

# Brooklyn Journal of International Law

---

Volume 1 | Issue 1

Article 3

---

1975

## The American Environmental Law System: A Model for Transnational Action

Karen S. Boxer

Follow this and additional works at: <https://brooklynworks.brooklaw.edu/bjil>

---

### Recommended Citation

Karen S. Boxer, *The American Environmental Law System: A Model for Transnational Action*, 1 Brook. J. Int'l L. (1975).  
Available at: <https://brooklynworks.brooklaw.edu/bjil/vol1/iss1/3>

This Article is brought to you for free and open access by the Law Journals at BrooklynWorks. It has been accepted for inclusion in Brooklyn Journal of International Law by an authorized editor of BrooklynWorks.

# THE AMERICAN ENVIRONMENTAL LAW SYSTEM: A MODEL FOR TRANSNATIONAL ACTION

*Karen Sue Boxer\**

## I. INTRODUCTION

The first worldwide conference on the human environment was held under United Nations auspices at Stockholm, Sweden, from June 5 to 16, 1972, one hundred and fourteen countries participating.<sup>1</sup> That Conference became the first articulation of an international commitment to solve, through cooperative effort, the frightening environmental problems which blight the present and threaten the very existence of a future. With the spotlight at last turned upon the environment, perhaps the most revealing fact to be kept in mind about current "international environmental law" is that, barely nine years ago, no such separate discipline was formally recognized.<sup>2</sup> Against this backdrop, the accomplishments of Stockholm, culminating in the drafting of the "Declaration on the Human Environment,"<sup>3</sup> are truly impressive.

Significant as the work of the Stockholm Conference is, however, its solutions to environmental problems are fundamentally political ones, resting on the voluntary cooperation of participat-

---

\* Law Clerk to the Honorable Paul R. Hays, Judge, United States Court of Appeals for the Second Circuit. B.A., University of Miami, 1961; M.A., Columbia University, 1963; J.D., Columbia University School of Law, 1974. The author wishes to thank Richard N. Gardner, Henry L. Moses Professor of Law and International Organization, Columbia University School of Law, for suggesting the topic of this article and for his helpful comments and warm encouragement during its development.

1. The Stockholm Conference had been six years in gestation. See note 2 *infra*. For a complete account of the Conference, see Sohn, *The Stockholm Declaration on the Human Environment*, 14 HARV. INT'L L.J. 423 (1973).

2. The topic of "problems of the human environment" was first explicitly debated in the United Nations General Assembly in the mid 1960's. In December, 1968, the Swedish proposal for an international conference, 45 U.N. ECOSOC, Annexes, Agenda Item 12 (Doc. E/4466/Add.I) at 2 (1968), was endorsed by the Economic and Social Council and approved by the General Assembly of the United Nations, ECOSOC Res. 1346, July 30, 1968, 45 U.N. ECOSOC, Supp. 1, (Doc. E/4561) at 8 (1968); G.A. Res. 2398, Dec. 3, 1968, 23 U.N. GAOR, Supp. 18 (Doc. A/7218) at 2 (1969).

3. REPORT OF THE U.N. CONFERENCE ON THE HUMAN ENVIRONMENT, U.N. Doc. A/CONF.48/14 at 2-65, and Corr. 1 (1972), 11 INT'L LEG. MAT'S 1416-69 (1972). Of the 109 recommendations approved by the Conference, the most important relate to the establishment of institutional and financial arrangements for a United Nations environmental program and the institution of "Earthwatch", a global system for monitoring and evaluating environmental problems. See 11 INT'L LEG. MAT'S at 1464.

ing states working together on a policy-making level. Such cooperation, always difficult, is particularly hard to achieve in the environmental area. The developed, industrialized nations which have built sophisticated and capital-rich economies, often at the expense of localized and transnational environmental conditions, are belatedly realizing the large and often excessive price they have paid for their industrial bases and, in varying degree, favor action aimed at preventing further environmental deterioration. The underdeveloped nations, by contrast, are still faced with the prospect of a long and arduous climb out of poverty, with the need to realize whatever advantages may be attained from the natural resources they possess in order both to increase their economic base and to better the living conditions of their citizens. Despite an awareness of the ecological price already paid by their more highly developed neighbors, they may, nonetheless, be willing to pay the same price themselves to attain a comparable level of development. The poorer nations argue, with some force, that since most of the world's pollution and ecological deterioration can be traced to the past policies of those now most insistently seeking reform, equity requires that partial exemption from the full impact of environmental strictures be granted to the industrial latecomers until such time as they have improved their economic position.<sup>4</sup>

---

4. The position of the underdeveloped nations does not, generally speaking, reflect an unwillingness to comply with international demands for conformity to more rigid standards of environmental care, but rather an insistence on a system of subsidies to prevent their compliance from retarding their economic development. They favor the principle of "additionality," whereby a "developed nation would be held liable for damages caused to a developing country as a result of its anti-pollution measures." Note, *The Stockholm Conference: A Step Toward Global Environmental Cooperation and Involvement*, 6 IND. L. REV. 267, 271 (1972). Thus, for example, the less developed countries demand compensatory agreements to guard against the restriction of their exports caused by inability to comply with stricter environmental standards. Although some industrialized nations have expressed support for the principle of additionality, others are opposed, the major holdout against the concept being the United States. *Id.* at 271 n.15.

Consideration of the impact of the environmental movement on the developing nations constituted the central debate at the Stockholm Conference itself. The delegates' attempt to accommodate disparate views is embodied in Principle 23 of the Stockholm Declaration which states that

[i]t will be essential in all cases to consider the systems of values prevailing in each country; and the extent of the applicability of standards which are valid for the most advanced countries but which may be inappropriate and of unwarranted social cost for the developing countries.

REPORT OF THE U.N. CONFERENCE ON THE HUMAN ENVIRONMENT, U.N. Doc. A/CONF.48/14 (1972).

For the moment at least battle lines seem drawn over whether worldwide environmen-

Cooperative global action becomes, therefore, increasingly difficult to effectuate when the positions of the participants tend to polarize along such lines of comparative development. Even when international action is possible—and some cooperative environmental activities have in fact been undertaken on a regional or bilateral basis by countries of similar economic development<sup>5</sup>—such action is subject to the normal constraints of the multinational lawmaking process.

Traditionally, only nation states have been considered the subjects of international law with standing to present claims against other sovereigns. Natural and corporate persons have generally been denied direct access to international tribunals to present claims against foreign states or their citizens for personal injury or property damages, or to protest the lack of fair and effective local remedies.<sup>6</sup> In the complex, often globally-oriented interrelationships of states, the claim of a private plaintiff may go unheard and the violative activity may be allowed to continue because the offending party is not subject to the jurisdiction of the municipal courts of the plaintiff's state. The injured party whose cause is espoused by his government is fortunate; but a mechanism must be developed to compensate the party whose injury receives less sympathetic advocacy, or none at all, from his government.

Even if a nation does agree to press the claim of its injured national, international disputes can be judicially resolved only if the involved nations will agree to the jurisdiction of either the International Court of Justice or a comparable form of adjudication, such as arbitration.<sup>7</sup> Moreover, claims may be accumulated to be settled en masse, and any dispute-settlement process may itself consume an extensive period of time, a period which has, inevitably, a vastly different meaning to an injured individual than it does to a nation state. Even after settlement is finally made there is no assurance that the nation obtaining recovery on behalf of its injured nationals, will actually distribute the pro-

---

tal improvement will be subsidized by the richer nations, and whether whatever environmental standards are arrived at will be uniform.

5. See generally Bleicher, *An Overview of International Environmental Regulation*, 2 *ECOL. L.Q.* 1, 31-51 (1972) [hereinafter cited as Bleicher].

6. See generally F. DAWSON & I. HEAD, *INTERNATIONAL LAW, NATIONAL TRIBUNALS, AND THE RIGHTS OF ALIENS* (1971) [hereinafter cited as DAWSON & HEAD]. See also 1 WHITEMAN, *DIGEST OF INTERNATIONAL LAW* § 2 (1963).

7. See, e.g., *Trail Smelter Arbitration (U.S. v. Canada)*, 3 *U.N.R.I.A.A.* 1905 (1941), 35 *AM. J. INT'L L.* 684 (1941).

ceeds to them.<sup>8</sup> In addition, the dictates of political negotiation may well operate to preclude the swift application of corrective measures or other sanctions to prevent further injury. Compounding these difficulties are those of agreeing on international standards and, often, of merely exchanging data such as damage and treatment costs. Consequently, inaction becomes the rule and effective measures tend to be limited to those which are instituted to cope with catastrophe.<sup>9</sup>

In light, therefore, of the difficulties attendant upon action by international agreement or treaty, the possibility of utilizing national systems to solve transnational environmental problems should be carefully examined. Municipal systems may include such measures as the imposition of product standards, the limitation or prohibition of the manufacture of certain materials, unilateral exclusion from intranational geographic jurisdiction of ships, aircraft or products that do not conform to reasonable standards of construction or operation, and the extension of national anti-pollution jurisdiction.<sup>10</sup> National systems often offer legally enforceable standards of action in environmental areas and, perhaps even more importantly, can be structured to provide a means for compensating the victims of transnational injury.

It may initially appear paradoxical to propose an examination of national systems at a time when it has become increasingly apparent that protection of our rapidly deteriorating environment is an undertaking of global dimension, and that a solution correspondingly broad in scope is needed to deal with the problem. This paradox is merely illusory, however; upon reflection it becomes clear that what is necessary is the development and interaction of international organizations set up to examine, utilize and increase awareness of effective unilateral environmen-

---

8. See L. HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* 262-66 (1972). In the United States, distribution of any recovery to injured nationals may be constitutionally required. *Id.* Some countries have established national claims commissions to distribute any funds recovered in international litigation. See generally R. LILICH, *INTERNATIONAL CLAIMS: THEIR ADJUDICATION BY NATIONAL COMMISSIONS* 23-40 (1962). However, such awards generally are subject to only limited judicial review, if at all. See DAWSON & HEAD at 53.

9. Bleicher notes that

[t]he dangers of a slow, piecemeal approach is that it is likely to leave us, in the words of a United States Government memorandum, one convention behind the next major pollution disaster, not only because of the slow process of drafting and signing a large number of conventions, but because of the inevitable delays in ratification.

Bleicher at 50-51 (footnotes omitted).

10. See generally Serwer, *International Cooperation for Pollution Control, LAW, INSTITUTIONS, AND THE GLOBAL ENVIRONMENT* 178-207 (J. Hargrove ed. 1972).

tal remedies. Not only can such national remedies provide valuable insights for the development of a viable international system of environmental protection, but they can provide workable models for individual nations which are in the process of developing and improving their own domestic environmental law systems.

This recommended approach merely acknowledges the inescapable fact that national and international systems of law are inextricably interwoven. International law depends for its very existence upon achieving a consensus among national systems which, once established, can in turn add new dimensions to national law. For example, as the consensus among nations on the urgency of controlling environmental damage becomes more widespread, culminating in environmental protection legislation, the probability greatly increases that Principles 21 and 22 of the Stockholm Conference, respectively, which, propose a duty to refrain from transfrontier pollution and a duty to provide compensation to victims of such pollution,<sup>11</sup> will achieve the status of rules of international law.<sup>12</sup> Moreover, if these Principles are elevated to the level of generally recognized rules of conduct, they will, as international law, often be enforceable in municipal courts.<sup>13</sup> Aside from actual incorporation of international law, a sovereign's evaluation of the content and reach of its own domestic law will be profoundly influenced by considerations of international relations, as illustrated by recent efforts in the United States to suspend temporarily some of the requirements of the

---

11. Principle 21 states that

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

Principle 22 declares that

States shall co-operate to develop further the international law regarding liability and compensation for the victims of pollution and other environmental damage caused by activities within the jurisdiction or control of such states to areas beyond their jurisdiction.

Report, *supra* note 3, 11 INT'L LEG. MAT's at 1420.

12. For examples of unilateral action leading to the development of international law, see Bilder, *The Canadian Arctic Waters Pollution Prevention Act: New Stresses on the Law of the Sea*, 69 MICH. L. REV. 1, 25 (1970).

13. Nations adopt various methods to incorporate international law into their municipal systems; see, e.g., R. MASTERS, *INTERNATIONAL LAW IN NATIONAL COURTS* (1932). The United States Supreme Court has recognized that international law must be ascertained and administered by the courts whenever an adjudication depending upon it is presented. See *The Paquete Habana*, 175 U.S. 677, 700 (1900).

Clean Air Act<sup>14</sup> in response to the energy crisis.<sup>15</sup>

As the state of the environment becomes an increasingly volatile issue on the national level, the number of domestic laws dealing with environmental considerations is likely to increase concomitantly. Such laws not only have transnational effects now, but the unilateral actions of individual nations today may become the consensual law of the world tomorrow. An examination of existing national environmental legislation is, therefore, appropriate to understand the foundation upon which a more far-reaching system for the protection both of injured plaintiffs, and of the world's resources, could be based.

## II. SELECTED ASPECTS OF AMERICAN ENVIRONMENTAL LAW

The very concept of transnational use of national systems for dealing with environmental problems of course presupposes that viable and effectively utilized national systems exist. Many national systems, those of developed as well as less developed countries, do not meet this standard.<sup>16</sup> The American system exhibits a wide variety of effective, and often unique, administrative and judicial mechanisms for dealing with environmental problems. As a result, the focus of this analysis will be upon selected aspects of that system of environmental law.

The history of American environmental law is one of movement from almost unrestricted private use of natural resources, to governmental regulation of private use of such resources, to citizen overview of governmental regulation of the use of re-

---

14. 42 U.S.C. §§ 1857 *et seq.* (1970), *as amended*, (Supp. II, 1972).

15. Council On Environmental Quality, ANNUAL REPORT 551-563 (1974), *reprinting* The President's Message to Congress of January 23, 1974. *See also* Comment, *Environmental Legislation Passed By the 93rd Congress: A Review*, 5 E.L.R. 10020, 10022 (1975).

Another example is the Canadian Arctic Waters Pollution Prevention Act, 18-19 Eliz. 2, c. 47 (Can. 1970). The Act claims Canadian jurisdiction over two hundred miles of coastal waters for purposes of environmental protection and was passed primarily in response to "an increasing and profound disillusionment and frustration with international processes concerning the law of the sea. . . ." Bilder, *supra* note 12, at 23. While economic motivations were also present, there seems little doubt of Canada's good faith in asserting that her principal concern was with the environment. As one commentator has noted, "[w]hen states such as Canada perceive collective international processes as unlikely in practice to protect what they regard as vital interests, they may see no viable alternative to unilateral action, whatever the consequences such action may produce for the existing legal system." *Id.* at 26-27.

16. *See* Council on Environmental Quality, ANNUAL REPORT 350-55 (1973). *See also* Juergensmeyer, *A Comparative View of the Legal Aspects of Pollution Control*, 5 SUFFOLK L. REV. 741 (1971).

sources.<sup>17</sup> It is this last step which is unique. Many other nations permit private damage actions for those injured by the activities of polluters,<sup>18</sup> and most industrialized nations have some form of governmental regulation of environment-affecting activities.<sup>19</sup> These schemes often provide for some citizen involvement at administrative hearings. Nowhere, however, is there legislation comparable to the National Environmental Policy Act,<sup>20</sup> which enables private citizens to force reluctant agencies to consider in-depth environmental factors in planning federal projects.<sup>21</sup> Similarly, citizen suit provisions of the Clean Air Act<sup>22</sup> and Federal Water Pollution Control Act Amendments,<sup>23</sup> which specifically confer upon citizens a right to challenge in the courts ineffective governmental enforcement of statutory requirements, are a uniquely American invention.

Before examining the extent to which the American environmental law system can be utilized to adjudicate transnational disputes, some general observations on the remedies available under that system are necessary.

The American environmental law system, like virtually all environmental law systems, has two goals: financial compensation to injured individuals and, in a broader context, protection of natural resources. Traditional environmental litigation, consisting primarily of actions brought on various common law theories seeking damages or injunctive relief, has been relatively successful, at least in the domestic context, in achieving the first of these goals.<sup>24</sup> It has been less effective when the relief required goes

---

17. Wengert, *Notes on the Development of Environmental Law in the United States*, (based on the author's contribution to ENVIRONMENTAL DESIGN AND PUBLIC PROJECTS (D. Hendricks, E. Vlachos, L. Tucker & J. Kellogg eds. 1973)).

18. For example, in the countries of the British Commonwealth, pollution claims are generally litigated on the basis of common law theories of recovery, most notably on the theory of nuisance. See generally, Juergensmeyer, *supra* note 16, at 741. By contrast, in civil law countries, including the members of the European Economic Community, very little "private judicial activity" by individuals is encountered. *Id.* at 777.

19. For a collection of papers describing some of these mechanisms, see Economic Commission for Europe, Symposium on Problems Relating to the Environment Proc. and Documentation, May 3-10, 1971, Prague, Czechoslovakia. U.N.P. Sales No. E. 71. II. E. 6. United Nations Publication ST/ECE/ENV/1.

20. 42 U.S.C. §§ 4321 *et seq.* (1970), *as amended*, (Supp. II, 1972). *But see* text accompanying note 89 *infra*.

21. See, e.g., Maryland-National Capital Park & Planning Comm. v. Postal Serv., 487 F.2d 1029 (D.C. Cir. 1973); Save Our Ten Acres v. Kreger, 472 F.2d 463 (5th Cir. 1973); Hanly v. Kleindienst, 471 F.2d 823 (2d Cir. 1972), *cert. denied*, 412 U.S. 908 (1973); Calvert Cliffs' Coordinating Comm., Inc. v. AEC, 449 F.2d 1109 (D.C. Cir. 1971).

22. 42 U.S.C. § 1857h-2 (1970).

23. 33 U.S.C. §§ 1251 *et seq.* (Supp. II, 1972).

24. See, e.g., Martin v. Reynolds Metal Co., 221 Ore. 86, 342 P.2d 790 (1959), *cert.*

beyond the payment of money damages.<sup>25</sup> Recently enacted federal statutory provisions are designed to fill this gap by providing mechanisms for compelling governmental consideration and enforcement of environmental quality standards. While common law damage remedies continue to be utilized, this recent federal legislation has provided the greatest advances for environmentalists in the United States.

By far the most significant piece of environmental legislation in the United States is the National Environmental Policy Act of 1969 [hereinafter referred to as NEPA].<sup>26</sup> NEPA enunciates a national policy of environmental protection<sup>27</sup> and imposes on all federal agencies an obligation to "identify and develop methods and procedures . . . which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decision-making. . . ."<sup>28</sup> Each federal agency must file a detailed statement of the environmental impact of all major federal actions which may significantly affect the quality of the environment;<sup>29</sup> other government agencies and

*denied*, 362 U.S. 918 (1960) (trespass); *Jost v. Dairyland Power Cooperative*, 45 Wis. 2d 164, 172 N.W.2d 647 (1970) (nuisance). See generally 1 F. GRAD, ENVIRONMENTAL LAW (1971); 2 F. GRAD, ENVIRONMENTAL LAW (1972).

25. See, e.g., *Boomer v. Atlantic Cement Co.*, 26 N.Y.2d 219, 257 N.E.2d 870, 309 N.Y.S.2d 312 (1970).

26. 42 U.S.C. §§ 4321 *et seq.* (1970), as amended, (Supp. II, 1972). For excellent discussions of NEPA, see Council on Environmental Quality, ANNUAL REPORT 371-420 (1974); Yarrington, *The National Environmental Policy Act*, 4 BNA ENVIR. REP. (Monograph No. 17) 1 (1974).

27. 42 U.S.C. § 4331 (1970).

28. 42 U.S.C. § 4332(2)(B) (1970).

29. 42 U.S.C. § 4332(2)(C) (1970) provides that all agencies of the federal government shall:

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

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

The threshold determination of whether the filing of an impact statement is required is made by the agency having primary responsibility for the proposed federal action. S. REP. NO. 296, 91st Cong., 1st Sess. 20 (1969). Although the courts have agreed that this determination is subject to judicial review, they have differed on the appropriate standard to be applied. Compare *Save Our Ten Acres v. Kreger*, 472 F.2d 463, 465 (5th Cir. 1973)

the public must be given the opportunity to scrutinize and comment on these impact statements before ultimate decisions are made.<sup>30</sup> Thus, despite the fact that the requirements which NEPA imposes are procedural rather than substantive, it is "action-forcing,"<sup>31</sup> and an agency which does not comply with its statutory duties under NEPA is subject to suit.<sup>32</sup> On the other hand, if the agency has complied with these procedural requirements and decides to proceed despite an adverse environmental impact, the court, once convinced that the agency has indeed considered all appropriate environmental factors,<sup>33</sup> has no power to substitute its judgment on the merits for that of the agency.<sup>34</sup>

Perhaps the primary significance of NEPA lies in the fact that, in contrast to most environmental legislation which focuses on standard setting and remedial action available in the event of noncompliance with said standards, NEPA provides a viable

---

(agency's threshold determination not to file an environmental impact statement should be reviewed under the standard of reasonableness rather than by the narrower standard of arbitrariness or capriciousness) *with* *Hanly v. Kleindienst*, 471 F.2d 823, 829 (2d Cir. 1972), *cert. denied*, 412 U.S. 908 (1973) (the appropriate standard for review is the "arbitrary, capricious" standard rather than the "rational basis" standard). *See generally* Note, *NEPA, Environmental Impact Statements and the Hanly Litigation: To File or Not To File*, 48 N.Y.U.L. Rev. 522 (1973).

30. 42 U.S.C. § 4332(2)(C) (1970).

31. The Senate Report on NEPA labelled section 102 as "action-forcing." S. REP. NO. 296, 91st Cong., 1st Sess. 19 (1969). Supporters of the bill insisted that such a mechanism was necessary to insure governmental compliance with NEPA's policy mandate. *See, e.g., Hearings on S. 1075, S. 237 and S. 1752 Before the Senate Comm. on Interior and Insular Affairs*, 91st Cong., 1st Sess. 116 (1969).

32. On review, the court will consider whether the agency was required to prepare an impact statement, *see* note 29 *supra*, whether the statement was prepared in the proper manner, *see, e.g., Calvert Cliffs' Coordinating Comm., Inc. v. AEC*, 449 F.2d at 1109, and whether the statement is sufficiently broad in the scope of its contents, *see, e.g., Hanly v. Kleindienst*, 471 F.2d 823 (2d Cir. 1972), *cert. denied*, 412 U.S. 908 (1973).

33. An agency's obligation under NEPA is an affirmative one; throughout the NEPA process, the agency must take positive steps to ascertain the effect of its actions on the environment.

[The agency's] responsibility is not simply to sit back, like an umpire, and resolve adversary contentions at the hearing stage. Rather, it must itself take the initiative of considering environmental values at every distinctive and comprehensive stage of the process. . . .

*Calvert Cliffs' Coordinating Comm., Inc. v. AEC*, 449 F.2d at 1119. *See also* *Hanly v. Kleindienst*, 471 F.2d 823 (2d Cir. 1972), *cert. denied*, 412 U.S. 908 (1973). *Cf. Scenic Hudson Preservation Conf. v. FPC*, 354 F.2d 608, 620 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966) (decided under the Federal Power Act and holding that an agency which represents the public interest must act affirmatively to protect the rights of the public).

34. *Save Our Ten Acres v. Kreger*, 472 F.2d 463, 467 (5th Cir. 1973). *But see* *Calvert Cliffs' Coordinating Comm., Inc. v. AEC*, 449 F.2d at 1115 (suggesting that reversal on the merits may be possible if the agency's decision is clearly arbitrary or clearly gave insufficient weight to environmental values).

mechanism for permitting anticipatory relief. Courts have recognized that "[i]t is far more consistent with the purposes of [NEPA] to delay operation at a stage where real environmental protection may come about than at a stage where corrective action may be so costly as to be impossible."<sup>35</sup> Accordingly, courts have enjoined even environmentally neutral preliminary segments of environmentally significant projects pending formulation and approval of an environmental impact statement.<sup>36</sup> It is this anticipatory mechanism, in conjunction with liberalized concepts of standing,<sup>37</sup> the rise of committed environmental interest groups, and broad interpretations by the courts of the Act's requirement, which have molded NEPA into an extremely valuable environmentalists' tool.

As valuable as NEPA has shown itself to be, its efficacy lies in its potential for forcing those who make basic policy decisions to take environmental factors into account. It is a procedural management tool and as such is not a substitute for sound substantive legislation to regulate specific areas of environmental concern. Such statutes abound in the United States at all levels of governmental organization.<sup>38</sup> Of particular importance are the Clean Air Act Amendments of 1970<sup>39</sup> and the Federal Water Pollution Control Amendments of 1972.<sup>40</sup> In addition to complex provisions for functionally integrating state and federal systems,<sup>41</sup>

---

35. *Calvert Cliffs' Coordinating Comm., Inc. v. AEC*, 449 F.2d at 1128.

36. *People of Enewetak v. Laird*, 353 F. Supp. 811, 820-21 (D. Haw. 1973).

37. See note 56 *infra*.

38. See generally 1 F. GRAD, ENVIRONMENTAL LAW (1973).

39. 42 U.S.C. §§ 1857 *et seq.* (1970), *as amended*, (Supp. II, 1972). See generally Settle, *Guarding the Guardian: The "Citizen Suit" for Clean Air*, 3 ENVIR. LAW 1 (1973).

40. 33 U.S.C. §§ 1251 *et seq.* (Supp. II, 1972). See generally Comment, *The Federal Water Pollution Controls Act Amendments of 1972*, 14 B.C. IND. & COM. L. REV. 672 (1973).

41. The general statutory framework for these laws involves total federal preemption of some areas (*e.g.*, emission controls for new motor vehicles and aircraft emission standards under the Clean Air Act); partial federal preemption of others (new source performance standards and hazardous emission standards or toxic effluent standards under both the Clean Air Act and the Federal Water Pollution Control Act); and an area where states may adopt and enforce emission and effluent standards so long as they comply with minimum federal standards of air or water quality. See Luneberg, *Federal-State Interaction Under the Clear Air Amendments of 1970*, 14 B.C. IND. & COM. L. REV. 637 (1973).

The Administrator of the Environmental Protection Agency determines the minimum acceptable national standards, and promulgates guidelines for state standards in this third area. Each state must then, within a specified time period, hold public hearings, adopt and submit to the EPA a state implementation plan which at least meets federal standards, though a state retains the right to set more stringent standards. The EPA Administrator must then, within a specified time period, adopt or reject the state plan. 33 U.S.C. §§ 1311-14 (Supp. II, 1972). If the state submits no plan or fails to revise a plan

these Acts are unique in that they authorize citizens both to institute lawsuits against polluters to compel compliance,<sup>42</sup> and to sue the Administrator of the Environmental Protection Agency if he fails to carry out a nondiscretionary duty.<sup>43</sup>

Citizen suits are contingent upon sixty days prior notice to the Administrator, the proper state agency, and the alleged violator.<sup>44</sup> If, at the end of this time, an abatement action is pending and is being diligently pursued in a district or state court, a citizen suit cannot be commenced; however, any party in interest may intervene in that action as a matter of right.<sup>45</sup> Although both the Clean Air Act and the Federal Water Pollution Control Amendments specifically reserve any rights and remedies under

---

which has been rejected, the Administrator of the EPA is required to promulgate an acceptable plan for that state. 33 U.S.C. § 1313(b) (Supp. II, 1972). Once the plan for the state is promulgated or accepted, it becomes "federalized"; thus, although the states are expected to assume the primary responsibility of enforcement, the federal government retains the right to assume enforcement if any state is derelict in that duty. 33 U.S.C. § 1319 (Supp. II, 1972).

Under the Federal Water Pollution Control Act Amendments, the primary means of enforcement is via a nationwide permit system. 33 U.S.C. § 1341 (Supp. II, 1972). A permit is required for anyone discharging effluents into navigable waters. States must hold public hearings for review and revision of water quality standards at least every three years and each such revision is subject to the approval of the Administrator of the EPA. 33 U.S.C. § 1313(c) (Supp. II, 1972). Similar opportunities for revision of standards are available under the Clean Air Act. 42 U.S.C. § 1857c-2(d) (1970).

42. Section 304 of the Clean Air Act of 1970, 42 U.S.C. § 1857h-2(a) (1970), and section 505 of the Federal Water Pollution Control Act, 33 U.S.C. § 1365 (Supp. II, 1972), provide that suit may be filed by "any person" or "any citizen" against private polluters or government agencies for failure to comply with emission or effluent limitations, state implementation plans, or abatement orders issued by the Environmental Protection Agency or a state agency. See Council on Environmental Quality, ANNUAL REPORT 176-77 (1972).

The Federal Water Pollution Control Act differs from the Clean Air Act in that it provides for the imposition of civil penalties of up to \$10,000 a day in addition to injunctive relief; it also permits a state governor to disregard the notice provision, see note 41 *supra*, in a suit against a private polluter where a violation in another state "is causing an adverse effect on the public health and welfare in his State, or is causing a violation of any water quality requirement in his State." Mannino, *Citizen Suits to Protect the Environment, An Introduction to Some "New Remedies,"* 44 PA. B.A.Q. 181, 188 (1973).

43. 33 U.S.C. § 1365(a)(2) (Supp. II, 1972); 42 U.S.C. § 1857h-2(a) (1970).

44. 33 U.S.C. § 1365(b) (Supp. II, 1972); 42 U.S.C. § 1857h-2(b) (1970). The notice provisions are not operative in the case of violations of hazardous emission or toxic effluent standards, for violations of new source standards, and for violations of abatement orders. The theory behind the notice provisions is that the Administrator, having been notified, will take action to have the violation corrected and thereby relieve the citizen from the burden of maintaining the suit.

45. 33 U.S.C. § 1365(b)(1)(B) (Supp. II, 1972); 42 U.S.C. § 1857h-2(b)(1)(B) (1970). The Administrator may intervene in any citizen action to which he is not a party. 33 U.S.C. § 1365(c)(2) (Supp. II, 1972); 42 U.S.C. 1857h-2(c)(2) (1970).

any other law, citizen suits are for enforcement only,<sup>46</sup> and the joinder of damage actions is not permitted unless there is an independent basis for federal jurisdiction.<sup>47</sup>

The Clean Air Act Amendments and the Federal Water Pollution Control Act Amendments illustrate a scheme of regulation designed to adjust pollution control responsibilities between federal and state sovereignties, while providing for maximum feasible participation of individual citizens in the regulation process. The litigation provisions, being limited to correction of violations, lack the anticipatory mechanism found in NEPA. Like NEPA, however, they are action-forcing<sup>48</sup> because they impose specific legislative deadlines upon statutorily required actions<sup>49</sup> and provide judicial remedies in the event of noncompliance.<sup>50</sup>

In addition to the laws which have been discussed, there is a wide variety of innovative environmental control mechanisms extant in the United States, the proliferation attributable in part to the complexities of the federal system.<sup>51</sup> There is also a movement in the United States to have "freedom from environmental harm" elevated to the stature of a constitutionally protected right.<sup>52</sup> Furthermore, the Supreme Court has recently opened the

---

46. The district courts may order compliance and, in addition, may award court costs (including reasonable attorney and expert witness fees) at its discretion to either party to the action. 33 U.S.C. § 1365(d) (Supp. II, 1972); 42 U.S.C. § 1857h-2(d) (1970).

The entire area of counsel fees in citizen suits may soon be clarified by the Supreme Court, which has recently granted certiorari in *Wilderness Society v. Morton*, 495 F.2d 1026 (D.C. Cir. 1974), cert. granted sub nom., *Alyeska Pipeline Ser. Co. v. Wilderness Society*, 43 U.S.L.W. 3208 (U.S. Dec. 15, 1974), to consider the appropriateness of a grant of counsel fees to citizen groups bringing suit under NEPA. Oral argument was heard January 22, 1975. 43 U.S.L.W. 3414 (U.S. Jan. 28, 1975).

47. If an alien is party to the suit, a damage action could be joined if the amount in controversy is over \$10,000 since a suit between a United States citizen and an alien falls within the federal diversity jurisdiction provision, see text accompanying note 64 *supra*.

48. See note 31 *supra*.

49. See note 41 *supra*.

50. See text accompanying notes 42-43 *supra*.

51. Vermont, for example, has enacted legislation which embodies the principle of the effluent charge. 10 VT. STAT. ANN. §§ 910 *et seq.* (1970). See generally 1 F. GRAD, ENVIRONMENTAL LAW § 2.03 [4] (1973). Michigan has enacted a statute grounded in the ancient common law doctrine of the "public trust." It gives standing to virtually anyone to assert environmental rights and permits the courts to perform the legislative function of adopting environmental standards. MICH. COMP. L. ANN. §§ 691.1201 *et seq.* (Supp. 1974). See generally J. SAX, DEFENDING THE ENVIRONMENT: A STRATEGY FOR CITIZEN ACTION (1971); Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970). Furthermore, many areas have enacted local legislation patterned after the federal statutes. See Luneberg, *supra* note 41.

52. See, e.g., Klipsch, *Aspects of a Constitutional Right to a Habitable Environment: Towards An Environmental Due Process*, 49 IND. L.J. 203 (1974).

way for the development of a federal common law of nuisance.<sup>53</sup> Any or all of these approaches, as well as the legal and institutional mechanisms utilized in functionally integrating such a variety of approaches, will have important implications for action aimed at protecting the international environment.

While it is possible to outline briefly the remedies by means of which the American system of environmental law achieves its goals in the domestic context, there are a number of key threshold issues which must be examined in order to evaluate the adaptability of that system to situations which are not wholly domestic in nature. Perhaps the single most significant issue in determining the extent to which a domestic legal system can be utilized to adjudicate transnational disputes is the status which that system accords the alien plaintiff. Most federal and state courts in the United States have adopted the position that resident and nonresident friendly aliens have the same legal capacity to sue and be sued as do citizens of the jurisdiction.<sup>54</sup> Thus, if an alien plaintiff has a legally cognizable claim under the common law or an applicable statute, he will not be barred from asserting it in an American forum merely because he is an alien.

In order to assert his claim, however, an alien plaintiff, like a domestic plaintiff, must meet the general test of standing.<sup>55</sup> The Supreme Court has set forth the guiding principles for determining the question of standing to sue:

Where the party does not rely on any specific statute authorizing invocation of the judicial process, the question of standing depends upon whether the party has alleged such a "personal stake in the outcome of the controversy" . . . as to ensure that "the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable

---

53. *Illinois v. City of Milwaukee*, 406 U.S. 91 (1972). The Court held that the district court had jurisdiction to hear a pollution abatement suit brought by the State of Illinois against a political subdivision of another state under 28 U.S.C. section 1331(a) (1970), the general federal question provision, even though the action did not arise under a specific statute of the United States. While this case arguably provides a basis for the development of a federal common law of nuisance, the extent to which its reasoning is applicable to suits between private parties is not yet settled. See Campbell, *Illinois v. City of Milwaukee: Federal Question Jurisdiction Through Federal Common Law*, 3 ENVIR. LAW 267 (1973).

54. The Judiciary Act of 1789 specifically granted aliens access to federal courts. Act of Sept. 24, 1789, ch. 20, 11, 1 Stat. 78; see *Ex Parte Kawato*, 317 U.S. 69, 77 n.13 (1942); *Dunlop & Co. v. Ball*, 6 U.S. (2 Cranch) 180 (1804). See also *Taylor v. Carpenter*, 11 Paige 292 (N.Y. Ch. 1844).

55. On standing to sue, see generally C. WRIGHT, *LAW OF FEDERAL COURTS* § 13 (2d ed. 1970).

of judicial resolution." . . . Where, however, Congress has authorized public officials to perform certain functions according to law, and has provided by statute for judicial review of those actions under certain circumstances, the inquiry as to standing must begin with a determination of whether the statute in question authorizes review at the behest of the plaintiff.<sup>56</sup>

An alien plaintiff may, therefore, be initially confronted with the argument that the right conferred by the statute upon which suit is based was intended to be limited to citizens.<sup>57</sup>

The question of the extent to which foreign citizens may participate in the NEPA process was apparently resolved in *Wilderness Society v. Morton*.<sup>58</sup> There, environmental groups challenged the construction of the Trans-Alaskan Pipeline, on the grounds, *inter alia*, that the Secretary of the Interior did not comply with NEPA's impact statement requirement.<sup>59</sup> The Court of Appeals for the District of Columbia Circuit allowed Canadian

---

56. *Sierra Club v. Morton*, 405 U.S. 727, 732 (1971) (citations omitted). Standing to bring statutory actions to challenge administrative decisions in court is governed by the language of the particular statute or by the Administrative Procedure Act, 5 U.S.C. §§ 701 *et seq.* (1970). To contest the legality of an administrative action of the federal government, as is necessarily the case when a statute such as NEPA is invoked, the Administrative Procedure Act requires that the person or group bringing the suit be "aggrieved by agency action within the meaning of a relevant statute." 5 U.S.C. § 702 (1970). In interpreting this provision, the Supreme Court has adopted a two-pronged test of standing which requires plaintiff to allege first, that the challenged action has caused him "injury in fact," economic or other, and second that the interest sought to be protected is "arguably within the zone of interests to be protected or regulated by the statute" in question. *Association of Data Processing Ser. Orgs., Inc. v. Camp*, 397 U.S. 150, 152-53 (1970); *Barlow v. Collins*, 397 U.S. 159, 164 (1970). In *Sierra Club v. Morton* the Supreme Court clearly established that environmental injuries were of sufficient stature to establish standing, but held that the complainant must show that he himself is among those harmed. 405 U.S. at 734-35. Once standing has been established, however, the litigant may assert the general public interest in protecting the threatened environmental asset. *Id.* at 737.

57. Although early Supreme Court cases permitted statutes to discriminate on the basis of alienage, provided that the state could demonstrate a rational basis for doing so, *Terrance v. Thompson*, 263 U.S. 197, 217-18 (1923) (land-holding); *Patson v. Pennsylvania*, 232 U.S. 138, 143-44 (1914) (killing of wild game), more recent decisions of the Court have held alienage to be a suspect classification requiring a compelling state interest to justify discrimination against resident aliens, *In re Griffiths*, 413 U.S. 717, 721 (1973) (eligibility to take a state bar examination); *Sugarman v. Dougall*, 413 U.S. 634, 642 (1973) (competitive civil service appointments); *Graham v. Richardson*, 403 U.S. 365, 372 (1971) (welfare benefits).

58. 463 F.2d 1261 (D.C. Cir. 1972).

59. This issue was eventually resolved by action of Congress. See *Wilderness Society v. Morton*, 495 F.2d at 1033-35. The Supreme Court has granted certiorari to consider whether an award of legal costs to plaintiff was proper under these circumstances; see note 46 *supra*.

citizens to intervene in order to raise issues regarding the impact of the project on territory under Canadian jurisdiction. The standard employed in deciding whether or not to permit intervention was apparently the same as that which would have been applied in a purely domestic context, i.e., whether or not the intervenors' interests were sufficiently antagonistic to those of parties before the court to justify permitting the intervenor to represent his own interests in the judicial process. The court specifically rejected the appellee's claim that challenges under NEPA, when made by non-United States citizens, are non-justiciable.<sup>60</sup>

The *Wilderness Society* holding was subsequently interpreted in *People of Enewetak v. Laird*<sup>61</sup> in which the court held that the Enewetakese, whose ancestral home was part of a United States Trust Territory, had standing to bring a NEPA action. The court specifically commented that

[t]he fact that the Enewetakese are non-resident aliens does not detract from their standing to sue . . . While it is true that non-resident aliens are denied standing in situations where the statute involved evinces such an intent—as in immigration disputes . . . —no such intent is apparent in NEPA.<sup>62</sup>

The analogous question of whether nonresident aliens may bring citizen suits under the Clean Air Act and the Federal Water Pollution Control Act provisions has not yet been litigated.<sup>63</sup>

In addition to the necessity of a proper plaintiff, an American court cannot adjudicate a dispute unless the requirements of subject matter and personal jurisdiction are satisfied. The United States Judicial Code provides that federal courts have diversity

---

60. The court noted that the Canadians were participating in the related administrative proceedings and concluded that "[n]o reason appears why they should not be allowed to participate with the other parties in the judicial review of those proceedings." 463 F.2d at 1262 n.2.

61. 353 F. Supp. 811 (D. Haw. 1973).

62. *Id.* at 820 n.14. See also *People of Saipan v. Department of Interior*, 502 F.2d 90 (9th Cir. 1974), cert. denied, 43 U.S.L.W. 3525 (U.S. March 31, 1975); note 77 *infra*.

63. Almost all citizen suit litigation pursued in the federal courts to date has focused on challenges to administrative action taken with respect to the implementation plan program under the Clean Air Act; see Comment, *The Aftermath of the Clean Air Amendments of 1970: The Federal Courts and Air Pollution*, 14 B.C. IND. & COM. L.R. 724 (1973). However, aliens do not appear to be precluded from bringing actions under the Clean Air Act since the statute itself provides that "any person" may sue, 42 U.S.C. § 1857h-2 (1970). And while the Federal Water Pollution Control Act language is more restrictive, limiting suit to "any citizen," the statute itself defines "citizen" very broadly as "a person or persons having an interest which is or may be adversely affected." 33 U.S.C. § 1365(g) (Supp. II, 1972).

jurisdiction in an action between an alien and a United States citizen.<sup>64</sup> Despite this provision, some ambiguity remains with respect to jurisdiction over transnational pollution cases because, in diversity actions, state rather than federal law usually governs.<sup>65</sup> The extent to which this fact creates obstacles to successful private litigation for damages or injunctive relief from injurious activities occurring across national boundaries varies from state to state. For example, some state courts are not permitted to exercise jurisdiction over injuries to property located outside the

---

64. 28 U.S.C. § 1332(a) (1970) provides:

The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of \$10,000, exclusive of interest and costs, and is between—

- (1) citizens of different States;
- (2) citizens of a State, and foreign states or citizens or subjects thereof;
- and
- (3) citizens of different States and in which foreign states or citizens or subjects thereof are additional parties.

In addition, federal courts have exclusive jurisdiction over actions brought by an alien "for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350 (1970). This provision, which deprives state courts of jurisdiction in such cases, has been strictly construed; *see O'Reilly de Camara v. Brooke*, 209 U.S. 45 (1908); *Khedirial Line, S.A.E. v. Seafarers' Int'l Union*, 278 F.2d 49 (2d Cir. 1960). Although the Judicial Code gives the Supreme Court original (but not exclusive) jurisdiction of any action brought by a state against an alien, no such cases have been reported. DAWSON & HEAD, *supra* note 6, at 128.

65. As one commentator noted:

The extent of the ambiguity surrounding such transnational litigation became apparent when some Canadian citizens inquired about the scope of their rights under a treaty provision reading:

[A]ny interference with or diversion from their natural channel of such waters on either side of the boundary, resulting in any injury on the other side of the boundary, shall give rise to the same rights and entitle the injured parties to the same legal remedies as if such injury took place in the country where such diversion or interference occurs. . . .

Treaty with Great Britain Relating to Boundary Waters between the United States and Canada, Jan. 11, 1909, art. II, 36 Stat. 2448 (1910), T.S. No. 548 (effective May 5, 1910). . . . The United States Government responded:

I regret that this Government cannot undertake to answer your inquiry as to what are the rights and remedies of the citizens of Minnesota in respect to such a case as the one under consideration, for that is a question which depends to a great extent upon State law rather than Federal law, and falls outside of the jurisdiction of this Department, except in so far as the treaty requires that Canadian interests in the State of Minnesota be protected, and on this point the provisions of the treaty are regarded as sufficient in themselves to insure such treatment.

Speech by Acting Sec'y of State, Aug. 22, 1911, as cited in Griffin, *A History of the Canadian-United States Boundary Waters Treaty of 1909*, 37 U. DET. L.J. 76, 94 (1959). No cases have been brought in the United States under this provision of the treaty.

Bleicher, *supra* note 5, at 15 n.45.

state.<sup>66</sup> On the other hand, the vast extension of personal jurisdiction via state "long arm" statutes may make it easier for residents to bring transnational suits against foreign polluters doing business or maintaining other contacts within the state.<sup>67</sup>

When suit is brought under a federal statute, the analogous question arises as to whether the statute should be interpreted to permit American courts to exercise jurisdiction in cases where the acts giving rise to suit occurred outside the geographic confines of the United States.<sup>68</sup> When such acts have repercussions in the United States, there is a sufficient basis for entertaining such a suit;<sup>69</sup> furthermore, allowing residents to bring, for example, citizen suits under the Clean Air Act and Federal Water Pollution Control Act Amendments against extraterritorial polluters whose activities result in substandard quality levels within the United States would appear to be, at least in some cases, necessary to effectuate the statutory purpose. However, the question of the extraterritorial application of these statutes apparently has not yet been litigated.<sup>70</sup>

Under NEPA, where the party against whom suit is brought is necessarily a federal governmental agency or administrator thereof, the issue of extraterritorial application of the statute has arisen in the form of a controversy as to the extent to which the

66. *Arvidson v. Reynolds Metals Co.*, 107 F. Supp. 51 (D. Wash. 1952). See *The Trail Smelter Dispute*, 1 CAN. Y.B. INT'L L. 213, 222-23 (1963), citing *British So. Africa Co. v. Companhia de Mocambique*, [1893] A.C. 602.

67. Bleicher, *supra* note 5, at 15 n.45. For a discussion focusing particularly on the New York long arm statute, see DAWSON & HEAD at 170-71.

68. American courts view the question as one grounded upon statutory construction. The courts examine the history and purposes of the legislation to ascertain the congressional intent as to its extraterritorial application; see, e.g., *McCulloch v. Sociedad Nacional De Marineros De Honduras*, 372 U.S. 10 (1963); *Steele v. Bulova Watch Co.*, 344 U.S. 280 (1952). If such an intent is discerned, the courts have gone on to determine whether a sufficient jurisdictional basis exists in the matter under consideration, for application of the statute; see, e.g., *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945); *Schoenbaum v. Firstbrook*, 268 F. Supp. 385 (S.D.N.Y. 1967). Additionally, the possible effects which applying the statute might have upon international relations are examined by the courts; see, e.g., *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962).

69. See *United States v. Aluminum Co. of America*, 148 F.2d at 416.

70. See note 63 *supra*. Although the penalty provisions of the Federal Water Pollution Control Act speak broadly of "any person" in violation, the Act continues the "Conference Procedure" available under prior law for purposes of international pollution abatement. 33 U.S.C. § 1320 (Supp. II, 1972). The conference procedure is available only to a foreign country which gives similar rights to the United States, and all other functions of the Administrator under the Act are unaffected. A similar conference procedure is available under the Clean Air Act. 42 U.S.C. § 1857(d) (1970), as amended, (Supp. II, 1972).

Act applies to those federal agencies whose activities have their sole or primary impact abroad.<sup>71</sup>

Section 102(2)(E)<sup>72</sup> is the only section of NEPA which is directed primarily to the international environment. This provision requires all agencies to

[r]ecognize the world-wide 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.<sup>73</sup>

While some agencies whose activities are primarily international in character and effect have promulgated regulations requiring the preparation of environmental impact statements,<sup>74</sup> others have taken the view that a general policy commitment to environmental protection is the extent of their obligation under NEPA and that NEPA's specific procedural requirements either do not apply<sup>75</sup> or are attenuated as to them.<sup>76</sup> The evident uncertainty over the foreign reach of NEPA has arisen because neither NEPA's language nor its legislative history is explicit about the

---

71. See Frank, *The Foreign Reach of NEPA*, ALL-ABA COURSE OF STUDY: INTERNATIONAL AND TRADE ASPECTS OF ENVIRONMENTAL LAW 131 (1974) [hereinafter cited as Frank]. See also Council on Environmental Quality, ANNUAL REPORT 381-86 (1974).

72. 42 U.S.C. § 4332(2)(E) (1970).

73. *Id.*

74. Although the Department of State initially contended that impact in foreign jurisdictions is not covered by NEPA, it has since promulgated regulations requiring the preparation of impact statements for its actions, which include international activities significantly affecting the environment, 37 Fed. Reg. 19167-9 (1972). The Department of Defense has also promulgated regulations calling for the filing of impact statements. 39 Fed. Reg. 14699 (1974).

75. The Export-Import Bank (Eximbank), despite the unquestioned environmental significance of its program, has no environmental regulations, does not prepare environmental impact statements and maintains that NEPA has no extraterritorial effect and therefore does not apply to Eximbank's activities which, in the agency's view, have no adverse environmental effect in the United States. FRANK at 144. The President of Eximbank has, however, in a memorandum to the staff, requested loan officers to evaluate the environmental impact of Eximbank activities; Memorandum (January 1, 1971), reprinted in FRANK, Appendix E.

76. The Agency for International Development (AID) has disseminated a circular informing its foreign officers of the "need of assessing the environmental costs of capital projects," but the suggested procedures fall short of those required by NEPA. 37 Fed. Reg. 22686 (1972). See also FRANK at 141. The Overseas Private Investment Corporation (OPIC) has adopted environmental guidelines but, like those of AID, they differ significantly from those of NEPA. OPIC General Policy and Guidelines Eligibility of Project Environmental Considerations, October 26, 1971, reprinted in FRANK, Appendix F. See also *id.* at 145.

territorial scope of the impact statement requirement. Nor has any court determined the ultimate scope of the impact statement requirement, although two courts have concluded that NEPA applies outside the United States to federal actions undertaken in trust territories administered by the United States under trust agreements with the United Nations.<sup>77</sup>

The trend of opinion seems to be in the direction of applying NEPA to international activities. The Council on Environmental Quality<sup>78</sup> has asked for impact statements on international activities which have their impacts primarily in other jurisdictions or in international areas, and its Legal Advisory Committee has concluded that the NEPA requirements concerning impact statements should apply to Department of State and AID actions carried out within the territorial jurisdiction of another nation, both as a matter of law and as a matter of policy,<sup>79</sup> and in fact during 1974 several statements were prepared in the international

---

77. In *People of Enewetak v. Laird*, 353 F. Supp. 811 (D. Haw. 1973), the hereditary and elected leaders of the people of the trust territory, the Enewetak Atoll, sued under NEPA to enjoin the Department of Defense from conducting nuclear tests on the Atoll. The court considered the applicability of NEPA outside the United States as an issue of first impression and, reasoning that federal legislation applies to the trust territories only if Congress manifests an intention that it should, found such an intention, relying upon the facts that (a) the statute uses broad language and is not by its terms restricted to United States territory delimited by the fifty states; (b) the statute clearly evidences a concern for all persons subject to federal action, not just United States citizens in the fifty states; (c) the legislative history shows Congress intended broad application and recognized the worldwide scope of environmental problems, and (d) other recent federal environmental legislation identifying areas where the laws are to be effective has included the Trust Territory. The court specifically declined to rule on defendants' argument that while NEPA applied to federal action in areas not under any nation's jurisdiction, it did not apply to territories under the jurisdiction of a nation other than the United States. *Id.* at 817 n.10.

In *People of Saipan v. Department of Interior*, 502 F.2d 90 (9th Cir. 1974), *cert. denied* 43 U.S.L.W. 3525 (U.S. March 31, 1975), plaintiffs, citizens of the Trust Territory of the Pacific Islands (Micronesia), brought suit under NEPA to enjoin certain actions of the Trust Territory Government. While dismissing plaintiffs' NEPA claims on the ground that the Trust Territory Government is not a "federal agency" subject to judicial review under the Administrative Procedure Act or NEPA, the Ninth Circuit clearly held that NEPA applies to federal agencies operating in the Trust Territory. *Id.* at 94-95.

78. The Council on Environmental Quality (CEQ) is established under NEPA, 42 U.S.C. § 4321 (1970). Its functions are to advise the President, review and appraise federal governmental programs in light of national environmental policy, undertake basic environmental research and facilitate the implementation of NEPA's procedural requirements. It also prepares the annual Environmental Quality Report which the President is required to submit to the Congress each year. 42 U.S.C. § 4341 (1970).

79. Legal Advisory Committee to the President's Council of Environmental Quality, News Release, April 25, 1971 (Copy on file at office of Professor Grad, Columbia University).

area.<sup>80</sup> In addition, of the two congressional committees that have overseen the implementation of NEPA, one, the House Committee on Merchant Marine and Fisheries, after careful consideration rejected the Department of State's initial position that impact in foreign jurisdictions is not covered by the statute.<sup>81</sup> Further, it appears that federal agencies can be exempted from filing an impact statement under NEPA only if there is a clear conflict with the statutory authority which authorizes that agency to perform its specialized functions.<sup>82</sup> On policy grounds, then, it is as advisable to apply NEPA to activities with impact wholly or primarily in a foreign jurisdiction as to domestic activities.<sup>83</sup> The function of NEPA is merely to ensure that environmental consequences are fully considered. The filing of NEPA statements for foreign-based activities not only will compel American decision-makers to consider such consequences, but will also ensure that countries which receive aid are aware of the potential environmental effects of a project so that they too can make informed decisions.

### CONCLUSION

Two related points inexorably emerge from an examination of the use of national systems to help solve transnational problems. The first of these is that as international commerce and its cross-frontier effects increase with the constant erosion of geographic barriers by advanced technology, it becomes more and

---

80. For example, the Department of State prepared an impact statement outlining the United States' negotiating position at the United Nations Law of the Sea Conference as well as an impact statement on United States alternatives to improve the quality of Colorado River water that flows into Mexico. See Council on Environmental Quality, ANNUAL REPORT 392 (1974). See also Frank at 138.

81. *House Comm. on Merchant Marines and Fisheries, Administration of the National Environmental Policy Act*, H.R. REP. No. 316, 92d Cong., 1st Sess. 33 (1971).

82. "Only when such specific obligations conflict with NEPA do agencies have a right under § 104 . . . to dilute their compliance with the full letter and spirit of the Act." *Calvert Cliffs' Coordinating Comm. v. AEC*, 449 F.2d 1109, 1115 n.12 (D.C. Cir. 1971).

83. See, e.g., Letter from William B. Macomber, Jr., Assistant Secretary for Congressional Relations, Department of State, to Senator Henry M. Jackson, 21 April 1969, S. REP. No. 91-296, Cal. No. 287, Appendix at 43-45 (on National Environmental Policy Act of 1969).

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

*Id.* at 43.

more important that nations provide, as an integral part of their legal systems, the means for the redress of environmental injuries. This entails providing both the jurisdictional means, such as long arm statutes, for bringing the offender before the court, and the domestic remedies to afford relief once the issues have been joined. The second, and equally important need, is that aliens who have been harmed by transnational events be permitted access to the courts and the legal remedies of whatever nation has the ability to effectuate the resolution of their claims. In both respects, the American system is unusually efficacious, and its distinctive methods of providing redress for both citizens and aliens deserves serious consideration as a model for other national systems.

The United States has set the strongest possible example for the world by incorporating into its own governmental system a concern for the environment which permeates all stages of the decision-making process. It is extraordinarily significant that even where economic or military considerations or energy imperatives are temporarily asserted to have assumed overriding importance, the burden of justifying priorities, preliminarily at least, is on those asserting the importance of these other considerations rather than on those whose primary concern is the environment. This shift in the burden of persuasion, as reflected in the procedural requirements of NEPA and the substantive remedies provided by the Clean Air and Water Acts, not only reflects a re-orientation in American environmental values, but the indications are that this new orientation is exportable.

In the past years it has become clear that environmental impact statements have significant transnational uses and implications. First, certain federal agencies such as the State Department<sup>84</sup> and the National Science Foundation<sup>85</sup> prepared guidelines covering certain of their activities abroad. Second, impact statements have been prepared by the United States to describe the international environmental effects of essentially domestic actions, such as the Colorado River International Salinity Control Project, affecting Mexico, and the Bureau of Reclamation's Garrison Diversion Project in North Dakota which may cause water pollution problems in Canada.<sup>86</sup> Such statements

---

84. See note 74 *supra*.

85. National Science Foundation, Circular No. 99, Rev. No. 2, § 6(b)(3) (February 28, 1974), cited in Council on Environmental Quality, ANNUAL REPORT 399 (1974).

86. Council on Environmental Quality, ANNUAL REPORT 399 (1974).

have also been prepared prior to the conclusion of international agreements affecting the environment, for example, for the Convention on the Prevention of Marine Pollution by Dumping Wastes and Other Matter, the Convention on International Trade in Endangered Species of Wild Fauna and Flora, the 1973 Convention on the Prevention of Pollution from Ships and the Law of the Sea Conference.<sup>87</sup> These impact statements have allowed environmentalists and other key interested and affected individuals and groups to evaluate and comment upon proposed international agreements at important points in the ratification process. Finally, impact statements have even played a significant role in American diplomatic dealings with foreign governments, as when the Atomic Energy Commission's statement on the 1971 Amchitka, Alaska nuclear explosion was provided to the governments of Canada and Japan.<sup>88</sup>

Perhaps more significantly, however, such impact statements have recently been adopted by Australia, Canada and Israel, and other nations such as West Germany and the Soviet Union have expressed considerable interest in adapting such procedure to their own legal and governmental systems and requirements.<sup>89</sup> This type of gradual dissemination of information and techniques of environmental cooperation represents the greatest hope for developing effective national environmental law systems, and ultimately, as individual nations reassess and reorder national priorities in the direction of environmental protection, for creating a viable international system for controlling and avoiding abuses of the environment.

The development of such an international system must be a vital goal for the immediate future. For whether the emphasis is placed upon providing redress for injured individuals or upon protecting natural resources, one essential fact must always be kept in focus: we have moved into an era in which, environmentally as well as politically and militarily, we have gone beyond the point where the limited national concerns of even the most powerful sovereign can be permitted the luxury of remaining the only frame of reference within which environmental decisions are made. If expanding technology is not accompanied by expanding vision, and transnational environmental effects with transnational environmental decision-making, no one will escape the transnational tragedy which will inevitably follow.

---

87. *Id.*

88. *Id.*

89. *Id.*