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WHEN THE NATIONAL ENVIRONMENTAL POLICY ACT COLLIDES WITH THE NORTH AMERICAN FREE TRADE AGREEMENT: THE CASE OF *PUBLIC CITIZEN v. OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE*

Public law litigation¹ on environmental issues has proliferated as Americans begin to recognize the consequences of abusing our natural resources.² The frontal attack on actions deemed harmful to the environment has often focused on initiatives developed or approved by agencies within the federal government.³ The weapons of choice often utilized in this battle against federal agency actions detrimental to the environment are the Administrative

¹ See Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1288 (1976) (describing public law model and suggesting how it affects role of courts in our political and legal systems); Richard H. Fallon, *Of Justiciability, Remedies, and Public Law Litigation: Notes on the Jurisprudence of Lyons*, 59 N.Y.U. L. REV. 1, 9 (1984) (focusing on *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983), as example of new type of public law litigation in which plaintiffs seek to enforce legal principles offending their moral and political values); Cass R. Sunstein, *Standing and the Privatization of Public Law*, 88 COLUM. L. REV. 1432, 1434 (1988) (tracing standing doctrine based on private law litigation); see also Stephen M. MacFarlane, Note, *Lujan v. National Wildlife Federation: Standing, the APA, and the Future of Environmental Litigation*, 54 ALB. L. REV. 863, 864 (1990) (stating that explosion of lawsuits involving environment coincided with increased interest in public law litigation which "emphasized the legitimacy of judicial review in vindicating rights and regulatory benefits conferred by Congress on broad segments of the public").

² See, e.g., Peter Lallas et al., *Environmental Protection and International Trade: Toward Mutually Supportive Rules and Policies*, 16 HARV. ENVTL. L. REV. 271, 273 (1992). The heightened awareness of the nexus between trade and the environment can be traced to several significant developments, including the recognition of "the ecological interdependence of life on earth and the global nature and potentially profound consequences of many environmental problems," the increased volume and expansion of international trade over the past half century, and the release of studies showing "that environmental protection and international trade policies affect each other in several important ways." *Id.* The authors suggest that the Brundtland Report illustrates that "long term environmental protection is an integral requirement of sustainable economic development policy, and that environmentally sound economic development, supported by open trade, is essential for longterm environmental protection." *Id.*; see also Eva H. Hanks & John L. Hanks, *An Environmental Bill of Rights: The Citizen Suit and the National Environmental Policy Act of 1969*, 24 RUTGERS L. REV. 230, 244-65 (1970) (discussing whether National Environmental Policy Act creates judicially protected interest in environment capable of being asserted by citizenry).

³ See VALERIE M. FOGELMAN, *GUIDE TO THE NATIONAL ENVIRONMENTAL POLICY ACT* xi (1990) (stating that between one thousand and two thousand published judicial decisions have been written involving challenges to agency action).

Procedure Act ("APA")⁴ and the National Environmental Policy Act of 1969 ("NEPA").⁵ The adoption of NEPA marked a departure from a one dimensional approach within the federal government which subordinated the importance of environmental management.⁶ Under NEPA, federal agencies are required to develop an

⁴ Administrative Procedure Act, 5 U.S.C. §§ 500-706 (1988) [hereinafter "APA"]. The APA was enacted primarily as a vehicle to ensure fair and efficient procedures within the burgeoning administrative bureaucracy while also serving as a unifying force within the federal government. See Marshall J. Breger, *The APA: An Administrative Conference Perspective*, 72 VA. L. REV. 337, 338 (1986). The APA has remained relatively unchanged throughout the years. *Id.* at 358. Major amendments have included the Freedom of Information Act in 1967, the abolishment of sovereign immunity, and the Government in Sunshine Act. *Id.* Within the APAs a provision for judicial review of agency action was included in order to guard against "excess of power and abusive exercise of power in derogation of private right." *Id.*

⁵ National Environmental Policy Act of 1969, Pub. L. No. 91-1901, 83 Stat. 852 (1970) (codified as amended at 42 U.S.C. §§ 4321-4370 (1988 & Supp. II 1990)). Section 4332 provides, in relevant part:

The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this Act, and (2) all agencies of the Federal Government shall —

(A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decision-making which may have an impact on man's environment;

(B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by title II of this Act, which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decision-making along with economic and technical considerations;

(E) study, develop and describe appropriate alternative to recommended courses of action any proposal which involves unresolved conflicts concerning alternative uses of available resources;

(F) 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;

(G) make available . . . advice and information useful in restoring, maintaining, and enhancing the quality of the environment;

(H) initiate and utilize ecological information in the planning and development of resource-oriented projects; and

(I) assist the Council on Environmental Quality established by title II of this Act.

Id. The Council on Environmental Quality was responsible for assisting in the preparation of the President's annual environmental quality report and served as advisor to the President on environmental policy. *Id.* §§ 4341-47. By executive order, the Council may also promulgate environmental impact statement regulations. Exec. Order No. 11,991, 3 C.F.R. 123 (1977). According to these regulations, agencies must develop Environmental Assessments for projects which may be subject to the NEPA environmental impact statement requirement. *Id.* These Environmental Assessments allow the agency to determine whether an impact statement is needed or to make a finding that no significant impact is foreseen. 40 C.F.R. § 1508.9(a)(1) (1993). Once an impact statement is deemed necessary, the agency must so notify through the Federal Register. 40 C.F.R. § 1501.7 (1993); see also VALERIE M. FOGELMAN, GUIDE TO THE NATIONAL ENVIRONMENTAL POLICY ACT 3-15 (1990) (providing detailed summary of NEPA regulations).

⁶ See EXECUTIVE OFFICE OF THE PRESIDENT: COUNCIL ON ENVIRONMENTAL QUALITY, ENVIRONMENTAL QUALITY: 21ST ANNUAL REPORT 189 (1990) [hereinafter CEQ REPORT]; see also

environmental impact statement for any major recommendation, legislative proposal, or significant undertaking which may materially affect the quality of the environment.⁷ Through what has been characterized as the "action enforcing provision"⁸ of NEPA, Congress sought to ensure that the possible environmental effects of agency actions would become an essential part of the internal agency decision-making process.⁹ However, as NEPA confers no

M. Diane Barber, *Bridging the Environmental Gap: The Application of NEPA to the Mexico-United States Bilateral Trade Agreement*, 5 TUL. ENVTL. L.J. 429, 434 (1992) (discussing need for NEPA); A. Dan Tarlock, *Balancing Environmental Considerations and Energy Demands: A Comment on Calvert Cliffs Coordinating Committee, Inc. v. AEC*, 47 IND. L.J. 645, 658 (1972). "Federal legislation was necessary because the creation of program, mission-oriented agencies has insured that these environmental considerations have been systematically under-represented in most short- and long-range decision making." *Id.* "Existing agencies were established to supervise the development of our natural resources consistent with the ethic which has prevailed throughout this country's history, and thus, they tended to overstress the benefits of development and to explore insufficiently the less environmentally detrimental alternatives to current methods of meeting their programmed objectives." *Id.*

⁷ See 42 U.S.C. § 4332 (1988). This section provides in relevant part:

(2) All agencies of the federal government shall—

(C) include in every recommendation or report on proposals for legislation or other major federal actions significantly affecting the quality of the environment, a detailed statement by the responsible official on—

- (i) the environmental impact of the proposed action,
- (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
- (iii) alternatives to the proposed action,
- (iv) the relationship between local short term uses of man's environment and the maintenance and enhancement of long term productivity, and
- (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Id.

⁸ See CEQ REPORT, *supra* note 6, at 196. Congressional oversight committees have recognized the role this provision has played "in the gain in environmental information available to the federal government and the public . . . [and] increasing the public ability to respond to proposed actions and to recognize their relationship to public criticism. . . ." *Id.*; see also David Bursleson, Note, *NEPA at 21: Over the Hill Already?*, 24 AKRON L. REV. 623, 625 (1991). The author quoted Senator Henry Jackson, a NEPA sponsor, who stated: "[W]hat is needed in restructuring the governmental side of the problem is to legislatively create . . . an action forcing procedure the departments must comply with. Otherwise these lofty declarations are nothing more than that." *Id.*

⁹ See CEQ REPORT, *supra* note 6. NEPA embodied Congress's "expressed determination to move the nation in a comprehensive manner toward accommodation of the disparate goals of economic growth and preservation of a quality environment." *Id.*; S. REP. NO. 296, 91st Cong., 1st Sess. 13 (1969). The report stated: "The pursuit of greater material wealth and increased productivity, the quest for scientific knowledge, and the requirements of world wide responsibilities have had unplanned and often unforeseen consequences in the form of resource depletion, pollution, ill-conceived urbanization, and other aspects of environmental degradation." *Id.* Though the drafters may not have foreseen an instrument in the nature of NAFTA, the language and the policy behind NEPA demonstrates that the "future oriented scheme adopted by Congress was designed explicitly to take account of impending as well as present crises in this country and in the world as a whole". *City of Los Angeles v. National Highway Traffic Safety Admin.*, 912 F.2d 478, 491 (D.C. Cir. 1990) (quoting language of NEPA).

right of action, the APA provides the means of enforcement by private parties.¹⁰

Relying on NEPA, some environmental groups have attacked the North American Free Trade Agreement ("NAFTA").¹¹ NAFTA, ratified by Congress¹² and signed by President George Bush on December 17, 1992, will create a common market in North America by gradually eradicating or minimizing tariff and non-tariff barriers between the United States, Canada, and Mexico.¹³ The treaty will create the world's largest free trade zone.¹⁴ However, the environmental effects of NAFTA, and the manner in which they will be monitored, was a point of contention throughout the negotiating process.¹⁵ Some commentators have posited

Only a clear and unavoidable conflict between an agency's own statutory mandate and NEPA's directives will allow an agency to escape NEPA's reach. *See id.* at 491; *Calvert Cliffs Coordinating Comm., Inc. v. United States Atomic Energy Comm'n*, 449 F.2d 1109, 1115 (D.C. Cir. 1971) (relieving agency of NEPA duties where specific statutory obligation made performance of duties impossible). Congress has at times passed legislation specifically exempting agency projects from NEPA, and the courts have upheld such provisions. *See* 15 U.S.C. § 719(h)(c) (1988) (exempting judicial review under NEPA regarding adequacy of Alaska pipeline environmental impact statement); 15 U.S.C. § 793(d) (1988) (exempting certain transmissions facilities at specific site).

¹⁰ *See* APA, 5 U.S.C. § 702; *see also* *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 410-11 (1971) (holding judicial review of agency action upon challenge of private party to be available under APA unless expressly forbidden by statute).

¹¹ *See, e.g., Environmental Community Cites Flaws in Border Plan, Environmental Review*, 15 Int'l Envtl. Rep. (BNA) 136 (Mar. 11, 1992); *Environmental Groups Criticize Negotiations on North American Free Trade Agreement*, Inside U.S. Trade, (Nov. 20, 1992), at 17; *Environmentals' Letter on NAFTA*, Inside U.S. Trade, (July 24, 1992) at 16 (reprinting letter from 50 American, Canadian, and Mexican environmental groups). *But see* Gary Lee, *At Border, NAFTA's Environmental Promise Is Murky*, WASH. POST, Nov. 15, 1993, at A1 (noting Sierra Club and Friends of the Earth opposed NAFTA while National Wildlife Federation supported it); *Six Environmental Organizations Back NAFTA, Denounce Opponents*, Inside U.S. Trade, Sept. 17, 1993, at S-1 (outlining split in environmental groups on NAFTA).

¹² North American Free Trade Agreement Implementation Act, Pub. L. No. 103-182, 107 Stat. 2057 (1993). On November 17, 1993, the House of Representatives adopted legislation to implement NAFTA starting January 1, 1994 by a vote of 234 to 200. *Id.* The Senate followed suit on November 20, 1993. *Id.*

¹³ *See infra* note 14 (describing genesis of NAFTA).

¹⁴ *See* Mickey Kantor, *At Long Last, A Trade Pact to be Proud Of*, WALL ST. J., Aug. 17, 1993, at A14. The proposed NAFTA will create a continental market including 360 million people and a GNP of \$6 trillion. *Id.* NAFTA's genesis was marked by an agreement, signed on June 10, 1990, between President George Bush and Mexican President Carlos Salinas to minimize tariff and non-tariff barriers between the two nations. *Id.* Canada joined the agreement in February of 1991 and in June of 1991 President Bush authorized the Office of the United States Trade Representative to begin negotiations. *Id.* Formal negotiations began on June 12, 1991. *Id.* *See generally* *Testimony of Carla A. Hills, United States Trade Representative, Before the Subcommittee on Trade, Committee on Ways and Means, United States House of Representatives, June 14, 1990*, 22 ST. MARY'S L.J. 583, 585 (1991) (outlining U.S. policy toward Mexico and future of United States-Mexico trade relations).

¹⁵ *See* Michael Gregory, *Environment, Sustainable Development, Public Participation, and the NAFTA: A Retrospective*, 7 J. ENVTL. L. & LITIG. 99, 99 (1992). In a detailed exposition of NAFTA's evolution, the author stated that the negotiation process involved an ex-

that the trade agreement will have dire consequences on the environment and on domestic laws pertaining to the environment.¹⁶ Specifically, they argue NAFTA will ultimately lead to a "downward harmonization" of U.S. domestic environmental standards in an effort to promote trade.¹⁷ Moreover, NAFTA will create incentives for industry to relocate to Mexico and evade more stringent environmental laws.¹⁸ Such environmental concerns fueled the development of the North American Agreement on Environ-

traordinary level of public participation and comment and that the trade agreement's approval depended on the treatment given to environmental issues by the administration. *Id.*; see also John K. Kim & James P. Cargas, *The Environmental Side Agreements to the North American Free Trade Agreement: Background and Analysis*, 23 *Envtl. L. Rep. (Envt. L. Inst.)* 10,720, 10,722 (1993). Environmental groups sought approval by NAFTA negotiators of 5 basic demands:

- 1) increased public participation, access to information, and oversight in dispute resolution and monitoring processes i.e. "transparency"; 2) improved enforcement and monitoring of environmental laws already in existence and the threat of trade sanctions for non-enforcement; 3) secure and adequate sources of funding for environmental infrastructure, environmental enforcement, and clean up efforts; 4) protection of national, provincial, state and local environmental and health standards from challenges under NAFTA; and 5) the establishment and protections of process standards or production process methods.

Id.

¹⁶ See Ron Wyden, *Foreword, Using Trade Agreements to Protect the Environment*, 7 *J. ENVTL. L. & LITIG.* 1, 1-2 (1992). The author stated that "the interaction between trade and the environment has rocketed to prominence" and led to creation of voting bloc of over 40 Congressman who conditioned their support for NAFTA on pledge by President Bush to "preserve the environment." *Id.*

¹⁷ See Petitioner's Writ of Certiorari at 6, *Public Citizen v. Office of the Trade Representative*, 5 F.3d 549 (D.C. Cir. 1993) (No. 93-5212), *cert. denied*, 126 L. Ed. 2d 652 (1994). Plaintiffs alleged NAFTA would:

[i]ncrease trade-related and other land transportation, which will increase air pollution in all three countries . . . Third, NAFTA established rules for evaluating whether domestic food safety and other health and environmental standards impose impermissible trade barriers. . . . Depending on the precise meaning of NAFTA's standard's provisions, measures such as emissions standards, pesticide residue bans, and restrictions on the transportation of hazardous materials. [Moreover], by reducing tariffs and other trade barriers in some economic sectors but not others, NAFTA creates incentives for certain types of development which will, in turn, have significant environmental impacts. For example, NAFTA's energy chapter expressly permits incentives for oil and gas exploration, but not for renewable energy or energy efficiency, which will increase development of non-renewable energy sources in all three countries.

Id.; see also Daniel Esty, *Beyond Rio: Trade and the Environment*, 23 *ENVTL. L.* 387, 390 (1992). The author highlighted four prominent environmental concerns raised by NAFTA. *Id.* at 390-91. First, that linking the United States with Mexico through a trade agreement will result in a "downward harmonization" whereby high U.S. environmental standards would be lowered. *Id.* at 391. Second, pollution from Mexican industry along the U.S.-Mexico border would spill over into the United States. *Id.* Third, environmental groups were not involved in the process of developing NAFTA and therefore the effects on the environment were not taken into consideration. *Id.* Fourth, "dirty" American industries will move factories to Mexico to evade tough U.S. anti-pollution laws, creating a "pollution haven." *Id.* at 392.

¹⁸ See Kurt Hofgard, *Is This Land Really Our Land?: Impacts of Free Trade on U.S. Environmental Protection*, 23 *ENVTL. L.* 635, 637 (1993) (providing thorough analysis of NAFTA's potential environmental impacts).

mental Cooperation ("side agreement") which established and empowered a three nation bureaucracy to monitor and pursue environmental problems.¹⁹

However, in *Public Citizen v. Office of the United States Trade Representative*,²⁰ Public Citizen, Friends of the Earth, and the Sierra Club claimed that the side agreement was insufficient and brought suit²¹ to compel the Office of the United States Trade Representative ("Trade Office") to produce an environmental impact statement before NAFTA was submitted to Congress.²² In

¹⁹ See generally Kim & Cargas, *supra* note 15, at 10,725-26. Initial negotiations on the Environmental Side Agreement to NAFTA began under the Bush Administration on December 15, 1992. *Id.* Little progress was made. *Id.* The Clinton Administration restarted the negotiations in early 1993 wherein Mexican and American representatives agreed to several general principles reflecting respect for national sovereignty, "that NAFTA would not be re-opened, and that the side agreements should not open the door for disguised protectionism. *Id.* President Clinton signed the finished document on September 14, 1993. *Id.* The Agreement "has been described as an international executive agreement" and accompanied both NAFTA and the implementing legislation to Congress. *Id.*

The North American Agreement on Environmental Cooperation ("Side Agreement"), is roughly broken into seven parts. *Id.* Part one of the side agreement lists the overall objectives. *Id.* Part two sets forth general commitments of the Parties to establish laws and procedures providing for high levels of environmental protection and enforcement. *Id.* Part three sets forth the general structure of the new Commission for Environmental Cooperation. *Id.* It is to be comprised of a Council, a Secretariat, and a Joint Public Advisory Committee. *Id.* Part four of the Side Agreement contains provisions relating to cooperation and provision of information among the parties. *Id.* Part five contains the general procedure for consultation and resolution of disputes among the signatory nations or Parties. *Id.* The dispute resolution procedures are available only when a Party complains that another Party has engaged in a "persistent pattern of failure . . . to effectively enforce its environmental law." *Id.* Finally, parts six and seven of the Side Agreements contain miscellaneous general provisions, including the definitional article. *Id.*; see also *Completing the Package: Supplemental Agreements on Environment, Labor and Import Surges; North American Free Trade Agreement Supplemental Provisions*, BUSINESS AM., Oct. 18, 1993, at 26 (discussing side agreement).

²⁰ 5 F.3d 549 (D.C. Cir. 1993), *cert. denied*, 114 S. Ct. 685 (1994).

²¹ *Public Citizen v. Office of the Trade Representative*, 782 F. Supp. 139, 140 (D.D.C. 1992) [hereinafter *Public Citizen I*]. In their original suit, plaintiffs, Public Citizen, the Sierra Club and Friends of the Earth, environmental advocacy groups based in Washington D.C., also sought an environmental impact statement for the Uruguay Round of negotiations under the General Agreement on Tariffs and Trade. *Id.* The complaint initially sought an injunction prohibiting the OTR and President Bush from entering into the trade agreement until the environmental impact requirement was met. *Id.* However, plaintiffs acknowledged that such relief might interfere with the President's constitutional powers and therefore removed this element of the claim. *Id.* In the district court, plaintiffs argued that the defendant's failure to develop an environmental impact statement adversely affected their ability to inform Congress and the public of the environmental and health consequences of the trade agreement. *Id.*

²² *Public Citizen v. Office of the United States Trade Representative*, 5 F.3d at 550. Plaintiffs urged judicial intervention during the negotiation process since NAFTA would receive "fast track" treatment, pursuant to 19 U.S.C. §§ 2107-2487, §§ 2902-2903 (1988), when submitted to Congress. *Id.* When the President requests fast track authority for an agreement, Congress must affirmatively act to deny it or it is granted. 19 U.S.C. § 2191 (1988). Fast track procedures were previously limited to agreements made prior to June 1, 1991, but Congress extended it by two years. 19 U.S.C. § 2903(b)(1) (1988). Under the fast

their second and final foray in court, the United States Court of Appeals for the District of Columbia Circuit held that the plaintiffs failed to demonstrate the existence of "final agency action" as required by the APA.²³ Analogizing the facts of *Public Citizen* to those presented in the Supreme Court decision of *Franklin v. Massachusetts*,²⁴ and applying the standard for finality articulated therein, the circuit court held that no final action was presented since NAFTA had not been submitted to Congress by the President.²⁵ The court further reasoned that since finality could only be realized by an act of the President, and he was not an agency within the meaning of the APA, no "final agency action" could exist to confer jurisdiction on the plaintiffs.²⁶

Part One of this Note follows the evolution of the litigation through the federal courts. Part Two briefly examines the nature of standing under NEPA and the APA, and analyzes the implications of applying the finality standard articulated in *Franklin v. Massachusetts* to *Public Citizen II*. Part Three argues that the *Public Citizen II* court should have addressed the narrower issue of whether requiring the Trade Office to develop an environmental impact statement for NAFTA would be consistent with the foreign policy of the United States. Part Three also evaluates the decisional law involving NEPA's application in, and potential conflict with, foreign policy initiatives of the United States.

I. PUBLIC CITIZEN v. UNITED STATES TRADE REPRESENTATIVE

A. *Public Citizen I*

Plaintiffs brought suit on August 1, 1991, to compel the Trade Office to develop an environmental impact statement for

track process, once NAFTA is submitted to Congress, it has 60 days to approve or rejects it without amendment. 19 U.S.C. § 2191(c),(e),(d) (1988); see also, *Hearing Before the Subcommittee of Trade of the House Committee on Ways and Means*, 102d Cong., 1st Sess. (1991) (reviewing arguments against fast track procedure based on environmental concerns); Edmund W. Sim, *Derailing the Fast Track for International Trade Agreements*, 5 FLA. J. INT'L L. 471 (1990) (providing detailed analysis of fast track process).

²³ See *infra* notes 37-56 and accompanying text (discussing circuit court decisions in *Public Citizen II*).

²⁴ 112 S. Ct. 2767 (1992).

²⁵ See *infra* notes 57-70 and accompanying text (discussing circuit court's analogy of *Public Citizen* to *Franklin* decision).

²⁶ See *Public Citizen v. United States Trade Representative*, 5 F.3d 549, 551-52 (D.C. Cir. 1993).

NAFTA.²⁷ In analyzing plaintiffs' claims, the district court stated that they were required to meet the constitutional requirements of standing and ripeness, and the separate general review provisions of the APA.²⁸ Specifically, the court reasoned that section 702 of the APA required the identification of some "final agency action" affecting plaintiff, and the demonstration that plaintiff was aggrieved within the meaning of the relevant statute.²⁹ Relying on the Supreme Court's discussion of standing and ripeness in *Lujan v. National Wildlife Federation*,³⁰ the district court held plaintiffs did not have standing.³¹ The court concluded that the routine activities of the Trade Office, as it engaged in the negotiation process, did not constitute a major federal action significantly affect-

²⁷ *Public Citizen I*, 782 F. Supp. at 141-42. In *Public Citizen I* plaintiffs also sought an environmental impact statement for the General Agreement on Tariffs and Trade ("GATT"). *Id.* In *Public Citizen II* plaintiffs dropped GATT from the lawsuit as it remained unsigned whereas the basis for the second effort with NAFTA was that the President had signed the agreement. *Public Citizen II*, 5 F.3d at 550-51.

²⁸ *Public Citizen I*, 782 F. Supp. at 141-42.

²⁹ *Id.*

³⁰ 497 U.S. 871 (1990).

³¹ *Public Citizen I*, 782 F. Supp. at 142-44. *Lujan* involved an attempt by the Bureau of Land Management ("BLM"), a federal agency within the Department of the Interior, to reclassify land for public and private use pursuant to a land review withdrawal program. *Lujan v. National Wildlife Fed'n*, 497 U.S. at 879. The National Wildlife Federation claimed that the BLM's decision to reclassify land in Wyoming and Arizona violated sections 202 and 302 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. 1712(a), 1732(a) (1988), for failing to adequately maintain the lands and consider other uses; that its failure to adequately assess the environmental impact of the land reclassification violated NEPA; and that its actions were an abuse of discretion under the APA. *Id.* In a multilayered opinion, the Court held that plaintiffs had no standing. *Id.* at 898-99. It stated that the land withdrawal review program was not a "final agency action" within the meaning of the APA since it did not constitute a single administrative act, but referred to a general scheme of action. *Id.* at 899. The Court also found that while plaintiffs' affidavits adequately met the zone of interest test, they failed to demonstrate whether plaintiffs were "actually affected" by the BLM's actions. *Id.* at 891-93.

The *Lujan* decision has been criticized as unduly burdening plaintiffs who seek to enforce environmental laws. See E. Gates Garrity-Rokous, *Preserving Review of Undeclared Programs: A Statutory Redefinition of Final Agency Action*, 101 YALE L.J. 643, 655-56 (1991) (asserting *Lujan* interpretation of APA is contrary to congressional intent); Bradley J. Larsen, Casenote, *Meeting the Requirements of Standing: A Framework for Environmental Interest Groups: Lujan v. National Wildlife Federation* 14 HAMLIN L. REV. 277, 278 (1990) (stating decision "represents a setback for environmental groups and those who attempt to seek judicial review of agency action have been largely thwarted through the manipulation of the standing doctrine"); Sarah A. Robichaud, *Lujan v. National Wildlife Federation: The Supreme Court Tightens the Reins on Standing for Environmental Groups*, 40 CATH. U. L. REV. 443, 470 (1991) (asserting that Justice Scalia's restrictive views on standing doctrine were determinative in decision and will make it more difficult for environmental organizations to plead redressable harm); Edward B. Sears, *Lujan v. National Wildlife Federation: Environmental Plaintiffs Are Tripped Up on Standing*, 24 CONN. L. REV. 293, 296 (stating Court's decision has elevated standing requirement and represents departure from previously liberal standards for standing).

ing the nature of the environment within the meaning of NEPA so as to trigger the environmental impact statement obligation.³²

The United States Court of Appeals for the District of Columbia Circuit affirmed the lower court decision, but directed its analysis to the jurisdictional requirement of finality mandated by section 704 of the APA.³³ Noting that a mere refusal to develop an impact statement did not constitute "final agency action," the court required plaintiffs to delineate a concrete legislative proposal that would trigger the obligation of preparing an environmental impact statement.³⁴ The circuit court found that since NAFTA was only in draft form and susceptible to change, there was no judicially reviewable "final agency action."³⁵ The court concluded that judicial intervention was not appropriate until a report of the proposal was offered and the plaintiffs alleged either the inadequacy of the environmental impact statement or its non-existence.³⁶

B. *Public Citizen II: Plaintiffs Recommence the Suit*

Plaintiffs again sought judicial intervention after NAFTA was signed by representatives of the United States, Mexico and Canada on October 7, 1992.³⁷ The cause of action was based on the theory that "final agency action" had occurred and jurisdiction was therefore conferred under the APA.³⁸ Defendants argued that the case of *Franklin v. Massachusetts*³⁹ controlled the present con-

³² *Public Citizen I*, 782 F. Supp. at 143 (describing activities of Office of the Trade Representative as "formulating negotiation positions, drafting language for proposed terms, and communicating with other negotiating parties").

³³ *Public Citizen I*, 970 F.2d at 918-19 (D.C. Cir. 1992).

³⁴ *Id.* at 918-19.

³⁵ *Id.* at 919.

³⁶ See *id.* The court also rejected plaintiffs attempts to analogize their case to *Trustees for Alaska v. Hodel*, 806 F.2d 1378 (9th Cir. 1986), where ripeness was found in an action enjoining the Department of the Interior from submitting a report to Congress until the Department complied with NEPA. *Id.* The *Public Citizen I* court stated that unlike *Trustees for Alaska*, where the agency intended the report to contain a "proposal for legislation," defendants herein were not required to complete NAFTA, nor was there indisputable evidence that the trade agreement would be submitted to Congress. *Public Citizen I*, 970 F.2d at 920.

In affirming the judgment, the District of Columbia Circuit reiterated the lower court's finding that there was no final resolution on the NAFTA at the time of suit. *Id.* at 918-19. It also noted that the defendants were not in any way required to complete the trade agreement and declined to speculate on the likelihood that the agreement would ever become final. *Id.* at 923.

³⁷ *Public Citizen v. U.S. Trade Representative*, 822 F. Supp. 21 (D.D.C. 1993) [hereinafter *Public Citizen II*].

³⁸ *Id.* at 23-24.

³⁹ 112 S. Ct. 2767 (1992).

trover. In *Franklin*, the State of Massachusetts and two registered voters sued the President and other public officials alleging that the method⁴⁰ used to calculate the 1990 census was unconstitutional,⁴¹ arbitrary, and capricious.⁴² According to the reapportionment statute,⁴³ after the census was taken by the Secretary of Commerce, the President would submit the tabulation to Congress.⁴⁴ In addressing the jurisdictional question under the APA, the Supreme Court sought to determine whether any "agency" or "final agency action" was presented, so as to allow judicial review.⁴⁵ Applying a two tier analysis, the Court first looked at whether the agency's decision-making process was completed, and second whether the result directly affected the parties.⁴⁶ The Court reasoned that since the statute expressly required the President to provide Congress with the apportionment results, it was the President's action which would have a direct effect on the plaintiffs.⁴⁷ Secondly, the Court concluded that since the action

⁴⁰ *Id.* at 2771. The dispute involved the decision to use "home of record" as a method of including overseas personnel in the census. *Id.* "Home of record" establishes where the military person will be relocated after his or her term of service is completed. *Id.* A controversy existed because the military people would designate the "home of record" in a state with low or no income taxes rather than their place of residence. *Id.* Thus the Census Bureau decided not to include overseas employees in the 1980 census. *Id.* However, the decision was made to include them in the 1990 census using home of record when other options did not materialize. *Id.* at 2771-73.

⁴¹ *Id.* at 2773. Plaintiffs alleged that the apportionment method did not adhere to the constitutional mandate that the number of representatives be determined by an "actual Enumeration" of individuals "in each State." *Id.*; see also U.S. CONST., art. I, § 2, cl. 3; U.S. CONST. amend. XIV, § 2.

⁴² *Franklin*, 112 S. Ct. at 2773.

⁴³ *Id.* at 2770. The Constitution mandates that the apportionment of Representatives be determined by an "actual Enumeration" of persons in each state "conducted every 10 years." See U.S. CONST. art. I, § 2 cl. 3; U.S. CONST. amend. XIV cl. 2. Due to political considerations, Congress enacted a statute which made the apportionment process self-executing and designated the Secretary of Commerce and the President to determine the number of representatives without congressional participation. *Franklin*, 112 S.Ct. at 2771; 13 U.S.C. § 141(a) (1988) (provides Secretary may develop census "in such form and content as [s]he may determine").

⁴⁴ *Franklin v. Massachusetts*, 112 S. Ct. 2767, 2771 (1992).

⁴⁵ *Id.* at 2772.

⁴⁶ *Id.* at 2773.

⁴⁷ *Id.* The Court also rejected the existence of finality by concluding that since the President would amend the census report or request reformation after its submission by the Secretary, the report constituted a "moving target" and was in the nature of a general recommendation rather than a final determination. *Id.* at 2774-75. Believing that the Secretary's actions were neither arbitrary nor capricious, Justice Stevens, joined by Justices Blackmun, Kennedy and Souter, concurred in the judgment, but found surprising and erroneous the Court's conclusion that deliverance of the census report to the president was not "final agency action" within the meaning of the APA. *Id.* at 2783. Justice Stevens examined the legislative history and the statutory language of the Census Act and found that Congress did not intend to give the President any substantive role in the census process. *Id.* at

under dispute was that of the President, and he was not an agency within the meaning of the APA, judicial review was unavailable.⁴⁸ Though the Court recognized that the APA did not explicitly exclude the President,⁴⁹ it held that separation of powers considerations and the position of the president necessitated that the APA not be applied to him.⁵⁰

Defendants argued that the *Public Citizen* court was similarly constrained and did not have jurisdiction because NAFTA, like the census report, was a product of presidential action and therefore outside the scope of NEPA and the APA.⁵¹ Characterizing defendant's arguments as a "misread[ing]" of the relevant statutes and case law,⁵² the district court held that once signed and submitted to Congress, the trade agreement had been finalized, and therefore constituted "final agency action."⁵³ The court distinguished *Franklin* by concluding that the instrument involved therein was a tentative recommendation whereas NAFTA was a completed document.⁵⁴ Moreover, plaintiffs had standing under NEPA because of the "reasonable risk" that NAFTA would not

2779-80. Rather, his participation was to be wholly ministerial and not discretionary. *Id.* at 2781. Moreover, Stevens asserted that the characterization by the majority of the Census Report as a "tentative recommendation" was misleading because the Census Report is a public document and is released to federal and state agencies at the same time it is submitted to the President. *Id.* at 2782. If the President changed the figures after receiving them from the Secretary, the states and the federal government would be working with different numbers, thereby destroying the goal of uniformity. *Id.* at 2783. Stevens stated that the "logic of the Court's opinion escapes [him], and apparently was not obvious to the Solicitor General, for he advances no such novel claim in his argument for reversal." *Id.* at 2779. The appropriate focus of the finality inquiry should have been the Secretary of Commerce. *Id.*

⁴⁸ *Id.* at 2772. The concurrence stated that since it found the Secretary's actions to be reviewable, it did not need to consider whether the President was an agency within the meaning of the APA. *Id.* at 2783 n.15 (Stevens, J., concurring).

⁴⁹ See 5 U.S.C. §§ 701(b)(1), 551(C) (1988). The APA defines agency as "each authority of the government of the United States, whether or not it is within or subject to review by another agency, but does not include—(A) the Congress; (B) the courts of the United States; (C) the government of the territories or possessions of the United States; (D) the government of the District of Columbia." *Id.* at § 701(b)(1)(A).

⁵⁰ *Franklin v. Massachusetts*, 112 S. Ct. 2767, 2775 (1992).

⁵¹ *Public Citizen v. Office of the Trade Representative*, 822 F. Supp. 21, 24 (D.D.C. 1993).

⁵² *Id.* at 25.

⁵³ *Id.* at 21.

⁵⁴ *Id.* at 11-26. [T]he NAFTA is in stark contrast to the census report in *Franklin* because the NAFTA is a complete, and most importantly, a final product that will not be changed before submission to Congress. The NAFTA that was negotiated and signed by the Trade Representative is the same document that shall be submitted to Congress and which is the subject of this suit." *Id.*

only give rise to environmental injury, but also affect state and federal health and environmental laws.⁵⁵

Relying on the *Franklin* decision, the United States Court of Appeals for the District of Columbia Circuit reversed the district court judgment and held that no "final agency action" existed to permit judicial review.⁵⁶ Writing for the court, Chief Judge Mikva adopted the reasoning of *Franklin* in three respects.⁵⁷ First, he adopted the definition of "final agency action" as an event occurring when the agency's decision making process was completed, and the result directly affected the parties.⁵⁸ He then concluded that it was the non-obligatory transmittal of NAFTA by the President, not finalization of negotiations by the Trade Office, which would affect the plaintiffs.⁵⁹ Until that sequence of events was

⁵⁵ *Id.* at 27. While claiming no reliance, the court focused on plaintiff's catalogue of health and environmental measures possibly affected by NAFTA such as pesticide residue standards, chemical bans, bans on seafood imports based on certain environmental criteria, and pollution control. *Id.* at 27 n.7, 29 n.11. The court further emphasized the problems at the notorious limited free trade zone, known as the maquiladora program, as evidence that environmental harm to individual members of the plaintiff organizations on the United States-Mexico border were concrete enough to demonstrate standing. *Id.* at 28; see generally Angela C. Montez, Note, *The Run Past the Border: Consequences of Treating the Environment under NAFTA as a Border Issue*, 5 GEO. INT'L ENVTL. L. REV. 417, 419 (1993).

The maquiladora program was instituted by Mexican President Gustavo Diaz Ordaz and allows foreign businesses to operate assembly plants along a border encompassing 2000 miles from the Pacific Ocean to the Gulf of Mexico and 65 miles on each side of the international boundary. *Id.* at 420-21. Through this program, certain goods are imported duty free into Mexico by wholly owned subsidiaries of the participating businesses. *Id.* The program's popularity stems from the benefits derived by businesses which utilize the cheap labor while also avoiding having to pay double duties on their finished goods. *Id.* At the same time, the maquiladora plants employ one tenth of Mexico's labor force and the industry is the second largest generator of foreign exchange. *Id.* Yet these factors have contributed to the creation of an environmental disaster area. *Id.* at 422. The contaminated water has caused widespread hepatitis along the Mexican border and in Arizona, hepatitis outbreaks are twenty times the national average. *Id.* at 422 n.33.

In order to address these concerns, the "Agreement Between the United States and the United Mexican State on Cooperation for the Improvement of the Environment in the Border Area" was developed in 1983. *Id.* at 423. A second plan, the Integrated Environmental Plan for the United States-Mexico Border Area was signed in March 1992. *Id.* at 417; see also Daniel I. Basurto Gonzalez & Elaine Flud Rodriguez, *Environmental Aspects of Maquiladora Operations: A Note of Caution for United States Parent Corporations*, 22 ST. MARY'S L.J. 659, 662 (1991) (discussing status of Mexican statutes and regulations pertaining to environmental concerns and maquiladora plants in Mexico and exploring potential liability of United States corporations with subsidiaries operating in maquiladora operations); Matilde K. Stephenson, *Mexico's Maquiladora Program: Challenges and Prospects*, 22 ST. MARY'S L.J. 589, 590 (1991) (discussing Maquiladora Program from perspective of governments of United States and Mexico as well as industrial entities).

⁵⁶ *Public Citizen v. U.S. Trade Representative*, 5 F.3d 549, 553 (D.C. Cir. 1993), cert. denied, 114 S. Ct. 685 (1994).

⁵⁷ *Public Citizen II*, 5 F.3d at 553.

⁵⁸ *Id.* at 551 (citing *Franklin v. Massachusetts*, 112 S. Ct. 2767, 2773 (1992)).

⁵⁹ *Id.*

completed, plaintiffs and their members could suffer no injury.⁶⁰ Yet, as in *Franklin*, judicial review would be precluded because the President was not an "agency" within the meaning of the APA.⁶¹ Secondly, the court emphasized the role of the President articulated in the Omnibus Trade and Competitiveness Act of 1974.⁶² The statute vests in the President, rather than the Trade Office, the primary responsibility for developing trade agreements.⁶³ Such a mandate, according to the court, was evidence that the legislature accorded significant importance to the role of the President in trade negotiations.⁶⁴ Lastly, the court concluded that NAFTA lacked finality as did the census report at issue in *Franklin*, since the President had discretion to renegotiate elements of the trade agreement or even refuse to submit it to Congress.⁶⁵

While recognizing the "stringency of *Franklin's* 'direct effect' requirement,"⁶⁶ Chief Judge Mikva dismissed the plaintiffs' allegation that its application in NEPA cases would disable the legislative environmental impact statement requirement.⁶⁷ In response, he stated that *Franklin* was only applicable where the President's constitutional or statutory responsibilities were the final steps in a series of actions which directly affected the parties.⁶⁸ The court declined to entertain the case on the merits,⁶⁹ asserting the judici-

⁶⁰ *Id.* at 551. Public Citizen also argued that the Trade Office's failure to develop an environmental impact statement "directly affected" their ability to lobby Congress and disseminate information. *Id.* at 552. The court dismissed this argument by stating that "an agency's failure to prepare an [environmental impact statement], by itself, is not sufficient to trigger APA review in the absence of identifiable substantive agency action putting the parties at risk." *Id.*

⁶¹ *Id.* at 551-52; see also *Armstrong v. Bush*, 924 F.2d 282, 288-89 (D.C. Cir. 1991). The *Armstrong* court rejected plaintiff's arguments that the exclusion of the President from the APA's definition of "agency" implied that the President was in fact an agency within the court's reach. *Id.* at 288. Instead, it found the textual silence, the legislative history, "the canons of construction applicable to statutes that implicate the separation of powers," and the long standing practice of the executive branch dispositive and showing that Congress did not intend to reach the President's action via the APA. *Id.* at 289.

⁶² 19 U.S.C. §§ 2101-2495 (1988).

⁶³ *Public Citizen II*, 5 F.3d at 552.

⁶⁴ *Id.*

⁶⁵ *Id.* The court found significant the fact that President Clinton had conditioned his approval of the NAFTA on the successful development of several side agreements, while finding insignificant his statements that he would indeed submit NAFTA to Congress. *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.* at 552-53.

⁶⁸ *Public Citizen v. United States Trade Representative*, 5 F.3d 549, 552 (D.C. Cir. 1993).

⁶⁹ *Id.* Defendants had sought to argue "weighty constitutional positions on the separation of powers and Public Citizen's lack of standing, as well as the inapplicability of NEPA

ary had "no role to play," and that the future of NAFTA was in the hands of the political branches.⁷⁰

In the concurring opinion, Judge Randolph accepted the court's interpretation of *Franklin*,⁷¹ but expressed concern that the application of its finality standard to a NEPA case unwittingly nullified the environmental impact statement requirement.⁷² He reasoned that if only members of Congress have the authority to introduce and present a bill encompassing a legislative proposal submitted by an agency, then no individual or organization could claim to be directly affected by an agency created proposal.⁷³ Judicial review would be denied since there could never be "final agency action" until Congress acted.⁷⁴ This interpretation of the APA, according to Judge Randolph, seemingly contradicted the intent of NEPA to require the preparation of an environmental impact statement earlier in the legislative process.⁷⁵

II. STANDING UNDER NEPA AND THE APA

A fundamental tenet of judicial review in federal courts requires that a complainant have standing.⁷⁶ This requirement stems from Article III of the United States Constitution which provides that

to agreements executed pursuant to the Trade Acts in general, and NAFTA in particular." *Id.*

⁷⁰ *Id.* at 553. "The political debate over NAFTA in Congress has yet to play out. Whatever the ultimate result, however, NAFTA's fate now rests in the hands of the political branches." *Id.*

⁷¹ *Id.* Judge Randolph agreed that there was no final action since President Clinton had not submitted the NAFTA for Congressional approval and that even if he does submit it, his actions are not reviewable because the President is not an agency. *Id.* However, Judge Randolph stated that it was "enough to hold that regardless of whether the president's submission of NAFTA to congress would be final action, there is no 'final' action that can be attributed to an 'agency.'" *Id.*

⁷² *Id.* at 553-54.

⁷³ *Public Citizen v. United States Trade Representative*, 5 F.3d 549, 553-54 (D.C. Cir. 1993).

⁷⁴ *Id.*

⁷⁵ *Id.* Judge Randolph also stated "there is a big difference in saying that APA review is unavailable and saying that officials do not have to comply with NEPA when they suggest legislation. . . . I am therefore not prepared to say whether in NEPA cases, the act of proposing legislation constitutes final agency action." *Id.* at 554 (Randolph, J., concurring).

⁷⁶ See *Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130, 2136 (1992). The Court stressed the importance of courts exercising jurisdiction only over "cases and controversies" as fundamental to the integrity of the separation of powers doctrine articulated in the Constitution. *Id.* The "irreducible constitutional minimum of standing" required a plaintiff suffer an injury in fact or an invasion of a legally protected interest, and demonstrate a causal relationship between the injury and the offending action or inaction. *Id.*

only "cases and controversies" may be brought before a court.⁷⁷ Co-existing with the constitutional limitations are court made prudential inquiries which address whether the complainant is within the zone of interest encompassed by the statute in question.⁷⁸

Under the APA, standing is conferred upon a NEPA petitioner "adversely affected or aggrieved by agency action within the meaning of a relevant statute."⁷⁹ In the leading case of *Association*

⁷⁷ See *Valley Forge Christian College v. Americans United For Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982) (stating that standing requirement "assures an actual factual setting in which the litigant asserts a claim of injury in fact"); *Warth v. Seldin*, 422 U.S. 490, 498 (1975); *Association of Data Processing Serv. Org. v. Camp*, 397 U.S. 150, 152 (1970); *Flast v. Cohen*, 392 U.S. 83, 94 (1968) (stressing complexity of case or controversy requirement); *Suntex Dairy v. Bergland*, 591 F.2d 1063, 1066 (5th Cir. 1979) (outlining how plaintiff may be found within zone of interest of relevant statute). Standing serves the purpose of ensuring that the parties are "truly adverse and therefore likely to present the case effectively, ensuring that the people most directly concerned are able to litigate the questions at issue, ensuring that a concrete case informs the court of the consequences of its decisions, and preventing the anti-majoritarian federal judiciary from usurping the policy making functions of the popularly elected branches." William Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 222 (1988) (arguing standing doctrine is not appropriate for accomplishing its intended purposes and offering new structure).

⁷⁸ See *Suntex Dairy*, 591 F.2d at 1066. *Suntex Dairy* examined the requirements for plaintiffs to be within the zone of interest. *Id.* Factors considered include whether the plaintiff is litigating his or her own interest and not those of a third party not present, and whether the court is adjudicating abstract questions of wide public significance or generalized grievances shared by the public at large. *Id.*; see also Stephen McFarlane, Note, *Lujan v. National Wildlife Federation: Standing, the APA, and the Future of Environmental Litigation*, 54 ALBANY L. REV. 863, 876 (1990) (commenting on *Lujan* decision and contending it misinterpreted APA standing requirements thereby frustrating environmental groups' enforcement of NEPA); see also Fletcher, *supra* note 77, at 258-262 (1988) (arguing for much broader standing analysis under NEPA because of procedural nature).

⁷⁹ A.P.A., *supra* note 4, § 10, 5 U.S.C. § 702 (1988). Where a statute does not provide for a right of action, a complainant may gain jurisdiction through the review provisions of the APA. See *Abbot Lab. v. Gardner*, 387 U.S. 136, 141 (1967). The legislative history of the APA evidences the basic presumption of judicial review. *Id.* The APA "covers a broad spectrum of administrative actions" and courts ought to grant review of agency actions liberally. *Id.* at 141-42. Only proof of clear and convincing evidence of legislative intent to the contrary should prevent judicial intervention. *Id.* The clear and convincing standard is not a "rigid evidentiary test but a useful reminder to courts that, where substantial doubt about congressional intent exists, the presumption favoring review of administrative action is controlling." *Block v. Community Nutrition Inst.*, 467 U.S. 340, 351 (1984). Judicial review may be skirted where: "(1) the statute precludes judicial review or (2) agency action is committed to agency discretion by law." 5 U.S.C. § 701(a)(1),(2) (1988).

The APA was meant to reiterate the generally accepted principles of judicial review embodied in many statutes and case law. Most relevant, the judicial review provisions have in the past been broadly construed so as to provide a cause of action where agency actions are challenged. See *Califano v. Sanders*, 430 U.S. 99, 104 (1977). The *Califano* Court found the APA "[u]ndoubtedly evinces Congress's intention and understanding that judicial review should be widely available to challenge the actions of federal administrative officials." *Id.* The statute has empowered courts to "decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action." See 5 U.S.C. § 706 (1988). Furthermore, the court may order an agency to act when it has unlawfully delayed or withheld the completion of some duty, 5 U.S.C. § 706(1), and may vacate agency actions found to be in violation of procedural re-

of *Data Processing Service Organizations v. Camp*,⁸⁰ the Supreme Court delineated a two part test for judicial review under the APA which parallels and complements the constitutional and prudential limitations.⁸¹ The relevant inquiry is whether the complainant has suffered an injury in fact, and whether he or she is within the zone of interest sought to be protected by the statute in question.⁸²

A. The "Final Agency Action" Requirement

The APA requires there be "final agency action" for a plaintiff to challenge the agency, but does not define the phrase.⁸³ Though it is not clear whether "final agency action" is a jurisdictional or prudential condition, it is generally accepted that this requirement addresses the issue of ripeness.⁸⁴ In its many formulations, ripe-

quirements of law. See 5 U.S.C. § 706(2)(D) (1988). Yet as the APA does not independently grant jurisdiction, the complainant must confront and overcome the standing requirements. *Califano*, 430 U.S. at 107.

⁸⁰ 397 U.S. 150 (1970).

⁸¹ See *id.* at 152-54.

⁸² See *id.* at 153. The zone of interest test has been the source of significant confusion in the courts and has been criticized. See 4 KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE § 24:17 at 273 (2d ed. 1979). The Supreme Court attempted to provide guidance regarding the meaning of the test in *Clarke v. Securities Indus. Ass'n*, 479 U.S. 388, 396-97 (1987). In *Clark*, the Court articulated the relevant inquiry as whether the plaintiff challenging the agency action is a member of the class which Congress intended to challenge the particular type of action taken. *Id.* The plaintiff was found to have standing because its interests had a plausible relationship to the agency actions and was within the "zone of interest" of the statute. *Id.*; see also *Calumet Indus. v. Brock*, 807 F.2d 225, 228-29 (D.C. Cir. 1986) (holding that plaintiff's business profits were not within zone of interest protected by OSHA).

⁸³ See 5 U.S.C. § 704 (1988). The statute provides in relevant part:

[A]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action.

Id.; see also *Edmund B. Sears, Lujan v. National Wildlife Federation: Environmental Plaintiffs Are Tripped Up on Standing*, 24 CONN. L. REV. 293, 313 (1991) (stating that APA does not define "final agency action").

⁸⁴ See *Toilet Goods Ass'n v. Gardner*, 387 U.S. 158, 164 (1967) (challenge to final agency action was not ripe because "judicial appraisal . . . is likely to stand on much surer footing in the context of a specific application"); *Municipality of Anchorage v. United States*, 980 F.2d 1320, 1323-25 (9th Cir. 1992) (holding that memorandum of Agreement adopted by EPA and Army Corps of Engineers was not final agency action since it did not meet ripeness criteria); *Dietary Supplement Coalition, Inc. v. Sullivan*, 978 F.2d 560, 562 (9th Cir. 1992) (determining whether agency's action was sufficiently final for judicial review by applying tests for ripeness); *Mount Adams Veneer Co. v. United States*, 896 F.2d 339, 343 (9th Cir. 1990). The court stated that "[i]ndicia of finality include: the administrative action challenged should be a definitive statement of an agency's position; the action should have a direct and immediate effect on the day to day business of the complaining party . . . immediate compliance should be expected. . . ."; *Assiniboine & Sioux Tribes v. Board of Oil & Gas Conservation*, 792 F.2d 782, 789 (9th Cir. 1986). "Review is not premature if the

ness serves the primary purpose of ensuring that courts will avoid premature interference and will skirt entanglements in abstract disagreements over administrative strategies.⁸⁵ Such a policy also protects the autonomy of agencies from judicial intervention until a decision has been rendered and it has a material impact on the challenging parties.⁸⁶

Ripeness primarily involves the question of timing.⁸⁷ Cases addressing the finality element in administrative actions have interpreted ripeness in a pragmatic and flexible manner.⁸⁸ Courts have attempted to determine if an agency has "announced, solidified and embraced" its position.⁸⁹ The finality inquiry often focuses on the formality of the administrative action,⁹⁰ the status of the ruling official, and the finality or tentative nature of the action.⁹¹ Given this interpretation, the application to *Public Citizen II* of "final agency action" as construed by the Court in *Franklin v. Massachusetts*⁹² was inappropriate. It was not, however, inexplicable. Many courts have applied the ripeness doctrine analysis in-

agency action is final and is purely legal." *Id.*; *Texas v. United States Dep't of Energy*, 764 F.2d 278, 285 (5th Cir. 1985) (Secretary's siting decisions are not "final agency actions which are ripe for our review"); see also LEE MODJESKA, *ADMINISTRATIVE LAW PRACTICE & PROCEDURE*, § 6.9, at 200 (1982 & Supp. 1992).

The dilemma revolving around the status of finality stems from its intermingling with the related doctrines of exhaustion and ripeness. See 4 DAVIS, *supra* note 82, § 26:10, at 485. It has been said that the "[p]roblems of finality are in the area where the law of exhaustion joins or overlaps with the law of ripeness. . . . Finality may be a part of exhaustion, a part of ripeness, or a third subject; courts do not clarify, for they need not." *Id.*

⁸⁵ See *Abbott Lab. v. Gardner*, 387 U.S. 136, 148-49 (1967). Under the ripeness doctrine, courts are required to "evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration". *Id.* See generally Gene R. Nichol Jr., *Ripeness and the Constitution*, 54 U. CHI. L. REV. 153, 161-83 (1987) (providing comprehensive exposition on ripeness doctrine).

⁸⁶ *Id.*

⁸⁷ See CHARLES KOCH, *ADMINISTRATIVE LAW AND PRACTICE*, § 10.31 at 193 (1985).

⁸⁸ See *Maryland Dep't of Human Serv. v. Department of Health & Human Serv.*, 763 F.2d 1441, 1459 (D.C. Cir. 1985). The withholding of payment by Health and Human Services was "final agency action" because the action, non-payment, could be completed unilaterally by the agency. *Id.* The court noted in dicta that if HHS had merely been demanding payment by the plaintiff, rather than withholding payment, the action would not be deemed final. *Id.*; see also MODJESKA, *supra* note 84, § 6.9, at 201.

⁸⁹ See *Port of Boston Marine Terminal Ass'n v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 71 (1970) (posing finality inquiry as "whether the process of administrative decision-making has reached a stage where judicial review will not disrupt the orderly process of adjudication and whether rights or obligations have been determined or legal consequences will flow from the agency action"); see also SEARS, *supra* note 31, at 313 (noting courts use finality requirement of APA to trigger ripeness inquiry).

⁹⁰ See *Estee Lauder, Inc. v. United States Food and Drug Admin.*, 727 F. Supp. 1, 5 (D.D.C. 1989) (FDA regulatory letter was "informal and advisory" and did not constitute final agency action).

⁹¹ See MODJESKA, *supra* note 84, § 6.9, at 201-02.

⁹² 112 S. Ct. 2767 (1992).

terchangeably with that of the standing doctrine.⁹³ As one commentator hypothesized, it seems as though ripeness analysis "is in fact a ripeness disposition, or a covert standing analysis."⁹⁴ In fact, the court in *Public Citizen II* had denied the plaintiffs standing much like the court in *Public Citizen I*, which relied on another Supreme Court decision found to be antagonistic to environmental plaintiffs.⁹⁵

B. Application of the Franklin Finality Standard to Legislative Proposals

Though the decision in *Public Citizen II* is troubling in many respects,⁹⁶ its application of the *Franklin* formulation of "final agency action" to a legislative proposal raises the most concerns. When applied to any "recommendation or report on proposals for legislation,"⁹⁷ such a standard places an almost insurmountable

⁹³ Sears, *supra* note 31, at 328 (arguing *Lujan* court raised standing requirements for environmental plaintiffs in way that effectively undercut their ability to enforce environmental legislation and proposing more liberalized standard).

⁹⁴ *Id.*

⁹⁵ See *supra* note 31 (discussing *Lujan* decision).

⁹⁶ See *Public Citizen II*, 5 F.3d 549 at 551-52. The circuit court in *Public Citizen II* focused its inquiry on the President rather than the Trade Office as the "agency" being required to develop an environmental impact statement. Yet, the APA defines an "agency" as "each authority of the government of the United States, whether or not it is within or subject to review by another agency, but does not include—(A) the Congress; (B) the courts of the United States; (C) the governments of the territories or possessions of the United States; (D) the government of the District of Columbia. . . ." 5 U.S.C. § 701(b)(1) (1988). While Congress may not have intended the President to come within the ambit of the APA, "the legislative history of the APA indicates that Congress wanted to avoid a formalistic definition of agency that might exclude any authority within the executive branch that should appropriately be subject to the requirements of the APA. For this reason, Congress thought it necessary to define agency as 'authority' rather than by name or by form. . . ." *Armstrong v. Bush*, 924 F.2d 282, 289 (D.C. Cir. 1991).

Moreover, the regulations promulgated by the Council for Environmental Quality provide that, for NEPA purposes, legislation includes "a bill or legislative proposal to Congress developed by or with the significant cooperation and support of a federal agency . . . proposals for legislation include requests for ratification of treaties." 40 C.F.R. § 1508.17 (1993). Regulations interpreting NEPA are entitled to great deference. See *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 355 (1989). Therefore, the actions of the Trade Office in negotiating and drafting the NAFTA were clearly sufficient to trigger NEPA's EIS requirement. Petitioners Writ of Certiorari, at 18a-19a, *Public Citizen II*, 114 S. Ct. 685 (1994).

⁹⁷ See Ian M. Kirschner, Note, *NEPA's Forgotten Clause: Impact Statements for Legislative Proposals*, 58 B.U. L. Rev. 560, 561-63 (1978). A distinction exists between a "major federal action" and a legislative proposal. *Id.* "Almost all of the attention focused on the EIS requirement . . . has concerned agency decisions to engage in 'major federal action.'" *Id.* In the first year of NEPA's existence, 234 final impact statements were filed for "major federal action" while only seven were filed for legislative proposals. *Id.* This number of impact statements for legislative proposals is extremely low, as evidenced by an early report of NEPA that estimated that the "workload on environment legislation should probably in-

burden on the private plaintiff seeking to enforce NEPA's environmental impact statement requirement.⁹⁸ By definition, proposed legislation can never directly impact anyone until passed by Congress and signed by the President.⁹⁹ Indeed, the Council for Environmental Quality ("CEQ"), whose binding regulations interpreting NEPA¹⁰⁰ are entitled to great deference,¹⁰¹ recognized legislation subject to NEPA includes proposals for legislation as well as requests for ratification of treaties developed with significant input from a federal agency.¹⁰²

Such an application of the *Franklin* decision to NEPA cases is inconsistent with the policies underlying the statute and inconsistent with the Supreme Court decision of *Kleppe v. Sierra Club*.¹⁰³ The very nature of NEPA requires an ongoing assessment of environmental questions throughout the decisionmaking process.¹⁰⁴ The *Kleppe* Court recognized that judicial intervention was not appropriate until the report or recommendation of the proposal was made, and a protest was entered regarding the absence or adequacy of an impact statement.¹⁰⁵ It is at this moment that an agency's action has sufficiently matured to assure that judicial intervention will not unnecessarily disrupt the process.¹⁰⁶ Clearly, in the case of *Public Citizen II*, the Trade Office completed its decision-making process when it submitted the final draft of NAFTA without an environmental impact statement.¹⁰⁷ The Trade Office's

involve at least 800 or more bills in each session of the Congress. . . . The full and precise scope of the 'proposals for legislation' provision is difficult to delineate." *Id.*

⁹⁸ See *infra* note 99 (arguing finality standard too strict).

⁹⁹ *Public Citizen II*, 5 F.3d at 553 (Randolph, J., concurring) (arguing result of such elevated standard would eliminate ability of private groups to enforce NEPA's EIS requirement for proposed legislation).

¹⁰⁰ See Council on Environmental Quality, 40 C.F.R. §§ 1500.1-1517.7 (1993).

¹⁰¹ See *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 355 (1987) (reiterating holding in *Andrus v. Sierra Club*, 442 U.S. 347, 357-58 (1979) that "CEQ regulations are entitled to substantial deference").

¹⁰² Council on Environmental Quality, 40 C.F.R. § 1508.17 (1993).

¹⁰³ 427 U.S. 390, 405-06 (1976) (rejecting balancing approach used by Court of Appeals to decide at what point in decision-making process NEPA requires EIS to be completed, and instead stated that EIS is required once agency has final report completed and is ready to make recommendation for federal action) (citing *Aberdeen and Rockfish R. Co. v. SCRAP*, 422 U.S. 289, 320 (1975)).

¹⁰⁴ *Id.* at 406 n.15 (stating that section 102(2)(c) of NEPA "contemplates a consideration of environmental factors by agencies during the evolution of a report or recommendation on a proposal").

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 406. The Court stated: "[A premature] judicial involvement in the day to day decision-making process of the agencies . . . would invite [unwanted] litigation." *Id.*

¹⁰⁷ See *supra* notes 52-55 and accompanying text.

proposal was no longer a "moving target."¹⁰⁸ Furthermore, the element of finality was underscored by the fact that, under the rules of fast-track legislation, NAFTA would not be subject to amendment once it reached the Congress.¹⁰⁹ Consideration of any relevant factors must have been done prior to submission to Congress or remain forever excluded from the trade agreement.

In *Robertson v. Methow Valley Citizens' Council*,¹¹⁰ the Supreme Court again recognized that the preparation of an environmental impact statement served NEPA's fundamental goal of ensuring that agencies would avail themselves of information regarding significant environmental impacts before irreversibly committing resources.¹¹¹ The Court noted that publication of an impact statement served a broader informational role by guaranteeing that the interested segments of the public may have the necessary information to inspire meaningful public discourse.¹¹²

To view the President's participation as the culmination of the decision making process regarding legislative proposals, and then place him outside the reach of judicial review, as the court did in *Public Citizen II*, distorted the agency's legislative proposal process by focusing solely on the President's act of submission, and not on the lengthy development process pursued by the Trade Office.¹¹³ It bears reiterating that NEPA is a procedural statute;¹¹⁴ it does not seek to control the substance of a final agency report or

¹⁰⁸ *Public Citizen v. United States Trade Representative*, 5 F.3d 549, 552 (1993), cert. denied, 114 S. Ct. 685 (1994).

¹⁰⁹ 19 U.S.C. § 2191 (1988).

¹¹⁰ 490 U.S. 332 (1989).

¹¹¹ See *id.* at 349. "Simply by focusing the agency's attention on the environmental consequences of a proposed project, NEPA ensures that important effects will not be overlooked or underestimated only to be discovered after resources have been committed or the die otherwise cast." *Id.*

¹¹² *Id.*; see also *Izaak Walton League v. Marsh*, 655 F.2d 346, 365 (1981) (stating that part of rationale behind NEPA's EIS requirement is to provide information to general public who may then choose to influence decision-making process through debate); *Sierra Club v. Morton*, 510 F.2d 813, 819 (5th Cir. 1975) (finding Secretary of Interior's EIS was adequate under NEPA for sale of public lands along Gulf of Mexico in Mississippi, Alabama, and Florida).

¹¹³ See *supra* note 53.

¹¹⁴ See *City of Los Angeles v. National Highway Traffic and Safety Admin.*, 912 F.2d 478, 491 (D.C. Cir. 1990) (stating NEPA's procedural mandate is very broad). *But see Don J. Frost Jr., Amoco Production Co. v. Village of Gambell and Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.: Authority Warranting Reconsideration of the Substantive Goals of the National Environmental Policy Act*, 5 ALASKA L. REV. 15, 48-56 (1988) (suggesting that NEPA's procedural requirements are secondary to its substantive goals contained in section 101 and that interpreting as solely procedural statute is against Congressional intent).

mandate any particular outcome.¹¹⁵ After completion of the environmental impact statement, an agency, the Congress, or the President, may decide whether other values will predominate.¹¹⁶

Moreover, the reformulation of "final agency action" by the court in *Public Citizen II* was contrary to established judicial practice.¹¹⁷ Recognizing that the environmental assessment requirement is narrowly focused on agencies and their independent role in the legislative process, courts have granted judicial review of claims challenging an agency's exclusion of the statement even where a subsequent act would be either necessary or discretionary before the complainant would be directly affected.¹¹⁸ Presidential participation in agency actions is a common element in the administrative landscape, yet standing has been granted to petitioners in some circumstances involving the powers of the President in military and foreign affairs.¹¹⁹ Plaintiffs in *Public Citizen II* were

¹¹⁵ See *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1987). "Although [NEPA] procedures are almost certain to affect the agency's substantive decision, it is now well settled that NEPA itself does not mandate particular results, but simply prescribes the necessary process." *Id.*

¹¹⁶ See *Robertson*, 490 U.S. at 350-51. While other environmental statutes may impose substantive obligations on federal agencies, "NEPA merely prohibits uninformed—rather than unwise—agency action." *Id.*

¹¹⁷ See *Petitioners Writ of Certiorari* at 12, *Public Citizen v. Office of the Trade Representative*, 5 F.3d 549 (D.C. Cir. 1993) (No. 93-5212), *cert. denied*, 114 S. Ct. 685 (1994).

¹¹⁸ See, e.g., *Defenders of Wildlife v. Lujan*, 112 S. Ct. 2130, 2142-43 n.7 (1992). "[O]ne living adjacent to the site for proposed construction of a federally licensed dam has standing to challenge the licensing agencies failure to prepare an environmental impact statement even though he cannot establish with any certainty that the statement will cause the license to be withheld." *Id.*; *Idaho Conservation League v. Mumma*, 956 F.2d 1508, 1511 (9th Cir. 1992). "Although the [Wilderness] Act vests Congress with exclusive authority to designate wilderness area," land management plans under direction of Forest agency must be prepared in compliance with NEPA and plaintiffs have standing to challenge sufficiency of EIS. *Id.*; *Trustees for Alaska v. Hodel*, 806 F.2d 1378, 1380-81 (9th Cir. 1986) (controversy held ripe and plaintiff granted standing to review Department of Interior's refusal to circulate an EIS in report to be submitted to Congress); *Realty Income Trust v. Eckerd*, 564 F.2d 447, 452 (D.C. Cir. 1977). "[A]ppellant had standing, on the basis presumably of the detrimental environmental impact to appellant that was alleged to result from the erection of the building." *Id.*; *Colorado Env'tl. Coalition v. Lujan*, 803 F. Supp. 364, 368 (D. Colo. 1992) (individual may enforce procedural rights so long as procedures in question are designed to protect some concrete interest of individual); *California v. Bergland*, 483 F. Supp. 465, 470-71 (E.D. Cal. 1980), *modified*, *California v. Block*, 690 F.2d 753, 758 (9th Cir. 1982) (President's role in alteration of wilderness recommendations submitted by Forest Service, and subsequent transmittal of EIS to Congress did not bar challenge of adequacy of EIS).

¹¹⁹ See, e.g., *Weinberger v. Catholic Action of Hawaii*, 454 U.S. 139, 143 (1981) (stating that Navy would have to consider environmental effects of constructing nuclear weapons dump in Hawaii); *Environmental Defense Fund v. Massey*, 986 F.2d 528, 529-30 (D.C. Cir. 1993) (addressing preparation of EIS for use of incinerator in Antarctica); *No-Gwen Alliance, Inc. v. Aldridge*, 855 F.2d 1380, 1381-84 (9th Cir. 1988) (addressing sufficiency of EIS for Air Force's installation of 300 foot radio towers used to send war messages to U.S. strategic forces during and after nuclear war); *Romer v. Carlucci*, 847 F.2d 445, 461 (8th Cir.

not trying to enjoin the President from signing NAFTA, or prevent its transmittal to Congress.¹²⁰ Accordingly, the District of Columbia Circuit Court should have found there was "final agency action" sufficient to grant plaintiffs standing.

III. BEYOND STANDING: *PUBLIC CITIZEN II* ON THE MERITS

A. *The Foley Doctrine*

Had the court in *Public Citizen II* found the plaintiffs had standing it would have been necessary to grapple with the delicate issue of whether NEPA applied to a treaty such as NAFTA. Where an environmental impact statement would extend beyond the borders of the United States, courts have generally analyzed NEPA's application by exploring whether the *Foley* Doctrine is applicable.¹²¹

1988) (en banc) (addressing adequacy of EIS prepared for MX missile project and rejecting argument that dispute involving political question not subject to judicial review); *Wisconsin v. Weinberger*, 745 F.2d 412, 414-17 (7th Cir. 1984) (determining whether supplemental EIS required for "extremely low frequency" submarine communication system); *Sierra Club v. Adams*, 578 F.2d 389, 390 (D.C. Cir. 1978) (discussing adequacy of EIS relating to construction of international highway pursuant to agreement between United States, Panama, and Columbia); *Concerned About Trident v. Rumsfeld*, 555 F.2d 817, 823-30 (D.C. Cir. 1977) (discussing, on merits, applicability of NEPA to United States Navy atomic missile submarine system and stating that assertion that NEPA not apply to strategic military decisions is "a flagrant attempt to exempt from the mandate of NEPA all such military actions under the overused rubric of 'national defense'"); *Committee for Nuclear Responsibility v. Seaborg*, 463 F.2d 796 (D.C. Cir. 1971).

According to the Administrative Conference of the United States, presidential review "does not displace responsibilities placed in the agency by law . . ." See ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, OFFICE OF THE CHAIRMAN, A GUIDE TO FEDERAL AGENCY RULEMAKING *passim* (1991 2d ed.) The Conference was established by statute as an independent agency of the federal government in 1964 to:

[P]romote improvements in the efficiency, adequacy, and fairness of procedures by which federal agencies conduct regulatory programs, administer grants and benefits and perform related governmental functions . . . the Conference conducts research and issues reports concerning various aspects of the administrative process and, when warranted, makes recommendations to the President, Congress, particular departments and agencies, and the judiciary concerning the need for procedural reforms.

Id. Presidential review is defined as a:

[P]rogram of systematic executive oversight and dialogue that involves coordinating agency actions where conflicts exist, and in all cases probing the agency's fact and policy judgments, with the purpose of ensuring that the agency considers factors of importance to the President's policies to the extent permitted by law.

Id.

¹²⁰ *Public Citizen v. United States Trade Representative*, 5 F.3d 549, 550 (D.C. Cir. 1993), *cert. denied*, 114 S. Ct. 685 (1994).

¹²¹ See, e.g., *Environmental Defense Fund v. Massey*, 986 F.2d 528, 530-31 (D.C. Cir. 1993) (discussing presumption against extraterritoriality); *Natural Resources Defense Council v. Nuclear Regulatory Comm'n*, 647 F.2d 1345, 1366 (D.C. Cir. 1981); *Greenpeace USA v. Stone*, 748 F. Supp. 749, 758-59 (D. Haw. 1990), *appeal dismissed as moot*, 924 F.2d 817 (D.C. Cir. 1991). Other courts have simply sidestepped this issue. See *Sierra Club v. Adams*, 578 F.2d 389, 392 (D.C. Cir. 1978) (assuming, without deciding, that NEPA applies to federal highway construction project in Panama); *National Org. for the Reform of Mari-*

This doctrine, articulated in *Foley Brothers v. Filardo*,¹²² creates the presumption that absent clear congressional intent to the contrary,¹²³ statutes should be construed as enforceable only within the territorial jurisdiction of the United States.¹²⁴ The *Foley* Doctrine is rooted in the need to respect the jurisdiction of other sov-

juana Laws v. United States, 452 F. Supp. 1226, 1232-33 (D.D.C. 1978) (assuming NEPA applicable to program of Mexican government funded by United States to spray marijuana crops with toxic herbicide); *Sierra Club v. Atomic Energy Comm'n*, 4 Env'tl. L. Rep. (Env'tl. L. Inst.) 20,685, 20,686 (D.D.C. 1974) (avoiding issue of NEPA's extraterritorial applicability when AEC agreed voluntarily to conduct worldwide EIS for their nuclear export program); *People of Enewetak v. Laird*, 353 F. Supp. 811, 817-18 (D. Haw. 1973) (holding NEPA applicable to United States trust territory without rendering decision as to extraterritorial reach).

¹²² 336 U.S. 281 (1949).

¹²³ *Massey*, 986 F.2d at 531. The court stated: "[T]he presumption will not apply where there is an affirmative intention of the Congress clearly expressed to extend the scope of the statute to conduct occurring within other sovereign nations." *Id.* However, the courts have found no affirmative intent on the part of Congress to make NEPA applicable to conduct outside the United States. *Natural Resources Defense Council*, 647 F.2d at 1367. "I must conclude that NEPA's legislative history illuminates nothing in regard to extraterritorial application [of NEPA]." *Id.*; see also VALERIE M. FOGELMAN, GUIDE TO THE NATIONAL ENVIRONMENTAL POLICY ACT, 13-14 (1990). The issue of NEPA's extraterritoriality is multidimensional. *Id.* According to one commentator:

The issue has several facets. The first facet is determining whether NEPA applies only to the fifty states or whether it also applies to trust territories and other territory outside the fifty states. The broad language of NEPA referring to the "nation" rather than the "United States" has been interpreted to include trust territories. The other facet of NEPA's extraterritorial application has two components: whether NEPA applies to actions that affect the global commons such as the oceans and Antarctica, and whether NEPA applies to actions that only affect the territory of foreign nations. These issues caused considerable debate during the 1970's, with the CEQ taking the position that NEPA applied to both types of action.

Id. at 13; see also J.D. Head, Comment, *Federal Agency Responsibility to Assess Extraterritorial Environmental Impacts*, 14 TEX. INT'L L.J. 425, 431 (1979) (providing explanation of NEPA's ambiguous legislative history concerning its extraterritorial application and also exploring judicial treatment of issue); c.f. Nicholas A. Robinson, *Extraterritorial Environmental Protection Obligations of Foreign Affairs Agencies: The Unfulfilled Mandate of NEPA*, 7 N.Y.U. J. INT'L L. & POL. 257, 257-58 (1974) (arguing that intent behind NEPA was to attack environmental problems globally and hence NEPA was meant to apply to action by federal agencies operations abroad and proposing that such federal agencies have insulated themselves from NEPA's mandate thereby frustrating statute's purpose); Comment, *NEPA's Role in Protecting the World Environment*, 131 U. PA. L. REV. 353, 373 (1982) (arguing for international application of NEPA based on Congress's intention to approach problem of environmental degradation on global scale, but noting that NEPA's language allows for flexibility in international arena by deciding controversies on case-by-case basis).

¹²⁴ See *Foley*, 336 U.S. at 281 (holding U.S. "eight hour law" which required all laborers performing work for contract with U.S. government receive time and a half for any work done past eight hours a day not applicable to private contractor performing U.S. government contract in Iran and Iraq); see also *Commodity Futures Trading Comm'n v. Nahas*, 738 F.2d 487, 493 (D.C. Cir. 1984) (federal district court lacked jurisdiction to permit service of Brazilian citizen, within Brazil, by Commodities Futures Trading Commission); *McKeel v. Islamic Republic of Iran*, 722 F.2d 582, 586 (9th Cir. 1983), cert. denied, 469 U.S. 880 (1984) (*Foley* doctrine not applicable to Americans previously held hostage in Iran suing the Iranian government in tort and holding that US embassies not within territorial jurisdiction of the United States).

ereigns and avoid conflict of laws issues which could result in international turmoil.¹²⁵

Since NEPA solely regulates the internal decision-making process of federal agencies within the United States,¹²⁶ technically there is no extraterritorial issue raised.¹²⁷ In the context of *Public Citizen II*, the enforcement of NEPA would merely have regulated the Trade Office's internal decision-making process,¹²⁸ without threatening the substantive integrity of the actual agreement.¹²⁹ Once the decision making process is separated from the substance of NAFTA, it is apparent that such regulation is within the territorial jurisdiction of Congress, and therefore raises no extraterritorial issues.¹³⁰ All NEPA could have required of the Trade Office was preparation of an environmental impact statement for NAFTA.¹³¹ An environmental impact statement would have resulted in a more informed debate about NAFTA, and therefore fulfilled the informational role of NEPA.¹³²

¹²⁵ See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 403 cmt. g (1987).

¹²⁶ See *supra* notes 104-116 and accompanying text.

¹²⁷ See *Environmental Defense Fund, Inc. v. Massey*, 986 F.2d 528, 532 (D.C. Cir. 1993); *Mary A. McDougall, Extraterritoriality and the Endangered Species Act of 1973*, 80 GEO. L.J. 435, 437 (1991) (arguing, in context of Endangered Species Act, that there can be no extraterritoriality issue where statute merely regulates procedure of federal agencies decision-making process because that process occurs within United States).

¹²⁸ See *supra* note 127.

¹²⁹ See *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989) (holding it is well settled that NEPA is purely procedural statute and never mandates particular result after EIS is prepared).

¹³⁰ *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 925 (D.C. Cir. 1984) (holding there is jurisdiction under U.S. antitrust laws where disputed conduct is intended to and does have significant impact within United States); *Schoenbaum v. Firstbrook*, 405 F.2d 200, 206 (2d Cir. 1968) (extending U.S. securities laws to actions abroad where necessary to protect American investors), *rev'd on other grounds*, 405 F.2d 215, 218-19 (2d Cir. 1968) (en banc) (finding plaintiff not entitled to summary judgment); see RESTATEMENT (THIRD) FOREIGN RELATIONS LAW OF THE UNITED STATES, § 403 cmt. g (1987). It should also be noted that even if NEPA were deemed to regulate conduct outside the national borders the presumption against extraterritoriality would still not be applicable in the case of NAFTA due to the impact it will likely have within the United States, especially along the Mexican border. RESTATEMENT (THIRD) FOREIGN RELATIONS LAW OF THE UNITED STATES § 403(1)(a) (presumption against extraterritoriality not applicable where to not do so would precipitate adverse results within United States). The Trade Office's own "Environmental Review" of NAFTA concluded the agreement would probably exacerbate the well known environmental problems that already plague the U.S.-Mexico border region. See *Review of U.S.-Mexico Environmental Issues, Executive Summary*, pgs 3-7. Furthermore, *Public Citizen* had alleged extensive harmful environmental impacts within the United States. Brief for Appellant at 27(a) n.11, *Public Citizen v. Office of the Trade Representative*, 5 F.3d 549 (D.C. Cir. 1993) (No. 93-5212), *cert. denied*, 114 S. Ct. 685 (1994).

¹³¹ 42 U.S.C. § 4332(2)(C) (1988).

¹³² See *supra* note 112 (discussing informational role of NEPA).

B. Foreign Policy Concerns Under NEPA Section 102(2)(F)

The second issue presented by the application of NEPA to NAFTA arises from the express language of NEPA.¹³³ Where preparing of an environmental impact statement would be contrary to U.S. foreign policy interests, section 102(2)(F) of NEPA has been interpreted to create an exception to NEPA's environmental impact statement requirement.¹³⁴ In tackling the issue of whether NEPA mandates an impact statement in circumstances affecting foreign policy interests, courts have balanced the specific foreign policy interests implicated in the suit against the environmental goals of NEPA.¹³⁵

In *Natural Resources Defense Council v. Nuclear Regulatory Commission*,¹³⁶ the District of Columbia Circuit Court of Appeals held the Nuclear Regulatory Commission was not compelled to prepare an environmental impact statement regarding the issuance of a nuclear technology export license to the Philippines.¹³⁷ The court reasoned that such an application of NEPA was inconsistent with U.S. foreign policy,¹³⁸ because it would impose United States regulations within the Philippines and inappropriately supersede Philippine law.¹³⁹ Also, construing NEPA in this manner would open the door to a flood of litigation challenging the adequacy of the Nuclear Regulatory Commission's environmental impact statements every time an export license was granted.¹⁴⁰ Such litigation would cause lengthy delays, and thus frustrate congres-

¹³³ See 42 U.S.C. § 4332(2)(F) (1988).

¹³⁴ See *id.* The statute requires that all federal agencies:

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

Id.; see also *Environmental Defense Fund v. Massey*, 986 F.2d 528, 534-35 (D.C. Cir. 1993); *Natural Resources Defense Council v. Nuclear Regulatory Comm'n*, 647 F.2d 1345, 1366 (D.C. Cir. 1981); *Greenpeace USA v. Stone*, 748 F. Supp. 748, 759 (D. Haw. 1990).

¹³⁵ See *Massey*, 986 F.2d at 535; *Natural Resources Defense Council*, 647 F.2d at 1357; *Stone*, 748 F. Supp. at 759.

¹³⁶ 647 F.2d 1345 (D.C. Cir. 1981).

¹³⁷ *Id.* at 1365.

¹³⁸ 42 U.S.C. § 4332(F) (1988).

¹³⁹ 647 F.2d at 1356-57. The court found this a form of regulatory coercion incompatible with U.S. foreign policy objectives and NEPA itself which emphasizes cooperation, not unilateral action. *Id.* at 1366.

¹⁴⁰ *Id.*

sional intent behind the statute authorizing the issuance of licenses.¹⁴¹

As in *NRDC*, compelling the Trade Office in *Public Citizen II* to conduct an independent environmental impact statement for NAFTA would have been tantamount to "regulatory coercion."¹⁴² The court in *NRDC* believed that this type of coercion should be avoided under NEPA, which seeks international cooperation, rather than unilateral action.¹⁴³ The element of the *NRDC* rationale that sought to avoid undue delays caused by private parties seeking NEPA injunctions was equally applicable to *Public Citizen II*.¹⁴⁴ Requiring an environmental impact statement after the treaty and the environmental side agreements had been negotiated and signed would have undermined the United States' position as a willing and cooperative partner in NAFTA.¹⁴⁵ Moreover, such a ruling could have delayed or disrupted the ratification process and frustrated the political will to enter into a binding trade agreement.¹⁴⁶

Following the *NRDC* approach, the United States District Court for the District of Hawaii in *Greenpeace v. Stone*,¹⁴⁷ held that the United States Army could not be compelled to perform an environmental impact statement before transporting chemical weapons from West Germany to Johnston Atoll.¹⁴⁸ District Judge Ezra reasoned that conducting an impact statement would be intrusive upon German sovereignty.¹⁴⁹ The court noted in dicta that an important factor in deciding whether NEPA should be applicable, was whether the relevant agency had already made an effort to

¹⁴¹ *Id.*

¹⁴² *Id.* at 1356.

¹⁴³ See 42 U.S.C. § 4332(2)(F) (1988).

¹⁴⁴ See *supra* notes 138-39.

¹⁴⁵ See *infra* note 146.

¹⁴⁶ See 19 U.S.C. § 2191(c), (d), (e) (1988). By Congress not affirmatively acting to contrary, fast-track procedures were automatically made available under Trade Act of 1974. *Id.* Indeed, President Bush said in a letter to Congress that "[m]aintaining fast-track is essential to our leadership in the global trading system." See Peter Truell, *Bush Asks Congress For Special Authorization to Negotiate Liberalized Trade Rules*, WALL ST. J., March 4, 1991, at A2.

¹⁴⁷ 748 F. Supp. 749 (D. Haw. 1990).

¹⁴⁸ *Id.* at 754. This action was performed pursuant to an executive agreement signed by President Bush and West Germany's Chancellor Kohl. *Id.* The executive agreement was also authorized by act of Congress. Department of Defense Authorization Act of 1985, Pub. L. No. 99-145, § 1412(a), 99 Stat. 583, 747 (1988), amended by Pub. L. No. § 118, 102 Stat. 1918, 1934 (1988).

¹⁴⁹ *Greenpeace USA v. Stone*, 748 F. Supp. 748, 760 (D. Haw. 1990).

determine the environmental impact of the action.¹⁵⁰ In the context of *Public Citizen II* the governments of the United States, Mexico, and Canada addressed the potential environmental effects that the implementation of NAFTA would precipitate in the environmental "side-agreement."¹⁵¹

Also instructive is the case of *Environmental Defense Fund, Inc. v. Massey*,¹⁵² which similar to *Public Citizen II*, involved a defendant agency in the midst of negotiating a treaty.¹⁵³ The plaintiff sought to enjoin the National Science Foundation from operating a garbage incinerator at a research facility in Antarctica, until an impact statement was furnished.¹⁵⁴ When the action was commenced, the United States was negotiating a treaty with several other countries in an effort to provide for international protection of the Antarctic environment.¹⁵⁵ The National Science Foundation argued the injunction should not be granted since it would inevitably interfere with the ongoing treaty negotiations, and therefore disrupt legitimate foreign policy objectives of the United States in two respects.¹⁵⁶ First, they alleged that forcing the development of an environmental impact statement would make the United States an unsure partner in the delicate treaty negotiations, because the proposed treaty called for the signatory nations to approach Antarctica's environmental problems jointly through cooperation.¹⁵⁷ Applying U.S. law to the region, through NEPA, would usurp the intended role of the prospective treaty.¹⁵⁸ Secondly, the defendant argued that an environmental impact statement would conflict with the procedural duties articulated in the prospective treaty.¹⁵⁹

¹⁵⁰ See *id.* at 761 (citing *Sierra Club v. Adams*, 578 F.2d 389 (D.C. Cir. 1978)).

¹⁵¹ North American Agreement On Environmental Cooperation, available in WESTLAW, NAFTA database (1993). This so-called environmental side agreement was finalized August 12, 1993 and incorporated into the treaty.

¹⁵² 986 F.2d 528 (D.C. Cir. 1993).

¹⁵³ See *id.* at 534.

¹⁵⁴ *Id.* at 529. The National Science Foundation operates the research facilities in Antarctica under the U.S. Antarctica Program. *Id.* The decision was made to begin using an incinerator to dispose of food waste created at the station in early 1991. *Id.* After it was discovered the open landfill used to burn the waste contained asbestos NSF immediately began using an incinerator to burn the waste while a state of the art incinerator was in the process of being delivered. *Id.*

¹⁵⁵ Protocol on the Environmental Protection of the Antarctic Treaty, reprinted in 30 International Legal Materials 1461 (1991).

¹⁵⁶ *Environmental Defense Fund v. Massey*, 986 F.2d 528, 535-36 (D.C. Cir. 1993).

¹⁵⁷ See *supra* note 19.

¹⁵⁸ *Massey*, 986 F.2d at 535-36.

¹⁵⁹ *Id.* at 534-35.

The *Massey* court rejected the first argument because the treaty was neither signed nor enforceable.¹⁶⁰ Likewise, the court was unpersuaded by the second argument because the impact statement would not have interfered with any future duties under the treaty, but coincide with such duties.¹⁶¹ The proposed treaty would require an environmental impact statement even where the action being considered would have only "minor or transitory" effects, as compared to significant impact under NEPA.¹⁶² The *Massey* court also found it significant that Antarctica is not under sovereign rule and thus there was little chance of conflict of laws problems arising.¹⁶³ Furthermore, of all the nations involved in the treaty negotiations, the United States had the most influential presence in Antarctica and was therefore in the best position to regulate the region.¹⁶⁴

It is tempting to analogize *Public Citizen II* to *Massey* simply because both cases involved treaties. However the cases are distinguishable in several respects.¹⁶⁵ First, in *Massey*, the court recognized that the proposed treaty was years from ratification,¹⁶⁶ while NAFTA was signed by the President and received "fast track" status from Congress.¹⁶⁷ Thus, once submitted, only sixty days were allotted for Congress to decide whether NAFTA would be ratified without amendment.¹⁶⁸ Perhaps most importantly, the *Massey* court placed substantial weight on the fact that Antarctica is under no sovereign and that only the United States was in a position to regulate.¹⁶⁹ In the context of *Public Citizen II*, the main environmental concerns focused on the potential effects of Mexico's maquiladora industrial plants that cluster along the border of the United States and Mexico.¹⁷⁰ Therefore, an extensive environmental impact statement would have involved Mexican coopera-

¹⁶⁰ *Id.*

¹⁶¹ *Id.* at 534. Presumably an EIS prepared under NEPA would be sufficient to discharge NSF's future procedural duties under the treaty with respect to incinerator. *Id.* The court found no extraterritoriality issue to exist because Antarctica is not controlled by any sovereign governments, and the United States, of all nations, had the most substantial contacts there. *Id.* at 533-34.

¹⁶² *Id.* at 535.

¹⁶³ *Environmental Defense Fund v. Massey*, 986 F.2d 528, 533 (D.C. Cir. 1993).

¹⁶⁴ *Id.* at 533-34.

¹⁶⁵ See *infra* notes 166-73 and accompanying text.

¹⁶⁶ *Massey*, 986 F.2d at 534.

¹⁶⁷ 19 U.S.C. § 2191(c)-(e) (1988).

¹⁶⁸ See *supra* note 167.

¹⁶⁹ *Environmental Defense Fund v. Massey*, 986 F.2d 528, 533 (D.C. Cir. 1993).

¹⁷⁰ See *supra* note 55 (discussing maquiladora program).

tion, and thus Mexican compliance with the law of the United States. Such a unilateral effort by the United States would be contrary to the partnership spirit of NAFTA, and the international cooperation embraced by NEPA.¹⁷¹ Considering the environmental side agreement incorporated into NAFTA, the Trade Office's own internal study,¹⁷² and the joint environmental plan for the border region conducted by the Environmental Protection Agency and its Mexican counterpart,¹⁷³ it is clear that the environmental issues raised by NAFTA have been dealt with through cooperation. In accordance with this caselaw, the D.C. Circuit Court of Appeals should have found NAFTA to be within the "foreign policy" exception created by section 102(2)(F) of NEPA.

CONCLUSION

In *Public Citizen II*, the District of Columbia Court of Appeals was presented with the opportunity to determine the level of standing plaintiff's must meet in order to enforce NEPA. Rather than applying an unduly restrictive interpretation of standing and "final agency action", the court could have, and perhaps should have, disposed of the case by using Section 102(2)(F) of NEPA on the ground that foreign policy interests were implicated. The benefit of this approach would be that only those NEPA claims involving substantial foreign policy interests would be susceptible to a narrower standing scrutiny. By not following this route, the court has traveled futher down the path in making NEPA a less effective weapon.

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¹⁷¹ 42 U.S.C. § 4332(2)(F) (1988).

¹⁷² UNITED STATES TRADE REPRESENTATIVE, REVIEW OF U.S.-MEXICO ENVIRONMENTAL ISSUES (1992).

¹⁷³ EPA & SEDUE, INTEGRATED ENVIRONMENTAL PLAN FOR THE MEXICO-U.S. BORDER AREA (1992).

