(2)(F) is the sole provision of NEPA which mandates that federal decision makers address extraterritorial problems, the authority conferred is circumscribed by the dual requirement that any NEPA action by the agency must be "consistent with the foreign policy of the United States" and that it shall be done under the foreign policy guidance of the Secretary of State. 40

III. THE UNITED STATES HAS ESTABLISHED A COMPREHENSIVE SYSTEM TO REGULATE ENVIRONMENTAL IMPACTS OCCURRING OUTSIDE THE UNITED STATES, ITS TERRITORIES AND POSSESSIONS

A. Executive Order 12,114

The validity of the foregoing analysis is attested by the fact that President Carter created by executive order a regime of law that purports to be "[t]he United States government's exclusive and complete determination of the procedural and other actions to be taken by Federal agencies to further the purposes of the National Environmental Policy Act, with respect to the environment outside the United States, its territories and possessions." 41 The primary reason for promulgating the Executive Order that created a separate regime of law governing federal agency decision making with respect to the environment outside the USTP was that NEPA by its terms did not apply to such decision making. Also, in recognition of the fact that the NEPA requirements, if enforced abroad, would encroach, or be perceived to encroach, impermissibly on the sovereignty of foreign nations, the Executive Order was issued so as to assist regulating the international environment through bilateral or multilateral conduct. 42

Various provisions of the Executive Order show that the ex-

42. See infra notes 59 & 60.
Executive branch has consistently interpreted NEPA to limit the extraterritorial acts of federal decision makers and that the NEPA process was not enacted to apply outside the sovereign jurisdiction of the United States government. This is consistent with the plain language of NEPA and supported by Congress' acquiescence to this interpretation for more than a decade. The Executive Order provides, for example, that "Agency procedures under section 2-1 implementing section 2-4 (Applicable Procedures) may provide for appropriate modifications in the content, timing, and availability of documents to other affected federal agencies and affected nations, where necessary to . . . avoid adverse impacts on foreign relations or infringement in fact or appearance of other nation's sovereign responsibilities."43 This provision recognizes the limitations on United States' intervention into the internal affairs of sovereign nations in the guise of environmental protection. Section 3-5 reinforced this principle by expressly providing that in case of "multiple impacts" on the environment of the United States and a foreign nation, an EIS need not be prepared with respect to the impacts on the foreign nation so as to avoid intervening with the its legislative sovereignty.44 This provision is likewise based on recognition of the impermissibility of United States' intervention in the internal affairs of sovereign nations.45

Moreover, although the Executive Order establishes a regime of law intended to further the purposes of NEPA, it is a regime that differs significantly from the NEPA process. These differences reflect the fundamental infeasibility of attempting to impose the NEPA process upon sovereign foreign nations.


44. Id.

45. The CEQ has recognized that prior to the promulgation of the Executive Order there had been a debate in the government about whether NEPA should apply "to major Federal actions having significant environmental effects on the oceans or on foreign countries . . .," but that "[a]fter 7 years of divided opinion in government, the Carter Administration approached the issue in a way sensitive both to environmental and foreign policy concerns." TENTH ANNUAL REPORT OF THE CEQ. at 582 (1979). Ten years later, CEQ's General Counsel provided a progress report on the operation of the Executive Order: "[s]ince 1985, over 200 documents have been prepared under it by 7 federal agencies." Bear, NEPA at 19: A Primer on an "Old" Law with Solutions to New Problems, 19 Envtl. L. Rep. (Envtl. L. Inst.) 10060, 10067 (February 1989).
The history of the adoption of the CEQ regulations in 1979 shows that the idea of applying NEPA to decisions impacting in sovereign foreign nations was considered and rejected. Executive Order 12,114, which created the process governing federal agency decision making with respect to the environment outside the United States, was preceded by the promulgation of Executive Order 11,991 which purported to authorize the President’s CEQ to promulgate regulations binding on federal agencies respecting implementation of the procedural provisions of NEPA. The CEQ circulated proposed regulations purportedly authorized by Executive Order 11,991 on December 12, 1977, to all heads of federal agencies in a document entitled “Draft Regulations to Implement the National Environmental Policy Act.” On January 11, 1978, CEQ also circulated to the heads of all federal agencies a memorandum with an attachment entitled “Draft Provisions to Implement the National Environmental Policy Act for Agency Activities Affecting the Environment in Foreign Nations and the Global Commons.”

However, these “Draft Provisions,” which would have applied NEPA to federal decisions which would result in impacts on the environment outside the USTP, were countermanded and were not included in the formal CEQ Notice of Proposed Rulemaking issued July 9, 1978, nor were they included in the CEQ Final Regulations for Implementation of Procedural Provisions of the National Environmental Policy Act, issued November 29, 1978.


47. Section 1508.13 of the CEQ “Draft Provisions” provided the following: “‘Human environment’ shall be interpreted comprehensively to include the natural and physical environment and the interaction of people with that environment. The human environment is not confined to the geographical borders of the United States.” Section 1506.13 of the CEQ “Draft Provisions” also provided as follows:

Application of NEPA to Significant Environmental Effects Not Confined to the United States:

(a) Agencies shall fully comply with these regulations insofar as their major federal action significantly affect the environment of:

(1) The United States and its trust territories.
(2) The global commons, which consist of areas outside [the] jurisdiction of any nation (e.g., the oceans).
(3) Antarctica.

1979. Instead President Carter by Executive Order 12,114 fashioned a regime of law which, although dedicated to furthering the purposes of NEPA, employed a different and more limited process designed to deal with agency actions having extraterritorial environmental impacts. This Executive Order established four categories of "included actions," i.e., actions that are subject to the procedural requirements of the Executive Order rather than NEPA:

(a) major Federal actions significantly affecting the environment of the global commons outside the jurisdiction of any nation [e.g., the oceans];
(b) major Federal actions significantly affecting the environment of a foreign nation not participating with the United States and not otherwise involved in the action [the innocent bystander situation];
(c) major Federal actions significantly affecting the environment of a foreign nation which provide to that nation:
   (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;
(d) major Federal actions outside the United States, its territories and possessions which significantly affect natural or ecological resources of global importance designated for protection under this subsection by the President, or, in the case of such a resource protected by international agreement binding on the United States, by the Secretary of State. Recommendations to the President under this subsection shall be accompanied by the views of the Council on Environmental Quality and the Secretary of State.

These provisions clearly delineate the difference in jurisdiction between NEPA, which applies restrictively to the USTP through section 102(2)(F), and the jurisdiction of the Executive Order, which embraces the four broad categories of "included actions" described above.

The Executive Order also designates "applicable procedures" for each of these four categories of "included actions." The "applicable procedures" for the "included actions" described in section 2-3(a) require, subject to exceptions and other exemptions described hereinafter, the preparation of an EIS (including generic, program and specific statements).\(^5\) The "applicable procedure" for "included actions" described in section 2-3(b) requires preparation of either "bilateral or multilateral environment studies" or "concise reviews of the environmental issues."\(^5\) Actions described in section 2-3(c) are subject to the same applicable procedures as section 2-3(b) actions.\(^5\) Actions described in section 2-3(d) are subject to one or the other of the three foregoing applicable procedures.\(^5\)

The Executive Order does not define what an "EIS," a "bilateral or multilateral study" or a "concise review of environmental issues" must consider or how they differ one from the other. Instead, section 2-4(c) of the Executive Order requires that all federal agencies with activities outside the United States, after consultation with the CEQ and the Department of State, establish specific definitions and procedures to implement the order. Fifteen federal agencies whose decision making has extraterritorial applicability have promulgated such rules.\(^5\)

The CEQ notes that since 1985 seven of these agencies have prepared more than two hundred EISs, bilateral or multilateral environmental studies and concise reviews of environmental issues.\textsuperscript{56} Thus, the system created by the Executive Order to carry out the goals, which are analogous to NEPA's, with respect to the environment outside the United States has been implemented extensively and effectively.\textsuperscript{57}

The Executive Order, to accommodate, \textit{inter alia}, the sovereign rights of foreign nations, adopted a narrow definition of "environment" and imposed five basic limitations on the Order's environmental protection procedures:

(1) the Executive Order established seven specific exceptions to the coverage of "included actions;"\textsuperscript{58}

(2) the Executive Order enumerated eight discretionary "appropriate modifications" in the content, timing, and availability of

\textsuperscript{56.} See Bear, supra note 45. These seven agencies include the Defense Logistics Agency, the Defense Nuclear Agency, the Joint Chiefs of Staff-Pacific Command Agency, the State Department, EPA and the Coast Guard.

\textsuperscript{57.} See, e.g., Natural Resources Defense Council v. Nuclear Regulatory Comm'n, 647 F.2d 1345 (D.C. Cir. 1981) (Department of State prepared "concise review of environmental issues" rather than NEPA impact statement. Court upheld action and held that NEPA did not apply to environmental impacts in Philippine Islands caused by nuclear plant sold to Philippines government by American manufacturer with approval of Nuclear Regulatory Commission).

\textsuperscript{58.} Exec. Order No. 12,114 § 2-5(a), 3 C.F.R. at 736 (1961-1981), \textit{reprinted in} 42 U.S.C. § 4321 app. at 516 (1982). This section provides as follows: Notwithstanding Section 2-3, the following actions are exempt from this Order:

(i) actions not having a significant effect on the environment outside the United States as determined by the agency;
(ii) actions taken by the President;
(iii) actions taken by or pursuant to the direction of the President or Cabinet officer when the national security or interest is involved or when the action occurs in the course of armed conflict;
(iv) intelligence activities and armed transfers;
(v) export licenses or permits or export approvals, and actions related 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, as amended, or a nuclear waste management facility;
(vi) votes and other actions in international conferences and organizations;
(vii) disaster and emergency relief action.
whatever environmental study the federal decision maker may prepare;\footnote{59}

(3) the Executive Order provided "categorical exclusions" and additional unspecified exemptions;\footnote{60}

(4) the Executive Order adopted a narrow definition of the environment to be protected, i.e., "the natural and physical environment" and specifically excludes "social, economic and other environments;"\footnote{61} and

(5) the Executive Order noted that its sole purpose is to establish "internal procedures for Federal agencies to consider the significant effects of their actions on the environment outside the United States, its territories and possessions, and nothing in this Order shall be construed to create a cause of action."\footnote{62}

These basic differences between the NEPA and the Executive Order processes assure that the latter will be significantly more

\footnote{59} Id. \S 2-5(b), 3 C.F.R. at 736-37 (1961-1981), \textit{reprinted in} 42 U.S.C. \S 4321 app. at 516 (1982). This section provides as follows:

Agency procedures under section 2-1 implementing section 2-4 may provide for appropriate modifications in the contents, timing and availability of documents to other affected federal agencies and affected states, where necessary to:

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

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

(iii) ensure appropriate reflection of:

(1) diplomatic factors;

(2) international commercial, competitive and export promotion factors;

(3) needs for governmental or commercial confidentiality;

(4) national security considerations;

(5) difficulties of obtaining information and agency ability to analyze meaningful environmental effects of a proposed action; and

(6) the degree to which the agency is involved in or able to affect a decision to be made.

\textit{Id.} (emphasis added).

\footnote{60} Id. \S 2-5(c), 3 C.F.R. at 737 (1961-1981), \textit{reprinted in} 42 U.S.C. \S 4321 app. at 516 (1982). This section provides the following:

Agency procedures under section 2-1 may provide for categorical exclusions and for such exemptions in addition to those specified in subsection (a) of this section as may be necessary to meet emergency circumstances, situations involving exceptional foreign policy and national security sensitivities and other such circumstances . . . . In utilizing such additional exemptions agencies shall, as soon as feasible, consult with the Department of State and the Council on Environmental Quality.

\textit{Id.} (emphasis added).

\footnote{61} Id. \S 3-4, 3 C.F.R. at 737 (1961-1981), \textit{reprinted in} 42 U.S.C. \S 4321 app. at 516-17 (1982).

\footnote{62} Id. \S 3-1, 3 C.F.R. at 737 (1961-1981), \textit{reprinted in} 42 U.S.C. \S 4321 app. at 516 (1982).
limited than a NEPA impact statement. The narrow definition of "environment" excludes from the executive order process numerous situations protected by NEPA. The elimination of recourse to the courts in the executive order process constitutes a major departure from the manner in which NEPA has been enforced. In large part, the courts have enforced NEPA through orders mandating that nondiscretionary environmental assessment duties be fully carried out by federal decision makers.

These limitations on the "exclusive and complete" regime of law developed to "further the purposes" of NEPA with respect to the environment outside the USTP were required because of the inherent limitations on U.S. power over the global commons and the environment within sovereign foreign nations. These inherent limitations are discussed more fully in Part IV.

B. Bilateral International Environmental Processes: The United States Agency for International Development

The Agency for International Development (AID)\textsuperscript{63} administers the United States bilateral program for non-military foreign assistance.\textsuperscript{64} The Foreign Assistance Act (FAA) directs AID to help upgrade the quality of life of the poor in developing countries by providing development assistance to overcome such basic problems as hunger, malnutrition, over-population, disease, disaster, deterioration of the environment and the natural resources base, illiteracy and the lack of housing and transportation.\textsuperscript{65} This development assistance consists of, \textit{inter alia}, technical advisory services, research, training, construction, and community support.\textsuperscript{66} AID carries out its mission by providing, \textit{inter alia}, funding for those activities by foreign nations and private applicants which qualify under the provisions of the FAA.\textsuperscript{67} These AID-funded projects necessarily produce environmental impacts within the recipient nation, in some cases within the borders of foreign nations.


\textsuperscript{64} The United States role in multinational development and assistance is described in the subsection C of this Article.

\textsuperscript{65} NEPA § 102, 42 U.S.C. § 4332. \textit{See also} 22 C.F.R. § 216.1(b) (1990).

\textsuperscript{66} 22 C.F.R. § 216.1(b) (1990).

\textsuperscript{67} \textit{Id.} § 216.4.
neighboring the recipient nation, and occasionally within both foreign nations and the United States itself.68

If the impacts of an AID project affect the environment within the United States, it is clear that NEPA applies.69 However, if the impacts are confined to the environments of foreign nations, AID environmental regulations apply.70 These AID regulations have been promulgated as a result of private litigation71 and Presidential Order.72 They are explicitly based upon Execu-

69. Id. See also 22 C.F.R. §§ 216.7(a)(1) & 216.7(b) (1990).
70. 22 C.F.R. § 216 (1990).


72. President Carter in his 1977 Environmental Message stated as follows: Whether to try to prevent or undo environmental damage is a decision which each country must make for itself. But I am convinced that in the long run, development programs that are environmentally sound will yield the most economic benefit. To encourage the adoption of such programs, I have taken these steps:

(1) I have instructed the Secretary of State, the Administrator of AID, and other concerned federal agencies to ensure full consideration of the environmental soundness of development projects under review for possible assistance.
(2) I have asked the Administrator of AID to make available to developing countries assistance in environmental and natural resources management. Such assistance could help developing
tive Order 12,114 and are declared to be "consistent" with the "purposes of the National Environmental Policy Act of 1970, as amended . . . [and are intended] . . . to implement the requirements of NEPA as they effect [sic] the A.I.D. program." 73

The policies AID seeks to effectuate by these regulations are four-fold: (1) to ensure that environmental consequences of AID-financed activities are identified and considered by AID and the host country prior to final decision to proceed and that appropriate environmental safeguards are adopted; (2) to assist developing countries . . . to select, implement and manage effective environmental programs; (3) to identify impacts of AID projects not only on the environment of host countries but on "aspects of the biosphere which are the common and cultural heritage of all mankind;" and (4) to define "environmental limiting factors that constrain development and identify and carry out activities that assist in restoring the renewable resource base on which sustained development depends." 74

The AID regulations establish definitions and require procedures the effect of which is to impose a regime of law that in some respects exceeds and in other respects falls short of that mandated by NEPA. 75 Although the AID regulations implement NEPA and adopt the CEQ Regulations (as promulgated under the authority of Executive Order 11,514, as amended by Executive Order 11,991), whenever an AID regulation section 216.7 situation occurs, alternative definitions are established which limit the environmental analysis required by the CEQ regulations, in order to accommodate the sovereignty of foreign nations as well as United States foreign relations considerations. 76 For example,

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countries design environmentally sound projects, regardless of the scope of funding for a particular project.

COUNCIL ON ENVIRONMENTAL QUALITY, EIGHTH ANNUAL REPORT 361 (1977). For a critique of AID decision making prior to adoption of these environmental regulations, see Comment, Controlling the Environmental Hazards of International Development, 5 Ecology L.Q. 321 (1977).

74. Id. § 216.1(b).
75. Congress in 1978 amended section 118 of the FAA to add a planning component not included in NEPA: "In furtherance of the purposes of this section, the President shall carry out studies to identify the major environment and natural resource problems, which exist in developing countries. The results of these studies shall be reported to the Congress by March 1, 1979." Pub. L. No. 95-424, 92 Stat. 948 (codified as amended at 22 U.S.C. § 2151p (1982)).
under these regulations AID has determined that for the purposes of environmental review all proposed actions fall into one of three categories: (1) actions excluded from detailed environmental review requirements either categorically or by a decision reached through preparation of an Initial Environmental Examination; or (2) actions for which the use of approved “Design Criteria” has been authorized, thereby excluding such project from formal environmental review; or (3) actions requiring an Environmental Assessment or an Environmental Impact Statement either because they involve an activity normally requiring such evaluations or because of a decision reached through preparation of an Initial Environmental Examination.77

As to the first category, the regulations establish three “criteria” to exclude actions from either Initial Environmental Examination, Environmental Assessment or an Environmental Impact Statement.78 The second of these criteria, which excludes any environmental considerations from aspects of a project over which AID lacks “control,” is clearly a limitation necessary to avoid encroachment upon sovereign rights of the recipient nation.

The second category employs “design considerations” as a means of either eliminating or “standardizing” environmental analysis to reduce paperwork and delay “while assuring environmental soundness.”79 In addition, to the “design criteria” exception, the regulations specify fourteen other “exceptions” to which the environmental assessment provisions of section 216.3 do not apply.80 Several of these exceptions involve situations in which the performance of the environmental analysis mandated by sec-

78. Section 216.2(c) states in pertinent part:
   (i) The action does not have an effect on natural or physical environment;
   (ii) A.I.D. does not have knowledge or control over, and the objective of A.I.D. in furnishing assistance does not require, either prior to approval of financing or prior to implementation of specific activities, knowledge of or control over, the details of the specific activities that have an effect on the physical and natural environment for which financing is provided by A.I.D.;
   (iii) Research activities which may have an effect on the physical and natural environment but will not have a significant effect as a result of limited scope, carefully controlled nature and effective monitoring.
22 C.F.R. § 216.2(c) (1990).
79. Id. § 216.2(c)(2)(xv); See also supra note 76.
80. Id. § 216.2(c)(i)-(xiv).
tion 216.7 would intrude or be perceived to intrude on the sovereign rights of the recipient country.

Decisions to designate projects for exclusion on the ground they fall within either of the two above-noted categories must be made in writing and be submitted with the Project Identification Document, the Program Assistance Initial Proposal or comparable document, and contain a justification which shall be reviewed by the Bureau Environmental Officer in the same manner as a "threshold decision" under section 216.3(a)(3) of the AID regulations.\textsuperscript{81}

The procedure for evaluating the third category actions may begin with an Initial Environmental Examination\textsuperscript{82} which is a primary review of the reasonably foreseeable effects of a proposed action to provide a factual basis for the "threshold decision," a formal agency decision whether the proposed action is a major action significantly affecting the environment. If the proposed action would be major and significantly affect the environment, the key decision then facing the agency is whether to prepare an "Environmental Assessment"\textsuperscript{83} or an "Environmental Impact Statement."\textsuperscript{84} This decision is controlled by the definition of "Environmental Impact Statement" which includes only proposed decisions having impacts within the United States, the global environment and areas outside the jurisdiction of any nation. The provisions of NEPA and the CEQ Regulations govern preparation of the Environmental Impact Statement.\textsuperscript{85}

If the proposed major action significantly affects only the environment of the recipient nation or that of a neighboring foreign country, an Environmental Assessment is required. The purpose of the Environmental Assessment is to provide AID and the host country with a full discussion of the significant environmental impacts that would result from the proposed action and the alternatives "which would avoid or minimize adverse effects or enhance the quality of the environment so that the expected benefits of development objectives can be weighed against any adverse im-

\begin{itemize}
\item \textsuperscript{81} Id. § 216.2(c)(3). See id. § 216.1(c) for definition of such terms as PID, PAIP, threshold decision, and other pertinent terms.
\item \textsuperscript{82} 22 C.F.R. § 216.1(c)(2) (1990). The "Initial Environmental Examination" may be by-passed if the project is one of the eleven projects listed in section 216.2(d) as actions having a significant effect on the environment (e.g., river basin development, road building, construction of power plants, and industrial plants). Id. § 216(d).
\item \textsuperscript{83} Id. § 216.1(c)(4).
\item \textsuperscript{84} Id. § 216.1(c)(5). See supra note 69.
\item \textsuperscript{85} Id. See also 22 C.F.R. § 216.7 (1990).
\end{itemize}
pacts upon the human environment or any irreversible or irre-
trievable commitment of resources."^{86} The AID regulations
require collaboration with the affected nation in the preparation
of the Environmental Assessment and also require AID to "assist
in building an indigenous institutional capability to deal nation-
ally with such [environmental] problems."^{87}

Thus, like the Environmental Assessment process fashioned
by Executive Order 12,114, when the impacts of a proposed ac-
tion would be confined to the environment of sovereign foreign
nations, the Environmental Assessment is structured to avoid en-
croachment or the perception of encroachment on the sover-
eignty of the foreign countries involved.^{88}

The most extensive independent study which evaluated the
AID environmental protection process concluded that the present
AID system reflects "a more balanced approach to environmental
issues than had previously existed," that it "includes a relatively
well-integrated assessment procedure" and it "places more posi-
tive emphasis on directing development resources to environ-
mental and natural resource programs."^{89} This study noted that
AID's strategy to implement its environmental policy is supported
by six components: environmental analysis, improving host coun-
try environmental policy, building human and institutional capa-
bilities, technology and information transfer, environmental
research, and cooperation with other donors.^{90}

C. The Multinational Development Banks: United States
Environmental Protection Process

Since the end of World War II, the United States has been a
leader in efforts to assist Third World development. In addition
to its bilateral AID program, the United States is participating
with two dozen donor countries and some fifty major bilateral and

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86. Id. § 216.6(a).
87. Id. § 216.6(b). For the details of the required contents and form, see id.
§ 216.6(c).
88. The AID regulations allow substitution of bilateral and multilateral
studies and concise reviews of environmental issues for an Environmental As-
seSSment, but not for an EIS. 22 C.F.R. § 216.9 (1990). The AID regulations
also provide special provisions when pesticides are involved, section 216.3(b), or
when endangered species are affected, section 216.5. However, in both situ-
ations the environmental analysis falls short of that required by NEPA, the Fed-
eral Insecticide, Fungicide and Rodenticide Act and the Endangered Species Act
within the USTP.
89. Horberry, supra note 71, at 843.
90. Id. (citing U.S. AID, Environmental Sector Strategy Paper 1 (Dec.
1982)).
international organizations and numerous private agencies to provide a total of approximately $40 billion annually to more than 150 recipient countries.\textsuperscript{91} The major part of this assistance is provided by the Multilateral Development Banks (MDBs),\textsuperscript{92} with the result that the MDBs exercise comparatively more influence on developing countries than other international or bilateral institutions.\textsuperscript{93} MDB lending has become an increasingly important part of overall development assistance.\textsuperscript{94} Accordingly, the effectiveness of the environmental protection processes of the MDB are of correspondingly increased importance. Although the United States share of aid provided to developing countries and


\textsuperscript{93} In 1987, the MDBs loaned over $25 billion or nearly four times the total AID commitments by the United States for that year. The World Bank committed over $18 billion of the total MDB loans to fund over 250 projects. SUSTAINABLE DEVELOPMENT AND NATURAL RESOURCES: A STRATEGY FOR U.S. FOREIGN ASSISTANCE, REPORT TO CONGRESS BY THE SECRETARY OF STATE, at 18 (August 1988) [hereinafter FOREIGN ASSISTANCE REPORT]. This Report was mandated by section 537(k) of the Foreign Operations Appropriations Bill, Pub. L. No. 100-202, 101 Stat. 1329-131 (codified at U.S.C. (19)). Congress directed that the Report address a comprehensive strategy for maximizing the use of foreign assistance provided by the United States through multilateral and bilateral development agencies to address natural resources problems and that the Secretary consider, inter alia:

(1) an identification of the multilateral and bilateral agencies funded in part or in whole by the U.S. Government, whose activities have or could have, a significant impact on sustainable natural resource use, and the rights and welfare of indigenous peoples, in the developing countries;
(2) a description of the internal policies and procedures by which each of these agencies addresses these issues, as well as a description of their own organizational structures for doing so;
(3) an assessment of how the funds contributed by the U.S to these agencies can best be used in the future to address these issues.

FOREIGN ASSISTANCE REPORT at 1-2.

\textsuperscript{94} FOREIGN ASSISTANCE REPORT at 6. For purposes of this article the MDBs include the World Bank and the African, Asian and Inter-American Regional Banks. Although the United Nations organizations concerned with the global environment are multinational, they are discussed separately in the following section because of their unique political structure.
the related voting share in the MDBs has declined from 42% in 1946 to slightly below 20% at present, the United States role is still a major one. It is clear, however, that the United States cannot utilize its lending power to dictate the requirements for the protection of the environment in developing countries.

The Foreign Assistance Report compiled by the Secretary of State for Congress contained six conclusions, all of which pertained to enhancing environmental monitoring, obtaining environmental information, assuring adequate analysis, encouraging environmental planning, urging adoption of measures to assure environmental protection and the development of environmental expertise in Third World countries. Subsequently, the Department of State supplemented its existing regulations governing actions affecting the environment in foreign jurisdictions by the

95. Id.
96. The Summary of Conclusions reached by the FOREIGN ASSISTANCE REPORT is as follows:
(1) The concept of sustainable development should underlie all U.S.-funded development assistance which has an impact on the natural resource base in recipient countries. New conceptual tools such as natural resource accounting, cost-benefit analysis and other approaches which seek to integrate environmental factors into the macroeconomic and social decision-making process should be applied when appropriate and practical.
(2) U.S. government agencies should take steps further to enhance the commitment and capacity of developing country governments and non-governmental organizations to monitor and protect their environments.
(3) The United States should continue to encourage borrowing countries and the MDBs to provide more timely information about the environmental aspects of proposed projects. Non-governmental organizations, particularly in borrowing countries, should also be encouraged to provide input to the governments of borrowing countries and to the MDBs on the design of projects and their potential for adverse environmental impacts.
(4) The U.S. government should encourage further efforts by the MDBs to continue to strengthen and institutionalize the environmental assessment process in their consideration of project proposals.
(5) MDBs should commit a larger proportion of their resources to environmental enhancement and conservation projects.
(6) The U.S. should continue to work towards greater donor coordination on environmental issues through multilateral fora, such as the OECD, the Consultative Group process, the United Nations Development Program (UNDP) Round Table, the Development Committee of the International Monetary Fund/International Bank for Reconstruction and Development (IMF/IBRD), the Committee of International Development Institutions on the Environment (CIDIE) and the International Union for the Conservation of Nature (IUCN).

promulgation and incorporation into its procedures of six principles or processes governing the use of foreign assistance funds for environmental purposes, three of which pertain to the financial assistance operations of the MDBs. The effect of these regulations and procedures is to place a legal obligation on the Department of State to undertake to effectuate these environmental principles in dealings between the United States and both donor and recipient nations.

The United States has exercised substantial diplomatic persuasion upon the MDBs and their donor nations to incorporate environmental analysis, methods and procedures when considering the environmental impacts on funding decisions for projects throughout the Third World. Deputy Assistant Secretary of State William Nitze testified that these efforts have been effective, noting that "[t]he World Bank has demonstrated its responsiveness [and] . . . [w]e have good reason to believe that the regional development banks will quickly emulate the environmental reforms embraced by the World Bank." The World Bank has established an Environmental Department, organized on a geographical basis, which prepares "environmental actions plans" to preclude unnecessary environmental impacts, especially in countries having "fragile environments or in which degradation seriously threatens." The World Bank also publishes an environmental newsletter to inform the world environmental community of the World Bank's activities and Secretary Nitze forecasts that the Ninth Replenishment of the International De-

98. The processes promulgated by the Department of State which pertain to the financial assistance operations of the MDBs are in pertinent part:
(1) The U.S. government should encourage further efforts by the MDBs to continue to strengthen and institutionalize the environmental assessment process in their consideration of project proposals;
(2) MDBs should commit a larger proportion of their resources to environmental enhancement and conservation projects;
(3) The U.S. should continue to encourage borrowing countries and the MDBs to provide more timely information about the environmental aspects of proposed projects. Non-governmental organizations, particularly in borrowing countries, should also be encouraged to provide input to the governments of borrowing countries and to the MDBs on the design of projects and their potential for adverse environmental impacts.


99. Id.
100. Id. at 3.
101. Id.
velopment Association will include a requirement for Project Environmental Impact Statements.\textsuperscript{102}

The United States Department of Treasury also operates under extensive environmental protection regulations, including rules governing their relations with the MDBs.\textsuperscript{103} In a recent report to Congress, the Director of Treasury's Office of Multilateral Development Banks provided several examples of Treasury's efforts to persuade the World Bank to adopt procedures that would assure "that environmental information on specific projects may be made publicly available on a regular basis well in advance of Board review."\textsuperscript{104} Treasury also specifically requested that the MDBs adopt "internal environmental impact assessment procedures for providing environmental information about individual loans to non-governmental organizations and community groups" in Developing Countries to supplement present environmental procedures pertaining to loans to governmental entities.\textsuperscript{105}

Because the United States is but one of several nations participating in the MDBs' activities, Treasury's environmental provisions necessarily take the form of recommendations and proposals to be considered by the members of the multilateral board rather than unilateral attempts to impose environmental criteria formulated either by Congress or by the President's Council on Environmental Quality.\textsuperscript{106}

The Departments of State and Treasury, the CEQ, and the Environmental Protection Agency (EPA) agree that environmental consideration by the MDBs may be enhanced by authorizing the Secretary of Treasury "to initiate international discussions with the goal of developing criteria and procedures for conducting environmental impact assessment in the MDBs."\textsuperscript{107} The

\begin{thebibliography}{99}
\bibitem{102} Id. at 1-2.
\bibitem{103} 45 Fed. Reg. 47626 (1980).
\bibitem{104} \textit{Amending the National Environmental Policy Act, 1989: Hearings on S. 132 Before the Subcomm. on Superfund, Ocean and Water Pollution, Comm. on Environment and Public Works, 101st Cong., 1st Sess. 2 (1989) [hereinafter Treasury Statement] (statement of William A. Nitze, Deputy Assistant Secretary of State for Environment, Health and Natural Resources) (statement of Frank G. Vukmanic (citing letter from Secretary of Treasury to President of World Bank dated March 1, 1989)).\textsuperscript{105} \bibitem{105} Id. at 3. For further examples of Treasury suasion on the MDBs to expand environmental protection provisions, see id. at 3-5.
\bibitem{106} Id. at 5-7.
\bibitem{107} \textit{Amending the National Environmental Policy Act, 1989: Hearings on S. 132 Before the Subcomm. on Superfund, Ocean and Water Pollution, Comm. on Environment and Public Works, 101st Cong., 1st Sess. 25 (1989) [hereinafter CEQ Statement]}
\end{thebibliography}
goal of the discussions would be "to agree upon internationally accepted criteria and procedures which could be adopted by the banks to guide their internal procedures."\(^{108}\) The Departments of State and Treasury, the CEQ and EPA also favor authorizing relevant federal agencies "to provide U.S. personnel for training, preparation of documents, and similar activities" to assist the MDBs in expanding their environmental program.\(^{109}\) The EPA stressed the importance of strengthening the MDBs' environmental processes by "international consensus rather than unilateral action" by the United States.\(^{110}\)

During the past five years, and especially in the last two years, the United States through the Departments of State and Treasury have stepped-up efforts to convince the MDBs, the donor nations and the recipients of financial assistance of the need for adopting effective environmental impact assessment and planning processes as an indispensable part of the development program. The most recent congressional hearings on S. 1045, \textit{et al.}, assembled evidence that these efforts have produced important results.\(^{111}\) These developments provide a response to the query of Robert McMamara in 1972:

The question is not whether there should be continued economic growth. There must be. Nor is the question whether the impact on the environment must be respected. It has to be. Nor — least of all — is it a question of whether these two considerations are interlocked. They are. The solution of the dilemma revolves clearly not about whether, but about how.\(^{112}\)

\(^{108}\) Id.

\(^{109}\) Id. The four agencies agree that such assistance should be authorized but not required by Congress as Senate bill 1045 would presently provide.

\(^{110}\) EPA \textit{Statement}, at 7. The Statements of the Department of Treasury, State and the CEQ also stressed the urgency of obtaining international consensus rather than unilaterally seeking to impose U.S. standards.

\(^{111}\) The enactment of legislation such as Senate bill 1045, shorn of its peremptory unilateral provisions, would probably enhance this effort by specifically authorizing initiatives by Treasury to assist the MDBs to develop an effective environmental structure.

\(^{112}\) Address by Robert McMamara, President of the World Bank, United Nations Stockholm Conference on the Human Environment (1972) (quoted in part in Horberry, supra note 71, at 849).
IV. THE NEPA PROCESS IS UNSUITABLE AND UNNECESSARY TO COPE WITH EXTRATERRITORIAL ENVIRONMENTAL IMPACTS

The principal argument that has been advanced in support of amending NEPA to extend its jurisdiction to include major federal decisions producing extraterritorial environmental impacts is the growing awareness of the need to cope with problems such as global warming, tropical deforestation in both the eastern and western hemispheres, depletion of the ozone layer, ocean pollution, protection of endangered species and other living resources, and increases in acid rain.113 A facet of this argument is that the industrialized nations, especially the United States, are aggravating these global problems by failing to consider the environmental consequences of the technical and financial assistance that is being provided to Third World countries.114

The assumption implicit in this argument is that if federal decisions causing extraterritorial impacts were subjected to the NEPA process, otherwise unattainable progress would be achieved in coping with these global problems. Several factors must be considered in assessing the validity of this hypothesis.

First, extraterritorial extension of NEPA would supersede the existing regimes of law. Although any environmental system, including NEPA, falls short of perfection, these systems represent the best effort of the United States to achieve the purposes of NEPA in areas outside U.S. sovereignty and not subject to the jurisdiction of U.S. courts.

With respect to the environmental protection system fashioned by Executive Order 12,114, it was expressly structured to differ from NEPA in order to avoid encroachment or the perception of encroachment by the United States upon the sovereignty of foreign nations and upon portions of the global commons not subject to U.S. sovereignty.115 It has been recognized for more than a decade in all but the most environmentally chauvinistic quarters that attempts by the United States to impose its environmental views upon the rest of the world unilaterally would be disruptive and counterproductive.116 After more than ten years of operations under this system of law, the fifteen principal agencies of the U.S. government whose decisions affect the quality of the

114. Id. at 8 & 68.
115. See supra notes 42-62 and accompanying text.
116. Id.
extraterritorial environment have promulgated comprehensive binding legal regulations governing their decision making processes.\textsuperscript{117} There has been no significant evidence adduced that this process is not performing effectively or that there are problems that cannot be resolved within the existing system.\textsuperscript{118}

In the case of the AID environmental protection processes, they exceed those imposed by NEPA in some respects, and like Executive Order 12,114, avoid aspects of NEPA regulation which would encroach upon, or appear to encroach upon, the sovereignty of foreign nations.\textsuperscript{119}

The inadvisability and futility of attempting to impose NEPA jurisdiction over United States participation in the MDBs' activities to assist the Third World is equally clear. These activities are not programs which the United States controls but rather consist of programs in which the United States is one of many independent national participants. Despite the fact that the economic role of the United States in the MDB donor community has declined substantially, the United States has been conspicuously successful in persuading, not unilaterally commanding, the World Bank and various regional MDBs to adopt more efficient and comprehensive environmental assessment of projects financed by the MDBs.\textsuperscript{120}

Under recognized principles of national sovereignty, realism requires recognition that consensus, not unilateral command, is the only feasible approach to international environmental protection. In the only judicial decision to date that has addressed a major federal decision affecting exclusively the environment within a sovereign foreign nation,\textsuperscript{121} the court held that its "reluctance to apply NEPA extraterritorially is animated by the same anti-extraterritorial policy arguments and understandings adumbrated in the [Nuclear Non-Proliferation Act] analysis."\textsuperscript{122} The principle "policy argument and understanding" articulated by the court was the propriety of "conditioning export licenses on the satisfaction of standards fashioned in the United States [that] may un-

\begin{itemize}
\item \textsuperscript{117} See supra note 55 and accompanying text.
\item \textsuperscript{118} See supra note 56 and accompanying text.
\item \textsuperscript{119} See supra note 75 and accompanying text. See also supra notes 73-90.
\item \textsuperscript{120} See supra notes 91-111 and accompanying text.
\item \textsuperscript{121} Natural Resources Defense Council v. Nuclear Regulatory Comm'n, 647 F.2d 1345, 1365 (D.C. Cir. 1981) (court upheld determination by NRC and Department of State that proposed sale of nuclear technology to Republic of Philippines would not produce any significant effects in United States and global commons).
\item \textsuperscript{122} Id. at 1366.
\end{itemize}
necessarily displace domestic regulation by the government of the Philippines." 123 The court noted that "[c]onditioning an export license on the health, safety and environmental standards we think sound for the foreign nation's regulation directs that nation's choices just about as effectively as a law whose explicit purpose is to compel foreign behavior." 124 The court proceeded to characterize the "failure to perceive extraterritorial consequence[s]" of attempting to impose NEPA in such a situation as "naive." 125

The court also stressed the importance of accommodating environmental objectives with the principle of extraterritoriality, noting the following:

Given the agenda of transnational order implicit in the nonproliferation statutes, [one must give force to the NEPA imperative] to recognize the worldwide and long range character of environmental problems and, where consistent with the foreign policy of the United States, lend appropriate support to initiatives, resolutions and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind's world environment. 126

Thus, this court held that the provisions of NEPA do not apply when environmental impacts would exclusively occur within a sovereign foreign nation. Instead, the court stressed that the "NEPA prescription" contained in section 102(2)(F), which "looks toward cooperation, not unilateral action, in a manner consistent with our foreign policy," should control. 127

123. Id. at 1356.
124. Id. at 1356-57.
125. Id. at 1357.
126. Id. at 1366 (emphasis in original) (citation omitted).
127. Id. (emphasis added). The court noted that there was a direct relation between U.S. health, safety and environmental regulations imposed upon foreign nations and the conduct of U.S. foreign policy:

If the Commission's health, safety and environmental review of foreign impacts were to impede or challenge the development of foreign nuclear energy programs, it would, in turn, inhibit the conduct to United States foreign relation . . . . It is difficult to imagine how the licensing acts of NRC affecting the United States role as a nuclear supplier could escape association with our foreign relations goals . . . . Plainly, the Commission simply by deliberating on nuclear export questions will influence the denouement of United States foreign relations in a particularly sensitive arena . . . .

Id. at 1358.

The court concluded that "[t]he premise that the Philippines is sensitive to
On September 7, 1990, the Federal District Court for the District of Hawaii denied the motion for preliminary injunction filed by Greenpeace USA, to prevent the United States Army's transportation of approximately 100,000 rounds of 8-inch and 155-millimeter projectiles containing nerve agents GB and VX from United States storage facilities in the Federal Republic of Germany (FRG) to the Johnston Atoll, an unincorporated U.S. Territory, for disposal in the Johnston Atoll Chemical Agent Disposal System (JACADS). JACADS was designed for the purpose of destroying the entire U.S. stockpile of "unitary chemical weapons" by 1997 pursuant to a plan and procedures authorized by Congress. Under this plan, as subsequently modified by Congress, the Secretary of Defense is requested to certify that JACADS has successfully destroyed chemical munitions and there is adequate storage facilities on Johnston Atoll before moving the subject munitions. The Secretary made this certification on July 22, 1990. Accordingly, the shipment is in transit to Johnston Atoll at the time of this writing.

The U.S. Department of the Army prepared three environmental impact statements pursuant to NEPA. The first was published in 1983 and addressed the construction and operation of the basic destruction facility; the second was published in 1988 and addressed the plan to dispose of the solid and liquid wastes the JACADS project will produce; and on July 23, 1990, the Army published a Supplemental EIS addressing the disposal of its European Stockpile. The scope of the Supplemental EIS includes the impacts pertaining to (1) the transportation of the chemical munitions from the edge of the territorial waters surrounding Johnston Atoll to the landing pier on the Atoll, (2) unloading the munitions at the JACADS facility, (3) storage of the munitions at

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132. Id. at 5.

133. Id. at 5-6.
the facility, and (4) the destruction of the munitions. 134

In addition to these NEPA environmental impact statements, the Army also prepared, pursuant to Executive Order 12,114, a Global Commons Environmental Assessment, which addressed the phase of the planned operation involving shipment from the German port of Nordenham to the edge of the territorial waters of Johnston Atoll, encompassing four alternative possible shipping routes. 135

Finally, the movement from the United States storage site in Germany to the port of Nordenham was conducted under the authority of an approval granted by the Federal Minister of Transport under German law. The legality of this approval was challenged but upheld by the German Administrative Court, which held that the approval complied with German law, did not violate any German constitutional rights, and did not pose an unacceptable risk. 136

Plaintiff, Greenpeace USA, thereupon brought this suit on the ground that the Army had violated NEPA because it had failed to prepare a comprehensive EIS covering all aspects of the transportation and disposal of the munitions, including specifically the intra-German segment and the global commons segment of the project. The court, relying on the following reasons, rejected this interpretation of NEPA. 137 The court referred to the established principle that "absent evidence of Congressional intent to the contrary, a Federal statute should be construed as applying only within the territorial jurisdiction of the United States." 138 The

134. Id. at 6.
135. Id.
136. Id. at 7.
137. Id. at 15-16. The court held, "[t]he crux of this issue, as discussed in this court's previous order denying temporary preliminary relief, is whether NEPA applies extraterritorially to the circumstances at hand." Id. The court indicated preliminarily that it is not convinced NEPA applies extraterritorially to the movement of munitions in Germany or their transoceanic shipment to Johnston Atoll. The court reached this conclusion based largely on the political question and foreign policy implications which would necessarily result from such an application of a United States statute to joint actions taken on foreign soil based on an agreement made between the President and a foreign head of state. See, e.g., Natural Resources Defense Council v. Nuclear Regulatory Comm'n, 647 F.2d 1345, 1367 (D.C. Cir. 1981). After further briefing and argument, the court's determination with respect to the application of NEPA remains unchanged.
court noted that NEPA "does not explicitly provide that its requirements are to apply extraterritorially" although NEPA "requires Federal agencies to 'recognize the worldwide and long-range character of environmental problems,'" therefore, actions should be taken "consistent with the foreign policy of the United States." The court also quoted the statement from NRDC v. Nuclear Regulatory Commission that NEPA "looks toward cooperation, not unilateral action, in a manner consistent with our foreign policy. Moreover, if an EIS requirement attached to nuclear exports, there would be the spectre of litigation over the adequacy of the EIS, with delay of the inevitable result." The court concluded that "an extraterritorial application of NEPA to the Army's action in the FRG with the approval and cooperation of the FRG would result in a lack of respect for the FRG's sovereignty, authority and control over actions taken within its borders."

With respect to the requested application of NEPA to the global commons phase of the operation, the court rejected the Greenpeace argument and ruled that Executive Order 12,114, not NEPA, governed and that the 142 page Global Commons Environmental Assessment prepared by the Army complied with the legal requirements of the Executive Order.

Plaintiffs have appealed this decision, but the case may be rendered moot if the removal to Johnston Atoll is completed before the Court of Appeals for the Ninth Circuit and the U.S. Supreme Court have the opportunity to consider the case.

The NEPA process constitutes a series of commands: (1) to perform various analytical duties (e.g. enumerate impacts, identify unavoidable impacts, and consider alternatives that may achieve the project's goal without incurring unacceptable impacts); (2) to utilize specialized methodology (e.g. a systematic interdisciplinary approach, use of quantification techniques for presently unquantified environmental amenities); (3) to publish the results of this analysis in the Environmental Impact Statement format mandated by the CEQ regulations (e.g. tiering, scoping, and avoiding encyclopedic volume); (4) to obtain comments on the EIS from a variety of entities specified by the CEQ regulations (e.g. cooperating agencies, local governments and Indian Tribes); and (5) to consider the environmental aspects of the proposed

139. Slip Opinion at 19 (citing section 102(2)(F) of NEPA).
140. Id. at 22 (citing NRDC, 647 F.2d at 1366) (footnote omitted).
141. Slip Opinion at 22-23.
142. Id. at 26-28.
decision, along with the technical, economic and other factors that may be required by law.

These NEPA commands are judicially enforceable by declaratory judgments and the imposition of injunctive relief. As the court noted in *NRDC v. Nuclear Regulatory Commission*, such a system of commands may not be imposed directly or indirectly on third world countries without causing extraterritorial consequences. This rudimentary fact of life in international relations is the basis for structuring Executive Order 12,114 to contain special mechanisms to avoid confrontations that would disrupt the foreign relations of the United States and discourage harmonious international cooperation to protect the environment.

A second compelling consideration is that extraterritorial application of NEPA would not only supersede and disrupt the existing system of environmental regulation, but it would contribute little to resolution of the global problems such as climate change, ozone depletion, acid rain, ocean pollution and protection of living resources. These problems are quintessentially global in nature. Accordingly, such problems can only be addressed by diplomatic means. No one nation or group of nations (such as the industrialized nations) can dictate remedial measures. Action must be preceded by consensus, which provides the basis for multinational agreement. Consensus must be preceded by the development of the scientific and technical expertise to formulate acceptable remedial measures. Such a process is fundamentally different from the mandatory, court-enforced NEPA process. Imposition of the NEPA process upon United States diplomats and their technical and scientific colleagues participating in international negotiations to develop international mechanisms to deal with these global problems would impair their flexibility and would be counterproductive.

V. CONCLUSION

There is no doubt that global environmental problems are becoming increasingly important. Scientific understanding of the nature and causes of these problems is meager. Consequently, there is little if any consensus on what would constitute effective remedial action.

Congress has recognized that there are two fundamental elements involved in coping with global environmental problems.

143. *NRDC*, 647 F.2d at 1357.
First, the remedial response must be international in nature. Ocean dumping can only be controlled effectively by international compacts such as the London Dumping Convention; protection of the world’s living resources can only be achieved by such organizations as the Convention Against International Trade in Endangered Species, and the International Convention for the Regulation of Whaling. As yet no comparable institutional response has been developed by the world community of nations to address ozone depletion, climate change or even acid rain. The development of such institutional responses can only be achieved by the diplomatic process.

The other fundamental problem is the development of the scientific data base and technical capability necessary to establish and implement specific remedial programs. Until this is achieved there is very little the diplomatic process can achieve other than to establish the institutional framework for international cooperation in addressing these global problems.

To attempt to impose the NEPA process on this global effort would be disruptive, counterproductive and wasteful.