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# ENVIRONMENTAL RESPONSIBILITIES OVERSEAS: THE NATIONAL ENVIRONMENTAL POLICY ACT AND THE EXPORT-IMPORT BANK

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**Abstract:** The National Environmental Policy Act (NEPA) serves to regulate the environmental impacts of the activities of federal agencies. One such agency, the Export-Import Bank, aids the growth of United States exports in international markets by funding projects where private banks are unwilling. The courts have been selective in applying NEPA requirements to extraterritorial U.S. activities, but the Ex-Im Bank's activities fall within the categories created by prior cases. Therefore, the Ex-Im Bank should apply NEPA to the projects it considers for funding.

## INTRODUCTION

Congress enacted the National Environmental Policy Act (NEPA)<sup>1</sup> in 1970 as a means of regulating the environmental impacts of federal actions.<sup>2</sup> The stated purposes of NEPA are:

[T]o 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 biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality.<sup>3</sup>

By passing this statute, the federal government sought to make environmental management a priority on a national level.<sup>4</sup>

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<sup>1</sup> National Environmental Policy Act, 42 U.S.C. §§ 4321-4370 (2000).

<sup>2</sup> Andrew A. Smith, Comment, *The Extraterritorial Application of the National Environmental Policy Act: Formulating a Reliable Test for Applying NEPA to Federal Agency Actions Abroad*, 34 NAT. RESOURCES J. 751, 751 (1994).

<sup>3</sup> 42 U.S.C. § 4321.

<sup>4</sup> See 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, 2145 (2004).

Under NEPA, all federal agencies must consider the potential environmental impacts of their actions.<sup>5</sup> An agency must create and submit an Environmental Impact Statement (EIS) when it undertakes a major action which may significantly affect the environment.<sup>6</sup> An EIS must include a “detailed” account of the environmental effects of the proposed project, possible alternatives, and other considerations.<sup>7</sup> NEPA’s regulatory scheme revolves around the EIS requirement.<sup>8</sup> If the agency is unsure whether its proposed action is a major federal action that requires an EIS, it must prepare an Environmental Assessment (EA).<sup>9</sup> An EA must put forth the need for the project, possible alternatives, potential environmental impacts, and a list of the entities consulted in the creation of the EA.<sup>10</sup> Unlike an EIS, this discussion need only be “brief.”<sup>11</sup> After reviewing the EA, the agency must then issue either a statement of intent to prepare an EIS or a Finding of No Significant Impact (FONSI) detailing why no EIS is necessary.<sup>12</sup>

There has been much debate regarding the scope of this EIS requirement.<sup>13</sup> Courts “provided some guidance . . . in the domestic context.”<sup>14</sup> However, NEPA’s application to U.S. actions overseas brought

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<sup>5</sup> *See id.* at 2196.

<sup>6</sup> 42 U.S.C. § 4332(2)(C). The relevant statutory language states:

The Congress authorizes and directs that, to the fullest extent possible . . . all agencies of the Federal Government shall—

.....

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

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

*Id.*

<sup>7</sup> *Id.*

<sup>8</sup> Smith, *supra* note 2, at 751.

<sup>9</sup> *See* 40 C.F.R. § 1501.4 (2005).

<sup>10</sup> *Id.* § 1508.9(b).

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* §§ 1501.4(e), 1508.13.

<sup>13</sup> Wayne J. Carroll, *International Application of the National Environmental Policy Act*, 4 ILSA J. INT’L & COMP. L. 1, 2 (1997).

<sup>14</sup> *Id.*

new, and more complex, inquiries into the statute's requirements.<sup>15</sup> Because NEPA does not specifically state that its requirements extend to actions outside the United States, such actions are often not held to be subject to the statute.<sup>16</sup> In fact, most federal agencies have refused to apply NEPA to their activities outside the United States.<sup>17</sup>

In particular, NEPA's application to the Export-Import Bank (Ex-Im Bank) raises concerns. The Ex-Im Bank serves "to assist in financing the export of U.S. goods and services to international markets."<sup>18</sup> The Ex-Im Bank finances projects when private sector banks and financiers are unwilling to do so.<sup>19</sup> The very purpose of the Ex-Im Bank—to support projects with greater risks than a private source is willing to assume—raises concerns about potential environmental impacts.<sup>20</sup> Many of these projects affect developing nations that do not have NEPA-like environmental policies in place.<sup>21</sup> It therefore becomes important to consider whether the Ex-Im Bank's actions trigger NEPA's EIS requirement.<sup>22</sup> This inquiry is further complicated by the international nature of most actions taken by the Ex-Im Bank.<sup>23</sup>

This Note asserts that the Ex-Im Bank should be required to apply NEPA when reviewing applications for financial support. Part I explores the historical approach to applying NEPA extraterritorially. Part II provides an overview of the Ex-Im Bank, its activities, and its existing environmental guidelines. Part III argues generally that NEPA should be applied extraterritorially. Finally, Part IV considers NEPA application in context of the Ex-Im Bank, arguing that the Ex-Im Bank should be subject to NEPA requirements.

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<sup>15</sup> *Id.*

<sup>16</sup> Joan R. Goldfarb, *Extraterritorial Compliance with NEPA Amid the Current Wave of Environmental Alarm*, 18 B.C. ENVTL. AFF. L. REV. 543, 546 (1991).

<sup>17</sup> Bruce S. Manheim, Jr., *NEPA's Overseas Application—U.S. National Environmental Policy Act*, ENVIRONMENT, Apr. 1994, available at [http://www.findarticles.com/p/articles/mi\\_m1076/is\\_n3\\_y36/ai\\_15419881](http://www.findarticles.com/p/articles/mi_m1076/is_n3_y36/ai_15419881).

<sup>18</sup> Export-Import Bank of the United States, Mission, [www.exim.gov/about/mission.html](http://www.exim.gov/about/mission.html) (last visited Mar. 31, 2007) [hereinafter Ex-Im Bank, Mission].

<sup>19</sup> *Id.*

<sup>20</sup> *See id.*

<sup>21</sup> *See* Carroll, *supra* note 13, at 25.

<sup>22</sup> *See* John T. Burhans, *Exporting NEPA: The Export-Import Bank and the National Environmental Policy Act*, 7 BROOK. J. INT'L L. 1, 1 (1981); Carroll, *supra* note 13, at 25.

<sup>23</sup> *See* Ex-Im Bank, Mission, *supra* note 18.

## I. APPLICATION OF NEPA REQUIREMENTS TO EXTRATERRITORIAL PROJECTS

### A. Congressional Response to NEPA Application

In order for a statute to have extraterritorial application, Congress must intend for the statute to have such application, and the application must not violate principles of international law.<sup>24</sup> NEPA lacks any explicit language regarding its scope.<sup>25</sup> Without a clear statement of congressional intent to apply the statute extraterritorially, it is presumed to apply only within the United States.<sup>26</sup> However, other evidence indicates that the intent of extraterritorial application is implicit in the statute.<sup>27</sup>

At the time of NEPA's enactment, there was little congressional debate; therefore, the legislative history for the statute is not helpful in determining what Congress intended its scope to be.<sup>28</sup> However, documents from the joint House-Senate colloquium on environmental policy from which NEPA emerged shed some light on congressional intent.<sup>29</sup> After the conclusion of the colloquium, Congress summarized its activities in a White Paper on a National Policy for the Environment (White Paper).<sup>30</sup> The White Paper acknowledged the inter-connectedness of the world's environment and recognized "the importance of considering environmental impacts" when evaluating projects with an international scope.<sup>31</sup> Furthermore, the House Report on the original House version of the bill explicitly stated that the consideration of "the international implications" of U.S. activities was implicit in the required assessment.<sup>32</sup>

Over the years, Congress has considered amending NEPA explicitly to include extraterritorial application.<sup>33</sup> One such attempt took place in 1989, when Congress sought to specify that "major federal ac-

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<sup>24</sup> Lewis, *supra* note 4, at 2165.

<sup>25</sup> See 42 U.S.C. §§ 4321–4370 (2000); Lewis, *supra* note 4, at 2167.

<sup>26</sup> Lewis, *supra* note 4, at 2167.

<sup>27</sup> See *infra* notes 194–214 and accompanying text.

<sup>28</sup> See Goldfarb, *supra* note 16, at 556.

<sup>29</sup> *Id.* at 556–57.

<sup>30</sup> See *id.* at 556 (citing Congressional White Paper on a National Policy for the Environment, 115 CONG. REC. 29,078 (1969)).

<sup>31</sup> *Id.*

<sup>32</sup> See *id.* (citing H. R. REP. NO. 91-378, at 9 (1969), as reprinted in 1969 U.S.C.C.A.N. 2751, 2759).

<sup>33</sup> Lewis, *supra* note 4, at 2148.

tions” included extraterritorial actions.<sup>34</sup> Specifically, the bill sought to “clarif[y] that NEPA applies to all Federal actions, not just those in the United States.”<sup>35</sup> Given NEPA’s silence on its applicability overseas, few federal actions outside the United States have been subject to the EIS project.<sup>36</sup> According to the bill’s sponsors, this lack of consideration for environmental impacts overseas “is inconsistent with the goals and policies of NEPA.”<sup>37</sup> Despite this call to “strengthen the NEPA process,” the bill did not pass in Congress.<sup>38</sup> Another bill, authorizing appropriations for the Office of Environmental Quality, provided for consideration of the global environmental impacts of federal actions.<sup>39</sup> This provision also failed to pass through Congress.<sup>40</sup> In fact, none of the proposed amendments have been successful.<sup>41</sup>

### B. *The Executive Weighs In: Executive Order 12,114*

After NEPA’s enactment, government agencies issued conflicting interpretations of the statute’s requirements.<sup>42</sup> The Council on Environmental Quality (CEQ) issued a memorandum stating its belief that NEPA’s EIS requirement applies to federal actions both in the United States and outside of its jurisdiction.<sup>43</sup> Alternately, the U.S. Department of State (State Department) interpreted the requirement as applying to actions in the United States and in the global commons, but not to actions within the jurisdiction of other nations.<sup>44</sup> The State De-

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<sup>34</sup> S. 1089, 101st Cong., 135 CONG. REC. S5990 (daily ed. June 1, 1989).

<sup>35</sup> *Id.* The bill sought to clarify the definition of “major Federal actions” in NEPA by adding: “[I]ncluding extraterritorial actions (other than those taken to protect the national security of the United States, actions taken in the course of armed conflict, strategic intelligence actions, armament transfers, or judicial or administrative civil or criminal enforcement actions).” *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*; Lewis, *supra* note 4, at 2148.

<sup>39</sup> Laura Carlan Battle, *A Transnational Perspective on Extending NEPA: The Convention on Environmental Impact Assessment in a Transboundary Context*, 5 DUKE ENVTL. L. & POL’Y F. 1, 14 (1995).

<sup>40</sup> *See id.*

<sup>41</sup> Lewis, *supra* note 4, at 2148.

<sup>42</sup> Comment, *NEPA’s Role in Protecting the World Environment*, 131 U. PA. L. REV. 353, 364 (1982).

<sup>43</sup> *Id.* (citing U.S. COUNCIL ON ENVTL. QUALITY, MEMORANDUM ON THE APPLICATION OF THE EIS REQUIREMENT TO ENVIRONMENTAL IMPACTS ABROAD OF MAJOR FEDERAL ACTIONS (1976), reprinted in 42 Fed. Reg. 61,068 (1977)).

<sup>44</sup> *Id.* (citing *Administration of the National Environmental Policy Act: Hearing Before the Subcomm. on Fisheries and Wildlife Conservation of the H. Comm. on Merchant Marine and Fisheries*,

partment based its view on the idea that applying a U.S. law extraterritorially could have adverse impacts on the relationship between the United States and other countries.<sup>45</sup>

In response to these questions about the applicability of NEPA in the international arena, President Jimmy Carter issued Executive Order 12,114 (the Order) in 1979.<sup>46</sup> Both the State Department and CEQ contributed to the drafting of the Order, taking into consideration environmental and foreign policy concerns.<sup>47</sup> The Order mapped out the use of NEPA with respect to different international situations, and stood as “the United States government’s exclusive and complete determination of the procedural and other actions to be taken by the Federal agencies to further the purpose of the National Environmental Policy Act, with respect to the environment outside the United States, its territories and possessions.”<sup>48</sup> In the wake of the Order, NEPA’s potential role in extraterritorial projects was severely limited.<sup>49</sup>

The Order delineates four categories of international projects to which it applies.<sup>50</sup> First, there are “major Federal actions significantly affecting the environment of the global commons.”<sup>51</sup> Second, the Order applies to any “major Federal action significantly affecting the environment of a foreign nation . . . not involved in the action.”<sup>52</sup> Third, the Order includes “actions significantly affecting the environment of a foreign nation which provide to that nation . . . a product, or . . . project producing a principal product or an emission or effluent, which is prohibited or strictly regulated” by the U.S. government because of its toxic environmental effects or radioactivity.<sup>53</sup> Fourth, the Order includes extraterritorial actions “which significantly affect natural or ecological resources of global importance.”<sup>54</sup> The Order provides for several exemptions, many of which reflect State Department concerns

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91st Cong., 551 (1970) (memorandum of C. Herter, Special Assistant to the Secretary of State for Environmental Affairs, U.S. Department of State)).

<sup>45</sup> Lewis, *supra* note 4, at 2149.

<sup>46</sup> Exec. Order No. 12,114, 44 Fed. Reg. 1957 (1979), *reprinted in* 42 U.S.C. § 4321 (2000) [hereinafter Executive Order 12,114]; Carroll, *supra* note 13, at 4.

<sup>47</sup> Lewis, *supra* note 4, at 2151.

<sup>48</sup> Executive Order 12,114, *supra* note 46, § 1-1.

<sup>49</sup> See Executive Order 12,114, *supra* note 46; Carroll, *supra* note 13, at 4–6; Comment, *supra* note 42, at 365.

<sup>50</sup> Executive Order 12,114, *supra* note 46, § 2-3.

<sup>51</sup> *Id.* § 2-3(a). The global commons are those areas outside of the specific control and jurisdiction of any nation, such as Antarctica. *Id.*

<sup>52</sup> *Id.* § 2-3(b).

<sup>53</sup> *Id.* § 2-3(c).

<sup>54</sup> *Id.* § 2-3(d).

about foreign policy implications.<sup>55</sup> Most of these exemptions are consistent with the requirements of NEPA.<sup>56</sup>

The Order sets forth the necessary documents in the situations described.<sup>57</sup> EISs, bilateral or multilateral environmental studies related to the proposed actions, and concise environmental reviews of the project are all accepted under the Order.<sup>58</sup> Which of these documents are necessary depends upon the nature of the project, as does the scope of the environmental review performed therein.<sup>59</sup> In general, the Order appears to weaken the requirements on federal agencies acting outside of the United States.<sup>60</sup> Furthermore, the Order also denies a private cause of action based on the Order, preventing concerned citizens from forcing review of an agency's actions under the Order.<sup>61</sup>

### C. Extraterritorial Application of NEPA in the Courts

The courts have been called on to consider the application of NEPA to federal actions outside the United States on several occasions.<sup>62</sup> This question was considered in light of the presumption against extraterritoriality—“[a] longstanding judicial principle . . . that, unless Congress has indicated otherwise, statutes are meant to apply only within American borders.”<sup>63</sup> The courts have responded by carving out different situations and applying different standards to each scenario.<sup>64</sup>

*People of Enewetak v. Laird* first raised the issue of the proper application of NEPA outside the territory of the United States in the courts in 1973.<sup>65</sup> The U.S. government was performing a high explosive detonation—as nuclear blast simulation—on Enewetak, a trust territory of the United States.<sup>66</sup> The people of Enewetak sought an injunction

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<sup>55</sup> *Id.* § 2-5; see Lewis, *supra* note 4, at 2151–52. These exemptions include actions taken by the President or at the direction of the President or Cabinet officer when national security is at issue, and include any “intelligence activities and arms transfers.” Executive Order 12,114, *supra* note 46, § 2-5(a).

<sup>56</sup> Comment, *supra* note 42, at 365. For example, presidential actions are exempt under the Order, and also do not fall under NEPA. *Id.* at 365 n.86.

<sup>57</sup> Executive Order 12,114, *supra* note 46, § 2-4.

<sup>58</sup> *Id.*

<sup>59</sup> Carroll, *supra* note 13, at 5.

<sup>60</sup> See *id.* at 5–6; Comment, *supra* note 42, at 364–65.

<sup>61</sup> Carroll, *supra* note 13, at 6; Comment, *supra* note 42, at 365.

<sup>62</sup> See Carroll, *supra* note 13, at 7–15.

<sup>63</sup> Lewis, *supra* note 4, at 2152.

<sup>64</sup> See Carroll, *supra* note 13, at 7–15.

<sup>65</sup> See generally 353 F. Supp. 811 (D. Haw. 1973).

<sup>66</sup> *Id.* at 813.



against the Secretary of Defense, Secretary of the Air Force, Assistant Secretary of the Air Force, Commander in Chief of the U.S. Military Forces in the Pacific Ocean, and Director of the Defense Nuclear Agency.<sup>67</sup> The U.S. District Court for the District of Hawaii found that NEPA did apply to trust territories.<sup>68</sup> Since federal laws do not automatically apply to a trust territory, the court examined whether Congress “manifest[ed] an intention to include the Trust Territory within the coverage of” NEPA.<sup>69</sup> The court concluded that the broad language employed in NEPA indicated that Congress intended to include the trust territories under the statute.<sup>70</sup> In NEPA, “United States” is left undefined, and furthermore appears only twice in the statute.<sup>71</sup> Instead, NEPA applies to “the Nation.”<sup>72</sup> By using the term “Nation” rather than “United States,” the court reasoned, Congress expressed an intent for NEPA to apply beyond the boundaries of the fifty states.<sup>73</sup> In fact, the court indicated that the language used in NEPA was so expansive that it “clearly evidences a concern for all persons subject to a federal action which has a major impact on their environment,” whether inside or out of the United States.<sup>74</sup>

After examining the statute’s language, the court also considered NEPA’s legislative history.<sup>75</sup> The court first points to the comments of the statute’s sponsor, and then mentions various reports, including the Conference Committee Report and the House Report.<sup>76</sup> All of these reports indicate an intent to apply the statute broadly.<sup>77</sup> In particular, the House Report indicates that Congress recognized the global scope of environmental concerns.<sup>78</sup> Finally, the court noted that since a trust territory does not exist under its own government, and will not be independently protected from U.S. actions, it should be afforded the pro-

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<sup>67</sup> *Id.* at 812–13.

<sup>68</sup> *Id.* at 814.

<sup>69</sup> *Id.* at 815.

<sup>70</sup> *Id.* at 815–16.

<sup>71</sup> *Enewetak*, 353 F. Supp. at 816; *see* 42 U.S.C. §§ 4332(1), 4332(2) (E) (2000).

<sup>72</sup> *Enewetak*, 353 F. Supp. at 816; *see* 42 U.S.C. §§ 4321, 4331(b), 4342, 4344.

<sup>73</sup> *Enewetak*, 353 F. Supp. at 816.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at 817–18.

<sup>76</sup> *Id.*

<sup>77</sup> *See Id.*

<sup>78</sup> *Id.* at 817. International considerations are implicit in NEPA, according to the House Report, which noted that they are “inseparable . . . from the purely national consequences of our actions.” *Id.* at 817 (quoting H.R. REP. No. 91-378, at 4 (1969), *as reprinted in* 1969 U.S.C.C.A.N. 2751, 2759).

tection provided to other areas under U.S. jurisdiction.<sup>79</sup> The court therefore concluded that NEPA's requirements apply to federal actions taken in a trust territory.<sup>80</sup>

Soon after *Enewetak*, a transborder project confronted the court in *Sierra Club v. Adams*.<sup>81</sup> The United States had agreed to contribute two-thirds of the funding to the construction of the Darien Gap Highway in Panama and Colombia.<sup>82</sup> This highway would complete the Pan American Highway, spanning from Alaska to Chile.<sup>83</sup> The Sierra Club first brought suit against the Secretary of Transportation and the Administrator of the Federal Highway Administration for failing to prepare an EIS for the project.<sup>84</sup> The district court issued a temporary injunction until the agency prepared an EIS in compliance with NEPA.<sup>85</sup> The agency then issued an EIS for the project.<sup>86</sup> The district court refused to lift the injunction, finding the EIS insufficient.<sup>87</sup> The court pointed to the EIS's failure to adequately consider three issues: "1) the control of aftosa, or foot-and-mouth disease; 2) possible alternative routes for the highway; and 3) the effect on the Cuna and Choco Indians inhabiting the area that the highway is expected to traverse."<sup>88</sup> The government prepared an EIS on the district court's order, and assumed itself to be subject to NEPA.<sup>89</sup> Therefore, on appeal, the U.S. Court of Appeals for the District of Columbia Circuit in turn assumed that NEPA applied to this project, only considering the merits of the EIS.<sup>90</sup>

Similarly, that same year, the D.C. Circuit assumed that NEPA applied to United States participation in a heroin-eradication program involving spraying Mexican marijuana and poppy plants with herbi-

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<sup>79</sup> *Enewetak*, 353 F. Supp. at 818.

<sup>80</sup> *Id.* at 819. The application of NEPA to trust territories was upheld soon after this decision in *Saipan v. U.S. Dep't of Interior*, where the U.S. government sought to build a hotel in Saipan. Goldfarb, *supra* note 16, at 559 (discussing the merits of *Saipan*, 502 F.2d 90 (9th Cir. 1974)). The court held that NEPA requirements must be followed in the construction of the hotel. *Id.*

<sup>81</sup> 578 F.2d 389 (D.C. Cir. 1978).

<sup>82</sup> *Id.* at 390.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* at 391.

<sup>87</sup> *Adams*, 578 F.2d at 391.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *See id.* at 392-93. The court's focus on the domestic effects of the project may have contributed to the government's willingness to prepare an EIS rather than oppose the application of NEPA. Lewis, *supra* note 4, at 2154.

cides.<sup>91</sup> The National Organization for the Reform of Marijuana Laws (NORML) sought judgment against the State Department, the Agency for International Development (AID), the Drug Enforcement Administration (DEA), and the Department of Agriculture for their roles in the program.<sup>92</sup> United States entities provided financial and other types of assistance to a program spraying the herbicides Paraquat and 2,4-D on marijuana and poppy fields.<sup>93</sup> Despite arguing that NEPA did not apply to a project taking place entirely outside of the United States, the U.S. government had agreed to prepare an EIS regardless of the outcome of the case.<sup>94</sup> The court, therefore, did not have to expressly address whether NEPA applied.<sup>95</sup> It noted, however, that although the means by which the herbicide-spraying program would have effects in the United States—smoking marijuana illegally imported from Mexico—certain actions by federal agencies indicate an awareness of and potential for this activity to occur.<sup>96</sup> For example, the National Institute on Drug Abuse undertook a study examining “the potential health hazards associated with [P]araquat-contaminated marijuana.”<sup>97</sup> The court also cited a public notice issued by the Department of Health, Education, and Welfare warning of the potential health effects of smoking Paraquat-contaminated marijuana.<sup>98</sup> This activity indicated an interest on the part of federal agencies to inform U.S. citizens of this particular potential hazard.<sup>99</sup>

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<sup>91</sup> Nat'l Org. for Reform of Marijuana Laws (NORML) v. U.S. Dep't of State, 452 F. Supp. 1226, 1231–32 (D.C. Cir. 1978).

<sup>92</sup> *Id.* at 1228. The Drug Enforcement Administration and the Department of Agriculture both provided technical assistance for the first few years of the program. *Id.* at 1231. The Department of State was the primary administrator of U.S. involvement in the eradication program. *Id.* The Agency for International Development assisted Mexico in selecting equipment for the program, and developing the U.S. support system for the program. *Id.*

<sup>93</sup> *Id.* Paraquat is a highly toxic herbicide and exposure may occur through ingestion, absorption, or inhalation. Centers for Disease Control and Prevention, Facts About Paraquat, <http://www.bt.cdc.gov/agent/paraquat/basics/facts.asp> (last visited Mar. 31, 2007). The pesticide known as 2,4-Dichlorophenoxyacetic acid (2,4-D) may be ingested, absorbed, or inhaled, and has been linked to cancer, endocrine disruption, and kidney and liver damage. BEYOND PESTICIDES, CHEMICALWATCH FACTSHEET: 2,4-D (July 2004), available at <http://www.beyondpesticides.org/pesticides/factsheets/2,4-D.pdf>.

<sup>94</sup> *NORML*, 452 F. Supp. at 1229.

<sup>95</sup> *Id.* at 1232.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

The courts next considered NEPA requirements where impacts were felt exclusively in foreign nations.<sup>100</sup> In *Natural Resources Defense Council, Inc. v. Nuclear Regulatory Commission*, the court determined that the Nuclear Regulatory Commission (NRC) was not subject to NEPA in its review of a nuclear export application to the Philippines.<sup>101</sup> In 1974, the Philippine Government sought to acquire its first nuclear generator from Westinghouse Electric Corporation (Westinghouse).<sup>102</sup> Accordingly, Westinghouse petitioned NRC for approval to export a nuclear reactor and corresponding nuclear materials.<sup>103</sup> NRC approved this export in 1980, and the Natural Resources Defense Council in turn sought to enjoin the shipment.<sup>104</sup> In light of the Order—issued two years earlier—the court considered the NRC’s duties with deference to the executive’s analysis.<sup>105</sup> Concluding that the statute’s legislative history provided no insight into extraterritorial application, the court distinguished the situation before it from preceding cases.<sup>106</sup> In particular, the court noted that the export of nuclear reactors was a one-time activity which would not require continuing supervision by the United States.<sup>107</sup> Also, there would be no direct domestic repercussions from this activity, unlike the proposed highway in *Adams*.<sup>108</sup> Ultimately, the court concluded that no NEPA requirement for an EIS existed where the impact from an action fell exclusively within the jurisdiction of a foreign nation.<sup>109</sup> However, the court was careful to note that it held only that NEPA requirements were not applicable to NRC nuclear export licensing decisions, allowing that they may be necessary for other extraterritorial federal actions.<sup>110</sup>

The court in *Greenpeace v. Stone* also held federal action to be outside the scope of NEPA where the actions was performed under presidential agreements with foreign nations.<sup>111</sup> In that case, the U.S. Army had sought to transport “approximately 100,000 rounds of nerve gas [that had] been stored in the Federal Republic of Germany” for almost

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<sup>100</sup> See *Natural Res. Def. Council, Inc. (NRDC) v. Nuclear Regulatory Comm’n*, 647 F.2d 1345, 1347–48 (D.C. Cir. 1981); Carroll, *supra* note 13, at 10.

<sup>101</sup> 647 F.2d at 1347–48.

<sup>102</sup> *Id.* at 1348, 1351.

<sup>103</sup> *Id.* at 1348.

<sup>104</sup> *Id.*

<sup>105</sup> See *id.* at 1364–65.

<sup>106</sup> See *id.* at 1367, 1368.

<sup>107</sup> *NRDC*, 647 F.2d at 1367–68.

<sup>108</sup> See *id.* at 1368.

<sup>109</sup> *Id.* at 1365–65.

<sup>110</sup> *Id.* at 1366.

<sup>111</sup> See generally 748 F. Supp. 749 (D. Haw. 1990).

twenty years.<sup>112</sup> The munitions were loaded in steel containers, placed in shipping containers, and transported by truck, then transferred to railcar.<sup>113</sup> The shipping containers were then transferred to ships for transport to the Johnston Atoll, a U.S. territory in the Pacific Ocean, for incineration.<sup>114</sup> In considering the U.S. government's obligations in this transport, the court again pointed to the Order.<sup>115</sup> The court found that applying NEPA to actions in Germany "would result in a lack of respect for [Germany's] sovereignty, authority and control over actions taken within its borders . . . [and] would encroach on the jurisdiction of [Germany] to implement" its own balancing of environmental and public concerns.<sup>116</sup> The transport of the munitions within Germany were deemed outside of NEPA's reach.<sup>117</sup> However, again, the court was careful to state that this decision did not preclude NEPA application to other federal actions abroad, noting in particular the possibility of situations where federal actions abroad may have domestic environmental effects, "or where there has clearly been a total lack of environmental assessment by the federal agency or foreign country involved."<sup>118</sup>

The court therefore only considered the Department of Defense's NEPA obligations with respect to the transportation of the missiles across the oceans.<sup>119</sup> The Army had prepared an environmental evaluation considering the effects of this action, which the court deemed sufficient under the Order.<sup>120</sup> The court held that no NEPA EIS requirement applied, stating that this leg of the transport was still connected to the actions within Germany.<sup>121</sup> Furthermore, the court expressed concern regarding the implications that subjecting this project to NEPA might have on foreign policy.<sup>122</sup> First, using NEPA would interfere with an existing agreement between U.S. President Ronald Reagan and German Chancellor Helmut Kohl.<sup>123</sup> Second, the court noted that employing NEPA could have great political impact when the action in

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<sup>112</sup> *Id.* at 752.

<sup>113</sup> *Id.* at 753.

<sup>114</sup> *Id.* at 753, 752.

<sup>115</sup> *Id.* at 762.

<sup>116</sup> *Id.* at 760.

<sup>117</sup> *Greenpeace*, 748 F. Supp. at 761.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.* at 761-65.

<sup>120</sup> *See id.* at 761-63.

<sup>121</sup> *Id.* at 763.

<sup>122</sup> *Id.* at 757-58.

<sup>123</sup> *Greenpeace*, 748 F. Supp. at 757-58.

question takes place entirely within a foreign sovereign nation which had already approved the activity.<sup>124</sup>

The court finally upheld NEPA's requirements with respect to actions taken outside the jurisdiction of any nation in *Environmental Defense Fund, Inc. v. Massey*.<sup>125</sup> The National Science Foundation (NSF) incinerated food wastes in Antarctica and failed to prepare an EIS for this action.<sup>126</sup> The court analyzed the issue by first asking whether an extraterritorial problem even existed.<sup>127</sup> An extraterritorial problem arises where a U.S. statute is used to regulate conduct in another sovereign country.<sup>128</sup> Because the extraterritoriality of the action caused effects in Antarctica—"an international anomaly"—the presumption against extraterritorial application of federal statutes did not apply.<sup>129</sup> Antarctica is outside the jurisdiction of any one nation, and is also "an area over which the United States has a great measure of legislative control," and therefore NEPA could attach to actions undertaken there.<sup>130</sup> Furthermore, because the NSF decision-making process took place in the United States, NEPA applied to this process without any consideration of extraterritoriality.<sup>131</sup> Notably, the court concluded by specifying that it did not decide how NEPA should apply to actions "involving an actual foreign sovereign," nor does its holding extend to the applicability of other federal statutes in Antarctica.<sup>132</sup>

Overall, the court has been sparing in its application of NEPA to extraterritorial actions.<sup>133</sup> Federal agencies are only held to the EIS requirements imposed under NEPA in limited circumstances, including when the action takes place in the global commons.<sup>134</sup> NEPA requirements may also be imposed when the agency retains control over the project in question.<sup>135</sup> When the project may directly affect the environment within the United States, NEPA may apply.<sup>136</sup> This interpretation of the appropriate application of NEPA leaves federal agen-

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<sup>124</sup> See *id.* at 759–60.

<sup>125</sup> *Envtl. Def. Fund, Inc. v. Massey*, 986 F.2d 528, 529 (D.C. Cir. 1993).

<sup>126</sup> *Id.*

<sup>127</sup> *Id.* at 530–32.

<sup>128</sup> *Id.* at 530.

<sup>129</sup> *Id.* at 529.

<sup>130</sup> *Id.*

<sup>131</sup> *Massey*, 986 F.2d at 532.

<sup>132</sup> *Id.* at 537.

<sup>133</sup> See *supra* text accompanying notes 65–132.

<sup>134</sup> See *Massey*, 986 F.2d at 536–37.

<sup>135</sup> See *National Organization for Reform of Marijuana Laws (NORML) v. U.S. Dept. of State*, 452 F. Supp. 1226, 1232–33 (D.C. Cir. 1978).

<sup>136</sup> See *Sierra Club v. Adams*, 578 F.2d 389, 390–91 (D.C. Cir. 1978).

cies with great discretion when acting overseas.<sup>137</sup> As federal agencies continue to interact with developing nations, the refusal to apply NEPA extraterritorially causes major concerns.<sup>138</sup>

## II. FEDERAL ACTIVITY IN DEVELOPING NATIONS: THE EXPORT-IMPORT BANK

Congress created the Ex-Im Bank in 1945 to aid the growth of exports from the United States in the international market.<sup>139</sup> The Ex-Im Bank provides loans, loan guarantees, and export credit insurance to U.S. entities looking to export to developing markets when private loans are unavailable.<sup>140</sup> It also works to match the government support provided to similar foreign entities, seeking to “level the playing field” for U.S. companies acting internationally.<sup>141</sup> In considering projects to fund, the Ex-Im Bank considers the potential success of the project according to three criteria: “1) to promote U.S. employment; 2) to complement, but not compete with, private sector sources of trade financing; and 3) to have a reasonable assurance of repayment for every transaction.”<sup>142</sup> In fiscal year 2004, the Ex-Im Bank provided support to over 3000 U.S. export sales, authorizing \$13.3 billion in loans, guarantees, and export credit insurance.<sup>143</sup> As a self-sustaining agency, the Ex-Im Bank does not rely on federal funding for its budget.<sup>144</sup>

In its pursuit of facilitating U.S. trade overseas, the Ex-Im Bank often interacts with other entities, both government and private.<sup>145</sup> The Ex-Im Bank collaborates with the U.S. Department of Commerce, the Trade Development Agency, and other federal agencies to develop a range of assistance programs and to provide solutions to a variety of applicant problems.<sup>146</sup> In addition, the Ex-Im Bank sometimes provides assistance to projects which also receive funding from multilateral and

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<sup>137</sup> See Carroll, *supra* note 13, at 23–24.

<sup>138</sup> See *id.* at 22–25; Comment, *supra* note 42, at 353–54.

<sup>139</sup> Burhans, *supra* note 22 (citing Export-Import Bank Act of 1945, 12 U.S.C. § 635–635n (1976 & Supp. 1977)).

<sup>140</sup> EXPORT-IMPORT BANK OF THE UNITED STATES, 2004 ANNUAL REPORT 3 (2004) [hereinafter 2004 ANNUAL REPORT].

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> *Id.* at 18.

<sup>144</sup> Burhans, *supra* note 22, at 2.

<sup>145</sup> See Export-Import Bank of the United States, A Reporter’s Guide to Ex-Im Bank, <http://www.exim.gov/news/reporter.html> (last visited Mar. 31, 2007) [hereinafter Ex-Im Bank, *Reporter’s Guide*].

<sup>146</sup> *Id.*

regional banks such as the World Bank and the African Development Bank.<sup>147</sup>

#### A. *Application to the Export-Import Bank*

Applicants may reach the Ex-Im Bank in a number of ways.<sup>148</sup> An exporter in contact with a buyer, or a buyer in contact with an exporter, may be referred by their counterpart's bank.<sup>149</sup> Alternately, an interested exporter or buyer may be referred to the Ex-Im Bank by other public and private sector partners, or simply by contacting Ex-Im Bank regional offices.<sup>150</sup>

An applicant may apply for a Letter of Interest (LI), a Preliminary Commitment (PC), or a Final Commitment (AP).<sup>151</sup> Any responsible party may apply for an LI during the bidding or negotiating stage of a sale.<sup>152</sup> An LI, when issued, simply indicates that the Ex-Im Bank will consider financing the specified transaction.<sup>153</sup> They are typically issued within seven business days of receipt of the application, and are valid for six months.<sup>154</sup> Where a formal competitive bidding process accompanies an export contract, any responsible party may apply for a PC.<sup>155</sup> A PC is a commitment by the Ex-Im Bank for financing, it is subject to awarding of the contract, and final Ex-Im Bank review of the transaction.<sup>156</sup> Because it involves a more concrete commitment by the Ex-Im Bank, PC applications require more specific information than LI applications, including an examination of environmental effects of the pro-

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<sup>147</sup> *Id.* The World Bank provides "low-interest loans, interest-free credit and grants to developing countries" as part of its mission to reduce global poverty. The World Bank, About Us, <http://go.worldbank.org/7N162E3TF0> (last visited Mar. 31, 2007). The African Development Bank seeks "to promote economic and social development" in Africa by providing financial and technical assistance. African Development Bank Group, How We Work, <http://www.afdb.org> (follow "About Us" hyperlink; then follow "How We Work" hyperlink) (last visited Mar. 31, 2007).

<sup>148</sup> Ex-Im Bank, *Reporter's Guide*, *supra* note 145.

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> Export-Import Bank of the United States, How to Apply for Ex-Im Bank Financing, [http://www.exim.gov/tools/how\\_to\\_apply.html](http://www.exim.gov/tools/how_to_apply.html) (last visited Mar. 31, 2007) [hereinafter Ex-Im Bank, *How to Apply*].

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*



ject.<sup>157</sup> An applicant may choose either a four-month PC with an interest rate cap, or a six-month PC with no cap.<sup>158</sup>

Eligible parties may apply for an AP after the export contract has been awarded.<sup>159</sup> For an AP for a direct loan, only the foreign borrower is eligible to apply, but a guaranteed borrower may also submit an application related to a guarantee.<sup>160</sup> After performing “a comprehensive evaluation of the transaction,” the Ex-Im Bank may grant an AP, authorizing financing of the project.<sup>161</sup> An applicant may request an AP even without having received an LI or a PC.<sup>162</sup>

### B. *Environmental Review in the Export-Import Bank*

The very nature of the Ex-Im Bank’s activities—funding and encouraging projects in developing nations—raises environmental concerns.<sup>163</sup> The federal Council on Environmental Quality (CEQ) issued regulations requiring the Ex-Im Bank to adhere to NEPA requirements when its actions have potentially adverse environmental impacts within the United States, but no such requirement exists for projects without domestic impacts.<sup>164</sup> For projects proposed with solely extraterritorial impacts, it is necessary, therefore, to look at the Ex-Im Bank’s internal procedures.<sup>165</sup>

Under its charter, the Ex-Im Bank is required to establish procedures for the consideration of “the potential beneficial and adverse environmental effects of goods and services for which support is requested.”<sup>166</sup> The Board of Directors may then take this report into account when choosing to grant or withhold support for a project.<sup>167</sup> Accordingly, the Ex-Im Bank has adopted the goal of requiring “only the extent and detail of environmental information that is necessary to

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<sup>157</sup> Ex-Im Bank, *How to Apply*, *supra* note 151.

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

<sup>163</sup> See 2004 ANNUAL REPORT, *supra* note 140.

<sup>164</sup> 12 C.F.R. § 408.3 (1979). The Council on Environmental Quality (CEQ) has the authority to issue binding regulations regarding NEPA procedures under Executive Order 11,991. Lewis, *supra* note 4, at 2150.

<sup>165</sup> See 12 C.F.R. § 408.3; Lewis, *supra* note 4, at 2150.; Export-Import Bank of the United States, Environmental Procedures and Guidelines, <http://www.exim.gov/products/policies/environment/envproc.html> (last visited Mar. 31, 2007) [hereinafter Ex-Im Bank, *Procedures and Guidelines*].

<sup>166</sup> Ex-Im Bank, *Procedures and Guidelines*, *supra* note 165.

<sup>167</sup> *Id.*

enable the Board of Directors to evaluate the environmental effects” of the project before it.<sup>168</sup> Interim environmental guidelines were first implemented in October 1993, followed by the first issuance of the Ex-Im Bank’s Environmental Procedures and Guidelines (Procedures and Guidelines) in February 1995.<sup>169</sup> The Procedures and Guidelines were created with input from other government agencies, non-governmental organizations, and U.S. exporters, and were most recently revised in July of 2004.<sup>170</sup>

The applicability of the Procedures and Guidelines depends on the nature of the project in question.<sup>171</sup> Applications are split into three categories: long-term, medium-term, and short-term transactions.<sup>172</sup> Long-term transactions are those for which the Ex-Im Bank would contribute more than \$10 million, or which have a repayment term of longer than seven years.<sup>173</sup> These transactions are screened and categorized according to their potential environmental impact.<sup>174</sup> Accordingly, candidates must submit an “Environmental Screening Document”—a form available from the Ex-Im Bank—with their application.<sup>175</sup> Any long-term transaction involving a physical project deemed to have potential adverse environmental impacts is also subject to environmental review.<sup>176</sup> The majority of Ex-Im Bank activities fall under this category.<sup>177</sup> Medium-term transactions have a potential contribution of no more than \$10 million, most with a repayment term of seven years or less.<sup>178</sup> When such a project is determined to be likely to have an adverse environmental impact on a sensitive area, it will be subject to an environmental review.<sup>179</sup> Short-term transactions are not subject to either screening or review.<sup>180</sup>

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<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> *See id.*

<sup>172</sup> Ex-Im Bank, *Procedures and Guidelines*, *supra* note 165.

<sup>173</sup> *Id.* Certain projects for which the Ex-Im Bank will commit less than \$10 million will have a repayment period of longer than seven years because of financing enhancements; these transactions are deemed medium-term, not long-term, transactions. *Id.*

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

<sup>176</sup> *Id.* A physical project is defined as “any commercial, industrial or infrastructure undertaking that results in the construction or the extraction of a tangible asset at an identified location.” *Id.*

<sup>177</sup> *Id.*

<sup>178</sup> Ex-Im Bank, *Procedures and Guidelines*, *supra* note 165.

<sup>179</sup> *Id.*

<sup>180</sup> *Id.*

After an applicant submits its Environmental Screening Document, the Ex-Im Bank's Engineering and Environment Division (E&E) reviews the project and places it in one of four categories.<sup>181</sup> These four categories, as set forth by E&E, are: (A) large greenfield projects or projects located in, or impacting a sensitive site; (B) expansions, upgrades and projects having limited environmental impact; (C) categorical exclusions; or (N) nuclear.<sup>182</sup> The type of environmental information necessary, and the extent of environmental review, for the project depends upon this categorization.<sup>183</sup> Applicants for Category A projects must submit an Environmental Impact Assessment (EIA) and related information.<sup>184</sup> These documents should "identify the environmental impact of the project and measures needed to mitigate the adverse environmental effects," as well as review relevant host-country and international environmental requirements and guidelines.<sup>185</sup> Category B projects require only information relevant to the expansion or upgrade to an existing plant.<sup>186</sup> If, in the process of review, it is determined that the project is more appropriately placed in Category A, it may be re-categorized, and an EIA will be required.<sup>187</sup> Those transactions classified as Category C require no additional environmental information.<sup>188</sup> Category N projects are governed by Ex-Im Bank Nuclear Procedures and Guidelines.<sup>189</sup>

In 2004, the Ex-Im Bank approved six projects categorized as environmental Category A, including a natural gas liquefaction plant in Qatar, a gas fired combined cycle power plant in Turkey, and an open pit gold-mining project in Argentina.<sup>190</sup> Among the eleven environmental Category B projects approved in 2004 are a cocoa bean processing plant in Ghana, a petroleum refinery in Nigeria, and construction

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<sup>181</sup> *Id.*

<sup>182</sup> *Id.*

<sup>183</sup> *Id.*

<sup>184</sup> Ex-Im Bank, *Procedures and Guidelines*, *supra* note 165.

<sup>185</sup> *Id.*

<sup>186</sup> *Id.*

<sup>187</sup> *Id.*

<sup>188</sup> *Id.* Category C transactions are those "related to the export of a product (or products) not identified with a physical project; or exports relating to projects of the type that have little or no potential to cause environmental effects and do not impact sensitive locations." *Id.*

<sup>189</sup> *Id.*

<sup>190</sup> Export-Import Bank, 2004 Category A and B Transactions, <http://www.exim.gov/products/policies/environment/2004categoryab.html> (last visited Mar. 31, 2007) [hereinafter Ex-Im Bank, *2004 Transactions*].

of a commercial and residential complex in Azerbaijan.<sup>191</sup> Projects for which EIAs have recently been prepared include: a gas fired combined cycle power plant in India; modernization and expansion of an oil refinery in Mexico; and a simple cycle gas turbine power plant in Uruguay.<sup>192</sup> Additionally, projects for which the need for an EIA was still under consideration in the spring of 2006 include: a corrugated box manufacturing plant in Chile; two semiconductor fabrication facilities in China; rehabilitation and construction of an airport in the Dominican Republic; and a direct reduction iron plant in Malaysia.<sup>193</sup>

### III. A CASE FOR APPLYING NEPA TO EXTRATERRITORIAL PROJECTS

The language of NEPA indicates an intent to apply the EIS requirements overseas.<sup>194</sup> Generally, the statute seeks to “prevent or eliminate damage to the environment.”<sup>195</sup> This stated purpose makes no reference to limiting the scope of concern to the environment of the United States.<sup>196</sup> Particularly in light of growing recognition that environmental impacts are felt globally, the congressional aim of mitigating damage to the environment includes an implicit applicability of NEPA requirements to extraterritorial federal actions.<sup>197</sup> Looking specifically to the EIS requirements further encourages an extraterritorial application of NEPA.<sup>198</sup> The only qualification stated for actions to fall under the requirements is that they be “major.”<sup>199</sup> A federal action may be major whether it occurs within the jurisdiction of the United States or outside of it.<sup>200</sup> The statute does not limit its requirements to domestic projects, and its application should not be so limited.<sup>201</sup> In addition, an EIS is required where a project “significantly affect[s] the quality of the *human* environment.”<sup>202</sup> Again, this language does not limit the EIS

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<sup>191</sup> *Id.*

<sup>192</sup> Export-Import Bank, Ex-Im Bank Major Transactions Pending List, <http://www.exim.gov/products/policies/environment/envproj.html> (last visited Mar. 31, 2007) [hereinafter Ex-Im Bank, *Transactions Pending*].

<sup>193</sup> *Id.*

<sup>194</sup> See 42 U.S.C. §§ 4321, 4331–4332 (2000).

<sup>195</sup> *Id.* § 4321.

<sup>196</sup> See Goldfarb, *supra* note 16, at 554 (noting that “[m]any of the provisions . . . imply concern for environmental problems throughout the world”).

<sup>197</sup> *Id.* at 554, 575–77.

<sup>198</sup> See 42 U.S.C. § 4332(2)(C).

<sup>199</sup> *Id.*

<sup>200</sup> See Goldfarb, *supra* note 16, at 554–55.

<sup>201</sup> See 42 U.S.C. § 4332(2)(C); Goldfarb, *supra* note 16, at 554.

<sup>202</sup> 42 U.S.C. § 4332(2)(C) (emphasis added).

requirements to domestic projects.<sup>203</sup> In fact, by calling into concern the entire human environment, Congress actually opened the statute to a much broader arena than simply the national environment.<sup>204</sup> This reading of the statute is further supported by the congressional White Paper issued prior to the enactment of NEPA.<sup>205</sup> Congress considered and enacted NEPA with an understanding of the importance of the international environmental implications of its actions.<sup>206</sup>

Congress has not passed any of the proposed amendments clarifying the scope of NEPA to include extraterritorial projects.<sup>207</sup> This failure does not necessarily mean that NEPA should not be applied extraterritorially.<sup>208</sup> The existence of other congressional priorities may have drawn attention and energy away from the NEPA amendments.<sup>209</sup> For example, at the time of the 1989 proposed amendment, the Senate was likely preoccupied with the immediate and direct repercussions of the Exxon-Valdez oil spill in Alaska, and NEPA applicability was likely not at the forefront of congressional debate.<sup>210</sup> Therefore, extraterritorial application of NEPA is not necessarily against congressional intent, and should not be ruled out on this ground.<sup>211</sup> Furthermore, it could be inferred that Congress's reluctance to enact any of these amendments actually reflects a belief that extraterritorial application is already implicit in the statute.<sup>212</sup>

Despite a lack of explicit language making NEPA applicable to extraterritorial federal actions, the statute should not be limited to solely domestic projects.<sup>213</sup> The language of the statute itself, considered in conjunction with the legislative history and the historical context of the statute, indicate an implicit intention to apply NEPA extraterritorially.<sup>214</sup>

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<sup>203</sup> *See id.*

<sup>204</sup> *See id.*

<sup>205</sup> *See* Goldfarb, *supra* note 16, at 556 (citing Congressional White Paper on a National Policy for the Environment, 115 CONG. REC. 29,078 (1969)); discussion *supra* Part I.A.

<sup>206</sup> *See* Goldfarb, *supra* note 16, at 556.

<sup>207</sup> *See supra* notes 34–42 and accompanying text.

<sup>208</sup> *See* Lewis, *supra* note 4, at 2149.

<sup>209</sup> *Id.* at 2148–49.

<sup>210</sup> *Id.* at 2149.

<sup>211</sup> *Id.* at 2148–49.

<sup>212</sup> *See id.*

<sup>213</sup> *See supra* notes 194–206 and accompanying text.

<sup>214</sup> *See supra* notes 208–12 and accompanying text.

## IV. NEPA AND THE EXPORT-IMPORT BANK

The United States regularly contributes to activities outside its own jurisdiction through the Ex-Im Bank.<sup>215</sup> These activities should be subject to NEPA and its EIS requirement.

A. *The Need for Environmental Review of Export-Import Bank Activities*

The Ex-Im Bank, which funds projects that private banks are reluctant to support, often becomes involved in activities taking place in unstable and developing markets.<sup>216</sup> Often, the issue of environmental protection becomes more complicated in these nations.<sup>217</sup> The governments of developing nations may be reluctant to implement environmental assessment procedures.<sup>218</sup> Such considerations may be seen as impediments to progress.<sup>219</sup> Also, nations may be unwilling to invest the time required to complete an environmental impact inquiry.<sup>220</sup> Performing a full environmental assessment prior to authorizing and commencing a project will simply postpone progress for these nations.<sup>221</sup> Furthermore, requiring consideration of environmental impacts may impede the use of certain technologies.<sup>222</sup> By preventing developing nations from using inexpensive processes and technologies with greater environmental impacts, an environmental assessment process would make it more difficult for these nations to grow and compete with other nations.<sup>223</sup>

Developed nations contribute most to the degradation of the global environment.<sup>224</sup> Taking this fact into account strengthens the argument for NEPA applicability to Ex-Im Bank activities overseas in two ways. First, just because a nation does not currently contribute heavily to pollution and environmental degradation does not mean that it should be allowed to do so.<sup>225</sup> By bypassing NEPA requirements, the Ex-Im Bank

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<sup>215</sup> 2004 ANNUAL REPORT, *supra* note 140, at 3.

<sup>216</sup> *See id.*

<sup>217</sup> *See* Goldfarb, *supra* note 16, at 587.

<sup>218</sup> *Id.*

<sup>219</sup> *Id.*

<sup>220</sup> *See id.*

<sup>221</sup> *See id.*

<sup>222</sup> *See id.*

<sup>223</sup> *See* Goldfarb, *supra* note 16, at 587.

<sup>224</sup> *Id.* “[W]hile we are only 6% of the world’s people, we actually produce 40% of the world’s pollution.” *Id.* at 587 n.333 (quoting *U.N. Conference on the Human Environment: Preparations and Prospects: Hearings Before the S. Comm. on Foreign Relations*, 92d Cong., 2d Sess. 17 (1972) (statement of Sen. Claiborne Pell)).

<sup>225</sup> *See id.* at 587–88.

would essentially be encouraging increased pollution in the nations in which it operates.<sup>226</sup> Second, developed nations already contributing to global environmental damage should not be able to avoid answering for that harm simply by locating their projects outside their borders.<sup>227</sup> By authorizing and funding projects outside of the United States without compliance with NEPA requirements, the Ex-Im Bank is, in essence, allowing U.S. entities to “outsource” their pollution.<sup>228</sup>

*B. Applying NEPA to the Export-Import Bank: The Case Law Approach*

Even without a blanket application of NEPA to extraterritorial federal actions, the Ex-Im Bank’s activities should nonetheless be subject to EIS requirements under judicial precedent.<sup>229</sup> Previous case law has held NEPA to apply to federal actions outside the United States in certain situations.<sup>230</sup> Such instances include where federal control over a project is ongoing,<sup>231</sup> where a project outside the United States may have environmental impacts inside the United States,<sup>232</sup> and where the project is situated in the global commons.<sup>233</sup> Projects funded by the Ex-Im Bank likely fall within at least one of these categories.<sup>234</sup>

For any projects occurring in the global commons and funded by the Ex-Im Bank, the NEPA process will apply.<sup>235</sup> In fact, the Ex-Im Bank explicitly acknowledges that NEPA applies where a project under consideration “may significantly affect the quality of the human environment of . . . Antarctica.”<sup>236</sup> This use of the stricter environmental analysis requirements of NEPA extends beyond those projects proposed in Antarctica.<sup>237</sup> Any application the Ex-Im Bank receives for a project affecting any global common—Antarctica, the world’s oceans, or other—should be subject to NEPA’s EIS requirements.<sup>238</sup> Where the United States “has substantial interest and authority,” it should be able to regu-

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<sup>226</sup> See Burhans, *supra* note 22, at 2–3.

<sup>227</sup> See Goldfarb, *supra* note 16, at 587.

<sup>228</sup> See *id.*; Burhans, *supra* note 22, at 2–3.

<sup>229</sup> See *infra* notes 235–62.

<sup>230</sup> See *supra* notes 66–132.

<sup>231</sup> Nat’l Org. for the Reform of Marijuana Laws (NORML) v. U.S. Dept. of State, 452 F. Supp. 1226, 1232 (D.D.C. 1978).

<sup>232</sup> Natural Res. Def. Council, Inc. (NRDC) v. Nuclear Regulatory Comm’n, 647 F.2d 1345, 1367–68 (D.C. Cir. 1981).

<sup>233</sup> *Env’tl. Def. Fund, Inc. v. Massey*, 986 F.2d 528, 529 (D.C. Cir. 1993).

<sup>234</sup> See Burhans, *supra* note 22, at 1–3.

<sup>235</sup> See *Massey*, 986 F.2d at 529.

<sup>236</sup> Ex-Im Bank, *Procedures and Guidelines*, *supra* note 165, at I(12).

<sup>237</sup> See *Massey*, 986 F.2d at 536.

<sup>238</sup> See *id.*

late the environmental impacts of its actions without concern for foreign policy ramifications.<sup>239</sup> In particular, projects with resulting water emissions may affect the world's oceans, and therefore are subject to NEPA.<sup>240</sup> Similarly, certain projects with significant air emissions may affect the atmosphere—a global common—and the NEPA requirements should apply.<sup>241</sup>

It can be argued that the Ex-Im Bank retains control over the projects it funds.<sup>242</sup> The application, approval, and issuance of a loan occurs only once.<sup>243</sup> This distribution of funds does not end the relationship, however.<sup>244</sup> The loan still must be paid back.<sup>245</sup> In some instances, the repayment period exceeds seven years.<sup>246</sup> Therefore, in many situations, Ex-Im Bank involvement in the project continues for at least seven years.<sup>247</sup> As long as the Ex-Im Bank is fiscally involved in the project, and as long as the proponents of the project are indebted to the Ex-Im Bank, involvement and control lingers.<sup>248</sup> Under the reasoning of *National Organization for the Reform of Marijuana Laws (NORML) v. U.S. Department of State*, the Ex-Im Bank's continuing engagement in projects until the loan is fully repaid triggers NEPA applicability to the project.<sup>249</sup> Although the court in *NORML* simply assumed that NEPA applied to the pesticide spraying program in Mexico, it specifically noted that U.S. agencies continued to provide "significant financial aid and other assistance" to the program.<sup>250</sup> Until the loan is repaid, the Ex-Im Bank is still financially attached to a project.<sup>251</sup> The *NORML* court's focus on the financial aid provided indicates that it would apply NEPA's requirements to Ex-Im Bank-funded projects.<sup>252</sup>

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<sup>239</sup> *Id.*

<sup>240</sup> See *id.*; DANIEL W. BROMLEY & JEFFREY C. COCHRANE, ENVTL. AND NATURAL RES. TRAINING PROJECT EPAT/MUCIA WORKING PAPER, UNDERSTANDING THE GLOBAL COMMONS 1 (1994), available at <http://www.aae.wisc.edu/pubs/misc/docs/em13.pdf>.

<sup>241</sup> See *Massey*, 986 F.2d at 536; BROMLEY & COCHRANE, *supra* note 240.

<sup>242</sup> See Ex-Im Bank, *Procedures and Guidelines*, *supra* note 165.

<sup>243</sup> *Id.*

<sup>244</sup> *Id.*

<sup>245</sup> *Id.*

<sup>246</sup> *Id.*

<sup>247</sup> *Id.*

<sup>248</sup> See Ex-Im Bank, *Procedures and Guidelines*, *supra* note 165.

<sup>249</sup> See generally 452 F. Supp. 1226 (D.D.C. 1978).

<sup>250</sup> *Id.* at 1232.

<sup>251</sup> See Ex-Im Bank, *Procedures and Guidelines*, *supra* note 165.

<sup>252</sup> See *NORML*, 452 F. Supp. at 1232; Ex-Im Bank, *Procedures and Guidelines*, *supra* note 165.



The environmental effects of projects funded by the Ex-Im Bank are likely felt outside the nation in which the project is located.<sup>253</sup> Very few environmental impacts are felt wholly locally.<sup>254</sup> It is possible that the effects of these projects will be felt within the United States.<sup>255</sup> Where these domestic effects can be shown, under the reasoning in *Sierra Club v. Adams*, the Ex-Im Bank is subject to the EIS requirements under NEPA.<sup>256</sup> According to the court, the possibility of the spread of aftosa to the United States was “undoubtedly the most significant consideration” associated with the project.<sup>257</sup> The potential for environmental effects to carry into the United States weighs heavily in the determination of whether NEPA should apply to an extraterritorial project.<sup>258</sup> The Ex-Im Bank should consider possible domestic effects of any project it funds.<sup>259</sup> If it has the potential to have environmental impacts within the United States, then the Ex-Im Bank must fulfill the NEPA requirements.<sup>260</sup> This means NEPA will most likely apply to projects located in nearby locations, such as the Mexican oil refinery approved in 2004.<sup>261</sup> It is possible, however, that other, more remote projects will have far-reaching effects and also fall under this category.<sup>262</sup>

The courts have limited the application of NEPA to extraterritorial projects.<sup>263</sup> Even where the court has refused to extend NEPA applicability to an extraterritorial project, it has specifically noted that its decision does not preclude extraterritorial application of the statute in other circumstances.<sup>264</sup> In context of this conditionally restricted use of the statutory requirements, the Ex-Im Bank should apply NEPA to the projects it considers.<sup>265</sup> The projects which the Ex-Im Bank funds will likely affect the global commons, and therefore requires NEPA consideration.<sup>266</sup> Furthermore, the Ex-Im Bank’s participation in these pro-

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<sup>253</sup> See Goldfarb, *supra* note 16, at 576.

<sup>254</sup> See *id.*

<sup>255</sup> See *id.*

<sup>256</sup> See 578 F.2d 389, 390–91 (D.C. Cir. 1978).

<sup>257</sup> *Id.* at 394.

<sup>258</sup> See *id.*

<sup>259</sup> See *id.*

<sup>260</sup> *Id.*

<sup>261</sup> See *id.*; Ex-Im Bank, *Transactions Pending*, *supra* note 192.

<sup>262</sup> See *Adams*, 578 F.2d at 394.

<sup>263</sup> See discussion *supra* Part I.C.

<sup>264</sup> See *Natural Res. Def. Council, Inc. (NRDC) v. Nuclear Regulatory Comm’n*, 647 F.2d 1345, 1366 (D.C. Cir. 1981); *Greenpeace v. Stone*, 748 F. Supp. 749, 761 (D. Haw. 1990).

<sup>265</sup> See *supra* notes 235–262 and accompanying text.

<sup>266</sup> See *Envtl. Def. Fund, Inc. v. Massey*, 986 F.2d 528, 529 (D.C. Cir. 1993).

jects extends beyond a single transaction.<sup>267</sup> The ongoing involvement of the Ex-Im Bank in its funded projects requires application of NEPA requirements to the projects.<sup>268</sup> Finally, given the interconnectedness of the world's environment, it is possible that the environmental effects of extraterritorial projects funded by the Ex-Im Bank will be felt domestically in the United States.<sup>269</sup> Therefore, NEPA's environmental guidelines should apply to the consideration of these projects.<sup>270</sup>

#### CONCLUSION

The Ex-Im Bank must apply NEPA requirements to the projects it funds. NEPA seeks to create harmony between man and his environment, and simply acting outside of the domestic environment should not exempt the Ex-Im Bank from abiding by the statute's guidelines. First, NEPA's language indicates a need for its application even in extraterritorial projects. The broad language of the statute implies that its requirements should not be limited to projects occurring within the United States.

Second, the Ex-Im Bank should be subject to NEPA even in light of the court's limited application of NEPA to extraterritorial projects. The environmental impacts of the projects the Ex-Im Bank funds are unlikely to be localized to the foreign jurisdiction in which the project is located. The potential for these effects to be felt within the United States indicate that NEPA should apply to the projects. Furthermore, continuing involvement in the projects—in the form of indebtedness of the project proponents—requires the Ex-Im Bank to apply NEPA to its applications. This retention of a certain amount of control over the project triggers NEPA applicability to the projects financed by the Ex-Im Bank.

A consideration of the statutory language encourages NEPA applicability to the Ex-Im Bank. However, even if this approach is rejected, the judicial treatment of extraterritorial NEPA application further indicates that the Ex-Im Bank is subject to the EIS requirements of NEPA. Therefore, the Ex-Im Bank must abide by these requirements when considering the projects before it, and before approving funding for them.

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<sup>267</sup> See Ex-Im Bank, *Procedures and Guidelines*, *supra* note 165.

<sup>268</sup> See Nat'l Org. for the Reform of Marijuana Laws (NORML) v. U.S. Dept. of State, 452 F. Supp. 1226, 1232–33 (D.D.C. 1978).

<sup>269</sup> See Goldfarb, *supra* note 16, at 576.

<sup>270</sup> See *id.*; Sierra Club v. Adams, 578 F.2d 389, 394–97 (D.C. Cir. 1978).

