

BEING ABLE TO BE A SOLUTION TO IMPROVE THE DEPARTMENT OF DEFENSE'S OVERSEAS ENVIRONMENTAL POLICY

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I. INTRODUCTION

The environmental regulation of overseas military bases and operations should be an important component of the United States' foreign and national security policies. The Department of Defense (DoD) recognized over ten years ago that "America's national interests are inextricably linked with the quality of the earth's environment, and that threats to the environmental quality affect broad national economic and security interests"¹ Environmental degradation, for instance, has been linked to destabilizing forces around the world, including "poverty, disease, and suffering."² Global environmental issues, including deforestation, oceanic degradation, biodiversity loss, and chemical pollutants threaten the health and security of U.S. citizens and interests abroad.³ Implementing environmental regulations overseas would thus further national security and foreign policy interests by promoting stabilizing policies, international cooperation, and goodwill.

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1. Memorandum of Understanding Among the Environmental Protection Agency, the Department of Energy, and the Department of Defense Concerning Cooperation in Environmental Security para. 2 (July 3, 1996), *available at* http://www.dod.mil/pubs/envvest_mou.html.

2. Sherri Goodman, Deputy Under Sec'y of Def. for Envtl. Sec., Dep't of Def., Address at the NATO/CCMS Environmental Security Conference (May 20, 1997) (quoting Secretary of State Madeleine Albright), *in* PRELIMINARY REPORT ON THE NATO/CCMS ENVIRONMENTAL SECURITY CONFERENCE, Sept. 1997, at 24.

3. Jonathan Margolis, Dep't of State, Address at the NATO/CCMS Environmental Security Conference (May 20, 1997), *in* PRELIMINARY REPORT ON THE NATO/CCMS ENVIRONMENTAL SECURITY CONFERENCE, Sept. 1997, at 28.

These considerations have important practical consequences for the DoD's development and implementation of overseas environmental policies. First, environmental regulations at overseas military bases and during operations protect the national security interests of all U.S. citizens. Of particular importance, regulations protect U.S. soldiers stationed overseas from environmental harms. Not only do these soldiers deserve the same level of environmental protection afforded soldiers on domestic bases, but those whose health is adversely affected by environmental conditions overseas may have diminished capacity to protect national security interests. Second, foreign nations, in response to U.S. policies that aim to respect and protect their natural resources, may provide the United States increased access to overseas bases.⁴ Finally, acting in an environmentally responsible manner may improve the United States' image and facilitate relations with foreign nations.⁵

The DoD's current overseas environmental policies are inadequate to effectively regulate the environmental consequences of overseas military bases and operations. The DoD, for instance, has implemented discrete policies concerning environmental assessment, compliance, pollution prevention, and remediation that fail to provide a coherent roadmap for environmental regulation overseas. Furthermore, the DoD affords commanders a tremendous amount of discretion in the implementation of these policies and provides for a number of exemptions through which commanders may avoid compliance.

The DoD's failure to implement a coherent and enforceable set of environmental policies has resulted in very real environmental harms overseas. The United States maintained 823 sites in 39 countries in FY 2007⁶ and has been involved in a number of overseas operations, including those in Iraq and Afghanistan. As a result of the DoD's failure to implement environmental policies that adequately regulate overseas military bases, U.S. forces have damaged the environments of host nations to such an extent that the

4. James E. Landis, *The Domestic Implications of Environmental Stewardship at Overseas Installations: A Look at Domestic Questions Raised by the United States' Overseas Environmental Policies*, 49 NAVAL L. REV. 99, 101 (2002).

5. *Id.* at 102.

6. OFFICE OF THE DEPUTY UNDER SEC'Y OF DEF., DEP'T OF DEF., BASE STRUCTURE REPORT FISCAL YEAR 2007 BASELINE 6 (Sept. 30, 2006).

costs for environmental cleanup and remediation of just one base “could approach Superfund proportions.”⁷

Furthermore, the lack of environmental regulations during overseas operations has permitted open burn pits at bases in Iraq and Afghanistan, which spew smoke containing known carcinogens.⁸ For instance, at Balad Air Force Base in Iraq, commanders utilized jet fuel in a burn pit—the sole means of trash disposal for four years—to burn 500,000 pounds of trash per day, including plastics, food, and medical wastes.⁹ In a still-classified study, the Chief of Aeromedical Services stated that “the known carcinogens and respiratory sensitizers released into the atmosphere by the burn pit present both an acute and chronic health hazard to our troops and the local populations.”¹⁰ In fact, many soldiers who have been exposed to the burn pit have reported chronic cough and shortness of breath.¹¹

It is, therefore, clear that the DoD must improve its overseas environmental regulations. Rather than a complete overhaul of the DoD’s environmental regime, change should be effected through the factors which influence current DoD policy: international agreements, federal environmental statutes with extraterritorial effect, and executive orders. Of these, the DoD is most likely to improve its overseas environmental policies in response to an executive order. International agreements have historically failed to establish mandatory protections for the environments of foreign countries. The requirements of the most applicable environmental statutes, the National Environmental Policy Act and the Comprehensive Environmental Response, Compensation, and Liability Act, may not be applied extraterritorially to overseas military bases.

The applicable executive orders currently in force, however, fail to compel the DoD to implement adequate overseas environmental regulations. I, therefore, propose an Executive Order that would mandate environmental standards equivalent to those required domestically, while allowing base commanders flexibility and

7. U.S. GEN. ACCOUNTING OFFICE, *MILITARY BASE CLOSURES: U.S. FINANCIAL OBLIGATIONS IN THE PHILIPPINES* 27 (1992) (discussing the costs of cleanup and remediation for U.S. bases in the Philippines) [hereinafter *GAO BASE CLOSURES REPORT*].

8. Adam Levine, *Effects of Toxic Smoke Worry Troops Returning from Iraq*, CNN.COM, Dec. 15, 2008, <http://www.cnn.com/2008/US/12/15/burn.pits/index.html>.

9. *Id.*

10. *Id.*

11. *Id.* Soldiers have named the resulting cough “Iraqi crud.” *Id.*

respecting the sovereignty of foreign nations. This Executive Order would provide the DoD the standards necessary to implement an overseas environmental policy that is truly protective of U.S. national security and foreign policy interests.

II. CURRENT DEPARTMENT OF DEFENSE OVERSEAS ENVIRONMENTAL POLICY

In response to executive orders, the highlighting of deficiencies in the DoD's overseas environmental management by the U.S. General Accounting Office (GAO),¹² and changing norms in international environmental law,¹³ the DoD has implemented policies regarding environmental assessment, compliance standards, pollution prevention, and remediation at overseas bases and during military operations. Although these policies reflect progress in the DoD's commitment to preventing and remedying environmental damage, they are inadequate to compel commanders to enforce sufficient environmental regulations. First, the DoD did not draft its policies as a coherent environmental regime, but rather drafted its standards as separate, yet parallel, to one another.¹⁴ This lack of coherence is likely to engender confusion among commanders, thus decreasing the standards' effectiveness. Second, the policies prescribe the minimum environmental standards to be implemented by commanders, but provide no incentives for commanders to implement more rigid standards.¹⁵

Third, the DoD does not conduct sufficient oversight to ensure that overseas bases and operations comply with its environmental policies.¹⁶ In 1980, the Secretary of Defense assigned the primary responsibility for ensuring that overseas military bases comply with environmental laws and policies to base commanders, who may then delegate this responsibility to another person or office.¹⁷ As a result, according to the GAO, "there is no assurance that the bases are

12. See U.S. GEN. ACCOUNTING OFFICE, HAZARDOUS WASTE: MANAGEMENT PROBLEMS CONTINUE AT OVERSEAS MILITARY BASES (1991) [hereinafter GAO HAZARDOUS WASTE REPORT].

13. See discussion *infra* Part II.A.

14. See discussion *infra* Part II.A–D.

15. See Richard A. Phelps, *Environmental Law for Overseas Installations*, 40 A.F. L. REV. 49, 67 (1996).

16. GAO HAZARDOUS WASTE REPORT, *supra* note 12, at 8.

17. *Id.*

properly [implementing environmental policies].”¹⁸ In its audit of the management of overseas military bases’ environmental policy, for example, the GAO reported that oversight by outside organizations such as Inspector General offices, commands, and audit agencies was limited.¹⁹ Furthermore, oversight on bases was “inadequate” due to the poorly staffed and low-priority base operations charged with overseeing environmental management.²⁰

Fourth, DoD environmental policies do not contain specific sanctions for failure to comply with their requirements.²¹ Fifth, DoD policies provide a number of loopholes through which commanders may avoid environmental requirements, including broad exceptions and ambiguous key terms and procedures for implementation.²²

Finally, neither Congress nor the DoD has sufficient oversight of the funds devoted by military bases to environmental cleanup. Rather than allocating funds to a separate account for the implementation of environmental policies overseas, Congress has appropriated overseas environmental funds as part of military bases’ account for operations and maintenance.²³ Environmental protection and remediation funds are pulled from the same account as funds used, for example, to maintain aircraft, ships, tanks, and buildings.²⁴ As a result, neither Congress nor the DoD is able to determine whether funds are being properly utilized for the implementation of environmental policies or whether the current funding is sufficient.²⁵

As a result of these failures, the DoD’s current overseas environmental policies concerning assessment, compliance, pollution prevention, and remediation are inadequate to protect the environments of foreign nations.

18. *Id.* at 12.

19. *Id.* at 16.

20. *See id.*

21. Phelps, *supra* note 15, at 74.

22. *See* discussion *infra* Part II.A–D.

23. Mark Hamilton, Assistant to the Assistant Deputy Sec’y of Def. for Overseas Installations, Status of the U.S. Overseas Bases Program: Governmental Perspective (Oct. 25, 1999), *in* INST. OF POLICY STUDIES, THE INT’L GRASSROOTS SUMMIT ON MILITARY BASE CLEANUP 3 (2000).

24. *Id.*

25. *See id.*

A. *Environmental Assessment*

1. Executive Order 12114

On January 4, 1979, President Carter issued Executive Order 12114—*Environmental Effects Abroad of Major Federal Actions* (E.O. 12114), requiring federal agencies, including the DoD, to consider the environmental effects of their actions abroad.²⁶ The objective of the Order was to “provide information for use by decisionmakers, to heighten awareness of and interest in environmental concerns and, as appropriate, to facilitate environmental cooperation with foreign nations.”²⁷ E.O. 12114 mandated a process that federal agencies must follow before taking actions abroad but did not specify any substantive requirements. As such, E.O. 12114 required that, when authorizing or approving “major federal actions” that will significantly affect overseas environments,²⁸ agency decision makers must research, produce, and take into consideration specified documents assessing the environmental impact of their actions on the foreign nation.²⁹

Although E.O. 12114 furthered the goal of limiting environmental harm caused by federal agencies abroad, the Order included a number of exemptions which have been broadly interpreted by federal agencies to limit their obligation to comply with its requirements. For instance, in order for a foreign nation to receive the benefits of the Order, it cannot have participated with the United States or have been involved in the federal action significantly affecting the environment.³⁰ The Order also allowed agencies to modify the contents, timing, and availability of environmental documents in a number of broadly defined circumstances.³¹

2. Department of Defense Directive 6050.7

The DoD issued Directive 6050.7—*Environmental Effects Abroad of Major Department of Defense Actions* to establish internal procedures for the implementation of E.O. 12114 both at military

26. Exec. Order No. 12,114, 3 C.F.R. 356 (1979), *reprinted in* 42 U.S.C.S. § 4321 (2000) [hereinafter E.O. 12114]. E.O. 12114 was still in force as of October 15, 2008. *See* 43 C.F.R. § 46.170 (2008).

27. *Id.* § 2-2.

28. *Id.* § 2-1.

29. *See id.* § 2-4(a).

30. *Id.* § 2-3(b).

31. *Id.* § 2-5(b).

bases and during operations.³² The Directive defines key terms left undefined by E.O. 12114 and details the documents that must be produced and considered by DoD officials when authorizing or approving “major federal actions that do significant harm to the environment of places outside the United States.”³³ Because E.O. 12114 failed to define the term “major action,” the DoD interpreted it to mean that environmental assessments are only required for actions “of considerable importance involving substantial expenditures of time, money, and resources, that affect[] the environment on a large geographic scale or ha[ve] substantial environmental effects on a more limited geographical area”³⁴

Although the Directive purports to provide guidance on the implementation of E.O. 12114, it leaves a tremendous amount of discretion to base commanders to decide whether an environmental assessment should be prepared³⁵ and which of two specified forms it should take.³⁶ The Directive does not provide any instruction regarding which factors to consider when determining whether environmental harm will be sufficiently “significant” for an environmental assessment to be prepared. If the commander decides that the harm will not be significant, the decision will be simply recorded in a file.³⁷ If the commander decides that harm will be significant, no further action may be taken that would do “significant harm to the environment” until an environmental assessment has been completed and the results considered.³⁸ Once these procedural requirements have been satisfied, the Directive does not require that the results of environmental assessments affect any substantive aspects of military activities.

The DoD also took full advantage of the discretion granted by E.O. 12114 to implement a number of exceptions which may be utilized to justify failure to conduct an environmental assessment. These exemptions are so broad that they “would likely provide exempted status to most foreseeable overseas military operations.”³⁹

32. DEP’T OF DEF., DIRECTIVE NUMBER 6050.7: ENVIRONMENTAL EFFECTS ABROAD OF MAJOR DEPARTMENT OF DEFENSE ACTIONS § 1 (1979) [hereinafter DIRECTIVE 6050.7].

33. *Id.* §§ 1, 3, E2.3–4.

34. *Id.* § 3.5.

35. *See id.* §§ 5.4.1, E2.4.3, E2.5.3.

36. *See id.* § E2.3.1.1.

37. *Id.* § E2.4.3, .5.3.

38. DIRECTIVE 6050.7, *supra* note 32, § E2.4.3, .5.3.

39. Richard M. Whitaker, *Environmental Aspects of Overseas Operations: An Update*, 1997 ARMY LAW. 17, 23 (1997).

The Directive also incorporates E.O. 12114's allowance for flexibility in the preparation, content, and distribution of environmental assessment documents.⁴⁰ For example, the DoD reserves the right to modify the documents' requirements when necessary to avoid infringement, or even the appearance of infringement, on the internal affairs and sovereignty of another government.⁴¹

Furthermore, consistent with E.O. 12114,⁴² environmental assessments must only be conducted for "[m]ajor federal actions that significantly harm the environment of a foreign nation that is not involved in the action."⁴³ The Directive states that a foreign nation may be involved through direct participation with the United States in the environmentally harmful action, or through cooperation with another nation participating in the harmful action.⁴⁴ However, since the Directive does not specify the level of participation necessary to disqualify a foreign nation from receiving the benefits of an environmental assessment, this provision has been broadly interpreted to exclude any number of foreign nations where U.S. armed forces were present.⁴⁵

The United States, for instance, utilized the broad "participating nation exception" to avoid the requirement of conducting environmental assessments during Operation Uphold Democracy in Haiti in 1994.⁴⁶ The United States, under the authority of U.N. Security Council Resolution 940,⁴⁷ sent paratroopers to Haiti to oust the illegitimate Cedras regime from power just as the regime agreed

40. See E.O. 12114, *supra* note 26, § 2-5(b).

41. DIRECTIVE 6050.7, *supra* note 32, § E2.4.6.3. The DoD appears to have had serious concerns regarding infringement on the sovereignty of host countries under E.O. 12114. In addition to this exemption, the Directive states that the DoD's policy is to "act[] with care within the jurisdiction of a foreign nation. Treaty obligations and the sovereignty of other nations must be respected, and restraint must be exercised in applying United States laws within foreign nations unless the Congress has expressly provided otherwise." *Id.* § 4.3. The DoD thus may have been concerned that the Order, issued by the President rather than by Congress, applied U.S. environmental standards to foreign countries, and required invasive environmental assessment procedures that may interfere with the sovereignty of host nations. See *id.* § 4.

42. See E.O. 12114, *supra* note 26, § 2-3(b).

43. DIRECTIVE 6050.7, *supra* note 32, § E2.2.1.1.

44. *Id.*

45. See, e.g., Karen V. Fair, *Environmental Compliance in Contingency Operations: In Search of a Standard?*, 157 MIL. L. REV. 112, 131-34 (1998).

46. See *id.* at 133.

47. U.N. Security Council Resolution 940 authorized the creation of a multilateral force to restore the legitimately elected President in Haiti. S.C. Res. 940, ¶ 4, U.N. Doc. S/RES/940 (July 31, 1994).

to relinquish control.⁴⁸ The United States considered the new government of Haiti to be a “participating nation” and exempted it from receiving environmental assessments.⁴⁹

Operation Uphold Democracy exemplifies how E.O. 12114 and Directive 6050.7 may be interpreted broadly under circumstances in which a country did not clearly participate in the action. Although the new government of Haiti consented to the entry of U.S. forces under a legitimate international agreement, it may not have voluntarily agreed to host U.S. forces, but rather may have capitulated to the coercion of a superpower and the United Nations.⁵⁰ Thus, under this exception, weaker countries may be legally coerced into giving up their right to environmental assessments.

As a result of the discretion left to commanders and numerous broad exemptions, for which E.O. 12114 clearly provided, complete and fair implementation of E.O. 12114 at overseas military bases and during operations cannot be guaranteed.

B. Environmental Compliance Standards

The DoD defined its substantive standards for environmental compliance at overseas military bases through Instruction 4715.5—*Management of Environmental Compliance at Overseas Installations* (1996)⁵¹ and the Overseas Environmental Baseline Guidance Document (OEBGD) (2007).⁵² Instruction 4715.5 and the OEBGD do not apply to overseas military operations.⁵³ The DoD also explicitly stated that Instruction 4715.5 “does not apply to

48. Fair, *supra* note 45, at 131–32.

49. *Id.* at 131–33.

50. Whitaker, *supra* note 39, at 22.

51. DEP’T OF DEF., INSTRUCTION NUMBER 4715.5: MANAGEMENT OF ENVIRONMENTAL COMPLIANCE AT OVERSEAS INSTALLATIONS (1996) [hereinafter INSTRUCTION 4715.5]. Instruction 4715.5 was implemented in response to the National Defense Authorization Act for Fiscal Year 1991, *id.* § 1.2, which directed the Secretary of Defense to “develop a policy for determining the responsibilities of the Department of Defense with respect to cleaning up environmental contamination that may be present at military installations located outside the United States. In developing the policy, the Secretary shall take into account applicable international agreements (such as Status of Forces agreements), multinational or joint use and operation of such installations, relative share of the collective defense burden, and negotiated accommodations.” National Defense Authorization Act for Fiscal Year 1991, Pub. L. No. 101-510, § 342(b), 104 Stat. 1485, 1537–38 (1990).

52. OFFICE OF THE UNDER SEC’Y OF DEF. FOR ACQUISITION, TECH., AND LOGISTICS, DEP’T OF DEF., OVERSEAS ENVIRONMENTAL BASELINE GUIDANCE DOCUMENT (2007) [hereinafter OEBGD].

53. *Id.* § C1.3.3; INSTRUCTION 4715.5, *supra* note 51, § 2.1.4.

environmental analyses conducted under E.O. 12114.”⁵⁴ In doing so, the DoD created a substantive compliance regime wholly separate from the procedural requirements established in E.O. 12114 and Directive 6050.7. In fulfilling Instruction 4715.5’s substantive compliance standards, commanders are therefore not required to base their conduct on assessments under E.O. 12114.

Instruction 4715.5 mandated the creation of the OEBGD, a document that specified the minimum substantive standards that commanders must observe in developing environmental compliance standards at overseas military bases.⁵⁵ In mandating such standards, the OEBGD took into consideration “generally accepted environmental standards” applicable to military bases in the United States and incorporated U.S. laws that may be applied extraterritorially.⁵⁶

Instruction 4715.5 also provided for the development of Final Governing Standards (FGS), which dictate country-specific substantive environmental compliance standards for overseas military bases.⁵⁷ The FGS for each host nation are determined by Environmental Executive Agents (EEAs), who are appointed by the Deputy Under Secretary of Defense for Environmental Security (DUSD(ES)).⁵⁸ EEAs are only appointed, and FGS only promulgated, “in foreign countries where DoD installations are located and where the DUSD(ES) determines that the level of DoD presence justifies the establishment of FGS.”⁵⁹

Once appointed, the EEA must then determine country-specific FGS based on the criteria and management practices mandated in the OEBGD.⁶⁰ Instruction 4715.5 specifies that if host nation environmental standards or international agreements provide more protection “to human health and the environment” than the OEBGD, the EEA should generally use the more protective standards when developing the FGS.⁶¹ The EEA should, in all cases,

54. INSTRUCTION 4715.5, *supra* note 51, § 2.1.7.

55. Phelps, *supra* note 15, at 54–55; *see also* Hamilton, *supra* note 23, at 2 (noting that the OEBGD provides commanders at overseas military bases a “major measuring stick to use to begin to develop environmental programs”).

56. INSTRUCTION 4715.5, *supra* note 51, § 6.2.1.

57. *Id.* § 4.1.

58. *Id.* § 6.1.1.

59. *Id.*

60. *Id.* § 6.3.3.1; OEBGD, *supra* note 52, § C1.1.

61. INSTRUCTION 4715.5, *supra* note 51, § 6.3.3.1.

comply with any international agreement with a host nation that establishes a different standard.⁶² Once FGS are established in a host nation, military base commanders in that nation are charged with implementing policies to ensure compliance with the FGS' substantive standards.⁶³

In host countries that the DUSD(ES) has determined do not warrant FGS,⁶⁴ commanders must comply with applicable international agreements, host nation environmental standards,⁶⁵ and the OEBGD.⁶⁶ In cases of conflicting requirements, military bases must comply with the requirement that is "more protective of human health and the environment."⁶⁷

Although Instruction 4715.5 and the OEBGD set essential environmental compliance standards for U.S. bases in host nations, a number of exceptions and funding requirements decrease their effectiveness. First, the Instruction and the OEBGD do not apply to the determination or remediation of environmental harm caused by the DoD's past activities.⁶⁸

Second, the OEBGD sets the minimum, not the ideal, standard for environmental compliance.⁶⁹ Although Instruction 4715.5 provides for higher compliance standards if host nation environmental laws or international agreements are more protective, these circumstances are unlikely to occur in many host nations. Many host nations do not have, or do not enforce, stringent environmental regulations.⁷⁰ As the requirement to comply with host nation standards has generally been interpreted, military bases must only comply with standards to the extent that they are enforced by the host

62. *Id.*

63. *Id.* § 6.3.5 ("The DoD Components in a foreign nation for which FGS have been established shall comply with the FGS established for that country.")

64. *See id.* § 6.1.1.

65. *Id.* § 6.3.8. This requirement was implemented in response to President Carter's 1978 Executive Order 12088—*Federal Compliance with Pollution Control Standards*, requiring that "[t]he head of each Executive agency that is responsible for the construction or operation of Federal facilities outside the United States shall ensure that such construction or operation complies with the environmental pollution control standards of general applicability in the host country or jurisdiction." Exec. Order No. 12,088, 3 C.F.R. 243 § 1-801 (1979), *reprinted in* 42 U.S.C. § 4321 (2000).

66. INSTRUCTION 4715.5, *supra* note 51, § 6.3.8.

67. *Id.*

68. *Id.* § 2.1.6; OEBGD, *supra* note 52, § C1.3.5.

69. *See Phelps, supra* note 15, at 55.

70. GAO HAZARDOUS WASTE REPORT, *supra* note 12, at 12.

country.⁷¹ For example, although water and air quality standards in the Philippines are generally equivalent to U.S. standards, the Philippine government does not enforce these laws against its citizens or military bases. As a result, the United States does not recognize the higher standards as binding.⁷²

Furthermore, unless specified in an agreement, the United States has no legal obligation to comply with the host nations' environmental laws.⁷³ Most agreements between the United States and host nations do not include specific provisions regarding environmental protection or remediation.⁷⁴ As a result, the OEBGD's minimum standards govern the protection of most host countries' environments. Additionally, many international agreements between the United States and host nations release the United States from any obligation to remediate or compensate environmental damage.⁷⁵ Thus, even if a host nation's laws are protective of the environment, the EEA will base the nation's FGS on any agreements disclaiming U.S. liability for environmental harm caused by its overseas military bases.⁷⁶

Third, both Instruction 4715.5 and the OEBGD contain a number of exemptions. Specifically, neither document's provisions apply to core daily military operations,⁷⁷ including off-base operational and training deployments.⁷⁸ The Instruction and the OEBGD state that such operations and deployments should be conducted "in accordance with applicable international agreements, other DoD Directives and Instructions and environmental annexes incorporated into operation plans or operation orders."⁷⁹

However, as exemplified in Operation Restore Hope in Somalia in 1992, such guidance is inadequate during operational and training

71. GAO BASE CLOSURES REPORT, *supra* note 7, at 29.

72. *Id.*

73. *See Flores v. S. Peru Copper Corp.*, 414 F.3d 233, 256 (2d Cir. 2003).

74. Phelps, *supra* note 15, at 57.

75. *See* discussion *infra* Part III.A.1. These agreements are, at times, negotiated under a power imbalance, in which host nations that are reliant upon the economic stimulus provided by U.S. military bases feel pressured to make environmental concessions. *Id.*

76. *See* Hamilton, *supra* note 23, at 13 ("In terms of being required to follow host country laws, I have to go back to the basic rules of the game for us, which is the SOFA. If the SOFA says to [follow the host nation's laws] and we agree to that, then we'll do it. If the SOFA is silent or addresses it in a different way, we don't do it. We don't have a legal requirement to do it.").

77. Landis, *supra* note 4, at 119.

78. INSTRUCTION 4715.5, *supra* note 51, § 2.1.4; OEBGD, *supra* note 52, § C1.3.3.

79. INSTRUCTION 4715.5, *supra* note 51, § 2.1.4; OEBGD, *supra* note 52, § C1.3.3.

deployments. The DoD considered Operation Restore Hope to be exempt from its environmental compliance policies, and, given the “nature of the operation and the existing level of destruction in [Somalia], environmental considerations were admittedly a ‘low priority.’”⁸⁰ In addition, Somalia lacked any form of local government or regulatory system, leading to an absence of any environmental controls. Although U.S. forces prepared an environmental annex, it was largely neglected.⁸¹ Operation Restore Hope, therefore, demonstrates how the DoD’s environmental compliance policy containing broad discretion and exemptions is grossly inadequate to provide environmental protection to both the foreign country and U.S. troops during operations.⁸²

Finally, the DoD does not specify requirements for prioritizing the funding of environmental compliance standards in the FGS or OEBGD under any but the most dire circumstances.⁸³ Instruction 4715.5 states only that funding for environmental compliance requirements should be determined according to “risk-based prioritization, based on local circumstances and long-term objectives.”⁸⁴ Furthermore, when a host nation agrees to release the United States from liability for environmental damage in an international agreement, military bases are not authorized to expend funds or other resources to address environmental harms.⁸⁵ Commanders can thus easily justify not allocating sufficient, or any, funds to environmental compliance.

C. *Pollution Prevention*

Unlike the DoD’s regimes concerning environmental assessment and compliance, the DoD’s compliance and pollution prevention regimes are related. Instruction 4715.5 and the OEBGD specify that compliance standards should be attained primarily through pollution prevention, so long as prevention is “economically advantageous and consistent with mission requirements.”⁸⁶ The DoD created its pollution prevention regime through Instruction 4715.4—*Pollution*

80. Fair, *supra* note 45, at 129 (citation omitted).

81. *Id.* at 130.

82. *See id.* at 130–31.

83. *See* INSTRUCTION 4715.5, *supra* note 51, § 6.5.2.

84. *Id.* § 6.5.2.4.

85. *Id.* § 6.5.3.

86. INSTRUCTION 4715.5, *supra* note 51, § 4.3.

Prevention (1996) and the OEBGD (2007).⁸⁷ Instruction 4715.4 provides “additional pollution prevention guidance”⁸⁸ through procedural requirements⁸⁹ that are to be applied in a manner consistent with Instruction 4715.5’s substantive requirements,⁹⁰ while the OEBGD establishes substantive pollution standards for overseas military bases.⁹¹

Although Instruction 4715.4 does not include the same number of broad exemptions as the DoD’s environmental assessment and compliance policies, its initiatives are tempered by the constant reminder that they are to be implemented “in the most economical manner,”⁹² or only “where cost effective.”⁹³ Given that commanders have the discretion to determine whether pollution prevention measures are economically feasible, such provisions provide an easy means of avoiding the implementation of pollution prevention programs.

D. Environmental Remediation

1. Department of Defense Instruction 4715.8

Instruction 4715.8—*Environmental Remediation for DoD Activities Overseas* (1998) sets forth the DoD’s policies regarding remediation of environmental contamination caused by the DoD both on and off overseas military bases.⁹⁴ The Instruction explicitly states that these policies do not apply to the substantive environmental requirements issued under Instruction 4715.5 and the OEBGD.⁹⁵ The Instruction, therefore, creates a remediation regime separate from compliance standards.

The Instruction requires that EEAs, as designated in Instruction 4715.5 on compliance standards, establish country-specific remediation policies, which should, among other requirements: (1)

87. DEP’T OF DEF., INSTRUCTION NUMBER 4715.4: POLLUTION PREVENTION (1996) [hereinafter INSTRUCTION 4715.4].

88. INSTRUCTION 4715.5, *supra* note 51, § 6.7.

89. *See generally* INSTRUCTION 4715.4, *supra* note 87.

90. *Id.* § 2.2.

91. *See Phelps, supra* note 15. *See generally* INSTRUCTION 4715.5, *supra* note 51; OEBGD, *supra* note 52.

92. INSTRUCTION 4715.4, *supra* note 87, § 6.2.3.1.

93. *Id.* § 6.2.3.3.1,.2.

94. DEP’T OF DEF., INSTRUCTION NUMBER 4715.8: ENVIRONMENTAL REMEDIATION FOR DOD ACTIVITIES OVERSEAS § 2.1.2, .3 (1998) [hereinafter INSTRUCTION 4715.8].

95. *Id.* § 2.2.1.

define the appropriate level of remediation at contaminated sites, and (2) establish procedures for negotiating remedial measures with the host nation.⁹⁶ Base commanders must then remedy environmental contamination to the extent required under Instruction 4715.8 and the country-specific standards established by the EEAs.⁹⁷

Instruction 4715.8 specifies procedures that must be followed to effect remediation. Such procedures depend on whether the contamination occurred at overseas military bases that are “open and have not been designated for return” to the host country,⁹⁸ at bases that “have been designated for return or that are already returned,”⁹⁹ or outside of overseas military bases.¹⁰⁰ Under all circumstances, however, overseas base commanders are required to take “prompt action” only when remedying “known imminent and substantial endangerments to human health and safety that are due to environmental contamination that was caused by DoD operations.”¹⁰¹

Remediation under Instruction 4715.8 is inherently limited by its terms. First, in order to warrant any remediation at all, environmental contamination must be “known.”¹⁰² Commanders are thus under no obligation to foresee dangers, and, in fact, have an incentive not to conduct studies to determine the future environmental impacts of their activities.

Second, Instruction 4715.8 severely limits the circumstances under which it will apply. For instance, although the Instruction applies to current DoD operations, it does not apply to operations “connected with actual or threatened hostilities, security assistance programs, peacekeeping missions, or relief operations.”¹⁰³ The Instruction also does not apply to “[a]ctions to remedy environmental contamination that are covered by requirements in environmental annexes to operation orders”¹⁰⁴

Third, the DoD failed to set adequate assessment criteria and remediation standards. Instruction 4715.8 does not provide any criteria for commanders to assess whether environmental

96. *Id.* § 4.2.3.1.

97. *Id.* § 4.2.1.

98. *Id.* § 5.1.

99. *Id.* § 5.2.

100. INSTRUCTION 4715.8, *supra* note 94, § 5.3.1.

101. *Id.* § 5.1.1, .2.1, .3.1.

102. *Id.* § 5.1.1.

103. *Id.* § 2.1.3.

104. *Id.* § 2.2.1.

contamination presents “imminent and substantial endangerment.”¹⁰⁵ Given the restrictive nature of the phrase, commanders can likely exclude the vast majority of environmental issues. Furthermore, the Instruction failed to define adequate remediation standards. Environmental contamination need only be remedied to the point that it does not pose “imminent and substantial endangerment to human health, environment, and safety.”¹⁰⁶ Given the immediacy and urgency implicit in this phrase, commanders are not obligated to implement high levels of remediation. Commanders, in fact, are given the flexibility to order such little remedial action as restricting access to contaminated areas.¹⁰⁷ While protecting human health and safety in the short term (as implied by the term “imminent”), such action would hardly safeguard the host nation’s environment and people from the ill-effects of such contamination in the future.¹⁰⁸

Fourth, it may be difficult to determine when the DoD “caused” environmental contamination in host nations. As with the “participating nation exception” to E.O. 12114 and Directive 6050.7, the line between action that was clearly taken by the DoD and action that was taken with the consent, or participation, of the host nation may not be clear.¹⁰⁹ If the host nation approved of, or in any way participated in, the action causing environmental contamination, the DoD can claim that it did not “cause” the contamination and avoid the obligation to remediate it.

Finally, neither Congress nor the DoD has allocated additional funds for remediation. The Instruction provides that the remediation requirements are to apply, “subject to the availability of funds.”¹¹⁰ Since the funds that Congress allocates for the DoD’s environmental overseas policies are pulled from the same account as the funds for operations and maintenance of overseas military bases,¹¹¹ remediation projects must compete with operations and maintenance projects for financing.¹¹² Given the broad discretion Instruction 4715.8 affords base commanders in approving remediation programs,¹¹³ and given

105. *See id.* § 5.1.1, .2.1, .3.1.

106. INSTRUCTION 4715.8, *supra* note 94, § 5.4.3.

107. *Id.*

108. *See id.*

109. *See infra* Part II.A.2.

110. *Id.* § 5.

111. Hamilton, *supra* note 23, at 3.

112. Phelps, *supra* note 15, at 81.

113. *See supra* notes 105–108 and accompanying text.

the lack of transparency and oversight inherent in the combined environmental programs, operations and maintenance projects account,¹¹⁴ it is unlikely that commanders would pull funds from other operations and maintenance programs in order to fund any but the most urgent environmental remediation projects.

Although remediation at bases that are open and not scheduled for return to host countries, and at areas outside of bases, is limited only by the general requirements above,¹¹⁵ remediation at bases that have been designated for return or that are already returned is minimized by additional limitations. First, remediation may be completed after the return of a base to the host nation; however, it must be limited to specifications detailed in a remediation plan approved by the commander before the base's return.¹¹⁶ The Instruction does not provide any standards which commanders must follow in approving or denying the remediation plan.¹¹⁷ Remediation, therefore, is limited by the need to prepare a plan and obtain the base commander's approval in advance.

Second, after the military base is returned to the host nation, the DoD may not fund any remediation beyond that required by a binding international agreement or under an approved remediation plan, as described above.¹¹⁸ Because most international agreements do not include specific provisions regarding environmental remediation,¹¹⁹ the United States is generally under no obligation to comply if the host nation requests remediation.¹²⁰ Host nations are thus compelled to perform additional remediation,¹²¹ identify the contamination "as an offset against the residual value of DoD capital improvements,"¹²² or make claims under relevant provisions, if any, of the applicable international agreement to regain remediation costs.¹²³

114. See Hamilton, *supra* note 23, at 3.

115. See INSTRUCTION 4715.8, *supra* note 94, § 5.1, .3.

116. *Id.* § 5.2.1.

117. *See id.*

118. *Id.* § 5.2.3.3.

119. Phelps, *supra* note 15, at 57.

120. *See id.* at 80; Hamilton, *supra* note 23, at 8 ("In the way the thing is working, when we leave the facility, in the absence of some agreement which specifically says we have activities to take, it's over. . . . In the Philippines . . . the United States closed their facilities, left their facilities, the host country took those facilities and that was the end of it.").

121. *See, e.g.*, INSTRUCTION 4715.8, *supra* note 94, § 5.1.4.

122. *Id.* § 5.5.

123. Phelps, *supra* note 15, at 80.

2. Final Governing Standards

Although FGS, as determined by the OEBGD, do not generally apply to remediation of environmental problems caused by the DoD's "past activities,"¹²⁴ the OEBGD provides for remediation in response to spills and leaks from underground storage tanks.¹²⁵ The OEBGD, for instance, instructs overseas military bases to create a Spill Prevention and Response Plan, including measures to prevent, and, "to the maximum extent practicable," to remove, a "worst case discharge" of hazardous substances and refined petroleum, oil, and lubricant (POL) spills.¹²⁶ If hazardous wastes leak or spill in any way, the base must contain "visible releases to the environment."¹²⁷

The OEBGD fails, however, to provide substantive standards for remediation. For cleanup of hazardous substances and POL spills from underground storage tanks,¹²⁸ the OEBGD focuses on an ambiguous notion of containment, rather than on substantive remediation standards.¹²⁹ After an undefined initial response has been completed, for instance, any remaining pollutants and "obviously contaminated soil" must be "appropriately removed and managed" according to Instruction 4715.8.¹³⁰ Although the OEBGD provides the most specific remediation standards for leaks or spills of hazardous wastes, it again fails to provide any substantive standards for remediation.

The limitations of Instruction 4715.8 and the OEBGD thus have a detrimental effect on a host nation's ability to obtain remediation for environmental contamination caused by the DoD.

III. FACTORS INFLUENCING DEPARTMENT OF DEFENSE ENVIRONMENTAL POLICY

Given that current DoD policy is inadequate to fully address environmental concerns at overseas military bases and during operations, change must be effected through factors that influence DoD policy. In formulating its policies, the DoD considers: (1)

124. OEBGD, *supra* note 52, § C1.3.5.

125. Phelps, *supra* note 15, at 77-78.

126. OEBGD, *supra* note 52, § C18.3.1. A "worst case discharge" is "[t]he largest foreseeable discharge from the facility." *Id.* § C18.2.9.

127. *Id.* § C6.3.7.6.2.

128. *See id.* § C18.3.3.

129. *See id.* § C18.1.

130. *Id.* § C18.3.6.

international agreements;¹³¹ (2) federal environmental statutes with extraterritorial effect;¹³² and (3) executive orders.¹³³

The DoD, however, is most likely to significantly improve its overseas environmental policy in response to executive orders. Historically, international agreements have failed to provide protection for the environment of host nations, at times even including provisions disclaiming U.S. liability for the environmental harms it causes. Additionally, the requirements of the most applicable federal statutes, the National Environmental Policy Act (NEPA)¹³⁴ and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA),¹³⁵ cannot be applied extraterritorially to regulate environmental harm overseas, as neither statute overcomes the presumption against extraterritoriality.¹³⁶ Executive orders, on the other hand, have been shown to effect changes in DoD overseas environmental policy.¹³⁷ Furthermore, the President has unquestionable constitutional authority to issue executive orders concerning the DoD.¹³⁸ Thus, an executive order must be utilized in order to effect improvements in the DoD's overseas environmental policy.

A. *International Agreements*

1. Status of Forces Agreements and Basing Agreements

DoD policy regarding the determination of FGS, pollution prevention, and remediation is dictated, in part, by applicable

131. See, e.g., INSTRUCTION 4715.5, *supra* note 51, § 4.1 (considering international agreements in creating FGS); INSTRUCTION 4715.4, *supra* note 87, § 4.1.1 (“It is DoD policy to: Ensure . . . installations located outside the United States [comply] with applicable . . . international agreements”); INSTRUCTION 4715.8, *supra* note 94, § 5.1.3 (“International agreements may also require the United States to fund environmental remediation.”).

132. See, e.g., OEBGD, *supra* note 52, § C1.4.5.1 (incorporating federal environmental statutes with extraterritorial effect); INSTRUCTION 4715.4, *supra* note 87, § 4.1.1 (“It is DoD policy to: Ensure . . . installations located outside the United States [comply] with applicable . . . Federal statutes with extraterritorial effect”).

133. See, e.g., DIRECTIVE 6050.7, *supra* note 32, § 1 (implementing E.O. 12114); INSTRUCTION 4715.5, *supra* note 51, § 4.1 (implementing Executive Order 12088); INSTRUCTION 4715.4, *supra* note 87, § 4.1.1 (“It is DoD policy to: Ensure . . . installations located outside the United States [comply] with applicable Executive Orders”).

134. National Environmental Policy Act of 1969, 42 U.S.C. § 4321–4370 (2006).

135. Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601–9675 (2006).

136. See *infra* Part III.B.

137. See *infra* Part III.C.

138. See U.S. CONST. art. II, § 2.

international agreements.¹³⁹ These agreements impose legal obligations, similar to contractual obligations, on the United States and other parties to the agreements.¹⁴⁰ Generally, such agreements are in the form of Status of Forces Agreements (SOFAs), which define the legal status of U.S. military personnel and property in host nations,¹⁴¹ or basing agreements, which define rights and obligations arising from the use of military bases in a host country.¹⁴²

Although some of the more developed host countries are beginning to propose terms that would provide guidelines for environmental protection or remediation, the vast majority of international agreements signed by the United States do not define environmental compliance standards.¹⁴³ Some agreements contain claims that are sufficiently broad to cover injuries to people or property due to environmental contamination caused by U.S. forces;¹⁴⁴ however, the agreements do not provide for environmental protection or remediation and generally include provisions which limit the ability of host nation claimants to recover for environmental damage.¹⁴⁵

The 1947 basing agreement between the United States and the Philippines, for instance, stated that the United States would provide “reasonable compensation” for claims arising from harm to property or people caused by U.S. armed forces.¹⁴⁶ Although this provision was likely broad enough to encompass environmental damage, the ability of Philippine claimants to receive compensation was limited in several important ways, including that claims must have been presented within one year after the occurrence of the incident leading to the claim.¹⁴⁷ Claimants were thus foreclosed from recovering for injuries

139. See *supra* note 131.

140. *Flores v. S. Peru Copper Corp.*, 414 F.3d 233, 256 (2d Cir. 2003).

141. GlobalSecurity.org, Status-of-Forces Agreement [SOFA], <http://www.globalsecurity.org/military/facility/sofa.htm> (last visited Dec. 28, 2008).

142. See, e.g., Agreement Between the United States of America and the Republic of the Philippines Concerning Military Bases, U.S.-Phil., Mar. 14, 1947, T.I.A.S. No. 1,775 [hereinafter *Philippines Basing Agreement*].

143. See *Phelps*, *supra* note 15, at 57–58.

144. *Id.* at 57.

145. See *id.* at 57–58.

146. *Philippines Basing Agreement*, *supra* note 142, art. XXIII. The 1947 *Philippines Basing Agreement* expired in 1991, and the Philippine Senate rejected a treaty that would have extended its terms. DAVID S. SORENSON, *MILITARY BASE CLOSURE: A REFERENCE HANDBOOK* 116 (2007).

147. *Philippines Basing Agreement*, *supra* note 142, art. XXIII; GAO *BASE CLOSURES REPORT*, *supra* note 7, at 29.

resulting from environmental damage that did not manifest themselves for longer periods of time.¹⁴⁸

Furthermore, many agreements either relieve the United States of any obligation to remediate environmental damage or include a waiver for claims arising from damage to the host nation's property.¹⁴⁹ The SOFA between the United States and Japan, for instance, provides that "[t]he United States is not obliged, when it returns facilities and areas to Japan . . . to restore the facilities and areas to the condition in which they were at the time they became available to the United States armed forces, or to compensate Japan in lieu of such restoration."¹⁵⁰ The 1947 basing agreement between the United States and the Philippines also provided that "[t]he United States is not obligated to turn over the bases to the Philippines . . . in the condition in which they were at the time of their occupation . . ."¹⁵¹ Finally, the SOFA between the parties to the North Atlantic Treaty Organization (NATO), of which the United States is a member, provides that each party "waives all its claims against any other Contracting Party for damage to any property owned by it and used by its land; sea or air armed services . . ."¹⁵² As a result, many host nations have either disclaimed their right to enforce environmental remediation standards, or have agreed to waive any claims for damages resulting from environmental harm caused by the DoD.¹⁵³

The United States thus has a long history of entering into SOFAs or basing agreements that fail to provide meaningful environmental protections for host nations. Given that the United States often enters into agreements with host nations which are much less powerful, and which may not value environmental protection, or which may concede environmental compliance and remediation standards in favor of the economic benefits provided by U.S. military

148. Philippines Basing Agreement, *supra* note 142, art. XXIII; GAO BASE CLOSURES REPORT, *supra* note 7, at 29.

149. Phelps, *supra* note 15, at 82.

150. Agreement Under Article IV of the Treaty of Mutual Cooperation and Security Between the United States of America and Japan, Regarding Facilities and Areas and the Status of United States Armed Forces in Japan, U.S.-Japan, art. IV, Jan. 19, 1960, 11 U.S.T. 1652.

151. Philippines Basing Agreement, *supra* note 142, art. XVII, para. 2; *see also* GAO BASE CLOSURES REPORT, *supra* note 7, at 29 (analyzing the Philippines Basing Agreement).

152. Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of Their Forces art. VIII, para. 1, June 19, 1951, 4 U.S.T. 1792, 199 U.N.T.S. 67; *see also* Phelps, *supra* note 15, at 82 (describing the NATO SOFA).

153. *See* Phelps, *supra* note 15, at 57-58.

bases, the majority of international agreements are not likely to include clauses providing definite standards for environmental compliance and remediation. Without such standards, commanders have few incentives to provide adequate environmental protection and remediation.

It is, therefore, unlikely that changes to the DoD's overseas environmental policy will be effected through international agreements.

2. Customary International Law

It is often argued that the United States, in failing to prevent and remedy environmental harms at overseas military bases and during operations, is violating a duty under customary international law not to harm the environment of other nations.¹⁵⁴ This principle has been most famously articulated in the *Trail Smelter Case* regarding transboundary air pollution between the United States and Canada.¹⁵⁵ There, the Special Arbitral Tribunal found that “no State has the right to use or permit the use of its territory in such a manner as to cause injury . . . in or to the territory of another or the properties or persons therein”¹⁵⁶

The International Court of Justice (I.C.J.) has also issued several opinions indicating its approval of this obligation. In the 1949 *Corfu Channel Case*, for instance, the I.C.J. found that it was “every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States.”¹⁵⁷ More recently, in its 1996 advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*, the I.C.J. noted that “[t]he existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment.”¹⁵⁸

154. See, e.g., Kim David Chanbonpin, Comment, *Holding the United States Accountable for Environmental Damages Caused by the U.S. Military in the Philippines, a Plan for the Future*, 4 ASIAN-PACIFIC L. & POL'Y J. 245, 280–83 (2003); J. Martin Wagner & Neil A.F. Popovic, *Environmental Injustice on United States Bases in Panama: International Law and the Right to Land Free from Contamination and Explosives*, 38 VA. J. INT'L L. 401, 439–42 (1998).

155. Wagner & Popovic, *supra* note 154, at 440.

156. *Trail Smelter (U.S. v. Can.)*, 3 R. Int'l Arb. Awards 1905, 1965 (1941).

157. *Corfu Channel (U.K. v. Alb.)*, 1949 I.C.J. 4, 22 (Apr. 9).

158. *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 226, 241–42, para. 29 (July 8).

The United Nations has convened several conferences resulting in multilateral affirmation of this obligation. Principle 21 of the 1972 Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration) declared that “[s]tates have . . . the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.”¹⁵⁹ Subsequently, the 1992 Rio Declaration on Environment and Development (Rio Declaration) reaffirmed the Stockholm Declaration and restated Principle 21 in the context of sustainable development.¹⁶⁰

The overseas environmental policy of the DoD violates the principle that a nation’s activities should not cause environmental harm to other states. Yet, though this principle should be morally binding, it is not legally binding under norms of customary international law. Customary international law “is composed only of those rules that States universally abide by, or accede to, out of a sense of legal obligation and mutual concern.”¹⁶¹ The United States recognizes that customary international law creates legal obligations among States; however, federal courts are only required to “take judicial notice of, and to give effect to” rules of customary international law in the absence of an applicable treaty or domestic statute, judicial decision, or executive act.¹⁶²

As such, the decisions of the Special Arbitral Tribunal and the I.C.J. do not create legal obligations binding on the DoD’s environmental policies. The Special Arbitral Tribunal’s decision in the *Trail Smelter Case*, for instance, is only binding on the United States and Canada with respect to that particular case, and does not create obligations with respect to third parties. The United States and Canada convened the Special Arbitral Tribunal by Special Agreement, signifying their consent to the Tribunal’s jurisdiction and

159. United Nations Conference on the Human Environment, Stockholm, Swed., June 5–16, 1972, *Declaration of the United Nations Conference on the Human Environment*, part II, para. 21, U.N. Doc. A/CONF.48/14/Rev. 1 (June 16, 1972), available at http://www.unep.org/Law/PDF/Stockholm_Declaration.pdf [hereinafter Stockholm Declaration].

160. United Nations Conference on Environment and Development, Rio de Janeiro, Braz., June 3–14, 1992, *Rio Declaration on Environment and Development*, para. 2, U.N. Doc. A/CONF.151/26 (Aug. 12, 1992), available at <http://www.un.org/documents/ga/conf151/aconf15126-1annex1.htm> [hereinafter Rio Declaration].

161. *Flores v. S. Peru Copper Corp.*, 414 F.3d 233, 248 (2d Cir. 2003).

162. *The Paquete Habana*, 175 U.S. 677, 707 (1900).

to be bound by its decision.¹⁶³ Because other states did not submit themselves to the jurisdiction of the Tribunal, the United States cannot be obligated to comply with the Tribunal's decision in its relations with them. Furthermore, the United States and Canada consented to be bound to the Tribunal's decision, but only with respect to that case. For this reason, in a subsequent treaty with Canada regarding transboundary air pollution, the United States noted only a "tradition of environmental cooperation as reflected in . . . the Trail Smelter Arbitration of 1941," but did not refer to the decision as binding law.¹⁶⁴ The *Trail Smelter Case*, therefore, does not impose obligations on the United States with respect to the effects of its environmental policies on third parties.

Similarly, the I.C.J. is not "empowered to create binding norms of customary international law."¹⁶⁵ Under Article 59 of the Statute of the International Court of Justice, decisions such as *Corfu Channel* "[have] no binding force except between the parties and in respect of that particular case."¹⁶⁶ Additionally, advisory opinions, as on the *Legality of the Threat or Use of Nuclear Weapons*, are, by definition, advisory, and do not constitute binding international law.¹⁶⁷

Furthermore, U.S. courts have determined that the United Nations' Stockholm and Rio Declarations did not create a norm of customary international law binding on the United States. The Second Circuit, in *Flores v. Southern Peru Copper Corp.*, explicitly recognized that the Rio, and, by implication, the Stockholm, Declarations did not evidence customary international law with which the United States was obligated to comply.¹⁶⁸ "Such declarations," according to the court, "are almost invariably political statements—expressing the . . . aspirations and demands of some countries or organizations—rather than statements of universally-recognized legal obligations."¹⁶⁹ Specifically, the Rio Declaration expressed "boundless and indeterminate" principles that were "devoid of

163. See generally Special Agreement: Convention for Settlement of Difficulties Arising from Operation of Smelter at Trail, B.C., U.S.-Can., Apr. 15, 1935, U.S.T.S. No. 893.

164. See Agreement Between the Government of the United States of America and the Government of Canada on Air Quality, U.S.-Can., para. 8, Mar. 13, 1991, T.I.A.S. No. 11,783 [hereinafter U.S.-Canada Treaty].

165. *Flores*, 414 F.3d at 263.

166. See Statute of the International Court of Justice art. 59, June 26, 1945, 59 Stat. 1055.

167. See *id.* art. 65.

168. See *Flores*, 414 F.3d at 262.

169. *Id.*

articulable or discernable standards and regulations,”¹⁷⁰ and did not include any language “indicating that the [nations] joining in the Declaration intended to be legally bound by it.”¹⁷¹ Since the Rio, and, by implication, the Stockholm, Declarations did not create any enforceable legal obligations, they “do not provide reliable evidence of customary international law.”¹⁷²

Thus, although the DoD’s overseas environmental policy should not, in the spirit of international cooperation and environmental protection, violate this principle, the DoD is not bound by customary international law to ensure that its policies do not cause environmental harm to other States.

B. Federal Statutes with Extraterritorial Effect

The DoD requires that EEAs and commanders consider applicable federal statutes with extraterritorial effect in developing FGS under Instruction 4715.5 and the OEBGD.¹⁷³ Two of the most important federal environmental statutes are NEPA¹⁷⁴ and CERCLA.¹⁷⁵ NEPA, for instance, effects pollution prevention by aiming to influence decision-makers in the DoD to consider solutions that would prevent, or minimize, environmental harm.¹⁷⁶ Additionally, CERCLA imposes liability for environmental contamination caused by the DoD.¹⁷⁷ The DoD would thus likely consider NEPA and CERCLA as federal statutes that are “applicable” to its environmental policy at military bases overseas.

NEPA and CERCLA, however, do not meet the DoD’s requirement that statutes must have extraterritorial effect. In order for a federal statute to control activities overseas, it must overcome a strong “presumption against extraterritoriality.”¹⁷⁸ Since NEPA and CERCLA do not meet the requirements to overcome this

170. *Id.* at 255 (citation and internal quotation marks omitted).

171. *Id.* at 263.

172. *See id.*

173. *See supra* note 132.

174. National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321–4370 (2006).

175. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. §§ 9601–9675 (2006).

176. *See Wagner & Popovic, supra* note 154, at 427.

177. *See id.* at 428.

178. Equal Employment Opportunity Comm’n v. Arabian Am. Oil Co. (*Aramco*), 499 U.S. 244, 248 (1991).

presumption, their mandates cannot dictate DoD environmental policies overseas.

1. The Applicability of NEPA and CERCLA to the Department of Defense's Overseas Environmental Policy

a. NEPA

NEPA is considered to be the cornerstone of environmental protection under federal law.¹⁷⁹ Congress enacted NEPA in 1969 to “declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment . . . and stimulate the health and welfare of man; [and] to enrich the understanding of the ecological systems and natural resources important to the Nation”¹⁸⁰

NEPA does not dictate policy or establish substantive standards for environmental regulation, but rather mandates procedures to ensure that federal agencies incorporate into their decision-making processes the environmental effects of proposed actions.¹⁸¹ Section 102(2)(C) of NEPA thus requires all federal agencies, including the DoD, that are planning “major Federal actions significantly affecting the quality of the human environment” to assess the environmental impact of the proposed actions.¹⁸² If the assessment indicates that the proposed action will significantly impact the environment, agencies must then prepare a “detailed statement,”¹⁸³ known as an Environmental Impact Statement (EIS), reporting the results of their findings.¹⁸⁴ The purpose of the EIS is to inform decision-makers so that they may “avoid or minimize” the adverse environmental impacts of their decisions wherever possible.¹⁸⁵

b. CERCLA

Congress enacted CERCLA in 1980 “in response to the serious environmental and health risks posed by industrial pollution.”¹⁸⁶

179. Wagner & Popovic, *supra* note 154, at 427.

180. National Environmental Policy Act of 1969, 42 U.S.C. § 4321 (2006).

181. *Env'tl. Def. Fund v. Massey*, 986 F.2d 528, 532 (D.C. Cir. 1993).

182. 42 U.S.C. § 4332(2)(C).

183. *Id.*

184. Wagner & Popovic, *supra* note 154, at 427.

185. 40 C.F.R. § 1500.2(e) (2008).

186. *Arc Ecology v. U.S. Dep't of the Air Force*, 411 F.3d 1092, 1094 (9th Cir. 2005) (citations and internal quotation marks omitted).

CERCLA's primary objectives were "to ensure the prompt and effective cleanup of waste disposal sites, and to assure that parties responsible for hazardous substances [bear] the cost of remedying the conditions they created."¹⁸⁷

CERCLA is not a regulatory statute, but rather imposes liability on responsible parties for environmental contamination. CERCLA specifies that any covered party, including federal agencies such as the DoD,¹⁸⁸ is liable for: (1) the costs of investigation and assessment of any "release" or "substantial threat" of release¹⁸⁹ of hazardous substances or contaminants which may present "an imminent and substantial danger to the public health or welfare;"¹⁹⁰ (2) the costs of removal or remediation of the contamination; and (3) damages for harm to natural resources.¹⁹¹

Once it is determined that there has been a release, or that there is a threat of release, CERCLA mandates removal, remedial action, or abatement when the release poses an "imminent and substantial endangerment to the public health or welfare or the environment."¹⁹² CERCLA specifies that "remedial actions in which treatment permanently and significantly" reduces contaminants should "be preferred over remedial actions not involving such treatment."¹⁹³ Remedial actions are complete when they "attain a degree of cleanup and . . . control of further release" that, at the very least, "assures protection of human health and the environment."¹⁹⁴

2. The Extraterritorial Application of NEPA and CERCLA

Federal courts have made it fairly clear, however, that NEPA and CERCLA may not be applied extraterritorially to govern environmental policy at overseas military bases.¹⁹⁵ Courts have

187. *Id.* (citations and internal quotation marks omitted).

188. *See* Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. § 9601(21) (2006) (stating that the term "person" includes the U.S. Government).

189. "Release means any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment . . ." *Id.* § 9601(22).

190. *Id.* § 9604(a)(1).

191. *Id.* § 9607(a).

192. *Id.* § 9604(a)(1); 9606(a).

193. *Id.* § 9621(b)(1).

194. 42 U.S.C. § 9621(d)(1).

195. "Extraterritoriality" is defined as a "jurisdictional concept concerning the authority of a nation to . . . establish the norms of conduct applicable to events or persons outside its borders." *Massey*, 986 F.2d at 530.

enunciated a “longstanding principle . . . that legislation of Congress, unless a contrary intent appears, is [presumed] to apply only within the territorial jurisdiction of the United States.”¹⁹⁶ The primary purpose of this presumption against extraterritoriality is to protect against conflicts between federal laws and those of other States which could adversely affect international relations.¹⁹⁷

There are, however, three categories of cases in which the presumption against extraterritoriality will not apply: (1) where Congress has clearly expressed an “affirmative intention” to apply the statute extraterritorially,¹⁹⁸ as determined, in part, by consideration of the foreign policy implications of extraterritorial application;¹⁹⁹ (2) where failure to apply the statute to a foreign setting would “result in adverse effects within the United States;” or (3) where “the conduct regulated by the government occurs within the United States.”²⁰⁰

Because neither NEPA nor CERCLA satisfies the exceptions to the presumption against extraterritoriality, change in DoD overseas environmental policy cannot be effected through the extraterritorial application of these statutes.

a. Congressional Intent

NEPA and CERCLA may be applied extraterritorially to overseas military bases if Congress has expressed an “affirmative intention” to do so.²⁰¹ Congress has the authority to enforce its laws overseas.²⁰² However, courts assume that Congress legislates under a presumption against extraterritoriality.²⁰³ Therefore, unless Congress clearly expresses its intent to give a statute extraterritorial effect, courts assume that Congress intended the legislation to apply domestically.²⁰⁴

196. Equal Employment Opportunity Comm’n v. Arabian Am. Oil Co. (*Aramco*), 499 U.S. 244, 248 (1991) (citation and internal quotation marks omitted).

197. *Id.*

198. *Massey*, 986 F.2d at 531 (citation and internal quotation marks omitted).

199. *See Arc Ecology*, 411 F.3d at 1094; *Greenpeace USA v. Stone*, 748 F. Supp. 749, 759 (D. Haw. 1990).

200. *Massey*, 986 F.2d at 531 (citation and internal quotation marks omitted).

201. *Id.* (internal quotation marks omitted).

202. *Aramco*, 499 U.S. at 248.

203. *Id.*

204. *Id.*

i. NEPA

Although NEPA's language indicates that Congress was concerned with both domestic and global environmental problems, it does not state clearly whether Congress intended NEPA to apply extraterritorially. Congress indicated its concern for global environmental issues, for instance, in section 102(2)(F) of NEPA, which directed federal agencies to "recognize the worldwide and long-range character of environmental problems."²⁰⁵ Additionally, section 2 states Congress' intention that NEPA will "encourage productive and enjoyable harmony between man and *his environment*,"²⁰⁶ not just between man and the national environment. Congress, however, limited the extraterritorial implications of its previous statements by making clear that any actions taken in furtherance of international environmental cooperation must be "consistent with the foreign policy of the United States."²⁰⁷ Furthermore, NEPA's legislative history provides no indication whether Congress contemplated extraterritorial application.²⁰⁸ Congress' intention regarding the extraterritorial application of NEPA is thus "obscure."²⁰⁹

As a result of Congress' conflicting statements, courts have declined to decide whether NEPA may be given extraterritorial effect, instead limiting their decisions to the facts of the cases before them. Courts, therefore, "must determine whether Congress intended NEPA to apply under *circumstances such as these* and whether, under the unique facts presented, defendants have violated NEPA by failing to prepare a comprehensive EIS for actions taken . . . within a foreign country . . ."²¹⁰ The determination of whether Congress intended NEPA to apply extraterritorially must also take into consideration the foreign policy implications of extraterritorial application under those circumstances.²¹¹ If applying NEPA extraterritorially would threaten U.S. foreign policy, courts

205. National Environmental Policy Act of 1969, 42 U.S.C. § 4332(2)(F) (2006); Browne C. Lewis, *It's a Small World After All: Making the Case for the Extraterritorial Application of the National Environmental Policy Act*, 25 CARDOZO L. REV. 2143, 2169 (2004).

206. 42 U.S.C. § 4321 (emphasis added); Lewis, *supra* note 205, at 2169.

207. See 42 U.S.C. § 4332(2)(F).

208. *Natural Res. Def. Council v. Nuclear Regulatory Comm'n (NRDC v. NRC)*, 647 F.2d 1345, 1367 (D.C. Cir. 1981) (Robinson, J., concurring in the judgment).

209. *Id.*

210. *Greenpeace USA v. Stone*, 748 F. Supp. 749, 759 (D. Haw. 1990).

211. *Id.*; see also 42 U.S.C. § 4332(2)(F) (stating that agency actions overseas must be "consistent with the foreign policy of the United States").

presume that Congress did not intend NEPA to apply extraterritorially in that case.²¹²

Given that NEPA's statutory language and legislative history do not clearly state congressional intent, courts have largely considered the U.S. foreign policy implications of applying NEPA extraterritorially to be determinative.²¹³ In *Natural Resources Defense Council v. Nuclear Regulatory Commission (NRDC v. NRC)*, for example, the D.C. Circuit considered whether the Nuclear Regulatory Commission was required to prepare an EIS prior to exporting a nuclear reactor to the Philippines.²¹⁴ In determining whether Congress intended NEPA to be applied extraterritorially to environmental impacts in the Philippines, the court concluded that, within the context of nuclear technology exports, imposition of U.S. standards on foreign nations would adversely affect U.S. nonproliferation objectives, as nations may be deterred from purchasing reliable nuclear technologies from the United States.²¹⁵ Therefore, Congress did not intend for NEPA to impose an EIS requirement on nuclear export decisions with respect to environmental impacts occurring solely within foreign jurisdictions.²¹⁶

The D.C. Circuit adopted a different approach in *Environmental Defense Fund, Inc. v. Massey*.²¹⁷ The Environmental Defense Fund alleged "that the National Science Foundation (NSF) [had] violated NEPA by failing to prepare an [EIS] in accordance with section 102(2)(C) before going forward with plans to incinerate food wastes in Antarctica."²¹⁸ In determining whether Congress intended NEPA to apply extraterritorially to actions in Antarctica, the court held that the presumption against extraterritoriality does not apply where "the alleged extraterritorial effect of the statute will be felt in Antarctica—

212. See *Greenpeace USA*, 748 F. Supp. at 759 ("[T]he court *must* take into consideration the foreign policy implications of applying NEPA within a foreign nation's borders.").

213. See *id.*

214. *NRDC v. NRC*, 647 F.2d at 1346–48.

215. See *id.* at 1347–48.

216. *Id.*; see also *Greenpeace USA*, 748 F. Supp. at 760–61 (holding that, because requiring the U.S. Army to prepare an EIS before removing an arms stockpile from West Germany would result in timing delays that would violate substantive provisions of an agreement negotiated between the President and West Germany, and because environmental assessment would violate West Germany's sovereignty, Congress did not intend NEPA to apply to the movement of munitions through West Germany).

217. *Massey*, 986 F.2d at 528.

218. *Id.* at 529.

a continent without a sovereign,” and where the United States exercised legislative control.²¹⁹

In doing so, the court recognized the foreign policy considerations illustrated in *NRDC v. NRC*, stating that “the government may avoid the EIS requirement where U.S. foreign policy interests outweigh the benefits derived from preparing an EIS.”²²⁰ Because there was no conflict of laws between the United States and Antarctica, the presumption against extraterritoriality did not apply.²²¹ The court, however, specifically limited its holding to Antarctica, where the potential for foreign policy conflicts is low, and did not decide “how NEPA might apply to actions in a case involving an actual foreign sovereign”²²²

The District Court for the District of Columbia subsequently held that NEPA does not require the DoD to prepare an EIS for U.S. military installations in Japan.²²³ Plaintiffs in *NEPA Coalition of Japan v. Aspin* argued that, following *Massey*, the court should apply NEPA extraterritorially.²²⁴ The court again limited its holding to the facts of the case,²²⁵ but held that the legal status of U.S. bases in Japan, a sovereign nation, “is not analogous to the status of American research stations in Antarctica,” over which no state is sovereign.²²⁶ The court also determined that requiring the DoD to prepare EISs would risk interfering with the treaty relationship between the United States and Japan. The court explained that the United States would intrude on Japan’s sovereignty in preparing EISs by collecting environmental data from areas outside the base.²²⁷ Congress, therefore, did not intend NEPA to apply “where there is a substantial likelihood that treaty relations will be affected.”²²⁸

Following *Aspin*, it is unlikely that a court would support the extraterritorial application of NEPA to overseas military bases in any sovereign nation. The concerns that the District Court for the District of Columbia raised in *Aspin*, that the preparation of EISs in

219. *Id.*

220. *Id.* at 535.

221. *Id.* at 533.

222. *Id.* at 537.

223. *NEPA Coal. of Japan v. Aspin*, 837 F. Supp. 466, 467 (D.D.C. 1993).

224. *Id.*

225. *Id.* at 468.

226. *Id.* at 467.

227. *Id.*

228. *Id.*

accordance with NEPA regulations would intrude on foreign nations' sovereignty and may conflict with the terms of international agreements,²²⁹ are applicable to U.S. military bases and operations in any foreign nation. A court would likely determine that, given the foreign policy implications, Congress did not intend NEPA to apply extraterritorially to U.S. military activities overseas.

ii. CERCLA

Unlike NEPA, courts have found that Congress clearly did not intend CERCLA to apply extraterritorially. In *Arc Ecology v. U.S. Department of the Air Force*, for example, appellants sought to compel the DoD to perform a preliminary assessment and cleanup of former U.S. bases in the Philippines.²³⁰ In concluding that Congress did not intend CERCLA to have extraterritorial effect, the Ninth Circuit looked at the plain language of the statute. The court determined that CERCLA's "general approach, concerns, and procedures are inimical to judicial challenges to contamination alleged from sites outside the . . . United States."²³¹ In support of its decision, the court showed that, although CERCLA provisions specify that certain procedures are to be undertaken domestically, it does not contemplate any similar procedures to be undertaken in foreign countries.²³²

The court also based its conclusion on the foreign policy implications of applying CERCLA extraterritorially. The court recognized the DoD's concern, expressed in Directive 6050.7,²³³ that both treaty obligations and the sovereignty of foreign nations must be respected, and that agencies should exercise restraint in applying U.S. laws extraterritorially unless Congress has clearly expressed the contrary intent.²³⁴ The court thus determined that it would be "unreasonable" to find that Congress intended CERCLA to have extraterritorial effect, as environmental assessments or cleanups on foreign soil without an agreement would violate the nation's

229. *Aspin*, 837 F. Supp. at 467.

230. *Arc Ecology*, 411 F.3d at 1094.

231. *Id.* at 1100.

232. *See id.*; *see also, e.g.*, Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. § 9604(c)(2) (2006) (requiring that the President "consult with the affected State or States" before determining appropriate remedial action, but providing no provision for consultation with foreign authorities).

233. *See supra* note 41 and accompanying text.

234. *Arc Ecology*, 411 F.3d at 1103.

sovereignty, and would “impermissibly encroach” on the U.S. President’s foreign affairs authority.²³⁵

As a result of *Arc Ecology*’s holding, that Congress did not intend CERCLA to apply extraterritorially to regulate overseas bases in the Philippines, it is unlikely that any court would require the DoD’s environmental policies in any nation to comply with CERCLA.

b. Effects Test

Under the effects test, NEPA and CERCLA may be applied extraterritorially where failure to do so would result in adverse effects within the United States.²³⁶ The effects test allows legislation to regulate foreign conduct that is likely to cause “foreseeable and substantial” harmful effects within the United States.²³⁷ The test is illustrated by *Hirt v. Richardson*, in which plaintiffs requested a preliminary injunction, alleging that the Department of Energy had violated NEPA by failing to prepare an EIS related to a U.S.-funded shipment of nuclear wastes.²³⁸ The wastes were to have been shipped from Russia to Canada, but would pass close to the U.S. border on their way through Canada.²³⁹ The District Court stated that “the facts in this case warrant extraterritorial application of NEPA.”²⁴⁰ It concluded that plaintiffs were likely to prevail on their argument that the Department of Energy had been arbitrary and capricious in failing to prepare an EIS because the U.S. federal government exercised control over the Russian shipment and an accident, however remote the possibility, would substantially affect the United States.²⁴¹

Here, NEPA and CERCLA may not be applied extraterritorially to overseas military bases and operations under the effects test. Failure to apply these statutes to overseas military activities likely will not result in “foreseeable and substantial” effects within the United States.

235. *Id.* at 1099.

236. *Massey*, 986 F.2d at 531.

237. *Tamari v. Bache & Co.*, 730 F.2d 1103, 1106 n.6 (7th Cir. 1984).

238. *Hirt v. Richardson*, 127 F. Supp. 2d 833, 837 (W.D. Mich. 1999).

239. *Id.* at 836–37.

240. *Id.* at 844.

241. *Id.* at 844–45.

c. Conduct Test

Under the conduct test, legislation is deemed to apply domestically where the conduct regulated by the legislation occurs in the United States.²⁴² NEPA and CERCLA may, therefore, impose liability on foreign corporations, or on U.S. actors for harmful activities committed overseas, where the conduct regulated by the statutes occurs within the United States.²⁴³ For example, in *Massey*, the D.C. Circuit determined that, because NEPA is a procedural rather than a substantive statute, the conduct it regulates is the decision-making of federal agencies.²⁴⁴ Since the NSF's decision-making processes occurred within the United States, requiring the NSF to prepare an EIS before incinerating food wastes in Antarctica was a domestic, rather than an extraterritorial, application of NEPA.²⁴⁵

In *Pakootas v. Teck Cominco Metals, Ltd.*, the Ninth Circuit concluded that CERCLA regulates the “actual or threatened release” of hazardous substances.²⁴⁶ Plaintiffs filed suit under CERCLA’s “citizen suit” provision to compel the Environmental Protection Agency to enforce an order it had issued against Teck Cominco Metals, Ltd., a Canadian corporation, requiring it to conduct a remedial investigation/feasibility study in a portion of the Columbia River located entirely within the United States, where hazardous substances that Teck Cominco had discharged in Canada had accumulated.²⁴⁷ The court held that, because the “release” occurred within the United States, CERCLA was applied domestically, rather than extraterritorially, to impose liability on Teck Cominco.²⁴⁸

Here, the application of NEPA to overseas military activities would likely be considered domestic, as the majority of the DoD’s decision-making likely occurs within the United States.²⁴⁹ The application of CERCLA would almost certainly be considered

242. *Massey*, 986 F.2d at 531.

243. *See id.*

244. *Id.* at 532.

245. *See id.*

246. *Pakootas v. Teck Cominco Metals, Ltd.*, 452 F.3d 1066, 1079 (9th Cir. 2006), *cert. denied*, 128 S. Ct. 858 (2008).

247. *Id.* at 1068.

248. *Id.* at 1079.

249. *See Massey*, 986 F.2d at 532 (“[T]he decisionmaking processes of federal agencies take place almost exclusively in [the United States] . . .”).

extraterritorial, as any “releases” are unlikely to occur within the United States.²⁵⁰

Yet, even if NEPA and CERCLA were determined to apply to government action overseas under either the conduct or effects tests, courts must still balance the benefits of preparing an EIS against foreign policy considerations.²⁵¹ Thus, for example, the *Hirt* Court declined to issue an injunction preventing the transportation of nuclear wastes from Russia to Canada, despite the fact that plaintiffs were injured by the Department of Energy’s failure to prepare an EIS.²⁵² The Court cited the “weighty considerations” of U.S. foreign policy, nuclear non-proliferation, and the interests of the President in carrying out U.S. foreign policy.²⁵³ Furthermore, in *Aspin*, the D.C. Circuit limited *Massey*’s holding, which could be read to indicate that NEPA may always be applied extraterritorially, to the unique facts of the case.²⁵⁴ The court then stated that, even if NEPA could be applied extraterritorially, the DoD would not be required to prepare EISs, as U.S. foreign policy interests outweighed the benefits of environmental assessment.²⁵⁵

Therefore, in the case of environmental regulation of overseas military bases and operations, courts would likely determine that (1) Congress did not intend NEPA and CERCLA to apply under circumstances implicating such weighty foreign policy considerations; and (2) even if NEPA and CERCLA could be applied extraterritorially, foreign policy considerations would outweigh any benefits gained from the DoD’s preparation of EISs.

Any improvements in DoD environmental policy for overseas military bases, therefore, likely would not be effected through extraterritorial application of NEPA and CERCLA.

C. Executive Orders

Executive orders can improve DoD overseas environmental policy in ways in which international agreements and applicable federal statutes cannot. First, the President has unquestionable constitutional authority to issue executive orders under Article II,

250. See Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. § 9601(22) (2006) (defining “release”); *Pakootas*, 452 F.3d at 1079.

251. See *Massey*, 986 F.2d at 533; *Aspin*, 837 F. Supp. at 468.

252. *Hirt*, 127 F. Supp. 2d at 849.

253. *Id.*

254. See *Aspin*, 837 F. Supp. at 466.

255. *Id.* at 468.

Section 3, instructing that the President “shall take care that the laws be faithfully executed.”²⁵⁶ The President, as “commander in chief of the Army and the Navy,” has even greater authority to issue executive orders pertaining to the DoD.²⁵⁷ Furthermore, directing overseas environmental policy through executive orders can effect improvements on a broad array of military actions overseas. For instance, although DoD oversees environmental compliance policies, as stated in the OEBGD and FGS, do not apply to operational deployments,²⁵⁸ the environmental annexes in operations plans that accompany such operations are subject to executive orders.²⁵⁹

Through executive orders, the President may also effect the extraterritorial application of environmental principles expressed in domestic statutes. President Carter’s Executive Order 12114 regarding the environmental effects of federal actions abroad, for instance, stated that, although based on independent authority, the Order’s purpose was to further the goals of NEPA, as well as a number of other environmental regulatory statutes.²⁶⁰ Thus, like section 102(2)(C) of NEPA, the Order required the preparation and consideration of an EIS before undertaking a “major Federal action significantly affecting the environment.”²⁶¹ In essence, the Order gave extraterritorial effect to NEPA without implicating concerns that extraterritorial application of federal statutes would impermissibly infringe on the President’s foreign affairs authority.²⁶² Although, given the Order’s broad exceptions, compliance with E.O. 12114 is not necessarily analogous to compliance with NEPA,²⁶³ the Order was able to export the statute’s spirit and many of its core requirements.²⁶⁴

Finally, executive orders have proven the most effective at eliciting improvements in DoD overseas environmental policy. The DoD has, for instance, issued new policy statements in response to

256. See U.S. CONST. art. II, § 3.

257. See *id.* § 2, cl. 1.

258. INSTRUCTION 4715.5, *supra* note 51, § 2.1.4; OEBGD, *supra* note 52, § C1.3.3.

259. Phelps, *supra* note 15, at 69–70.

260. E.O. 12114, *supra* note 26, § 1-1.

261. *Id.* § 2-3; National Environmental Policy Act of 1969, 42 U.S.C. § 4332(2)(C) (2006).

262. See, e.g., *Arc Ecology*, 411 F.3d at 1099; *Hirt*, 127 F. Supp. 2d at 849; *Greenpeace USA*, 748 F. Supp. at 760–61.

263. See *Greenpeace USA*, 748 F. Supp. at 762 (“The court cannot conclude . . . that Executive Order 12114 preempts application of NEPA to *all* federal agency actions taken outside the United States.”).

264. See Fair, *supra* note 45, at 117.

E.O. 12114.²⁶⁵ Although the DoD's response was inadequate to effect environmental protection at overseas military bases and during operations, any inadequacies were the result of exemptions or ambiguities in the Order itself, not in the DoD's response to the Order.²⁶⁶ An executive order that did not contain such weaknesses would, therefore, have to be implemented by the DoD, and would likely result in more protective environmental policies.

IV. EXECUTIVE ORDER: A PROPOSAL

An executive order reaffirming the United States' commitment to environmental protection abroad and issuing standards for the DoD at overseas military bases and during operations is the best means of effecting improvements in DoD overseas environmental policy. A successful executive order must balance competing considerations, including the need to: (1) set adequate environmental standards without loopholes; (2) provide commanders discretion and flexibility in uncertain overseas environments; (3) respect foreign countries' right to sovereignty; and (4) respect any international treaties signed with the host countries. An executive order that rigidly imposes the highest environmental standards on the DoD might satisfy an ideal vision of how the DoD should conduct its environmental policies overseas, but would likely be resented and largely ignored by military base commanders implementing the policy. The proposal for a new Executive Order below, therefore, attempts to balance these competing considerations while furthering the goal of environmental protection abroad.

The Executive Order also attempts to provide guiding principles for commanders so that they may fill gaps in the DoD's current policy regarding assessment, compliance, prevention, and remediation. The Executive Order would replace E.O. 12114 to definitively set higher standards with fewer exemptions.²⁶⁷ Additionally, the Executive Order would address environmental regulation both at military bases and during military operations. The express exemptions for military operations in many of the DoD's policies, as in Instruction 4715.5 and the OEBGD,²⁶⁸ and the implied exemptions for operations that could be read into other policies, such as through the "participating nation

265. *See supra* Part II.A., .B.

266. *See supra* Part II.A.

267. *See supra* Part II.A.1.

268. *See supra* Part II.B.

exemption,”²⁶⁹ leave critical gaps in the regulation of much of the U.S. forces’ overseas military activities. The Executive Order thus promotes a comprehensive regime of environmental principles and standards applicable to U.S. military actions worldwide.

In order to further this goal, the Executive Order must first state the principles under which it is being issued. The broadest principle, and that which is accepted to the greatest extent by the international community, is principle 21 of the Stockholm Declaration, as reaffirmed in the Rio Declaration.²⁷⁰ The Executive Order should thus state, in general terms, its reaffirmation and approval of the principle that “[s]tates have . . . the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.”²⁷¹ Following this broad reaffirmation, the Executive Order should indicate that it is based on the President’s constitutional authority (rather than any statutory authority granted by Congress). The Executive Order should also state that it is being issued with the purpose of furthering the goals of procedural statutes such as NEPA and CERCLA, and, to the extent possible given varying environmental conditions overseas and concern for the sovereignty of host nations, substantive statutes such as the Resource Conservation and Recovery Act of 1976 (RCRA),²⁷² the Clean Air Act,²⁷³ and the Clean Water Act.²⁷⁴ In this way, the Executive Order would effect both pollution prevention and remediation. Any agency interpreting the Executive Order would also be fully aware of the principles which must be furthered by its interpretation.

The Executive Order’s standards must also be, to the greatest extent possible, equivalent to those in NEPA, CERCLA, and other domestic environmental statutes, rather than reflecting a minimum standard reserved for overseas bases and operations. If Congress has determined that standards such as those embodied in NEPA and

269. See *supra* Part II.A.2.

270. See Stockholm Declaration, *supra* note 159, part II, art. 21; Rio Declaration, *supra* note 160, para. 2.

271. Stockholm Declaration, *supra* note 159, part II, art. 21. The United States reaffirmed Principle 21 of the Stockholm Declaration in a 1991 treaty with Canada regarding transboundary air pollution. It is not, therefore, impossible that it might do so again. See U.S.-Canada Treaty, *supra* note 164.

272. Resource Conservation and Recovery Act of 1976 (RCRA), 42 U.S.C. §§ 6901–6922k (2006).

273. Clean Air Act, 42 U.S.C. §§ 7401–7671q (2006).

274. Clean Water Act, 33 U.S.C. §§ 1251–1387 (2006).

CERCLA are necessary to ensure the safety and health of the American people and their environment, there is no reason that lesser standards should be acceptable for those of other nations. To implement such a policy is to admit that their health and their environment are less valuable than Americans'. Additionally, setting overseas environmental standards in accordance with those of host nations will, in many instances, fail to provide adequate environmental regulations, as many host nations do not implement, or enforce, effective environmental policies.²⁷⁵ Furthermore, as the GAO states, it is "essential" that U.S. regulations be used in nations where operations take place in order to protect U.S. personnel—" [n]ot protecting U.S. personnel and the environment just because a host country does not enforce its environmental laws does not appear to be prudent."²⁷⁶

Thus, just as E.O. 12114 imported the EIS requirement and language of NEPA, this Executive Order should import both the EIS requirement of NEPA and the assessment and remediation requirements of CERCLA in order to effect change in the DoD's overseas environmental policy.²⁷⁷ In particular, NEPA and CERCLA's requirements regarding the DoD's obligations prior to, and following, the closure of military bases should be imported to remedy some of the most lacking provisions of DoD overseas environmental policy.²⁷⁸ Although environmental standards would, ideally, exceed those set in NEPA and CERCLA to achieve significant improvements, these are standards which Congress understands and for which it is capable of budgeting. These are also standards that the DoD has experience implementing in the United States, and would thus be more successfully applied abroad than newly heightened standards.

In importing the requirements of NEPA and CERCLA, the Executive Order must clearly define their key terms and avoid exemptions through which the DoD may circumvent compliance. Clearly defined standards would also effect uniformly adequate protection and avoid confusion within the DoD regarding implementation. Thus, the Executive Order's key terms should be

275. *See supra* Part II.B.

276. GAO HAZARDOUS WASTE REPORT, *supra* note 12, at 25–26.

277. *See supra* Part III.B.1.

278. *See supra* Part III.B.1. It may not be possible, or advisable, to impose the requirements of substantive statutes, such as the RCRA, Clean Air Act, and Clean Water Act on sovereign foreign nations.

defined with reference to the relevant definitions of NEPA, CERCLA, and other relevant statutes. Where ambiguities exist, the Executive Order should clearly define the term, taking into consideration its interpretation by federal agencies. For instance, E.O. 12144 defined the term “significantly affects the environment” as an action that does “significant harm to the environment,” leaving the meaning of the term “significant” to the discretion of agency officials. Although NEPA also left the term ambiguous, the Department of State explained that, in reviewing for potentially significant environmental effects abroad, an agency official should

consider potential direct effects on the . . . environment . . . which may be caused by the action and occur at the same time and place. [The agency official] should also consider reasonably foreseeable significant indirect effects on the natural and physical environment potentially caused by the action but occurring later in time.²⁷⁹

The Department of State also specified five categories which the official must consider in determining whether an action is “significant.”²⁸⁰ Rather than leaving such interpretations to agency discretion, the Order should specify such standards itself.

The Order, however, must balance these standards with the need for commanders to have the discretion and flexibility to quickly and effectively respond to national security concerns, operations such as peacekeeping missions, and changing host nation conditions at overseas military bases. The preparation of an EIS in such situations may not be possible, or, if possible, may result in detrimental delays. Rather than including broad exemptions for all actions requiring heightened discretion and flexibility, the Order should allow for an exemption only when the preparation of an EIS is not possible. The Order should specify that, if the DoD could not conduct an EIS prior to taking action, it must undertake remedial efforts in those areas in which the United States maintains a presence. This requirement may deter commanders from seeking an exemption when an EIS truly was feasible.

If host country conditions will not allow for either an EIS or remedial action, as was the case in Somalia,²⁸¹ then the DoD must use the latest technology available (not the latest technology currently available in that host country) in order to build pollution-prevention strategies into every aspect of its operational plans. Such strategies

279. Environmental Review Procedures, 44 Fed. Reg. 67,004, 67,006 (Nov. 21, 1979).

280. *Id.*

281. *See supra* Part II.B.

must be both planned and implemented in order to significantly reduce contamination, or the risk of contamination.

Furthermore, any exemptions that commanders request from the default standard of environmental assessment and remediation must be granted by the President, not by the DoD. The President would have the power to delegate this authority to other executive branch administrators in the DoD or the Environmental Protection Agency. This provision would provide a measure of oversight for the implementation of the Executive Order. Therefore, while uniform standards for environmental assessment and remediation must be clearly defined in order to ensure compliance with the goals of the Executive Order, commanders will be given some discretion and flexibility regarding the implementation of these standards.

Many military officials have expressed concern that unilaterally applying U.S. environmental standards would violate host nations' right to sovereignty, causing political or diplomatic problems.²⁸² However, enforcing U.S. regulations on portions of military bases where U.S. operations, such as maintenance of aircraft, are taking place would not likely cause political or diplomatic problems.²⁸³ Yet, because, as the GAO states, problems would result if the DoD enforced U.S. laws on host country operations on other parts of military bases,²⁸⁴ the Executive Order must include provisions protecting the sovereignty of host nations.

The most effective provision would be one requiring the Department of State, when negotiating international agreements such as SOFAs and basing agreements, to negotiate for provisions including concrete substantive and procedural environmental standards based on U.S. regulations. This would be in stark contrast to the current policy of negotiating to eliminate concrete environmental requirements. The treaties should specify that if host country laws provide more protection than U.S. environmental standards, the more protective laws, as written, should govern. Including heightened regulatory standards in agreements between the U.S. and host countries would thus avoid concerns that

282. See, e.g., GAO HAZARDOUS WASTE REPORT, *supra* note 12, at 25; Hamilton, *supra* note 23, at 4; Phelps, *supra* note 15, at 79–80.

283. GAO HAZARDOUS WASTE REPORT, *supra* note 12, at 25.

284. *Id.*

environmental regulations would interfere with host nations' sovereignty, U.S. foreign policy, and treaty agreements.²⁸⁵

Furthermore, the DoD should negotiate environmental assessments and remediation with the host country. Like the United States' nuclear non-proliferation policy, one of the DoD's goals in negotiating with the host country should be to encourage safe environmental practices.²⁸⁶ As the D.C. Circuit explained, "[n]onproliferation cannot be achieved by nonparticipation by the United States in the world commerce in nuclear machinery and materials; our policy set by the Congress recognizes that American abstention from international nuclear trade risks leaving the field to less responsible suppliers and encouraging uncontrolled proliferation."²⁸⁷ This logic is applicable to environmental regulation as well—unless the United States actively participates in the environmental protection of host countries, particularly where it is responsible for the environmental damage, it will be encouraging uncontrolled environmental harm.

285. See *supra* note 41 and accompanying text; *Arc Ecology*, 411 F.3d at 1103; *Aspin*, 837 F. Supp. at 467.

286. See *NRDC v. NRC*, 647 F.2d at 1347.

287. *Id.*