



Winter 1974

Strategies for International Environmental Action: The Case for an Environmentally Oriented Foreign Policy

Eugene V. Coan

Julia N. Hillis

Michael McCloskey

Recommended Citation

Eugene V. Coan, Julia N. Hillis & Michael McCloskey, *Strategies for International Environmental Action: The Case for an Environmentally Oriented Foreign Policy*, 14 Nat. Resources J. 87 (1974).
Available at: <https://digitalrepository.unm.edu/nrj/vol14/iss1/5>

This Article is brought to you for free and open access by the Law Journals at UNM Digital Repository. It has been accepted for inclusion in Natural Resources Journal by an authorized editor of UNM Digital Repository. For more information, please contact amywinter@unm.edu, lsloane@salud.unm.edu, sarahrk@unm.edu.

STRATEGIES FOR INTERNATIONAL ENVIRONMENTAL ACTION: THE CASE FOR AN ENVIRONMENTALLY ORIENTED FOREIGN POLICY*

EUGENE V. COAN,** JULIA N. HILLIS,*** and
MICHAEL McCLOSKEY****

The environmental movement is rapidly developing a global perspective. Environmentalists in the past tended to focus their attention almost entirely on domestic conditions, largely ignoring the worldwide implications. Recent studies indicate, however, that human survival itself necessitates awareness of the global nature of the environmental crisis and requires quick, effective action.¹

Much of the basic knowledge needed to fully appreciate the extent of the danger to the global life-support system is still lacking. Generally, environmentalists have already recognized the fragile interdependence characterizing the living and nonliving systems on Earth, the fact that damage to one part of the world endangers the whole, and the significance of the cumulative consequences of many seemingly insignificant events. They have voiced concern that the integrity of the global environment is threatened by population growth, by the overexploitation of both renewable and non-renewable resources, by unthinking technological innovation and by disruption of ecosystems as a result of unplanned growth and "military adventurism."²

The environmental movement within the United States has itself undergone a gradual change in emphasis, from traditional conservation of scenic areas based on aesthetic considerations to concern with economic growth, the importance of irreplaceable genetic material and the subtle effects of pollutants on both food chains and man.

*The material in this article does not necessarily reflect Sierra Club policy. The helpful suggestions made by Nicholas A. Robinson, Richard A. Frank and Patricia S. Rambach are gratefully acknowledged.

**Executive Director of the Sierra Club.

***Assistant to Mr. McCloskey.

****Administrator of the John Muir Institute for Environmental Studies.

1. The following books are particularly good reviews:

J. Forrester, *World Dynamics* (1971).

P. Ehrlich & R. Harriman, *How to be a Survivor* (1971).

E. Goldsmith, *et al.*, *Blueprint for Survival* (1972).

D. Meadows, *et al.*, *The Limits to Growth* (1972).

P. Ehrlich & A. Ehrlich, *Population, Resources, Environment: Issues in Human Ecology* (2nd ed., 1972).

2. The Board of Directors of the Sierra Club adopted a resolution to this effect at its meeting of September 26-27, 1971.

Important first steps have been taken at the level of international cooperation as the result of the Stockholm Conference on the Human Environment.³ Similarly, the recent bilateral convention on the Great Lakes, the multilateral conventions on Ocean Dumping, the World Heritage Trust, Endangered Species, and Wetlands and the environmental agreement between the United States and the U.S.S.R. represent crucial beginnings; and still others are presently under discussion.⁴ These conventions and agreements, in which monitoring, studies, coordination and preservation are the chief emphases, are significant but largely unenforceable.

Environmentalists maintain that more is both needed and possible. Many of them believe that the United States itself must move toward an entirely new, ecologically oriented foreign policy that places its greatest emphasis on the global balances among population, resources and environmental quality, rather than on ideological relationships among nations.⁵ Stated in traditional terms, they maintain that global deterioration threatens our national security in a most profound and immediate sense.

No one country can unilaterally maintain the health of the biosphere, but the U.S. presence is so pervasive throughout the world, and so many nations are influenced by U.S. policy directions, that we cannot ignore our pivotal role in protecting and improving world environmental health. The United States has a vast impact on the world's environment because of its reliance on overseas resources, the environmental destructiveness of its modern weaponry, the extent of its international trade and the magnitude of the activities of U.S. corporations operating abroad. Yet very little attention has been given to the possibility of unilateral U.S. action to protect the world environment. This article attempts to briefly outline some steps which might be taken were such a unilateral approach to be adopted.

There is no one formula that can produce global environmental

3. For background on the Stockholm Conference, see the following:

B. Ward & R. Dubos, *Only One Earth* (1972).

Secretary of State's Advisory Committee on the 1972 United Nations Conference on the Human Environment, *Stockholm and Beyond* (1972).

U.N. Centre for Economic and Social Information, *Environment: Stockholm* (a summary of the meeting and a compilation of the recommendations and resolutions) (1972).

P. Rambach, Report from Stockholm, 57 *Sierra Club Bull.* 19 (1972).

4. These conventions and agreements are reviewed in Council on Environmental Quality, 3rd Annual Report, at 77 (1972).

5. Testimony of E. Coan, *Hearings on Technological Assessment Before the Subcomm. on Science, Research, and Development of the House Comm. on Science and Astronautics*, 91st Cong., 2nd Sess. (1970).

Testimony of E. Coan & N. Hillis, *Hearings on Convention and Amendments Relating to Pollution of the Sea by Oil Before the Subcomm. on Oceans and Intl. Environment of the Senate Comm. on Foreign Relations*, 92 Cong., 1st Sess. (1971).

harmony. Ultimately strong, enforceable multinational agreements, many worked out through multinational organizations, hold the greatest promise. Support for such agreements and agencies must be a major component of our policy. However, such agreements will take a long time, and other types of actions should be taken in any event.

One of the most significant advances made at the Stockholm meeting is Principle 21, which states, in part:

States have . . . the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other states or of areas beyond the limits of national jurisdiction.⁶

This significant principle would seem to necessitate effective unilateral action. We recognize that some types of unilateral action involve complex nonenvironmental questions, including trade and tariff complexities, the relationship between the need for openness in environmental decision-making and the inherent sensitivity of international negotiations, the limits of national jurisdiction particularly in the light of the scheduled Law of the Sea discussion, and problems of the extraterritorial applicability of national law.⁷ Other scholars may wish to examine these and other nonenvironmental consequences of the policies here suggested.

Our artificial affluence is possible only because of our ability and willingness to rely upon natural resources from abroad. It has been estimated that our less than 6% of the world's population consumes over 30% of the world's resources and some 30% of its energy production.⁸ The U.S. is also the producer of a lion's share of the environmentally hazardous substances contaminating the biosphere, while our military tactics in the Vietnamese war have devastated large parts of the environment of Indochina.⁹ Half of the world's industrial capacity is controlled by U.S. corporations. Most importantly, we have set loose our artificially high standard of living on the rest of the world, which rushes to copy our bad example.

Environmentalists maintain that we must curb our excesses around the world and our overdependence on foreign resources. After we have taken steps to make these changes, we will be in a far better

6. U.N. Centre, *supra* note 3, at 2.

7. See 69 Harv. L. Rev. 1452 (1956).

8. Ehrlich & Ehrlich, *supra* note 1, at 72.

9. Good reviews on this topic are the following:

Constable & Meselson, *The Ecological Impact of Large Scale Defoliation in Vietnam*, 56 Sierra Club Bull. 4 (1971).

J. Lewallen, *Ecology of Devastation: Indochina* (1971).

A. Westing, *Herbicides in War: Current Status and Future Doubt*, 4 Biological Conservation, 322 (1972).

position to help those nations in which the ecological imbalances are most acute to achieve, through well designed economic and social development, a decent human environment and an environment more in harmony with the natural world upon which we all depend.

One area in which unilateral action should be taken is with respect to our policies on exportation. U.S. export controls have traditionally been based on considerations of national security and economics. In addition, we could now pursue policies which regulate exportation of U.S. products according to environmental criteria. At present, environmentally unsound products may be freely marketed abroad even though their use in the United States has been prohibited or made subject to strict control. DDT, for instance, which has been banned from most uses in the U.S.,¹⁰ may still be exported.¹¹

The overseas sale of environmentally hazardous substances might be prohibited if their use is banned here. For those substances which are safe only if their use is properly controlled, at least a thorough warning and recommendations for their safe use should be given to foreign countries importing them. The U.S. could also assume responsibility for developing safe substitutes for environmentally hazardous substances still thought to be essential for some uses.

The overseas marketing of all sorts of machinery and equipment could also be brought under environmental controls. For example, industrial equipment and vehicles not equipped with the latest air pollution control equipment required in this country could be banned from export.

Most importantly, an environmental export policy should be tied in with effective programs of technological assessment and environmental impact analysis. Exportation as well as domestic use of unstudied technological innovations should be prohibited until the environmental effects of each new development are thoroughly studied and knowledgeable judgments are made about their relative risks and benefits.

The United States already has some import restrictions aimed at preserving environmental quality. For instance, the importation of endangered species or of products made from them has already been banned, and some states of the U.S. have still more stringent restrictions.

A blanket ban might be imposed on certain products from countries with practices detrimental to the proper conservation of international

10. 37 Fed. Reg. 13369 (1972).

11. Federal Environmental Pesticide Control Act, 7 U.S.C. §136 (1972).

resources. Such an approach has been adopted in a recent amendment to the Fisherman's Protective Act.¹² This amendment allows the prohibition of the importation of fisheries products from foreign countries whose nationals are conducting fishing operations in a manner inconsistent with international fishery conservation programs.

In extreme cases, certain nonrelated imports from a country violating good conservation practice in areas of international jurisdiction could be banned. Thus, imports from Japan and the U.S.S.R., countries accounting for some 85% of world whaling operations, might be banned to bring sufficient pressure on these nations to cease whaling operations in the absence of an effective international agreement.

The U.S. should close its ports to tankers not constructed or equipped with environmentally sound protective devices or designs. For example, new tankers should have segregated ballasts and double bottoms, and existing tankers should be required to be refitted with the best retention or segregation systems feasible. Similarly, we could close our airports to foreign SST's. A bill to prohibit flights by commercial SST's has been introduced in Congress.¹³

United States import policies could also be aimed at influencing other nations' production processes. For example, lumber produced abroad through poor forestry practices and oil or other minerals extracted with blatant disregard of minimum environmental safeguards might be banned from importation into the U.S. A defeated amendment to the recently enacted federal pesticide legislation would have forbidden the importation of agricultural products grown with the use of pesticides which are restricted or forbidden in the U.S., unless that country had restrictions similar to those in the U.S. A major problem with this approach would be detecting practices in another country; but truly flagrant environmental disregard in connection with the production of a major import should be relatively obvious.

Any such import restrictions would not be popular, particularly in the less-developed countries, inasmuch as these nations are especially sensitive to the possibility of environmental controls which might retard their economic development.¹⁴ However, such restrictions could be focused specifically on (1) cases of U.S. business interests abroad, (2) instances where areas of U.S. jurisdiction would be

12. 22 U.S.C. §1978 (1972).

13. H.R. 5328, 93rd Cong., 1st Sess. (1973).

14. This question is discussed in Carnegie Endowment for International Peace, Environment and Development: The Founex Report, no. 586 (1972).

affected or international jurisdiction were involved, and/or (3) cases where flagrant and permanent environmental damage is apparent.

Many activities undertaken within the United States may have a more or less direct impact on foreign or international areas. An environmentally oriented foreign policy should ensure that no domestic activity having a detrimental effect abroad is allowed to proceed unthinkingly.

Examples of possible harm to foreign areas are the Cannikin thermonuclear blast in the Aleutian Islands, the overutilization of Colorado River water and the tanker traffic from the proposed trans-Alaskan pipeline. The tanker traffic is opposed by Canada, the increasing salinity of the Colorado has been protested by Mexico, and the Cannikin blast was objected to throughout the North Pacific basin. One of the most significant ways in which we can take action is to speedily eliminate our own water pollution, nearly all of which eventually ends up in the ocean.

Unilateral action can also be taken to reduce direct U.S. impact in areas of international jurisdiction, the high seas, the atmosphere and the Antarctic. To the extent that international conventions have dealt with environmental issues, they have most often applied to conduct within these areas, but unilateral action is also possible and desirable, particularly since current prospects for truly effective international regulation do not yet appear very promising. In addition to domestic law currently on the books, we need new regulations banning specific kinds of conduct by the U.S. government and its nationals which may have a damaging impact on these international areas.

Perhaps the most important unilateral action the U.S. could undertake is to curb the environmental abuses of its private sector abroad. Indeed, in view of the pervasiveness of U.S. private interests in other countries, particularly that of U.S.-based multinational corporations, we have a special responsibility to do so. It would be inconsistent to allow individuals and businesses to operate in a manner which conflicts with the goals of a U.S. environmental policy.

Multinational business activity has been increasing rapidly for some time, tripling in the last decade. The majority of multinational corporations are American; of the 500 largest, over 300 are headquartered in the United States. The value of American business assets abroad is conservatively estimated to be \$100 billion but is probably more than twice this amount. U.S. industries abroad have been termed the third largest economic force in the world, outranked only by the domestic economies of the U.S. and the U.S.S.R. If current trends continue, 25% of the world's industrial output will be produced by U.S. companies and their subsidiaries by 1975. By the year 2000,

some 300 giant corporations, 200 of them American, will account for more than one-half of the world's industrial output.¹⁵

In view of the recent nature of international concern on the part of American environmentalists, it is not surprising that relatively little attention has been paid to overseas environmental abuses by U.S. business interests. It is estimated that U.S. firms abroad spend proportionately only half of what they spend in the U.S. on pollution control.¹⁶ And, of course, pollution is only one of the many types of environmental abuse likely to occur.

It is time that comprehensive surveys be made concerning the environmental practices of U.S. corporations operating in other countries. The Sierra Club, for instance, is beginning to collect information from foreign environmental groups on the practices of U.S.-based corporations. Among many excesses abroad that are of growing concern, American lumber companies are reported to be using extremely poor forestry practices in their extensive overseas logging operations.¹⁷

In Quebec a major U.S. firm operating a ferroalloys plant reportedly emitted 11,000 tons of silica dust yearly. Similar facilities of the same firm in the United States have been ordered to reduce their particulate pollution by 99% within three to four years, but the Province of Quebec, worried about unemployment and operating under inadequate legislation, has said it will require considerably less of a reduction.¹⁸

Another major U.S. corporation reportedly plans to mine sand on Fraser Island, the last as-yet unspoiled sand island on Australia's east coast. In spite of intense opposition to such activities from Australian environmental groups, the government of Queensland has issued new mineral leases on the island.¹⁹

15. Material in this paragraph based on the following:

Knoppers, *The Multinational Corporation and the Third World*, 5 Colum. J. World Bus. 33 (1970).

Heilbroner, *The Multinational Corporation and the Nation-State*, New York Review of Books 20, (Feb. 11, 1971).

Robach & Simmonds, *International Business: How Big Is It—The Missing Measurements*, 5 Colum. J. World Bus. 6 (1970).

King, *The Global Corporation is Here to Stay*, America 229 (Oct. 3, 1970).

16. *Building Abroad: Less of an Escape Route for Polluters*, 5 Air & Water News. 4 (Special Supp. 1971).

17. Appell, *Kalimantan Timber Concessions Poses Challenge to Urgent Research*, 2 Borneo Research Bull. 16 (1970).

Letter from Brock Evans to Nicholas Robinson, Dec. 27, 1971, on file at the Sierra Club.

18. Testimony of Nader, *Hearings on Economic Dislocations Resulting from Environmental Controls Before the Subcomm. on Air & Water Pollution of the Senate Comm. on Publ. Works*, 92nd Cong., 1st Sess., ser. 92-H19, 5, 11 (1971).

19. Letters from John Sinclair, President of the Fraser Island Defense Organization, to Michael McCloskey, July 14, 1971 and to Eugene Coan, Feb. 9, 1972, on file at the Sierra Club.

Both environmentalists and U.S. labor leaders have cause for alarm over the emergence of so-called "foreign pollution havens." As nationwide pollution controls have become stronger, industry threatens to move abroad, though not always in one swift shift. Thus, air pollution standards have led to a gradual reduction in copper smelting operations in Arizona, Texas, Montana and Washington, and to a resulting increase in shipments of ore to West Germany, Canada and Japan.²⁰ (This gradual shift is also related to the cost of labor.) Especially for the less-developed countries desperately in need of development and capital, this shift amounts to what might be termed a subtle form of blackmail.

American private capital can play a crucial role in aiding the less-developed nations, but it must not be allowed to dictate its own environmental terms. If American corporations were held accountable under U.S. law for the results of their activities abroad, such environmental blackmail would be minimized. Of course this could not control the actions of the less-developed nations or those of other developed countries providing aid, but it would set an important example.

A concerted effort is required to determine the ways in which U.S. regulatory authority could be used to control American business activities overseas. A preliminary survey reveals a number of possibilities.

There is precedent for giving extraterritorial applicability in some cases to U.S. laws and regulations. International law gives a nation a right to regulate the actions of its nationals anywhere. A nation can also assert jurisdiction over conduct outside its territory, even by foreign nationals, if that conduct causes substantial effects within its own territory. Upon these concepts are based a variety of domestic measures, including export controls, antitrust policy abroad, balance of payments controls, many tax laws, securities regulations and the "Trading with the Enemy" Act.

Clearly, expanding the scope of existing domestic law is desirable. We must begin a review of laws and regulations to see where environmental requirements might be usefully incorporated.

We could theoretically prohibit our nationals, corporate and individual, from undertaking major business arrangements abroad, either alone or in concert with foreign nationals, unless those arrangements are shown in advance to incorporate certain environmental standards. Any proposed activity abroad which involved prior

20. Russell & Landsberg, *International Environmental Problems: A Taxonomy*, 172 Science 1307 (1971).

approval or facilitation by the U.S. government, such as the granting of antitrust exemptions and overseas investment insurance, could be scrutinized for its environmental implications before plans were allowed to proceed. We could also monitor ongoing foreign operations of U.S. firms and their subsidiaries and hold them accountable for their environmental misbehavior abroad by withholding tax benefits here at home.

One initial measure might be to require disclosure of all environmentally relevant aspects of overseas operation. Another would be to limit contracts with the U.S. government itself to those corporations which do not violate environmental standards overseas. Firms that fail to meet appropriate standards could be "blacklisted" in a manner similar to that utilized in Executive Order 11602 which covers only air pollution by corporations operating in the U.S.²¹

The possibility of withdrawing tax privileges from firms that ignore environmental standards should be explored, starting with those tax benefits which particularly encourage or facilitate overseas operations, such as tax credits for royalties paid to foreign governments. There are strong arguments for eliminating such tax credits altogether. We could use the tariff laws and the various duty-free entry permits to influence the overseas operations of American corporations importing their products into the U.S. Indeed, federal chartering of corporations operating overseas may be in order.

The activities of the U.S. government itself that have an influence on the global environment are, of course, of tremendous significance. Environmentalists are concerned about the effects of our military activities abroad, particularly those in southeast Asia. Questions have been raised as to whether the environmental harm we have caused may not itself impose a severe limit on the freedom of all Vietnamese and Cambodian peoples.

Attention must also be focused on the operation of American bases abroad and of American ships on the seas. The 1970 Executive Order on the Prevention, Control, and Abatement of Air and Water Pollution at Federal Facilities²² needs to be strengthened to include specific, enforceable standards against which agency actions abroad can be measured. It should also be extended to existing as well as new facilities, and to cover all kinds of environmental considerations. Similarly, other Executive Orders covering Department of State permissions for private road and other construction across borders

21. Exec. Order No. 11602, 36 Fed. Reg. 12475 (1971).

22. Exec. Order No. 11507, 35 Fed. Reg. 2573 (1970).

into the United States²³ might be revised to include specific environmental conditions for granting permits.

Many federal agencies conduct programs with an impact on the global environment. These agencies should not only be required to take environmental factors into account, but the entire thrust of their programs could become the framework of a foreign policy which addresses possible global survival scenarios. For instance, the various programs of the Agency for International Development (AID) should involve weighing long-term environmental considerations as well as immediate environmental protection in allotting economic and technical assistance, and should suggest various alternatives.

The Overseas Private Investment Corporation (hereinafter OPIC) was established to administer incentive programs for private U.S. investment abroad. Its activities include preinvestment assistance, "political" risk insurance, loan guarantees and direct loans. Many of the projects aided have a more or less direct impact on the foreign country's environment. For example, OPIC has insured a timber development project in Indonesia, guaranteed a loan on a power plant in Korea, and made loans to promote mining in Africa.²⁴ The mandate of this agency should be modified in light of environmental considerations, and all specific agency decisions should be made contingent on the assisted firm's clearing specific environmental hurdles.

OPIC's legislative charter establishes a number of policy guidelines, including financial and political considerations. Notably absent is any environmental policy constraint or requirement. OPIC's charter could be amended to incorporate such policy directives and to require the adoption of specific regulations implementing them. The bilateral agreement between the United States and the country in which an assisted project is to be located could be used as a vehicle to ensure host country cooperation with respect to environmental requirements.

In October 1971 OPIC adopted internal guidelines on environmental considerations with respect to project eligibility.²⁵ Unfortunately, these do not require conformance with environmental standards as a condition for project assistance. It remains to be seen whether these guidelines will prove helpful. Similarly, the Export-Import Bank (Eximbank) and its affiliates, which give direct loans, guarantee loans,

23. Exec. Order No. 10485, 18 Fed. Reg. 5397 (1953); Exec. Order No. 10530, 19 Fed. Reg. 2709 (1954); and Exec. Order No. 11423, 33 Fed. Reg. 11741 (1968).

24. OPIC Annual Report for 1971.

25. OPIC General Policy and Guidelines, *Eligibility of Projects, Environmental Considerations*, No. 5.101, Oct. 26, 1971.

and provide export credit insurance, should make environmental considerations a primary factor in designing their programs and should make pollution control, land planning assistance and whatever else is required in a given case major criteria for providing loans, guarantees and insurance. Many Eximbank-aided projects have major environmental significance. For example, the Eximbank is a leading force in the development of energy-related facilities overseas, including offshore drilling rigs and power plants.

Many federal agencies not normally thought of as international in scope are nonetheless involved in many overseas projects. A case in point is the road-building activities of the Federal Highway Administration. Current plans to close the "missing link" of the Pan-American Highway through the Atrato Swamp in the Darien Gap of Panama have been severely criticized by environmentalists. Apparently only one alternative route was even considered, though observers have suggested others. Recently, however, the Department of Transportation has agreed to file an environmental impact statement on the project, so the alternatives may now receive proper evaluation.²⁶

Environmentalists viewed with dismay the successful efforts by the Department of Defense to get a military exemption written into the Ocean Dumping Convention and to scuttle at least temporarily the Convention on Islands for Science. These military intrusions do not help establish the U.S. credibility needed to promote effective environmental action at the international level.

By far the most important activity of the federal government with a significant effect on the global environment is the design of foreign policy, which is shaped more or less behind the scenes through interactions between the White House, the Department of State and the Department of Defense.

After viewing the results of American foreign policy, it is clear that present perceptions of the world which influence the design of this policy do not include the factors environmentalists view as being of overriding significance. Environmentalists will increasingly press for reconsideration of what really constitute threats to our national security. The basic imbalances among population, resources and environmental quality must become a central theme of global policies.

The National Environmental Policy Act²⁷ (NEPA) was designed to

26. R. Soles, University of Wisconsin, (unpublished analysis on file at the Sierra Club June 1971).

Letters from George Frampton (Center for Law & Social Policy) to Eugene Coan, Jan. 3, 1972 and March 15, 1973, on file at the Sierra Club.

27. 42 U.S.C. §§4321, *et seq.* (1970).

provide a guide and a stimulus to the consideration of environmental factors in federal decision-making. Perhaps nowhere is this consideration more needed than with regard to international matters.

NEPA is clearly applicable to international matters. Its policy provisions declare a concern for the quality of the global environment. Moreover, section 102(2)(E) specifically requires all federal agencies to "recognize the worldwide and long-range character of environmental problems" and to take steps to "maximize international cooperation in anticipating and preventing a decline in the quality of mankind's world environment." Section 103 directs all federal agencies, with no exceptions stated for internationally oriented agencies, to review their statutory authority, regulations, policies and procedures to determine any deficiencies which prevent full compliance and to so inform Congress. Furthermore, section 102(2) is also directed to *all* federal agencies.

Surprisingly, few federal agencies with international responsibilities have availed themselves of the opportunity presented by the Act to expand their viewpoint, if not their mandate. Indeed, some agencies have maintained that certain of its provisions, particularly the section 102(2)(C) impact statement requirement, do not apply in some international contexts, though, inconsistently, they concede the law's applicability in other contexts.

The federal agencies which have thus far maintained that NEPA is not applicable to their activities in foreign countries do so on the grounds (1) that their activities are not of themselves "major Federal actions significantly affecting the quality of the human environment"; (2) that the environmentally significant events are not carried on inside the United States; and/or (3) that the environmental impacts created by the activities are not on the environment within the United States.

Regulations recently promulgated by the Department of State,²⁸ albeit at the insistence of Congressional leaders, the Council on Environmental Quality and its Legal Advisory Committee²⁹ and citizens groups such as the Sierra Club,³⁰ suggest that there are no such inherent limitations in NEPA and that such limitations do not, in fact, exist.

The Department of State's first environmental impact statement was on an application for a permit to use existing pipelines under the

28. 37 Fed. Reg. 19167 (1972).

29. Report of the Legal Advisory Committee to the President's Council on Environmental Quality 14 (Dec. 1971).

30. Letter from Richard A. Frank (Center for Law & Social Policy) to Undersecretary John Irwin II, on behalf of the Sierra Club, Jan. 7, 1972, on file at the Sierra Club.

Detroit River to carry petroleum.³¹ That statement also discussed the resulting construction of new pipelines in both the United States and Canada.

The Department of State has also filed environmental impact statements on several multilateral conventions affecting areas of international jurisdiction and on the conventions on the World Heritage Trust and Endangered Species, the last two having applicability within the territories of other nations as well as within our own. These impact statements provide a clear indication that the Department of State believes the Act to apply to situations in which the environmental effect of its actions would be outside the United States, even within the territory of other nations, when either issuance of a permit or support for a draft convention is the federal action under consideration.³²

As further evidence that the impact of a given federal action need not be within the United States, more than twenty statements have been filed by various agencies covering federal actions affecting the high seas, the atmosphere over the high seas or outer space. Among these statements are operations conducted wholly on the high seas, as well as operations carried out solely within our territory, but affecting a wider environment. The Department of Transportation's long-awaited statement on the Darien Gap highway will cover a federal action resulting in construction in another country.

Until recently, the record of the State Department's compliance with NEPA has been a dismal one. It had failed to evaluate the environmental impact of its actions or even to give notice to the public or other governmental agencies of its decisions which might affect the environment. For example, the Department had been negotiating a draft Antarctic Seals Convention for months without giving any public notice of the negotiations, of possible alternatives or of its actual decisions.³³ Even the Council on Environmental Quality was not informed. Nor did the Department invite public comment on the recently completed Convention on Ocean Dumping until two months after the draft prepared by the Department had been

31. Department of State, Amendment of Presidential Permit . . . to the Dome Pipeline Corporation . . . Draft Environmental Impact Statement (Sept. 1972).

32. The Department also originally argued that complying with NEPA and filing of environmental impact statements was inconsistent with the conduct of foreign affairs and was not suited to the negotiation of conventions. Now that the Department has complied, no problems have been raised and its initial concerns have proved incorrect.

33. Testimony of R. Frank, *Hearings on Draft Convention for the Conservation of Antarctic Seals Before the Fisheries & Wildlife Conservation Subcomm. of the House Comm. on Merchant Marine & Fisheries*, 92nd Cong., 2nd Sess. (1972).

Testimony of R. Frank, before the Secretary of State's Advisory Committee on the 1972 U.N. Conference on the Human Environment, March 22, 1972.

submitted to other governments, thereby solidifying the U.S. position on the question.

The Agency for International Development has adopted its own limited procedures for environmental review of certain of its projects in an attempt to conform to the "intent and objective" of NEPA.³⁴ These procedures are not only narrow in scope, covering only capital assistance projects and seriously deficient in many specific respects, but more importantly, AID continues to maintain that it is not really subject to NEPA's impact statement requirement and that its procedures are not required pursuant to NEPA.³⁵ They are, it claims, merely internal guidelines paralleling NEPA requirements. However, in a more encouraging development, continuing discussions with AID officials indicate that true compliance may not be far off.

In all fairness, we must say that AID has not been completely oblivious to the environmental implications of its operations. Indeed, because of its basic mission, AID must have an awareness of the environmental realities of the world, and it has produced a few circulars³⁶ demonstrating this growing concern. One of the most difficult problems for AID has apparently been its desire not to appear to be dictating a new set of conditions to less-developed nations that already regard the U.S. with somewhat less than complete trust. To impose new foreign aid restrictions, it feels, would be but to create a new form of "imperialism."

The Overseas Private Investment Corporation has taken another and even less tenable position with respect to implementation of NEPA. When asked about OPIC's compliance, its President, Bradford Mills, noted that "Projects in which OPIC is involved do not normally have a domestic environmental impact. Nevertheless, we are concerned with the environmental effects of OPIC-sponsored projects overseas. . . ."³⁷ Later, OPIC's Project Policy Officer wrote, "OPIC's activity is to provide support and encouragement to selected private sector enterprises in foreign countries. The projects themselves are not federal activities and normally do not involve major

34. Agency for International Development, *Procedure for Environmental Review of Capital Projects*, Manual Circular No. 1214.1 (Sept. 20, 1971).

35. Letter from Richard A. Frank (Center for Law & Social Policy) to Maurice J. Williams, Deputy Administrator, Agency for International Development, July 13, 1972, on file at the Sierra Club.

See also Strausberg, *The National Environmental Policy Act and the Agency for International Development*, 7 Intl. Lawyer 46 (1972).

36. See, e.g., Agency for International Development, *Procurement and Use of AID-Financed Pesticides*, Manual Circular 1612.10.3, (Feb. 12, 1971); Commodity Eligibility Listing, §III, (concerning pesticides), (Jan. 1, 1972).

37. Letter from Bradford Mills, President of OPIC, to Richard A. Frank in response to Sierra Club inquiry, Sept. 10, 1971, on file at the Sierra Club.

participation by OPIC. In addition, most of the projects, which involve individual private businesses, would not significantly affect the quality of the environment."³⁸

The last point may have merit in some cases, but the first two, that the actual projects and their impacts are overseas and that the federal government has little involvement, seem spurious in light of NEPA's purposes and directives, for the "federal action" need not be the project itself.

OPIC has taken limited steps to incorporate environmental considerations into its operations by issuing some weak guidelines.³⁹ These show a willingness to consider environmental matters and to consult with other agencies that have some experience with environmental concerns. The guidelines, however, fall far short of paralleling NEPA's requirements in that they (1) leave the environmental evaluation up to the private applicant; (2) apparently allow for a detailed evaluation process only when "serious adverse environmental effects" are likely; (3) provide no substantive guidance to OPIC's case officers; and (4) require investor compliance only with "current industry practice."⁴⁰

Of the various federal agencies with international involvements, the Export-Import Bank remains farthest from compliance with NEPA, either legally or in spirit. This is particularly unfortunate in view of the major environmental impact of Eximbank-sponsored projects, particularly those in the area of energy.

In response to inquiries from the Sierra Club, Henry Kearns, Eximbank's President and Chairman, replied, "Our Legal Division has reviewed NEPA and has determined that section 102(2)(C) of that Act does not apply to the operations of Eximbank, but applies only to matters pertaining to the natural environment within the United States."⁴¹

He goes on to express Eximbank's concern for environmental quality and to assure that it is doing everything it can "to support international cooperation to prevent a decline in the quality of mankind's world environment." Kearns also sent a memorandum to his loan officers asking them to review environmental concerns in connection with loan proposals.⁴²

38. Letter from Barton Veret, Office of Development, OPIC, to Richard A. Frank, in response to Sierra Club inquiry, Aug. 2, 1972, on file at the Sierra Club.

39. OPIC General Policy, *supra* note 26.

40. Letter from Richard A. Frank (Center for Law & Social Policy) to Barton Veret, OPIC, on behalf of the Sierra Club, Jan. 26, 1972, on file at the Sierra Club.

41. Letter from Henry Kearns, Eximbank, to Richard A. Frank, in response to Sierra Club inquiry, Jan. 6, 1972, on file at the Sierra Club.

42. Export-Import Bank, Memorandum to the Staff, Jan. 1, 1972.

More recent conversations with Eximbank officials reveal that this agency is now in the process of reevaluating its environmental review procedures.

These various federal agencies, in discussing their approach to NEPA, have been quick to point out that their assisted projects and the resulting environmental impacts occur outside the United States. In actuality though, the federal government makes its decisions here in the United States whether to issue permits, authorize or guarantee loans, give grants-in-aid, insure investments, and carry out projects. These governmental decisions are "federal actions" in the sense of NEPA.

The results of these governmental decisions can directly affect the global environment no matter where they are carried out and can have an indirect effect as a result of the example we set. While we should not and cannot tell other nations what to do about their own environments, it is also true that the global environment is the home and concern of all mankind. It seems inconceivable that any federal agency would ignore the opportunity to make productive use of the National Environmental Policy Act to understand what it is doing to the world's environment. This is an important first step in meeting the most significant and challenging problems and opportunities facing man.

In conclusion, the magnitude of the United States' impact on the world's environment demands that we undertake a variety of unilateral measures, from new regulations on exports and imports to a basic reorientation of our foreign policy. We must begin to assert greater control over the environmentally significant activities of our private sector abroad, and decision-making at the federal level must be a more open process involving full compliance with the National Environmental Policy Act.