

INTERNATIONAL APPLICATION OF THE NATIONAL ENVIRONMENTAL POLICY ACT

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I. INTRODUCTION

In 1969, Congress passed the National Environmental Policy Act (NEPA)¹ with the objective of causing governmental agencies to consider

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environmental impact in their decision-making. Questions arose early regarding who had standing to initiate judicial review under the Act, and what the proper scope was for consideration of environmental effects of agency actions. A line of cases provided some guidance regarding these issues in the domestic context. When the same questions arose in the context of government action having impact outside the sovereign territory of the United States, the analysis became even more complex.

Part II of this article outlines the underlying tenets of the NEPA and the modifications of the NEPA at the executive and administrative level. Part III examines the judiciary's interpretations of the NEPA's application internationally to direct government agency actions. Part IV examines NEPA application stemming from indirect or collaborative government action. Part V sets out a framework for analyzing the competing factors which may affect future cases concerning the application of NEPA abroad. Part VI concludes that until a statutory amendment is approved, or NEPA's Environmental Impact Statement (EIS) mechanism becomes a general principle of customary international law, the extraterritorial application of NEPA will likely remain an open question. Since weighing of the competing factors is the province of the judicial branch, this will likely mean continued deference to the executive branch's view with respect to foreign policy.

II. THE DEVELOPMENT OF NEPA INTERNATIONAL APPLICATION

A. *Outline*

A summary of the main issues confronted when applying NEPA domestically is useful for considering their impact in the international context. Under NEPA, federal agencies are required to act in an environmentally responsible manner,² yet they must also comply with other

1. 42 U.S.C.A. §§ 4321-70d (West 1994).

2. Section 102(2)(c) of NEPA reads as follows:

The Congress authorizes and directs that, to the fullest extent possible: . . . (2) all agencies of the federal government shall . . .

(c) 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

governmental policies.³ This cross-policy coherence obligation is especially important with respect to agency activities abroad. As a threshold, to trigger the necessity of an EIS a proposed federal agency action must qualify as major and having a significant environmental impact.⁴

If the threshold is met, the next step is to determine the scope, timing, and content of the EIS. The Council on Environmental Quality (CEQ) regulations contain a detailed description of the procedural requirements for the preparation of an EIS.⁵ To address uncertainty surrounding the timing of any obligations under NEPA, the CEQ provides a definition of the proposal for purposes of EIS preparation: "a proposal exists at that stage in the development of an action when an agency subject to the Act has a goal and is actively preparing to make a decision on one or more alternative means of accomplishing that goal and the effects can be meaningfully evaluated."⁶

Since government action in the international sphere is susceptible to being kept from the purview of the public, the secrecy issue is particularly relevant when considering NEPA's application abroad. In *Weinberger v. Catholic Action of Hawaii/Peace Education Project*,⁷ the United States Supreme Court addressed the classified information issue in the domestic context. The plaintiff challenged the government's creation of nuclear-capable storage facilities, but because the alleged project was classified, the plaintiffs were unable to prove the existence of an actual proposal for nuclear weapon storage.⁸ The Court dismissed the plaintiff's claim for failure to establish a cause of action, but instructed the United States Army (Army) to prepare a classified EIS if it was in fact storing nuclear weapons at the sites.⁹ This holding creates the possibility that an agency's good faith may be the only impetus to NEPA compliance when the underlying action implicates national security. This holding also increases the likelihood that courts will allow a reduced level of review of actions taken under the guise of national security.

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- (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Id.

3. *Id.* §§102-4.

4. *Id.* § 102(C).

5. Because of the importance of the scoping issue, the CEQ established it as a particular element of the procedure, in order to obtain early participation by other agencies and the public.

6. 40 C.F.R. § 1508.23 (1996).

7. *Weinberger v. Cath. Action of Haw. Peace Educ. Project*, 454 U.S. 139 (1981).

8. *Id.*

9. *Id.*

Once the *scope* analysis provides the particular matters to be included in the EIS, the *content* query asks what must be discussed in relation to these matters, and in particular, what alternatives should be included.¹⁰ The test for determining what alternatives must be considered is the rule of reason, namely, "whether a reasonable person would think that an alternative was sufficiently significant to warrant extended discussion."¹¹ Of significance to the international discussion is the District of Columbia Circuit Court's ruling that the agency discuss alternatives within the jurisdiction of any part of the federal government, and not just that of the agency in question.¹² The amount of detail with which an alternative must be discussed is directly proportional to the likelihood of its implementation.¹³ Under the CEQ regulations a *no-action* alternative must be considered in the EIS,¹⁴ but a *worst case scenario* discussion requirement was later rescinded.¹⁵

B. Executive Order 12,114

On January 4, 1979, President Jimmy Carter issued Executive Order 12,114 in an effort to clarify the questions surrounding NEPA's international application.¹⁶ The order was to represent the government's "exclusive and complete determination of the procedural and other actions to be taken by the federal agencies to further the purpose of the National Environmental Policy Act, with respect to the environment outside the United States, its territories and possessions."¹⁷ The actions covered in the Order include major federal actions significantly affecting the environment "of the global commons outside the jurisdiction of any nation (e.g. the oceans or Antarctica)"¹⁸ or "of a foreign nation not participating with the United States and not otherwise involved in the action."¹⁹ Actions which provide the foreign nation with a

10. See 40 C.F.R. § 1502.14 (1996).

11. NRDC, Inc. v. Morton, 458 F.2d 827 (D.C. Cir. 1972) (setting forth the test originally); See also Vt. Yankee Nuclear Power Corp. v. NRDC, Inc., 435 U.S. 519, (1978) (upholding the D.C. Circuit Court test).

12. Morton, 458 F.2d 827.

13. See 40 C.F.R. § 1502.2 (1996).

14. *Id.*

15. *Id.*

16. ENVIRONMENTAL EFFECTS ABROAD OF MAJOR FEDERAL ACTIONS, 1979 U.S.C.C.A.N. 3269, 3271 [hereinafter EXECUTIVE ORDER 12,114].

17. *Id.* at 3269. Under section 2, every federal agency had eight months to develop procedures to implement the Order and were to consult with the State Department and the CEQ in this effort. *Id.*

18. *Id.* at 3270.

19. *Id.*

product or projects producing a “principal product or an emission or effluent” which is strictly regulated or prohibited by federal law because of its toxic effects or radioactivity are also included.²⁰ Finally, the Order covers major federal actions outside the United States, its territories, and possessions which “significantly affect natural or ecological resources of global importance” by declaration of the President or international agreement binding on the United States.²¹

The documents acceptable in this procedure include EISs, bilateral or multilateral studies by the United States and one or more foreign nations, studies by an international organization or body of which the United States is a member, and *concise reviews of environmental issues*, including environmental impact assessments (EIAs), summary analyses, and other appropriate documents.²² Section 2-4(b) of the Order calls for a provision in agency procedures for document preparation according to the environmental effects involved.²³ For actions affecting the global commons, the agency must prepare an EIS.²⁴ For the uninvolved, non-participating foreign nation situation, and for the toxic effect and radioactivity instances described above, bilateral or multilateral studies or concise reviews are sufficient.²⁵ For the globally important resource scenario, any of the documents mentioned above are allowed.²⁶ Thus, the review’s type and scope are substantially impacted by the nature of the action and its effects, the level of coordination with the foreign nation, and the existence of any obligations stemming from international organization membership.

The Order also allows for “existing regulations of any agency adopted pursuant to court order . . . or judicial settlement of any case” or for procedures in addition to those in the Order which further NEPA’s purposes or those of other environmental laws (with specific laws listed), as long as they are consistent with foreign and national security policies.²⁷ When read in conjunction with the decision in *NRDC v. Morton*,²⁸ this section seems to imply that an individual agency’s particular provisions, as long as they pass the foreign policy/national security consistency test, will be triggered when

20. *Id.*

21. EXECUTIVE ORDER 12,114 *supra* note 16, at 3270. Such recommendations should be accompanied by the views of the State Department and the CEQ. *Id.*

22. EXECUTIVE ORDER 12,114, *supra* note 16, at 3270.

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. *NRDC, Inc. v. Morton*, 458 F.2d 827 (D.C. Cir. 1972).

actions have reasonable alternatives within the jurisdiction of any federal agency.

It is significant to note the Order's Presidential action exemption: intelligence activities and arms transfers, nuclear activities, actions arising from membership in international organizations, and emergency relief actions.²⁹ Also exempt are actions which, "in the view of the agency," do not have a significant effect on the environment.³⁰ Under section 2-5(b) agencies "may provide for" appropriate modifications in contents, timing, and availability of documents to fellow agencies or affected nations³¹ when necessitated by urgency, concerns of adverse impacts on foreign relations, or sovereign responsibilities.³² Modifications needed to reflect certain factors of diplomacy, competitiveness, confidentiality, national security, information collection obstacles, or ability of an agency to affect a decision are also allowed.³³ Indeed, in emergency circumstances and those involving "exceptional foreign policy and national security sensitivities," an agency procedure can even provide for exemptions and categorical exclusions beyond those listed in the order.³⁴ Section 2-5(d) addresses constitutional issues by limiting section 2-5's applicability to the extent permitted by law.

Finally, section 3 eliminates the availability of a private cause of action based on the Order. Furthermore it calls for coordination with the State Department and, in multi-agency actions, calls on the agencies to choose a lead agency responsible for implementation of the Order.³⁵ The definition of *environment* is restricted to the "natural and physical environment" and expressly excludes "social, economic and other environments."³⁶ Thus, unlike in the domestic context, where the Supreme Court has not limited consideration to the natural environment, Order 12,114 appears to do just that.³⁷ And section 3-5 seems to say that if an EIS is prepared because an action affects the United States or the global commons, a separate EIS need not be prepared concerning the effects of the environment on foreign nations.³⁸

29. EXECUTIVE ORDER 12,114, *supra* note 16, at 3271.

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. EXECUTIVE ORDER 12,114, *supra* note 16, at 3271.

36. *Id.*

37. *See, e.g.,* Metropolitan Edison Co. v. People Against Nuclear Energy, 460 U.S. 766 (1983); Hanly v. Kleindienst, 471 F.2d 823 (2d Cir. 1972); Hanly v. Mitchell, 460 F.2d 640 (2d Cir. 1972).

38. EXECUTIVE ORDER 12,114, *supra* note 16, at 3272.

III. NEPA APPLICATION TO DIRECT ACTION BY AGENCIES

A. *Pre-Order 12,114*

The first case to raise the issue of NEPA's applicability outside of the fifty states was brought in 1973 by the people of Enewetak, an atoll which is one of the Trust Territories of the United States.³⁹ The people of Enewetak sought a preliminary injunction against the United States government's program of nuclear blast simulation by means of high explosive detonation.⁴⁰ The United States District Court of Hawaii held that NEPA did apply to the Trust Territories of the Pacific Islands,⁴¹ stating that the government's drilling and seismic studies fell within the scope of the prohibition of the preliminary injunction requested where its primary purpose was to further the project in dispute, and where delay would not lead to irreparable injury.⁴²

In analyzing the statute's scope, the court noted that Congress must "manifest an express intention" that a statute apply to the Trust Territories, since federal legislation is not automatically applicable there.⁴³ The court looked at the language of the statute and pointed out that the legislators used the broader term of Nation, and used United States only twice, both times in order to reference certain policies, regulations, and laws which would be unclear without that modifier.⁴⁴ Judge King also pointed to the *expansive language* as indicating a concern for *all persons* subject to federal action having a major impact on their environment and not merely those located in the fifty states.⁴⁵ He found additional support in the statements of Senator Jackson, NEPA's principal sponsor, as well as in the Senate Conference Committee Report.⁴⁶ The court also cited the House Report as evidence of Congressional recognition of the worldwide scope inherent in environmental problems: "[i]mplicit in [U.S. Environmental Policy] is the understanding that the international implications of our current activities will also be considered, inseparable as they are from the purely national consequences of our actions."⁴⁷

39. *People of Enewetak v. Laird*, 353 F. Supp. 811 (D.C. Haw. 1973).

40. *Id.* at 813.

41. *Id.* at 815.

42. *Id.* at 820-21.

43. *Id.* at 815.

44. *Id.* at 816.

45. *Laird*, 353 F. Supp. 811, 816.

46. *Id.* at 817.

47. *Id.* at 817-18.

In *Sierra Club v. Adams*,⁴⁸ the plaintiff environmental group sought to enjoin the United States construction of the Darien Gap Highway in Panama and Colombia, alleging that the environmental impact statement was deficient.⁴⁹ The Supreme Court agreed on the issue of the plaintiff's standing to challenge the EIS based upon concern regarding the spread of aftosa, or *foot and mouth* disease, to the United States, and that once standing is found with respect to one ground, a plaintiff may raise other challenges to the EIS based upon the *public interest* in having government officials meet their duties under NEPA.⁵⁰ The Supreme Court noted the distinction between the issues of NEPA applicability to United States' government projects which involve *entirely local environmental impacts*, projects with some strictly local impacts, and some which affect the United States.⁵¹ But the Court held that based on the facts present in *Sierra Club*, it need only assume NEPA's applicability to the construction in Panama, and deferred the resolution of the issue of NEPA applicability to projects with "strictly local impacts."⁵²

In addressing the adequacy issue, the Court noted that the draft EIS had been circulated to over seventy officials in the United States, Panama, and Colombia, and neither the CEQ nor the Environmental Protection Agency(EPA) raised any objections to the statement.⁵³ The Court also noted the significance of the government's response to the adverse comments to the draft, the level of detail in the discussion concerning aftosa, and the exploration of alternatives in ruling that the statement met its NEPA requirements.⁵⁴ But the Court's green light was conditioned upon the Department of Agriculture filing a certification concerning the aftosa control issue with the court and the appellees before any construction began in Colombia.⁵⁵ The Court found this necessary because the government appeared *too anxious* to complete the project.⁵⁶ Apparently in the Congressional Budget request for Fiscal Year 1979 the "certain environmental requirements" which led to the delay in the Darien Gap Highway project were described as "[having] been met" despite the fact that

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

49. *Id.* at 390.

50. *Id.* at 391-92.

51. *Id.* at 392.

52. *Id.*

53. *Id.* at 393-94.

54. *Adams*, 578 F.2d 389, 394-97.

55. *Id.* at 397.

56. *Id.*

no final decision had been made by the Court on the case when the document was sent to Congress.⁵⁷

In the second 1978 case concerning NEPA's application abroad, the National Organization for the Reform of Marijuana Laws (NORML) sought a declaratory judgment that the government violated NEPA by failing to prepare an EIS with respect to a joint program of herbicide spraying of marijuana and poppy plants in Mexico.⁵⁸ The plaintiff group alleged that Mexican grown marijuana consumed in the United States was found to contain significant levels of the herbicide paraquat, and that this posed a "serious health hazard" to some of their members who smoke marijuana or ingest it in food or drink.⁵⁹ NORML also claimed that some of its members visited Mexico for "recreational and professional purposes" and had an interest in having the food and drink they consume there free from potentially harmful herbicides. In addition, the plaintiffs asserted a "recreational and aesthetic interest" that the areas of scenic beauty in Mexico not be harmed by herbicide usage.⁶⁰ Finally, the group claimed they had an interest in having Mexican agricultural imports free from potentially harmful herbicides.⁶¹ The United States District Court for the District of Columbia found that at least some of plaintiff's members had satisfied the *minimal* standing requirements set out in *Sierra Club v. Adams*,⁶² and had at the very least alleged a sufficient *informational interest* under NEPA.⁶³

The court noted that the extraterritoriality of NEPA was still an open question in the Circuit.⁶⁴ But since the defendant agreed to prepare an EIS regardless of the outcome of the litigation, the Court, as in *Sierra Club*, did not have to directly address the issue.⁶⁵ The court refused to issue an injunction requiring the agencies to use their *best efforts* to dissuade the Mexican government from continuing the spraying program until the EIS was prepared, holding this to be a nonjusticiable political question beyond its powers, and that such relief would infringe upon the foreign relations powers of the President.⁶⁶ The court noted that marijuana and heroin (also affected by the program) were Schedule I Controlled Substances and that simple

57. *Id.*

58. National Organization for the Reform of Marijuana Laws (NORML) v. U.S. Dep't. of St., 452 F. Supp. 1226 (1978).

59. *Id.* at 1228.

60. *Id.*

61. *Id.* at 1228-29.

62. *Adams*, 578 F. 2d 389.

63. *NORML*, 452 F. Supp. 1226, 1230.

64. *Id.* at 1232.

65. *Id.* at 1229, 1232-33.

66. *Id.* at 1234-35.

possession was a criminal violation.⁶⁷ Thus, even though NEPA demanded that federal agencies not *rush blindly* into major federal actions affecting the environment, this did not mean that environmental concerns could justify disregarding the criminal laws created by Congress.⁶⁸ Because of this and the fact that the relief sought presented a nonjusticiable political question, all other aspects of the relief sought by NORML were denied.⁶⁹

B. *Post-Order 12,114*

Two years later, an environmental group sought judicial review of the Nuclear Regulatory Commission's (NRC) approval of nuclear export applications to the Philippines.⁷⁰ The petitioners challenged the adequacy of the review under both the Atomic Energy Act and NEPA.⁷¹ The NRC relied extensively on generic analyses, Philippine EISs submitted, and other environmental review information compiled under Executive Order 12,114.⁷² Officials also stated that principles of national sovereignty constrained them from insisting on visits to the local sites, such that it did not need to examine site-specific impacts on the global commons.⁷³ The Commission also pointed to several specific efforts undertaken with the Philippines in order to carry out the NEPA requirement that an agency "maximize international cooperation" to prevent deterioration of the worldwide environment.⁷⁴

The court characterized the NEPA dispute as a legal question between the plaintiff's claim that NEPA should apply to the foreign effects of a domestic licensing decision, and the government's response that the requirement of an EIS, to the fullest extent possible, was narrowly limited to major federal actions taking place in, or having effects upon, the United States itself.⁷⁵ Judge Wilkey referred to the legitimate overlapping of the regulatory jurisdiction of the United States and the Philippines, but remarked that they were not the same.⁷⁶ While noting that the nature of the program as one of energy provision made the foreign political interest significant, the court also said that the "common defense and security" and the "international

67. *NORML*, 452 F. Supp. 1226, 1234.

68. *Id.* at 1324.

69. *Id.* at 1235.

70. *NRDC, Inc. v. NRC*, 647 F.2d 1345 (1981).

71. *Id.*

72. *Id.*

73. *Id.* at 1366.

74. *Id.* at 1353.

75. *NRDC*, 647 F.2d 1353, 1355. The opinion contains a parallel analysis of the government's obligations under the NEPA.

76. *Id.* at 1356.

reputation” of the United States were “on the line.”⁷⁷ Also of significance was the court’s view that the rule against extraterritoriality, when interpreting a statute, justified the NRC’s refusal to extend the scope of the review to the impact on American military personnel stationed in the Philippines.⁷⁸

Judge Wilkey of the District of Columbia Court of Appeals ruled that the Commission had acted properly by declining to consider the foreign impact, and that its deference to the executive’s analysis and foreign policy judgment was “fully consistent” with congressional objectives.⁷⁹ More specifically, the court was not able to find that NEPA imposed a requirement for an EIS where the impact fell exclusively within foreign jurisdictions.⁸⁰ In analyzing the language of the statute, the court felt that deference to the Presidential authority in foreign relations dictated that NEPA’s putative extraterritorial reach be curbed with respect to nuclear exports.⁸¹ The court concluded that NEPA’s legislative history revealed nothing about extraterritorial application, and that the line of precedent was distinguishable from the case at hand, such that the holding was entirely consistent with the NEPA jurisprudence to date.⁸² Judge Wilkey did restrict the NEPA holding to a finding that NEPA was inapplicable to NRC nuclear export licensing decisions, but that did not necessarily mean that the EIS requirement was inapplicable to some other types of major federal actions abroad.⁸³

In *Greenpeace v. Stone*,⁸⁴ a coalition of environmental groups and individuals contested the government’s transportation of the chemical weapons from West Germany to Johnston Atoll for ultimate destruction.⁸⁵ The United States District Court of Hawaii refused the requested preliminary injunction. The court held that the Army’s environmental impact statement met its obligations under NEPA, and that any interference with the stockpiles, which were already in transit, posed serious risks to both people and the environment.⁸⁶ Furthermore the court ruled that the transportation of the weapons within the Federal Republic of Germany did not fall within NEPA’s scope because the action was pursuant to a presidential agreement

77. *Id.*

78. *Id.* at 1364-65.

79. *Id.*

80. *Id.*

81. *NRDC*, 647 F.2d 1353, 1364-65.

82. *Id.* at 1368.

83. *Id.* at 1366.

84. *Greenpeace v. Stone*, 748 F. Supp. 749 (D.C. Haw. 1990).

85. *Id.* at 755.

86. *Id.* at 754.

between President Bush and Chancellor Kohl.⁸⁷ Additionally, the court ruled that the government's failure to consider the transoceanic shipment segment of the project in the same comprehensive EIS as regarding the eventual incineration did not constitute a NEPA violation.⁸⁸

In the decision, Judge Ezra pointed to the unique nature of the challenged federal action extending from the Federal Republic of Germany to Johnston Atoll.⁸⁹ The plaintiffs' standing was complicated by the *geographical nexus* requirement of the Ninth Circuit, especially the transoceanic portion of the program.⁹⁰ Plaintiff Walter Paulo, a Hawaiian native, stated that "he fished in the vicinity" of the Johnston Atoll and will likely be affected by the Johnston Atoll Chemical Agent Disposal System(JACADS) project."⁹¹ The court saw this fact as conferring upon Paulo standing to challenge the weapons storage and destruction on the Johnston Atoll, but that he was without standing to challenge the weapons movement within Germany, or across international waters.⁹² Plaintiff Greenpeace International claimed members within Germany, and in particular those along the stockpile transport route, would *likely satisfy* the procedural and *geographical nexus* test.⁹³ But despite the group's claims of members residing throughout the world, the court considered it "impossible [to] conclusively presume" whether any members were geographically in the vicinity or would potentially be affected since the actual shipment route had not yet been determined.⁹⁴

The court noted that despite the complexities in the analysis of standing, in ruling on the motion, it could still rule on whether substantial questions had been raised on the merits and whether the balance of hardships favored granting relief.⁹⁵ The first NEPA claim was that the Army's segmentation of the project and failure to develop a comprehensive EIS violated the Army's statutory duties.⁹⁶ The Court opined that NEPA did not

87. *Id.* at 757-58. Plaintiffs disputed the existence of an actual agreement. The court, while recognizing that no written agreement was actually executed between Bush and Kohl, still found sufficient evidence to show that Secretary of State Baker did enter an actual agreement with Chancellor Kohl on behalf of President Bush. *Id.*

88. *Id.* at 763.

89. *Stone*, 748 F. Supp 749, 756.

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.* at 756-57.

94. *Id.* at 757. *Cf.* *Weinberger v. Catholic Action of Hawaii/Peace Ed. Project*, 454 U.S. 139 (1981).

95. *Greenpeace v. Stone*, 748 F. Supp. 749 (D.C. Haw. 1990).

96. *Id.* at 757.

apply extra-territorially to the movement within Germany and shipment to the Johnston Atoll. This conclusion was based largely on the political question and foreign policy implications which would result from applying "a United States statute to joint actions taken on foreign soil based on an agreement made between the President and a foreign head of state."⁹⁷ While it noted the Executive Order 12,114 requirement that federal agencies consider environmental impacts of actions undertaken outside sovereign United States territory, the court pointed out that the assessment requirement only exists when the "foreign nation [was] not participating with the United States and [was] not otherwise involved in the action."⁹⁸ The court pointed out that the plaintiffs' reliance on CEQ comments regarding application of NEPA abroad was misplaced. Not only did they predate Order 12,114, but the CEQ worked with the State Department in drafting the Order "in a way sensitive to both environmental and foreign policy concerns."⁹⁹

The court did not favorably consider the second NEPA claim that the Army failed to adequately consider alternatives.¹⁰⁰ The court found that the Army's consideration of alternatives was sufficient, even though it recognized that the facility on the Johnston Atoll was, at that time, the only incinerator of its kind capable of destroying the weapons in question.¹⁰¹ Also, the *no-action* alternative and interim storage or disposal in the United States, mentioned in the Supplementary Impact Statement (SEIS), were not real options in light of the Presidential agreement and of a law passed by Congress which had specifically prohibited the Army from shipping a similar stockpile from Okinawa to the continental United States.¹⁰² The plaintiffs had pointed to biodegradation or chemical treatment methods as feasible alternatives, but the court found the Army's *incorporation by reference* of such methods sufficient under NEPA.¹⁰³

97. *Id.* It is worth noting that the court emphasized the fact that this decision was limited to the specific and unique facts presented by the case. The court felt that under different circumstances, NEPA may require a federal agency to prepare an EIS for an action undertaken abroad, in particular if the action would have *direct environmental impacts* within the United States, or when there has been a *total lack of environmental assessment* by the agency or by the foreign country. *Id.* at 761.

98. *Id.* at 761.

99. *Id.* at 763.

100. *Stone*, 748 F. Supp. 749, 764.

101. *Id.* at 764.

102. *Id.* Congress passed Public Law 91-672 to specifically prohibit the movement of the Army's stockpile at Okinawa to the continental United States. In response the Army shipped those chemical munitions to the Johnston Atoll without any Congressional interference. Thus while the law is not a direct ban on such shipments, the Army raised the issue to highlight the similar political problems which could arise from an attempt to bring the European stockpile to the continental United States. *Id.* at 764 n.20.

103. *Id.* at 764.

The third NEPA claim, that the Army violated NEPA by failing to supplement the final SEIS in light of alleged *new information*, was without merit. The information presented apparently was not *new*, the argument was simply a derivation of the alternatives claim.¹⁰⁴

Also, in 1990, the Eighth Circuit Court of Appeals decided a case which had major implications for plaintiffs suing under environmental statutes.¹⁰⁵ Defenders of Wildlife and other groups challenged a Department of Interior regulation which provided that the Endangered Species Act did not create a duty for federal agencies funding projects in foreign countries to consult with the Secretary of Interior about the project's likely impacts on endangered species.¹⁰⁶ The court found the *injury in fact* requirement was met on two grounds. First, that the rate of extinction of endangered species was on the rise in countries visited by its members which were also the site of specific agency products. Second, the Secretary's refusal to complete (project review) statutory procedures constituted a violation.¹⁰⁷ Judge Gibson held that the organizations had standing to challenge the regulation, and that the *consultation* requirement in the Endangered Species Act extended to all agency action affecting endangered species, whether within the United States or abroad.¹⁰⁸

Though not a NEPA case, *Defenders* highlights the importance of the judicial interpretation of a statute's legislative history. This case also stresses the importance of a sufficient nexus between the government's activity and the alleged injury to the plaintiff. One of the plaintiffs visited parts of Sri Lanka which were sites of development projects funded by the Agency for International Development (AID).¹⁰⁹ Another plaintiff went to Egypt and observed the Nile crocodile habitat which coincided with the huge Aswan High Dam construction project.¹¹⁰ Both plaintiffs noted their intent to return to those areas, and the court found they had standing.¹¹¹ The court felt that the Defenders members had provided specific facts and not merely use of "unspecified portions of immense tracts of land upon which governmental

104. *Id.* at 765.

105. *Defenders of Wildlife v. Lujan*, 911 F.2d 117 (1990) (8th Cir 1990)

106. *Id.* at 117-18.

107. *Id.* at 119.

108. *Id.* at 125. The court found that the statute defined *endangered species* without any reference to geographic limitations. The court also noted a section entitled, "International Cooperation" as evidencing a Congressional commitment to worldwide conservation efforts. NEPA also has such a section. It emphasized that final authority with respect to statutory construction lies with the judiciary, which must reject any agency interpretations which it finds contrary to clear congressional intent. *Id.* at 123.

109. *Id.* at 120.

110. *Lujan*, 911 F.2d 117, 120.

111. *Id.*

activity may or may not occur."¹¹² Another plaintiff, however, did not have standing relating to a construction project in Peru because he only came within a few hundred miles of the area.¹¹³

In *Environmental Defense Fund, Inc. v. Massey*,¹¹⁴ the plaintiff environmental group sought to enjoin the National Science Foundation's program of food related and domestic waste incineration in the Antarctic because it had failed to prepare a proper environmental analysis in violation of NEPA, the CEQ Regulations, and Executive Order 12,114.¹¹⁵ The United States District Court made a rather clear statement regarding the extra-territorial application of NEPA by stating it could not "ferret out a clear expression of Congress' intention that NEPA should apply beyond the territorial jurisdiction of the United States."¹¹⁶ The court relied substantially on a 1991 Supreme Court decision that Congressional legislation is meant to apply only within the territorial jurisdiction of the United States, unless a clear contrary intent is shown.¹¹⁷ In construing that case, the court ruled that it had *no choice* but to decide that NEPA was inapplicable to the NSF incineration program in Antarctica.¹¹⁸ In applying Executive Order 12,114, the court noted that, based on case law, executive orders without specific foundation in congressional action are *not* judicially enforceable in private civil suits.¹¹⁹ As a note of caution, however, the court noted its concern with the manner in which the defendant undertook the EIS, and remarked that if it had subject matter jurisdiction under NEPA or Order 12,114, the result may have been different.¹²⁰

IV. NEPA APPLICATION TO INDIRECT UNITED STATES ACTION ABROAD

The United States is involved in many activities in other countries by nature of its membership in various international organizations. Sometimes these efforts are in conjunction with certain programs of administrative

112. This was a reference to the failed challenge in *Nat. Wildlife Fed. v. Lujan*, 110 S.Ct. 3177, 3187-89 (1990).

113. *Id.*

114. *Env. Def. Fund, Inc. v. Massey*, 772 F. Supp. 1296 (D.C. 1991).

115. *Id.* at 1297.

116. *Id.* at 1297. This statement is difficult to reconcile with the passage quoted from the *Laird*, case, 353 F. Supp. at 817-18.

117. *Id.*

118. *Id.* at 1298.

119. *Massey*, 772 F. Supp. 1296, 1298. The court based this conclusion on the holdings in *In re Surface Mining Regulation Litigation*, 627 F.2d 1346 (D.C. Cir. 1980) and *Manhattan-Bronx Postal Union v. Gronouski*, 450 F.2d 451 (D.C. 1965), *cert. denied* 382 U.S. 978 (1966).

120. *Massey*, 772 F. Supp. 1296.

agencies, raising the issue of the extent that NEPA obligations attach to such joint or parallel activities. Also, many of the international organizations now have their own requirements with respect to environmentally sound planning, which are similar but not equivalent to NEPA's requirements. NEPA section 4332(2)(f) expressly refers to international activities by calling on agencies to recognize the worldwide and long-range character of environmental problems and to support [appropriate] initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of [humankind's] world environment.

A. *United States Bilateral Assistance*

This is the primary type of United States government assistance to foreign governments and institutions.¹²¹ It consists of the transfer of financial and/or technical assistance by governmental agencies, most of which is coordinated by the AID, an independent organization within the State Department.¹²² After a series of AID projects caused unforeseen negative environmental consequences in recipient nations,¹²³ the Agency improved its environmental review procedures along the lines of the NEPA model.¹²⁴ Even so, NEPA procedures need only be fully implemented if the AID action affects the environment of the United States, the global commons, or areas outside the jurisdiction of any nation.¹²⁵ In other words, projects having only local effects will be subject to a different standard of review.

AID projects falling within this category are governed by Regulation 16, which differs from NEPA in three main respects.¹²⁶ First, the Initial Environmental Examination (IEE), in contrast to NEPA's Environmental Assessment (EA) procedure, only requires a brief discussion of foreseeable environmental effects of the action.¹²⁷ A discussion of alternatives, including the *no-action* alternative, is not required, nor is any participation by the

121. See David Young, *The Application of Environmental Impact Statements to United States Participation in Multinational Development Projects*, 8 AM. U. J. INT'L L. & POL'Y 309 (1992).

122. *Id.*

123. The Center for Development Information and Evaluation reviewed over 200 AID projects between 1985 and 1986, and reported that 20 percent of the projects had unforeseen environmental impacts, and of these, most were negative and were not adequately addressed. Siew Tuan Chew, *Environmental Assessments of Development Projects: A Preliminary Evaluation of AID's Experience*, AID EVALUATION OCCASIONAL PAPER 17 (1988).

124. Gary M. Ernsdorff, *The Agency for International Development and NEPA: A Duty Unfulfilled*, 67 WASH. L. REV. 133 (1992).

125. *Id.*

126. See Susan K. Selph, *Potential Ramifications of Environmental Defense v. Massey Illustrated by an Evaluation of United States Agency for International Development Environmental Procedures*, 17 WM. & MARY J. ENVTL. L. 123 (1993).

127. *Id.*

public required in the IEE preparation process.¹²⁸ Second, the scope and content of the IEE, which is to include "the direct and indirect effects of the project on the environment," is much less detailed than the guidance provided by the CEQ Regulations.¹²⁹ Finally, the IEE is not circulated for public comment; only the draft EIS receives public input.¹³⁰

B. Multilateral Development Banks

Imposing the relatively stringent requirements under NEPA to projects undertaken by multilateral banks of which the United States is a member is complicated by the differing national views with respect to the environment. Three main factors account for this difficulty: 1) the absence of a national mechanism suitable to the activities of the banks; 2) the inherent infringement on the sovereignty of the recipient nation; and 3) the increased complexity of international development projects.¹³¹ But in some situations the centralized authority of institutions such as the World Bank may actually facilitate the EIA procedure relative to the United States federal bureaucracy.¹³²

In response to a series of environmental disasters resulting from some of its projects, the World Bank initiated a new policy of environmentally conscious development in May 1984.¹³³ When critics claimed that the policy was ineffective and merely a public relations ploy, the Bank issued a directive mandating an EIA for all projects which may have significant environmental impacts.¹³⁴ But under the Directive, the EIA requirement did not apply to

128 *Id.*

129. *Id.*

130. Susan K. Selph, *Potential Ramifications of Environmental Defense v. Massey Illustrated by an Evaluation of United States Agency for International Development Environmental Procedures*, 17 WM. & MARY J. ENVTL. L. 123 (1993).

131. See Carole Klein-Chesivoir, *Avoiding Environmental Injury: The Case for Widespread Use of Environmental Impact Assessments in International Development Projects*, 30 VA. J. INT'L L. 517 (1990).

132. *Id.* at 529-35.

133. *Id.* at 531. In the World Bank project cycle, the EIA process would function as follows. During the identification phase, environmentally trained bank experts conduct a sectoral analysis in cooperation with local experts. In the preparation phase, during which project objectives and timetables are outlined, the identification of potential adverse environmental impacts continues. These first two stages are the responsibility of the borrower. During the appraisal stage, the Bank reviews technical, institutional, economic and financial aspects of the project. At this stage Bank officials balance the short-term resource to use and long-term productivity, and identify any irretrievable commitment of resources. This is meant to result in an environmentally sensitive cost-benefit analysis of the project. *Id.* at 535-36.

134. World Bank Operational Directive on Environmental Impact Assessment. The Bank also publishes an Environmental Assessment Sourcebook which compiles all of the Bank's environmental policies and guidelines.

projects which can be characterized as *environmentally beneficial*, leaving the determination thereof to Bank officials. In part to address this issue, in 1989, Congress passed the International Development and Finance Act,¹³⁵ which prohibits American representatives of any international bank from voting for any development project unless an EIA has been performed.¹³⁶ This would mean a statement following the guidelines set by the United Nations Environment Programme (UNEP), and not NEPA.¹³⁷

C. *The United Nations*

The United States and other developed countries provide most of the funding for the development assistance programs of the United Nations.¹³⁸ The 1972 United Nations Conference on the Human Environment in Stockholm led to the creation of the UNEP.¹³⁹ UNEP was developed to create an action plan for the implementation of a set of environmental principles signed by 113 nations, and also to coordinate future United Nations activities concerning the environment.¹⁴⁰ UNEP encourages the development and use of the environmental impact assessment mechanism for all of its projects.¹⁴¹

The significance of the sustainable development issue is reflected in the drafting of the United Nations Convention on the Environmental Impact Assessment in a Transboundary Context.¹⁴² The Convention calls for countries to "[establish] an environmental impact assessment procedure that permits public participation and preparation of the environmental impact assessment documentation."¹⁴³ The content requirements under the Convention bear a strong resemblance to NEPA, and include a description of the project and purpose, reasonable alternatives, the environment affected, the estimation of the significance of impact, mitigation measures, and criteria

135. David Young, *The Application of Environmental Impact Statements to United States Participation in Multinational Development Projects*, 8 AM. U. J. INT'L L. & POL'Y 309 (1992).

136. *Id.* at 323; 22 C.F.R. § 161.7 (1996).

137. *Id.* at 323.

138. *Id.* at 314.

139. See THE EARTH SUMMIT: THE UNITED NATIONS CONFERENCE ON ENVIRONMENT AND DEVELOPMENT (UNCED) 3-10 (Graham & Trotman 1992).

140. *Id.*

141. *Id.*

142. U.N. Convention on the Environmental Assessment Impact in a Tansboundary Context, Feb. 25, 1991, 30 I.L.M. 800 [hereinafter U.N. Convention on E.I.A.]. The Convention was approved at a conference in Espoo (Finland) in 1991, but is not yet in force.

143. U.N. Convention on E.I.A., *supra* note 142, art. 2-2.

guidelines.¹⁴⁴ The appropriate authorities in “parties of origin”¹⁴⁵ should provide this documentation to “affected parties”¹⁴⁶ for comments within a reasonable time before a final decision is to be made on a proposed activity.¹⁴⁷ Although the Convention is not yet in force, the fact that the EIA serves as the subject of a United Nations sponsored international agreement is strong evidence that the development of an EIA statement will eventually be considered as a general principle of customary international law.¹⁴⁸ Consequently, such an obligation may someday be imputed to countries by nature of developments in the international legal arena.

144. U.N. Convention on E.I.A., *supra* note 142, app. II, 30 I.L.M. at 814-15: These following requirements are listed in Appendix II, Content of the Environmental Impact Assessment Documentation, which reads:

Information to be included in the environmental impact assessment documentation shall, at a minimum, contain, in accordance with Article 4:

- (a) A description of the proposed activity and its purpose;
- (b) A description, where appropriate, of reasonable alternatives (for example, locational or technological) to the proposed activity and also the no-action alternative;
- (c) A description of the environment likely to be significantly affected by the proposed activity and its alternatives;
- (d) A description of the potential environmental impact of the proposed activity and its alternatives and an estimation of its significance;
- (e) A description of mitigation measures to keep adverse environmental impact to a minimum;
- (f) An explicit indication of predictive methods and underlying assumptions as well as the relevant environmental data used;
- (g) An identification of gaps in knowledge and uncertainties encountered in compiling the required information;
- (h) Where appropriate, an outline for monitoring and management programmes and any plans for post-project analysis; and
- (i) A non-technical summary including a visual presentation as appropriate (maps, graphs, etc.).

145. U.N. Convention on E.I.A., *supra* note 141, art. 1(ii), 30 I.L.M. at 802. “Parties of origin” are defined in the Convention as Contracting Parties (to the Convention) or “[p]arties to this Convention under whose jurisdiction a proposed activity is envisaged to take place.” *Id.* art. 1(ii).

146. “Affected parties” are defined as Contracting Parties (to the Convention) or “[p]arties to this Convention likely to be affected by the transboundary impact of a proposed activity.” U.N. Convention on E.I.A., *supra* note 142, art. 1(iii), 30 I.L.M. at 806.

147. U.N. Convention on E.I.A., *supra* note 142, art. 4, 30 I.L.M. at 806.

148. Article 38(1)(b) of the Statute of the International Court of Justice defines an international custom as “a general practice accepted as law.” Statute of the International Court of Justice, art. 38 (1)(b). THE RESTATEMENT (THIRD) OF FOREIGN RELATIONS §102(2) (1987) states: “Customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation.” Thus state practice is key in determining whether a particular custom rises to the level of international customary law. The significance lies in the fact that neither federal statutes nor executive orders can contradict a self-executing custom, since these become automatically a part of the United States federal common law. Frederic L. Kirgis, *Federal Statutes, Executive Orders and Self-Executing Custom*, 81 AM. J. INT’L L. 371 (1987).

V. ANALYSIS: MAPPING THE NEPA EXTRATERRITORIAL APPLICATION TERRAIN

The panoply of United States case law, international organization policies, and regional and international conventions presents a very complex picture for analyzing the extraterritorial application of NEPA. Because of disparities in approach, application, interpretation, and enforcement of the various environmental planning policies mentioned in this paper, there may still exist incentives to characterize a given activity so as to bring it within the scope of a desired environmental regime. Some of the nuances of this analysis are presented below.

A. *The Potential for De-Internationalization*

In the domestic context, the *federal action* element in a project may take the form of a license requirement, funding restrictions, or some other type of federal participation.¹⁴⁹ If only a minor part of a project falls within federal control, the *small handle doctrine* states that only impacts stemming from those minor parts are covered by NEPA.¹⁵⁰ Parties would sometimes attempt to structure a project in order to *defederalize* it, partially or entirely. The courts have not looked favorably on such attempts.¹⁵¹ Even when an action involves a nonfederal defendant, at least one court has upheld an injunction against a private party, where prior approval of a federal agency was a *sine qua non* of the initiation and continuance of a non-federal action.¹⁵²

149. The CEQ Regulations read, in relevant parts:

Major federal action includes actions with effects that may be major and which are potentially subject to Federal control and responsibility. Major reinforces but does not have a meaning independent of significantly (1508.27). Actions include the circumstances where the responsible officials fail to act and that failure to act is reviewable by courts or administrative tribunals under the Administrative Procedure Act or other applicable law as agency action.

Actions include new and continuing activities, including projects and programs entirely or partly financed, assisted, conducted, regulated, or approved by federal agencies; new or revised agency rules, regulations, plans, policies, or procedures; and legislative proposals (1506.8, 1508.17). Actions do not include funding assistance solely in the form of general revenue sharing funds, distributed under the State and Local Fiscal Assistance Act of 1972, 31 U.S.C.A. § 1221 et seq., with no Federal Agency control over the subsequent use of such funds. Actions do not include bringing judicial or administrative civil or criminal enforcement actions.

40 C.F.R. § 1508.18 (1996).

150. See, e.g., *Macht v. Skinner*, 916 F.2d 13 (D.C. Cir. 1990).

151. See *San Antonio Conservation Soc'y v. Tex. Highway Dep't*, 446 F.2d 1013 (5th Cir. 1971), cert. denied 406 U.S. 933 (1972); *Scottsdale Mall v. Ind.*, 549 F.2d 484 (7th Cir. 1977), cert. denied 434 U.S. 1008 (1978).

152. *Found. on Econ. Trends v. Heckler*, 756 F.2d 143, 155 (D.C. Cir. 1985).

There is no case law regarding attempts to segment an international project involving federal agency participation. But certain activities, for example international construction projects, are potential candidates for segmentation. If a United States court followed the reasoning in the domestic defederalization cases, conflicts could arise from any attempts to apply NEPA to activities in which the United States is not the only participant.

B. Substitutability of Foreign and Multinational Assessments to Meet NEPA Requirements

A related issue in the bilateral project situation is the extent to which EIAs or EISs developed by a foreign government or agency may be substituted for the United States agency's EIAs or EISs. United States courts have already touched upon this issue in two cases. In *NRDC v. NRC*,¹⁵³ the District Court for the District of Columbia noted that the federal agency had cooperated on several specific programs in order to comply with the NEPA section 102(2)(f)'s requirement that agencies "maximize international cooperation" to prevent deterioration of the worldwide environment.¹⁵⁴ The government of the Philippines filed an amicus brief to assure the court that it had "responsibly undertaken to assess and protect the Philippines environment from the risks associated with the import of the nuclear reactor."¹⁵⁵ The brief stated that NRC consideration of impacts in the Philippines would improperly "substitut[e] United States regulatory standards for the Republic's own," and that refusal of the license on the grounds raised by petitioners would constitute an unwarranted intrusion into its internal affairs.¹⁵⁶ In *Greenpeace v. Stone*,¹⁵⁷ the District Court acknowledged the decision of a German court addressing a challenge to the transport of chemical weapons within the Federal Republic.¹⁵⁸ The Administrative Court of Cologne analyzed that claim under two statutes specifically covering chemical weapons transport on German territory.¹⁵⁹ In reviewing the opinion,

153. *NRDC v. NRC*, 647 F.2d 1345 (1981).

154. *Id.* at 1354.

155. Brief Amicus Curiae of the Republic of the Philippines, at 23, *NRDC v. NRC*, 647 F.2d 1345 (1981).

156. *Id.*

157. *Greenpeace v. Stone*, 748 F. Supp. 749 (D.C. Haw. 1990).

158. *Eric Neumayer v. die BRD, VG Koeln*, 4 Kammer, 4 L 1098/90.

159. The rail transport segment of the project was covered by the Verordnung ueber die innerstaatliche und grenzueberschreitende Befoerderung gefaehrlicher Gueter mit Eisenbahnen (GGVE) [Regulation concerning the domestic and cross-border movement of dangerous items by train], v. 1985 (BGBl. I s.1560). The road transport segment was covered by the Verordnung ueber die innerstaatliche und grenzueberschreitende Befoerderung gefaehrlicher Gueter auf Strassen (GGVS), v. 1985 (BGBl. I s.1550).

Judge Ezra noted that the request for injunctive relief was denied by the German court, which found the transport operation consistent with the applicable West German law.¹⁶⁰ He remarked that to impose NEPA's requirements to that operation would "encroach upon the jurisdiction of the [Federal Republic of Germany] to implement a political decision which necessarily involved a delicate balancing of risks to the environment and the public and the ultimate goal of expeditiously ridding West Germany of obsolete unitary chemical munitions."¹⁶¹

It would seem that when an American court is faced with such a scenario, four alternatives exist. The first, when available, would be to find a sufficient ground for applying NEPA which addresses the foreign policy sensitivity problem (e.g. argue that the potential effects on American service persons in the Philippines and Germany require application).¹⁶² The second would be for a court to review, or to order an agency to review, the affected nation's environmental planning procedures and determine whether they are sufficient to satisfy NEPA's requirements. This might at least reduce any negative foreign policy reverberations compared to the outright preemption alternative. It would, however, place a possibly greater administrative burden on the agency (or court) than would ordering the routine NEPA, EIA, or EIS. The third alternative is for the agency to work with the local officials and thereby ensure that NEPA-type standards for statements were met. Some commentators argue that this approach would have positive foreign policy consequences and would enhance the local environmental regime.¹⁶³ Detractors argue just the opposite. Such cooperation would be viewed as paternalistic meddling and also point to the increased costs which this approach would entail.¹⁶⁴ Finally, the court could simply defer to the foreign EIA or EIS and follow a *presumption of sufficiency* approach. A sliding-scale evaluation here would run the risk of insulting foreign nations perceived as maintaining *inadequate* environmental policies, while complete deference

160. *Stone*, 748 F. Supp. 749, 760 (1990).

161. *Id.*

162. Interestingly enough, this was argued in the Philippines case, but the court stated that "the rule against extraterritoriality [of a statute] is applied here to justify the Commission's refusal to assimilate the American public in America to American armed forces in the Philippines [or in the many other places around the globe where the United States has military personnel]." *NRDC v. NRC*, 647 F.2d 1345, 1364 (D.C. Cir. 1980). This rationale is somewhat curious in light of the holding in the *Defenders* case.

163. See 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 (1992).

164. Scott C. Whitney, *Should the National Environmental Policy Act Be Extended to Major Federal Decisions Significantly Affecting the Environment of Foreign States and the Global Commons?*, 1 VILL. ENVTL. L.J. 431 (1990).

could increase the risk of some of the problems, including disasters, which the statement is meant to aid in avoiding.

C. *The Blurring of NEPA*

At first glance, it appears that Executive Order 12,114 aims to occupy the field with respect to the extraterritorial application of NEPA. The wording of many of the provisions of the Order are troublesome when applied to actual agency actions abroad. In relation to the actions included under the order, it is difficult to imagine a situation where a foreign nation's cooperation or communication with a United States agency would be so minimal as to qualify it as "not participating" or "not otherwise involved."¹⁶⁵ The discretion left to the agency in determining actions not having a significant effect on the foreign environment raises questions about what it must do to backup such a determination. The apparently liberal substitutability of documents in sections 2-4 raises the possibility of deviation from the NEPA/CEQ requirements. The lead agency mechanism, authorization of agency modification regarding contents and timing of the statement, and the exclusion of "social, economic and other environments" from consideration all raise the issue of whether this can be done legitimately by executive order.¹⁶⁶ Since the scope of the Order represents the government's "exclusive and complete determination of the procedural and other actions" of agencies,¹⁶⁷ and does not create a cause of action,¹⁶⁸ it must be read to the extent it is consistent with NEPA, whose policy goals it is meant to further.

So far courts have not viewed the Order as preempting application of NEPA to all federal agency actions outside of the United States.¹⁶⁹ In the *Greenpeace* case, the court relied on the NEPA statute itself, and gave little attention to the Order in the holding or in dicta.¹⁷⁰ Some commentators attribute this to the lack of a statutory basis for the Order, and the lack of a framework upon which courts could rely.¹⁷¹

Other developments have led to the decreased likelihood that NEPA will be applied equally, or even at all, in the international sphere. These include express exemptions from NEPA coverage and the primacy of foreign

165. EXECUTIVE ORDER 12, 114, *supra* note 16.

166. Order 12,114 perhaps anticipated these issues by its limiting applicability of its provisions as "permitted by law." *Id.*

167. *Id.* at 3269.

168. *Id.*

169. *See* M. Diane Barber, (citing *Greenpeace v. Stone* case).

170. *Id.*

171. *Id.*

policy considerations in the administrative agency scheme. On both the multinational institution and agency level, commentators warn of the inherent project biases which exist once action on a proposal is taken which may prevent any post facto evaluation. This is particularly problematic given the traditional grand scale on which many of the development projects have been undertaken.

D. Judicial *Balancing of Competing Objectives*

Post-Executive Order 12,114 courts have tended to rely on a balancing of NEPA's goals with the particular foreign policy concerns arising from the federal action at hand.¹⁷² In particular, when a NEPA plaintiff seeks an injunction, even courts acknowledging environmental concerns may be forced by equity considerations to favor foreign policy implications. The court in *Wisconsin v. Weinberger*¹⁷³ held:

NEPA cannot be construed to elevate automatically its procedural requirements above all national considerations. Although there is no national defense exception to NEPA . . . the national well-being and security as determined by the Congress and the President demand consideration before an injunction should issue for a NEPA violation. Accordingly, courts have undertaken an evaluation of competing public interests in molding permanent injunctive relief for NEPA violators. A court should tailor its relief to fit each particular case, balancing the environmental concerns of NEPA against the larger interests of society that might be adversely affected by an overbroad injunction.¹⁷⁴

Some commentators argue that the global nature of environmental problems necessitate resolution by diplomatic means.¹⁷⁵ They argue that extraterritorial application of NEPA would be an attempt to supplant existing international law mechanisms, some of which, such as improved multilateral, development bank environmental policies, stem from successful persuasion, and not unilateral demand.¹⁷⁶ There may still be a role for NEPA internationally, since the agreements reached by consensus are often vague

172. *Id.*

173. *Wisconsin v. Weinberger*, 745 F.2d 412 (7th Cir. 1984).

174. *Id.*

175. Whitney, *supra* note 164.

176. *Id.*

and indefinite.¹⁷⁷ Such agreements often take years to reach, and proponents of extraterritorial application point to NEPA as a ready solution.¹⁷⁸

VI. CONCLUSION

Most industrialized nations already have policies similar to those entailed in NEPA. Thus, it is mainly in the industrialized/donor country-undeveloped/recipient country scenario that the issue of disparate environmental regimes arises. Developing nations are faced with a bit of a conundrum in formulating their development programs. Essentially, only three strategies are available to these countries with respect to compliance with environmental protocols, whether they stem from application of NEPA or some obligation under domestic or international law. These options are to simply ignore any environmental obligations, to borrow in order to afford the added costs of compliance with a regime such as NEPA, or to finance compliance through internal growth. Since environmental standards will have a direct impact on the goods and jobs which would stem from a development project, as well as the level of foreign exchange required, relatively weak environmental regimes may foster robust economic growth.¹⁷⁹ Case law shows that application of NEPA does not necessarily mean that more stringent environmental guidelines become part of the planning process.

The extraterritorial application of NEPA is still unclear. Case law gives more guidance with respect to issues of standing than it does to NEPA's reach. Executive Order 12,114 did not adequately clarify the situation and raised certain constitutional issues which must be worked out. An outright amendment to NEPA would achieve a definite answer, but in recent years such efforts have been unsuccessful. Consequently, the evolution of NEPA's extraterritorial reach will probably take the form of continued Congressional tinkering with the CEQ requirements. The EIA Convention signifies that at some point, both the utilization of the EIA mechanism and standards thereof will become a general principle of customary international law, hence binding on all nations. Until that time, however, the courts must perform complex analysis of the competing factors outlined in this paper. This will most likely mean continued deference to the foreign policy views of the State Department and of the Executive Branch over the environmental concerns addressed in NEPA.

177. Stanley W. Spracker & Ethan S. Naftalin, *Applying Procedural Requirements of U.S. Environmental Laws to Foreign Ventures: A Growing Challenge to Business*, 25 INT'L L. 1043 (1991).

178. *Id.*

179. *Extraterritorial Environmental Regulation*, 104 HARV. L. REV. 1609 (1991).