

## Exports and Environmental Responsibility: Applying NEPA to the Export-Import Bank

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## NOTES

### EXPORTS AND ENVIRONMENTAL RESPONSIBILITY: APPLYING NEPA TO THE EXPORT-IMPORT BANK

The National Environmental Policy Act of 1969 (NEPA)<sup>1</sup> has been the subject of much litigation and debate during the last decade. The controversy stems in large part from the expansive language of the Act.<sup>2</sup> Designed to establish environmental values as an important element in all planning done by U.S. Government agencies, the Act injects extensive procedural requirements into the agencies' decisionmaking processes.<sup>3</sup> Although the nature of these statutory duties as well as the policy behind them has been thoroughly explored,<sup>4</sup> the territorial scope of NEPA has until recently received comparatively little attention.<sup>5</sup>

The extent to which NEPA applies outside the territorial United States is a question of great importance, since many federal agencies conduct activities abroad that affect the environment. Several agencies, including the Department of Defense, the Department of State, and the Agency for Inter-

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1. 42 U.S.C. §§ 4321-4361 (1976) [hereinafter cited as NEPA].

2. As one commentator has observed, "[c]ast in sweeping, almost poetic language, the Act takes on a constitutional hue . . ." McGarity, *The Courts, The Agencies, and NEPA Threshold Issues*, 55 TEX. L. REV. 801, 803 (1977). The full sweep of the Act's language is typified by the preamble. NEPA § 2, 42 U.S.C. § 4321 (1976).

3. NEPA's main procedural requirements are contained in § 102(2), 42 U.S.C. § 4332(2) (1976), which requires "all agencies of the Federal Government [to] . . . utilize a systematic, interdisciplinary approach . . . in planning and in decisionmaking which will affect the environment . . ." This general goal, along with the others in § 102, is given effect by the "action-forcing" provisions of § 102(2)(C), which requires that all federal agencies "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" covering the "environmental impact" of the proposed action, alternatives, and so forth. It is this requirement of an environmental impact statement (EIS) that has given urgency to much of the disagreement over the scope of NEPA.

4. In the 10 years since Congress enacted NEPA, the meaning of the terms "major," "federal action," and "significantly affecting" have been litigated extensively. See F. ANDERSON, *NEPA IN THE COURTS* (1973); McGarity, *supra* note 2. This Note considers the scope of "the human environment."

5. The statute does not define its territorial scope specifically. It simply states a general policy that all agencies shall "recognize the worldwide and long-range character of environmental problems and, where consistent with the foreign policy of the United States, lend appropriate support to . . . programs designed to maximize international cooperation . . ." NEPA § 102(2)(E), 42 U.S.C. § 4332(2)(F) (1976).

national Development, have acknowledged some duty to evaluate potential environmental consequences of their overseas activities.<sup>6</sup> Other agencies, most notably the Export-Import Bank of the United States (Eximbank),<sup>7</sup> have until recently refused to include environmental safeguards in their decisionmaking procedures.<sup>8</sup> A January 1979 executive order,<sup>9</sup> which was not based on NEPA, requires federal agencies to consider the environmental consequences of certain overseas activities, but leaves many important questions unanswered.

This Note reviews the statutory and decisional bases for applying NEPA to actions by U.S. Government agencies that have environmental effects beyond the borders of the United States. The issues raised by extra-territorial application of the Act are then considered. This Note concludes by analyzing the recent executive and congressional initiatives that address NEPA's applicability to Eximbank.

## I

### THE LEGISLATIVE AND JUDICIAL GROUNDWORK

Since Congress may impose procedural requirements on the actions of federal agencies anywhere,<sup>10</sup> the extraterritorial effect of NEPA is fundamentally a question of the extent to which Congress has exercised that power. The Act does not define the geographical area to which it applies. Its preamble speaks in broad terms about "harmony between man and his environment," "the environment and biosphere," and the "health and welfare of man."<sup>11</sup> But the preamble also uses terms focusing on the United States, such as "natural resources important to the Nation."<sup>12</sup> Because the statute does not define the geographical scope of "the human environ-

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6. Regulations of the Department of State and the Agency for International Development do not explicitly acknowledge the applicability of NEPA to international operations, but the regulations arguably fulfill NEPA requirements. See 22 C.F.R. § 216 (1978). The Department of Defense complies with NEPA everywhere in the world, but regulations provide a tentative exception for areas under the jurisdiction of foreign nations. See 32 C.F.R. § 214.6 (1978). Regulations of the Nuclear Regulatory Commission do not address the territoriality issue. See 10 C.F.R. § 51 (1978). But see *In re Babcock & Wilcox*, 5 N.R.C. 1332 (1977).

7. 12 U.S.C. § 635 (1976). As its name suggests, the Bank's function is to help finance and otherwise bolster U.S. exports. See notes 41-42 *infra* and accompanying text.

8. See notes 43-48 *infra* and accompanying text.

9. Exec. Order No. 12,114, 44 Fed. Reg. 1957 (1979).

10. Congress clearly has the power to impose procedural requirements on federal agencies, since it can create or abolish them. See Comment, *Controlling the Environmental Hazards of International Development*, 5 *ECOLOGY L.Q.* 321, 359-62 (1976).

11. NEPA § 2, 42 U.S.C. § 4321 (1976).

12. *Id.*

ment,"<sup>13</sup> courts and agencies have considered both the language and legislative history of NEPA in determining how to apply the Act.

#### A. STATUTORY LANGUAGE AND LEGISLATIVE HISTORY

The apparent inconsistency in the language of the preamble is resolved when that section is read in light of the whole Act. NEPA's structure makes it clear that some sections apply only to the United States,<sup>14</sup> whereas others are not geographically limited. Section 102,<sup>15</sup> which illustrates the latter pattern, embodies NEPA's basic procedural standards, including the requirement of an environmental impact statement (EIS).<sup>16</sup> Not only does that section lack any provisions limiting its geographical effect; it also requires agencies to "recognize the worldwide and long-range character of environmental problems . . ." <sup>17</sup> This command, vague when viewed alone, can be read as applying to the whole of section 102, thus giving that section worldwide effect.<sup>18</sup> The EIS standard itself compels agencies to assess all "major federal actions significantly affecting the quality of the human environment."<sup>19</sup> Since the Act expressly restricts the effect of certain other sections to the United States,<sup>20</sup> unlimited terms like "the human environment" may be read to connote the world environment.<sup>21</sup> Under this reading of the statute, NEPA applies outside the United States.<sup>22</sup>

13. *Id.* § 102(2)(C), 42 U.S.C. § 4332(2)(C).

14. *See, e.g., id.* §§ 101, 201, 42 U.S.C. §§ 4331, 4341 (delineating substantive goals and requiring the President to prepare an annual report on the nation's environment).

15. *Id.* § 4332.

16. *Id.* § 102(2)(C), 42 U.S.C. § 4321(2)(C).

17. *Id.* § 102(2)(E), 42 U.S.C. § 4332(2)(F).

18. NEPA § 102(2) is best read as an entire unit, since separate interpretation of each subsection would produce a great deal of redundancy. For example, the "systematic and interdisciplinary approach" requirement of § 102(2)(A) seems little more than a clarification of the EIS requirement of § 102(2)(C). Likewise, the information sharing requirement of § 102(2)(F) can apply only after the information has been collected in an EIS. The same type of interdependence appears to connect all subsections of § 102. *But see* Memorandum of the Department of Defense, *The Application of the National Environmental Policy Act to Major Federal Actions with Environmental Impacts Outside the United States*, 124 CONG. REC. S19,358, S19,360 (daily ed. Oct. 14, 1978).

19. NEPA § 102(2)(C), 42 U.S.C. § 4332(2)(C) (1976).

20. *See* note 14 *supra* and accompanying text.

21. *See Export-Import Bank Act Amendments of 1978: Hearings on S. 3077 Before the Subcomm. on Resource Protection of the Senate Comm. on Environment and Public Works*, 95th Cong., 2d Sess. 220 (1978) [hereinafter cited as *Eximbank Hearings*] (remarks by Sen. Muskie). *But see id.* at 281-83 (statement of Prof. Scott Whitney).

22. Opponents of the extraterritorial application of NEPA assert that such an interpretation would unconstitutionally infringe the foreign policy power of the President. This argument is based on a misinterpretation of NEPA § 101, 42 U.S.C. § 4331 (1976), which requires only that agencies use "all practical means, consistent with other essential considerations of national policy" to implement the Act. Moreover, the requirements of NEPA are basically procedural—they do not require that the administrator reach any particular decision. The Supreme Court has sharply limited judicial review under NEPA to procedural issues.

The legislative history of NEPA does not expressly state whether the Act applies worldwide.<sup>23</sup> Some sources of the Act, as well as comments made during and soon after its enactment, suggest that Congress intended NEPA to apply internationally. When Congress first considered the need for broad environmental legislation, a joint House-Senate colloquium proposed a declaration of several new national policies including the goals that "[e]nvironmental quality and productivity . . . be considered in a worldwide context,"<sup>24</sup> and that "the global character of ecological relationships . . . be the guide for domestic activities. Ecological considerations should be infused into all international relations."<sup>25</sup> Senator Henry Jackson, NEPA's sponsor, also emphasized the international effect of the legislation when he presented the conference report<sup>26</sup> to the Senate. "What is involved, is a Congressional declaration that we do not intend . . . to initiate actions which endanger the continued existence or the health of mankind: That we will not intentionally initiate actions which will do irreparable damage to the air, land, and water which support life on earth."<sup>27</sup> Similarly, in a report on 1970 NEPA oversight hearings, the House Committee on Merchant Marine and Fisheries strongly endorsed an interpretation of NEPA that would give the Act extraterritorial effect.<sup>28</sup> Although there is

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Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 98 S. Ct. 1197 (1978). See also *Calvert Cliffs' Coordinating Comm. v. Atomic Energy Comm'n*, 449 F.2d 1109, 1114-15 (D.C. Cir. 1971). A second general objection frequently raised to extraterritorial application of NEPA is based on the principle that "[r]ules of United States statutory law . . . apply only to conduct occurring within, or having effect within the territory of the United States, unless the contrary is clearly indicated by the statute." RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAWS OF THE UNITED STATES § 38 (1965). See, e.g., Department of Defense Memorandum, *supra* note 18, 124 CONG. REC. at S19,360. This rule of construction is convincingly argued not to apply to NEPA in Note, *The Extraterritorial Scope of NEPA's Environmental Impact Statement Requirement*, 74 MICH. L. REV. 349, 354-58 (1975). See also Strausberg, *The National Environmental Policy Act and the Agency for International Development*, 7 INT'L LAW. 46, 54-57 (1973).

23. The House report, H.R. REP. NO. 378, 91st Cong., 1st Sess. (1969), reprinted in [1969] U.S. CODE CONG. & AD. NEWS 2751, points out that "[i]mplicit in [an earlier version of NEPA § 201] is the understanding that the international implications of our current activities will also be considered, inseparable as they are from the purely national consequences of our actions." *Id.* at 9, [1969] U.S. CODE CONG. & AD. NEWS at 2759. The Senate report, S. REP. NO. 296, 91st Cong., 1st Sess. (1969), and the conference report, H. CONF. REP. NO. 765, 91st Cong., 1st Sess. (1969), reprinted in [1969] U.S. CODE CONG. & AD. NEWS 2767, are silent on this issue.

24. CONGRESSIONAL WHITE PAPER ON A NATIONAL POLICY FOR THE ENVIRONMENT, reprinted in 115 CONG. REC. 29,078, 29,081-82 (1969).

25. *Id.* at 29,082.

26. H. CONF. REP. NO. 765, *supra* note 23.

27. 115 CONG. REC. 40,416 (1969). See also *Eximbank Hearings*, *supra* note 21, at 219-20 (remarks of Sen. Muskie).

28. At the hearings, the Department of State presented a memorandum of law asserting that NEPA applies only to activities carried out within the United States. *Administration of the National Environmental Policy Act: Hearings Before the Subcomm. on Fisheries and Wildlife Conservation of the House Comm. on Merchant Marine and Fisheries*, 91st Cong., 2d Sess., pt. 2, 546 (1970) (memorandum of Christian Herter, Special Assistant to the Secretary of State for

some authority to the contrary,<sup>29</sup> these sources support the conclusion that Congress intended NEPA to apply worldwide.

#### B. JUDICIAL INTERPRETATION

Court decisions have gradually expanded the possibilities for extraterritorial application of NEPA, but the direction of the expansion has remained uncertain. Although two early cases based their analysis on the nationality of plaintiffs asserting NEPA violations, recent decisions have focused instead on the locale of the environmental effect. In the earliest case, *Wilderness Society v. Morton*,<sup>30</sup> the plaintiffs alleged that the Secretary of the Interior failed to comply with NEPA in deciding to issue a permit for the Trans-Alaska Pipeline. The United States Court of Appeals for the District of Columbia Circuit permitted a Canadian environmental group to intervene in the litigation because the Canadians, who wanted the pipeline built through Alaska, had different interests from the Americans, who wanted the pipeline routed through Canada. By allowing the Canadian group to intervene, the court "seem[ed] to hold that NEPA provides foreign nationals with certain rights when their environment is endangered by federal actions."<sup>31</sup> A year later, in *People of Enewetak v. Laird*,<sup>32</sup> NEPA was held to apply to non-United States citizens who resided on a Pacific atoll administered by the United States under a United Nations Trust Agreement.<sup>33</sup>

Although the decisions in *Wilderness Society* and *Enewetak* suggested

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Environmental Affairs). The Committee flatly rejected the Department of State's position: "The history of the Act makes it quite clear that the global effects of environmental decisions are inevitably a part of the decision-making process and must be considered in that context." H.R. REP. NO. 316, 92nd Cong., 1st Sess. 33 (1971) (emphasis omitted).

29. See generally CONGRESSIONAL RESEARCH SERVICE, LIBRARY OF CONGRESS, APPLICATION OF THE NATIONAL ENVIRONMENTAL POLICY ACT'S ENVIRONMENTAL IMPACT STATEMENT REQUIREMENT WHEN A FEDERAL ACTION IMPACTS ONLY WITHIN THE TERRITORIAL JURISDICTION OF A FOREIGN NATION, reprinted in 124 CONG. REC. S16,850 (daily ed. Oct. 2, 1978). For an exhaustive analysis of the legislative history, see Note, *supra* note 22, at 365-71.

30. 463 F.2d 1261 (D.C. Cir. 1972).

31. *People of Enewetak v. Laird*, 353 F. Supp. 811, 818 (D. Hawaii 1973). Unfortunately, the opinion of the court in *Wilderness Society* does not elaborate on the extraterritoriality issue.

32. *Id.*

33. Despite this narrow holding, the *Enewetak* court noted that "*Wilderness Society* seems to hold that NEPA provides foreign nationals with certain rights . . ." *Id.* at 816. The court further commented that "NEPA is framed in expansive language that clearly evidences a concern for all persons subject to federal action which has a major impact on their environment—not merely United States' [*sic*] citizens located in the fifty states." *Id.* at 818. The same court reaffirmed its view that NEPA applies outside the United States in *People of Saipan v. Department of the Interior*, 356 F. Supp. 645 (D. Hawaii 1973), modified on other grounds *sub nom.* *People of Saipan ex rel. Guerrero v. Department of the Interior*, 502 F.2d 90 (9th Cir. 1974).

that courts might construe NEPA as protecting all people, a pair of recent cases points toward the development of a less expansive interpretation based on the geographical location of the environmental effect. In *Sierra Club v. Adams*,<sup>34</sup> the Sierra Club challenged the adequacy of the Federal Highway Administration's EIS covering construction of a highway between Panama and Colombia. The district court, without discussing the issue of extraterritoriality, found the EIS to be inadequate, in part because the statement failed to consider several purely local effects in Colombia. The D.C. Circuit reversed, holding that the EIS adequately covered the local effects of the construction. But the court of appeals also endorsed the district court's holding that the statement must consider localized foreign effects of the highway.<sup>35</sup> The court reasoned that because the Sierra Club had established an independent basis for standing to challenge the EIS, it had standing to "argue the public interest in support of . . . [its] claim that there . . . [was] inadequate discussion and consideration of the effect of the construction on the Cuna and Choco Indians."<sup>36</sup> Yet despite this apparent belief that NEPA applies fully to local effects of federal actions abroad, the appellate court's holding in *Sierra Club v. Adams* is narrow. The court noted that

34. 578 F.2d 389 (D.C. Cir. 1978), *vacating* *Sierra Club v. Coleman*, 405 F. Supp. 53 (D.D.C. 1975), *as supplemented*, 421 F. Supp. 63 (D.D.C. 1976). For an interesting discussion of the issues raised by this case, written before either decision had been rendered, see Tarlock, *The Application of the National Environmental Policy Act of 1969 to the Darien Gap Highway Project*, 7 N.Y.U. J. INT'L L. & POL. 459 (1974).

35. 405 F. Supp. 53, 55-56 (D.D.C. 1975).

36. *Sierra Club v. Adams*, 578 F.2d 389, 393 (D.C. Cir. 1978). The court of appeals supported this holding by quoting *Sierra Club v. Morton*, 405 U.S. 727, 737 (1972) ("the fact of . . . injury is what gives a person standing to seek judicial review . . . , but once review is properly invoked, that person may argue the public interest in support of his claim that the agency has failed to comply with its statutory mandate"). 578 F.2d at 392.

Should international NEPA suits become more common, standing may become the major issue. The requirements for standing established by *Association of Data Processing Serv. Organizations v. Camp*, 397 U.S. 150 (1970) and *Barlow v. Collins*, 397 U.S. 159 (1970) are "injury in fact," 397 U.S. at 152, 164, and "whether the interest sought to be protected by the complaint is arguably within the zone of interests to be protected or regulated by the statute . . . in question," 397 U.S. at 153, 164. Although injury in fact is generally easy to establish, the Supreme Court has denied standing to an environmental group that alleged no specific injury to its members, but only a general injury to the environment. *Sierra Club v. Morton*, 405 U.S. 727 (1972).

The zone of interests standard breaks down into two questions: whether the alleged harm is covered by the statute and whether the plaintiff is also covered. Presumably a foreign plaintiff who could show injury in fact would be granted standing to sue in a court that acknowledged that NEPA protects the global environment, following *Wilderness Society v. Morton*, 463 F.2d 1261 (D.C. Cir. 1972).

For a detailed study of the standing issue in international NEPA suits, see Comment, *Controlling the Environmental Hazards of International Development*, 5 *ECOLOGY L.Q.* 321, 367-76 (1976). *But see* *Gemeinschaft zum Schutz des Berliner Baumeistandes v. Marienthal*, 12 *Envir. Rep. Cas.* 1337 (D.D.C. 1978) (German environmental group denied preliminary NEPA injunction against U.S. Army construction in Berlin).

"we need only assume, without deciding, that NEPA is fully applicable to construction in Panama. We leave resolution of this important issue to another day."<sup>37</sup>

Notwithstanding its disclaimer, the court's decision was an important step<sup>38</sup> towards confirming that NEPA controls at least some foreign projects. Seemingly all the requirements of NEPA apply—even to purely local effects—when there is also an impact on the United States.<sup>39</sup> Faced with a statute and legislative history almost wholly silent on the extraterritoriality issue, the courts have exercised judicial restraint, postponing any decision on whether purely local foreign environmental effects must also be included in an EIS when there is no significant environmental effect within the United States.<sup>40</sup>

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37. 578 F.2d at 391 n.14.

38. See *National Organization for Reform of Marijuana Laws v. United States*, 11 *Envir. Rep. Cas.* 1841 (D.D.C. 1978) (impact within the United States necessitates EIS for herbicide spraying project conducted by Mexico but funded in part by U.S. Government agencies).

39. The concept that activities abroad that have an effect in the United States may be governed by U.S. law is expressed in *RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES* § 18 (1965): "A state has jurisdiction to prescribe a rule of law attaching legal consequences to conduct that occurs outside its territory and causes an effect within its territory, if . . . the effect within the territory is substantial." Comment *a* to § 18 states that the rule applies only to aliens. But § 30 of the *RESTATEMENT* provides that "[a] state has jurisdiction to prescribe a rule of law . . . attaching legal consequences to conduct of a national of that state wherever the conduct occurs."

Thus, although § 30 supports the application of NEPA to U.S. federal actions anywhere, the holdings of recent cases express a more restrictive principle, similar to the one expressed in § 18. Such an effects doctrine, also referred to as the "objective territorial principle," applies in the field of antitrust law. *Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597, 608-12 (9th Cir. 1976); *W. FUGATE, FOREIGN COMMERCE AND THE ANTITRUST LAWS* 35-39 (2d ed. 1973); Stanford, *The Application of the Sherman Act to Conduct Outside the United States: A View From Abroad*, 11 *CORNELL INT'L L.J.* 195, 199-204 (1978).

The effects doctrine also plays a role in the field of securities regulation. *Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974, 989, 991 (2d Cir. 1975); Note, *American Adjudication of Transnational Securities Fraud*, 89 *HARV. L. REV.* 553 (1976).

40. The courts are not alone in their view that an effects doctrine applies to NEPA. In *Sierra Club v. Adams*, 578 F.2d 389 (D.C. Cir. 1978), "the Government stated that it 'never questioned the applicability of NEPA to the construction of this highway in Panama . . .'; but it also intimated that this position might not apply to 'purely local concerns (Indians and alternate routes).'" *Id.* at 391 n.14. The important contribution of *Sierra Club* is that it requires all environmental effects, regardless of location, to be incorporated in any EIS required because of a domestic effect. See Note, *The Scope of the National Environmental Policy Act: Should the 102(2)(C) Impact Statement Provision Be Applicable to a Federal Agency's Activities Having Environmental Consequences Within Another Sovereign's Jurisdiction?*, 5 *SYR. J. INT'L L. & COM.* 317 (1978); cf. notes 82-83 *infra* and accompanying text (proposed exemption of Eximbank from NEPA implicitly incorporated effects doctrine). But see Exec. Order No. 12,114, *supra* note 9, § 3-5.



## II

## PROBLEMS OF APPLYING NEPA TO EXIMBANK

Eximbank provides an excellent case study of NEPA's international significance. The Bank's operations have a wide variety of environmental effects, whose magnitude ranges from negligible to very large. In implementing its principal charge, to expand American exports,<sup>41</sup> the Bank provides several direct and indirect kinds of support.<sup>42</sup>

The controversy over NEPA's applicability to Eximbank began with *Sierra Club v. Atomic Energy Commission*,<sup>43</sup> in which the Bank was a co-defendant. The parties settled most of the issues in the case when the Commission, as "responsible official,"<sup>44</sup> agreed to file a full EIS. The court held that Eximbank did not need to produce an additional statement,<sup>45</sup> pointing out that "[t]his case differs from one in which Eximbank would be the sole federal agency involved in the exportation of some commodity."<sup>46</sup> The hypothetical case suggested by the court became a reality in *Natural Resources Defense Council v. Eximbank*.<sup>47</sup> Plaintiffs alleged that several activities in which Eximbank was the sole responsible agency required an EIS.<sup>48</sup> But the district court dismissed the suit after Eximbank agreed to comply with an executive order requiring federal agencies to consider the environmental effects of their overseas activities.

41. 12 U.S.C. § 635j(a) (1976). In 1968, Congress gave the Bank's duty to promote exports higher priority than its import financing responsibility. *Id.*, §§ 635j-635n. See [1968] U.S. CODE CONG. & AD. NEWS 2541; 12 C.F.R. § 401.1(a) (1978) (Eximbank regulations).

42. The Bank's services include direct loans to finance all or part of an export transaction, repayment guarantees for U.S. or foreign lenders financing such transactions, local cost financing, and preliminary commitments to help borrowers market their products and meet tender requirements, as well as political risk and credit insurance for exporters, financing for feasibility studies, and a variety of informational programs. 12 C.F.R. § 401.1(c) (1978).

43. 6 Envir. Rep. Cas. 1980 (D.D.C. 1974) (suit to compel preparation of EIS covering sale of nuclear reactors by Atomic Energy Commission and Department of State to foreign buyers using Eximbank financing).

44. NEPA § 102(2)(C) requires that the EIS be prepared by "the responsible official." 42 U.S.C. § 4332(2)(C) (1976).

45. Eximbank's role in the nuclear power export process was limited to financing 11 of 19 agreements extant when the complaint was filed, supplying \$1.6 billion in credits. 6 Envir. Rep. Cas. at 1981.

46. *Id.* at 1982.

47. [1977] ENV'T'L L. REP.—PENDING LITIGATION (BNA) 65,444 (D.D.C. 1977). The case was dismissed after nearly two years of postponement, [1979] INT'L ENVIR. REP.—CURRENT REP. (BNA) 586; cf. *Environmental Defense Fund v. Agency for International Development*, 6 ENV'T'L L. REP. 20,121 (D.D.C. 1975) (AID consented to prepare EIS on foreign effects of its programs).

48. The projects in question include offshore drilling equipment, a railroad, an electric transmission line, dredging equipment, and nuclear power plants.

The possibility of applying NEPA to Eximbank raises a number of questions concerning the range of Eximbank activities subject to NEPA, the effect of the Act on project planning, the availability of information for EIS purposes, and the diplomatic or economic costs of applying NEPA to the Bank. This section explores these and other questions in an attempt to identify and analyze the specific problems raised by extraterritorial application of NEPA.

A threshold limitation on NEPA's applicability to Eximbank is that many of the Bank's activities would not be subject to the Act's requirements even if they occurred within the United States. Information services, for example, are unlikely to have a significant effect on the environment, whereas insurance, loan guarantees, and indirect loans are unlikely to be major federal actions.<sup>49</sup> The direct loan program,<sup>50</sup> however, accounts for essentially all of the Bank's largest transactions. In fiscal 1977, Eximbank issued \$700 million in direct loans to support fifty-two projects worth \$1.4 billion in exports—an average loan of nearly \$14 million to support an average export worth \$28 million.<sup>51</sup> It is this type of large transaction that typically poses the serious environmental problems addressed by NEPA. In analyzing the applicability of the Act to Eximbank, the present discussion focuses on these major loans because most of the Bank's other activities would be exempt from NEPA regardless of the Act's geographical reach.<sup>52</sup>

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49. The terms "major federal action" and "significantly affecting the environment" are usually held to operate independently of each other. *Hanly v. Mitchell*, 460 F.2d 640, 644 (2d Cir. 1972). See also *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669 (1973); *McGarity*, *supra* note 2. But see *Citizens for Reid State Park v. Laird*, 336 F. Supp. 783, 788 (D. Me. 1972); F. ANDERSON, *supra* note 4, at 89-96. Under the *Hanly* definition of major federal action, many Eximbank transactions would not trigger the EIS requirement because of low cost, low-echelon planning, and short duration. Likewise, most Eximbank transactions probably have no significant environmental effect when judged by the standard applied in the second appeal in *Hanly*, *Hanly v. Kleindienst*, 471 F.2d 823 (2d Cir. 1973). The court required that agencies review "the extent to which the action will cause adverse environmental effects in excess of those created by existing uses in the area affected by it, and . . . the absolute quantitative adverse environmental effects of the action itself . . ." *Id.* at 830. Although the two-pronged analysis used in the two *Hanly* appeals would exempt many Eximbank activities from the EIS requirement, the courts have yet to establish predictable threshold standards for major actions or significant effects. *McGarity*, *supra* note 2, at 837-61.

50. "Direct loans are dollar credit extended by Eximbank directly to borrowers outside of the United States for purchases of U.S. goods and services." 12 C.F.R. § 401.1(c)(1) (1978).

51. These amounts were calculated from data contained in EXPORT-IMPORT BANK OF THE UNITED STATES, 1977 ANNUAL REPORT. The REPORT lists 52 authorizations with export value of \$1,441,467,000, supported by gross authorizations of \$700,003,000.

52. Those who oppose application of NEPA to the Bank frequently cite statistics to show the havoc that might be wrought were the Act to apply. These statistics are often misleading because they include data on minor transactions that would never be subject to NEPA. See, e.g., 124 CONG. REC. S16,842-43 (daily ed. Oct. 2, 1978) (remarks of Sen. Muskie); ANNUAL REPORT, *supra* note 51; Report, "Environmental Restraints on U.S.A. Exports" Conference

The planning purpose of the EIS would also limit the effect of NEPA on Eximbank.<sup>53</sup> An EIS is useful as a planning tool only if it is available to and used by those developing a project. For projects carried out within the United States, it is usually possible to determine at an early stage whether federal involvement calls for an EIS. Planners can then take environmental considerations into account when designing the project. The same is often true of Eximbank's largest loans, which may finance the purchase of an entire project from the United States.<sup>54</sup> Yet many Bank transactions involve foreign projects that are fully planned and well underway before the Bank becomes involved, so that no amount of new environmental data will cause any change. As a result, an EIS is only useful when U.S. agencies are major participants in planning.

A related problem is that the information needed to formulate an EIS may be difficult or impossible to obtain for the kind of multinational project that Eximbank supports. Whereas data on the environment affected can be gleaned by studying that environment, information about the project itself must usually be obtained from its planner and supplier. When a project is planned and supplied primarily by the United States, this information should be readily available to Eximbank. In fact, the Bank or some other federal agency<sup>55</sup> will often be the only organization in a position to assess the environmental consequences of the project. But when the American contribution to a large, ongoing, foreign-planned project is slight, it becomes less likely that the Bank will be able to add to the environmental data already available to the purchaser.<sup>56</sup>

A corollary problem to the difficulty of obtaining information is that the Bank and the seller may be the only parties in a position to assess environmental effects that occur outside the borders of the importing country. This will be especially true for highly advanced, dangerous projects, such as nuclear reactors or toxic chemical factories, and for large projects that affect

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and the Need for Export Expansion (Apr. 6, 1978), *reprinted in* 124 CONG. REC. S16,843 (daily ed. Oct. 2, 1978).

53. NEPA § 102 requires agencies to use "to the fullest extent possible . . . a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment . . ." 42 U.S.C. § 4332 (1976).

54. *See* notes 90-92 *infra* and accompanying text.

55. *See* *Sierra Club v. Atomic Energy Comm'n*, 6 *Envir. Rep. Cas.* 1980 (D.D.C. 1974).

56. This is likely to occur in two types of situations. It may be impossible, for example, to determine either the end use of the impact of "[o]ff-the-shelf items such as turbines and generators that can be used in different projects . . ." *Eximbank Hearings, supra* note 21, at 211 (testimony of Eximbank Chairman John Moore). A second type of problem arises when the end use of the product is clear, but it represents such a minor ingredient of the foreign-planned project that the impact due to American participation is indefinable or negligible. *See* notes 106-07 *infra* and accompanying text.

rivers, such as dams and sewer systems. Any of these projects might have an impact on neighboring third countries or on global commons areas.

The prospect of administrative and litigation delays raises the most formidable obstacle to Eximbank's consideration of the environmental consequences of its operations. The time-consuming process of formulating an EIS, combined with the delay and uncertainty caused by lawsuits challenging a statement's adequacy, could seriously interfere with the Bank's operations. Many Eximbank transactions require an extremely short response time—an average of forty days for preliminary loan commitments. Yet the time necessary to prepare an EIS averages thirty-one months.<sup>57</sup> Although these statistics suggest that the pace of the Bank's operations precludes the preparation of an EIS, such figures can be grossly misleading. The forty-day average refers to all preliminary loan commitments. Of these, the response time for the largest, environmentally risky transactions is frequently much longer.<sup>58</sup> The Bank may, for example, have between six months<sup>59</sup> and two and one-half years<sup>60</sup> to finance the export of a nuclear power plant. The danger of administrative delays is likely to be reduced further by the streamlining of the EIS process under new regulations promulgated by the Council on Environmental Quality.<sup>61</sup> In addition, special procedures could be developed to reduce further the time needed to prepare environmental statements covering overseas actions.<sup>62</sup>

The risk of litigation delay is a problem whose magnitude is more difficult to estimate. Although courts enjoin only a small percentage of projects involving an EIS,<sup>63</sup> even the threat of litigation could impede the Bank's activities. Yet because Eximbank's programs have little visible effect within the United States, it seems likely that fewer of its activities would come

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57. ANNUAL REPORT, *supra* note 51.

58. See 124 CONG. REC. S16,843 (daily ed. Oct. 2, 1978) (remarks of Sen. Muskie).

59. See *Eximbank Hearings*, *supra* note 21, at 73 (statement of Marcus Rowden, former chairman, Nuclear Regulatory Commission).

60. "Eximbank is on record stating that it knows when a nuclear plant is to be exported as much as 2-1/2 years prior to the time final action must be taken by the Bank . . ." 124 CONG. REC. S16,843 (daily ed. Oct. 2, 1978) (remarks of Sen. Muskie).

61. 43 Fed. Reg. 55,978 (1978).

62. See notes 73-85 *infra* and accompanying text.

63. In 1977, the Council on Environmental Quality reported on the entire history of NEPA litigation. The Council found that:

As of June 30, 1976, 783 NEPA cases had been filed against the federal agencies surveyed.

. . . .

Actions delayed in injunctions granted under NEPA amount to only 177 cases in 6-1/2 years . . . . This figure is less than 3 percent of the 7,334 actions for which impact statements were prepared and a much smaller proportion of the unknown—but very large—number of assessments made.

8 C.E.Q. ANN. REP. 122-23 (1977).

under fire from environmentalists than if it were a domestically-oriented agency.<sup>64</sup>

Another frequent objection to the application of NEPA to Eximbank activities is that the Bank would find it diplomatically impossible to collect some environmental information from foreign countries likely to be affected by the activities it finances.<sup>65</sup> In many cases this may be partially true; however, the Bank does regularly collect detailed information from prospective borrowers,<sup>66</sup> and there is no apparent reason why environmental information should be treated differently. The Bank's credit terms, including information requirements, are already more restrictive than those of its competitors. Although this has raised complaints from American exporters,<sup>67</sup> it has not caused any diplomatic incidents.

A more serious problem is confidentiality. Foreign governments may object to the publicity given to an EIS<sup>68</sup> and deny Eximbank access to their environmental data. They might even refuse to allow the Bank to finance sensitive projects. This problem could be reduced by limiting public access to sensitive foreign environmental statements.<sup>69</sup>

Cost poses another barrier to placing any environmental responsibilities on Eximbank. Critics assert that the Bank is already at a disadvantage in the world marketplace and that any further procedural delay or expense would be an unacceptable burden,<sup>70</sup> especially in light of the large U.S. trade deficit. The cost objection is flawed in two respects. First, critics have overstated the severity of the problem. One estimate suggests that the annual cost of fully applying NEPA to the Bank would not exceed \$102 million, equal to a loss of about one percent of the Bank's \$8.5 billion annual business.<sup>71</sup> Second, although valuation is difficult, experience with past projects indicates that benefits could outweigh costs. Imposing elaborate

64. Foreign environmentalists might file a NEPA suit against the Bank, but the practical and financial barriers are likely to be insurmountable for many, and foreign courts may be able to provide better remedies. See note 36 *supra*.

65. See note 22 *supra*.

66. See generally 12 C.F.R. § 401.1-3 (1978).

67. NATIONAL ASSOCIATION OF MANUFACTURERS, EXPORT CREDIT SURVEY REPORT (1977), reprinted in *Eximbank Hearings*, *supra* note 21, at 128.

68. A foreign government might particularly resent a public document that highlighted major environmental problems in that government's Eximbank-financed project. Even if the EIS were used in the planning process, its publication might make the legitimate decision to proceed with a risky program politically troublesome.

69. See note 100 *infra* and accompanying text.

70. See, e.g., *Eximbank Hearings*, *supra* note 21, at 64 (statement by Jack Carlson, Chamber of Commerce of the United States). The argument is less an attack on extraterritorial application of NEPA than on EIS costs in general.

71. In fiscal year 1977 the Bank did \$8.5 billion worth of business . . . .

So in the worst case analysis, accepting the figures from the most self-serving agency source, . . . NEPA might hold up \$102 million in sales. If the experience of other

procedural requirements on every export that could conceivably injure the environment would certainly discourage exporters and yield little marginal benefit. But if American exports were identified as the cause of recurring environmental mishaps, more exports might be lost than NEPA could ever deter.

The important factors involved in analyzing the application of NEPA to the Bank fall into three general categories. First, relatively few Eximbank transactions involve the kind of major action and significant effects that invoke NEPA. The second group of factors, which includes questions about the availability, usefulness, and diplomatic sensitivity of information gathered for an EIS, presents problems that can be controlled by adding a measure of flexibility to the EIS process. By themselves, these problems do not seem to merit any drastic reduction in the Bank's duties under NEPA. Finally, the cumulative effect of all other factors raises questions about the degree to which imposing NEPA duties will interfere with the Bank's operations.

### III

#### EVALUATING THE PROPOSED ALTERNATIVES

Three proposals were presented in 1978 to solve the uncertainty surrounding the territorial reach of NEPA. Each provided answers to the questions about NEPA's application outside the United States. Although two of the proposals are no longer under active consideration, they are still instructive examples of possible responses to the issue of how, if at all, NEPA should apply extraterritorially.<sup>72</sup>

The executive branch's involvement with the extraterritorial effect of NEPA began when the Council on Environmental Quality (CEQ) circulated preliminary draft regulations<sup>73</sup> for agency comment in January 1978. The draft regulations stated unequivocally that "[t]he human environment is not confined to the geographical borders of the United States."<sup>74</sup>

The strong position taken in the draft regulations brought sharp criti-

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federal agencies is a guide the delay could be for a short time. And the trade deficit last year . . . was about \$36 billion.

124 CONG. REC. S16,859 (daily ed. Oct. 2, 1978) (remarks of Sen. Culver).

72. The three proposals considered here address only unilateral responses to what is basically a multinational problem. See Falk, *The Global Environment and International Law: Challenge and Response*, 23 KAN. L. REV. 385 (1975); Teclaff, *The Impact of Environmental Concern on the Development of International Law*, 13 NAT. RES. J. 357 (1973). See also S. Res. 49, 95th Cong., 2d Sess., 124 CONG. REC. S11,512 (daily ed. July 21, 1978).

73. Reprinted in 124 CONG. REC. S6513-14 (daily ed. Apr. 27, 1978). These draft regulations were intended to become part of the regulations clarifying and streamlining the EIS process, 43 Fed. Reg. 55,978 (1978).

74. Draft Regulations, *supra* note 73, § 1508.13.

cism from the export community,<sup>75</sup> several agencies,<sup>76</sup> and some members of Congress.<sup>77</sup> President Carter responded by instructing CEQ and the Department of State<sup>78</sup> to refashion the draft regulations into an executive order<sup>79</sup> that would reconcile the disagreements within the executive branch concerning NEPA's foreign reach. This reconciliation proved both difficult and time consuming.<sup>80</sup> The order that the two agencies developed resembles the draft regulations in form, but provides for a sharply limited application of NEPA except within the United States or global commons.

The Administration's slow response<sup>81</sup> prompted Senator Adlai Stevenson III to propose an amendment to the Eximbank renewal bill in the summer of 1978.<sup>82</sup> The amendment would have exempted from NEPA's provisions all Eximbank activities except those with environmental effects within the United States.<sup>83</sup> The Stevenson amendment came under fire both from the Administration and from other members of the Senate.<sup>84</sup> It was eventually deleted from the Eximbank bill.<sup>85</sup>

CEQ's draft regulations, the executive order, and the Stevenson amendment represent a spectrum of responses to the problems of applying NEPA extraterritorially. Of the three, the draft regulations would give the most attention to environmental issues, whereas the Stevenson approach

75. See, e.g., U.S. EXPORT WEEKLY (BNA) No. 212, at A-4, A-12 (1978); [1978] INT'L ENVIR. REP.—CURRENT REP. (BNA) 103.

76. See *Eximbank Hearings*, *supra* note 21, at 86-127.

77. See, e.g., 124 CONG. REC. S6513 (daily ed. Apr. 27, 1978).

78. The State Department represented the interests of all agencies that disagreed with the CEQ approach. U.S. EXPORT WEEKLY (BNA) No. 218, at A-1 (1978).

79. Exec. Order No. 12,114, *supra* note 9.

80. The draft order contained alternative language at several important points where the State Department and the CEQ were unable to agree. U.S. EXPORT WEEKLY (BNA) No. 218, at M-1 (1978). For a scathing indictment of the Administration's slowness in drafting the order, see *Eximbank Hearings*, *supra* note 21, at 201-06 (remarks of Sen. Culver). Six full months after the hearings, the executive order was finally issued.

81. See S. REP. NO. 844, 95th Cong., 2d Sess. 9 (1978).

82. "[N]o rule, regulation, or interpretation pursuant to the National Environmental Policy Act of 1969 applies to an activity of the Bank which does not have an environmental impact within the United States." S. 3077, 95th Cong., 2d Sess. § 5 (1978). The proposed amendment and related documents are reprinted in 124 CONG. REC. S6513 (daily ed. Apr. 27, 1978). Cf. 43 U.S.C. § 1652(d) (1976) (Trans-Alaska Pipeline Authorization Act exempted from NEPA). See generally Taylor, *NEPA Pre-Emption Legislation: Decisionmaking Alternatives for Crucial Federal Projects*, 6 ENV'TL AFF. 373 (1978).

83. The Stevenson proposal incorporated the effects doctrine of *Sierra Club v. Adams*, 578 F.2d 389 (D.C. Cir. 1978), which had just been decided. See notes 34-40 *supra* and accompanying text.

84. See generally 124 CONG. REC. S16,836-65 (daily ed. Oct. 2, 1978); *Eximbank Hearings*, *supra* note 21. Both sides seemed to agree that, absent legislation, NEPA applies in some sense to the Bank.

85. The bill was enacted as part of the Financial Institutions Regulatory and Interest Rate Control Act of 1978, Pub. L. No. 95-630, §§ 1201-1205, 92 Stat. 3641 (1978).

would guarantee that the Bank's operations would continue unfettered by nonfinancial restraints. The executive order represents a compromise between these two positions. Each of the three proposals will be evaluated in light of the factors already discussed in order to determine which of them would best accommodate the conflicting interests of environmental responsibility and export trade.

#### A. THE STEVENSON AMENDMENT

The fundamental problem with the Stevenson proposal to exempt Eximbank from NEPA was that by simply preserving the status quo it would have perpetuated a situation devoid of environmental safeguards. The problems that have resulted in the past from a total disregard for the potential adverse effects of major actions illustrate the risks that inhere in the policy adopted by the Stevenson proposal.

Mishaps that have resulted from environmentally dangerous exports fall into two categories. The first type includes ongoing exports of potentially dangerous products without notice to the buyer of the hazards involved.<sup>86</sup> One example would be the export of large quantities of dangerous chemicals or pesticides that could seriously damage the ecology of a purchaser's country. A more difficult issue is raised when the goods to be exported are banned in the United States due to relatively slight hazards, but may have very beneficial effects in foreign countries where the risk-benefit balance is different. For example, the injectable contraceptive Depo-Provera may carry a slight risk of cancer but also offers some nations a chance to avert overpopulation, starvation, and death.<sup>87</sup> Unregulated export of controversial products like Depo-Provera could inspire charges that the United States is dumping poison on the world market. Conversely, failure to export the products could breed accusations that the United States is imposing its values on foreign nations.<sup>88</sup> This dilemma would remain un-

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86. See HOUSE COMM. ON GOVERNMENT RELATIONS, REPORT ON EXPORT OF PRODUCTS BANNED BY U.S. REGULATORY AGENCIES, H.R. REP. NO. 1686, 95th Cong., 2d Sess. (1978). See also BUS. WEEK, June 12, 1978, at 152. Although some products undesirable by American standards may be very useful elsewhere, particularly in developing nations, others may cause catastrophe for the unwary buyer. Preparing an EIS for a questionable export would not prevent the transaction from taking place, but would require the Bank to inform the buyer of possible hazards and alternatives. The point is not to impose American environmental values on foreign nations, but rather to share American knowledge.

87. See *The Depo-Provera Debate: Hearings Before the House Select Comm. on Population*, 95th Cong., 2d Sess. (1978) [hereinafter cited as *Depo-Provera Hearings*].

88. Compare *id.* at 209 (withholding drug from export tantamount to imposing U.S. norms on foreign countries) with *id.* at 783 (exporting drug demonstrates dual standard: "first class drugs for Americans and second class drugs for everybody else"). See also H.R. REP. NO. 1686, *supra* note 86, at 5.



resolved under the Stevenson proposal, which would have done nothing to protect the environment and might harm exports if the United States were to become known as an habitual exporter of hazardous substances. Preparing an EIS would not necessarily prevent any exports or Eximbank financing, but would ensure that full information on potentially dangerous exports was available to all parties, especially the purchasers.<sup>89</sup>

The largest loan ever arranged by Eximbank illustrates the second type of mishap that has resulted from environmentally dangerous exports. The loan financed construction in the Philippines of a nuclear power facility on an improperly surveyed site dangerously close to a geologic fault and four active volcanoes. The project's organizers had made no provision for disposing of nuclear wastes, and there was some indication that geothermal power would have been a cheaper source of energy.<sup>90</sup> The Philippine nuclear power project resulted from exactly the kind of inadequate environmental planning that NEPA was designed to counteract. Had the Bank followed the requirements of NEPA, it would have consulted with other agencies, such as the Nuclear Regulatory Commission,<sup>91</sup> whose expertise could have revealed the problem early enough to permit relocation of the facility, other revision of the plans, or even cancellation of the project before loan commitments had been made or construction had begun.<sup>92</sup>

The epitome of this type of environmental planning failure is the Aswan Dam, built on the river Nile as a joint Soviet-Egyptian venture. Designed to provide hydropower, irrigation, and flood control, the dam has also disrupted fisheries in the entire Eastern Mediterranean Sea, threatened the fertility of the Nile delta, and created serious unsolved health problems for the farmers who were to have benefited from construction of the dam.<sup>93</sup> The most problematic aspect of the Stevenson preemption proposal was that it would have permitted the United States to finance construction of

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89. See H.R. REP. NO. 1686, *supra* note 86, at 25.

90. *Eximbank Hearings*, *supra* note 21, at 265-66 (statement by The Philippine Movement for Environmental Protection and the Friends of the Filipino People). See also 124 CONG. REC. S16,840 (daily ed. Oct. 2, 1978).

91. See, e.g., *Sierra Club v. Atomic Energy Comm'n*, 6 *Envir. Rep. Cas.* 1980 (D.D.C. 1974).

92. The Philippine authorities apparently relied to their detriment on the United States to calculate the project's risks. "Because his agency lacked the technical expertise and breadth of experience to evaluate the reactor site, the chairman of the Philippine Atomic Energy Commission asked the U.S. Nuclear Regulatory Commission for help." Remarks by Charles Warren, Chairman, CEQ, *reprinted in* 124 CONG. REC. S6516 (daily ed. Apr. 27, 1978). The U.S. Nuclear Regulatory Commission itself has expressed grave doubts about the project, but Eximbank President John Moore stated that much of the Bank's loan had already been disbursed or committed to the project. "If we call a halt now," he said, "you'd have a frustrated contract . . ." 124 CONG. REC. S16,841 (daily ed. Oct. 2, 1978).

93. B. JACKSON & R. DUBOS, *ONLY ONE EARTH* 161-63 (1972).

projects like the Aswan Dam and the Philippine nuclear power facility without first investigating the possible environmental consequences.<sup>94</sup>

#### B. CEQ'S DRAFT REGULATIONS

The draft regulations issued by CEQ distinguished between two geographical classes of environment.<sup>95</sup> They required a full-scale EIS for actions affecting the United States, the global commons, and Antarctica,<sup>96</sup> and required a detailed "Foreign Environmental Statement" (FES) for actions affecting only the environment of one or more foreign nations.<sup>97</sup> The FES represented a well-reasoned attempt to accommodate both the need for environmental safeguards and the special problems of federal agencies conducting international activities. The most important feature of the FES was its flexibility. Each agency would have consulted with CEQ and formulated its own FES procedures, adapted to the requirements of its international operations.

In designing the FES, CEQ envisioned three major changes from the basic EIS process. The first would have allowed an agency to foreclose public comment on an FES whenever "such review would be inconsistent with . . . the agency's statutory objectives."<sup>98</sup> This provision was designed to prevent unnecessary and undesirable second guessing of foreign buyers' decisions by the American public.<sup>99</sup>

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94. There is some indication that the United States has for several years supplied massive financial support, through Eximbank and other sources, for large, long-term development projects in Brazil. The adverse environmental consequences of this so-called "economic miracle" may rival or surpass those of the Aswan Dam. See *Briefing on the Impact of Brazil's "Economic Miracle" on the Amazonian Indians: Hearing Before the Subcomm. on International Development, House Comm. on International Relations, 95th Cong., 2d Sess. 8-9, 16-17, 35-65 (1978)*; S. DAVIS, *VICTIMS OF THE MIRACLE-DEVELOPMENT AND THE INDIANS OF BRAZIL (1977)*.

95. (a) Agencies shall fully comply with these regulations insofar as their major Federal actions significantly affect the environment of:

- (1) The United States and its trust territories.
- (2) The global commons, which consists of areas outside the jurisdiction of any nation (e.g., the oceans).
- (3) Antarctica.

(b) Agencies shall comply with the provisions of these regulations pertaining to foreign environmental statements (sec. 1508. —) insofar as their major Federal actions significantly affect the environment only of one or more foreign nations.

Draft Regulations, *supra* note 73, § 1506.13.

96. *Id.* § 1506.13(a)(3). This expression of the effects doctrine may have influenced the courts in *Sierra Club v. Adams*, 578 F.2d 389 (D.C. Cir. 1978), and *National Organization for Reform of Marijuana Laws v. United States*, 11 Envir. Rep. Cas. 1841 (D.D.C. 1978), whose decisions were both rendered within months after the first appearance of the draft regulations.

97. Draft Regulations, *supra* note 73, § 1506.13(b). The FES was described in Draft Regulations § 1508.—as an EIS modified by the "practical considerations of operating in the international context."

98. *Id.* § 1508.—(b)(1).

99. See notes 66-69 *supra* and accompanying text.

The second modification contemplated by CEQ would have allowed agencies to "take into account special factors which would limit the review period or the required detail of the statement. . . ." <sup>100</sup> An agency like Eximbank could exclude from its FES diplomatically sensitive material as well as information that was unavailable. Thus the Bank would never have been placed in the position of having to collect information its foreign customers were unwilling to release for either political or diplomatic reasons. <sup>101</sup> The draft regulations also acknowledged that planning for an international project may be complete before any United States agency is involved. <sup>102</sup> This deference to complete planning plus the ability to "limit . . . the required detail of the statement" <sup>103</sup> would have allowed the Bank to limit its FES to useful information. If planning were already complete, this narrowing of requirements might yield a very short statement. The draft regulations also addressed the problems of commercial competition and confidentiality, allowing the Bank the same flexibility in soliciting information from its commercial customers as in dealing with foreign governments over diplomatic matters.

The third major change that the draft regulations would have made dealt with several factors peculiar to transnational environmental hazards, which, when present, should always be included in the FES. <sup>104</sup> Recognizing that the U.S. agency would often be in the best position to assay widespread environmental consequences of a project, CEQ would have required a special effort to share those data with the parties affected by the project. <sup>105</sup>

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100. Draft Regulations, *supra* note 73, § 1508.—(b)(2), lists three factors: "(i) Diplomatic considerations or the relative unavailability of information; (ii) Whether the Federal agency role is one limited to passing on proposals developed elsewhere (as opposed to situations where the agency is involved in early planning or joint sponsorship); and (iii) International commercial competition and confidentiality."

101. There are strong indications that the diplomatic sensitivity problem has been greatly overstated. The Agency for International Development, whose overseas financing programs are roughly analogous to those of Eximbank, has "been able to undertake environmental analyses without undue strain on the relations between the United States and foreign countries. In fact, we have found that environmental analysis is no more intrusive . . . than other reviews, e.g., those for social soundness or women in development, that are routinely undertaken by the Agency." *Eximbank Hearings*, *supra* note 21, at 222 (letter from AID Director John Gilligan to CEQ Chairman Charles Warren (Dec. 9, 1977)).

102. See text accompanying note 54 *supra*.

103. Draft Regulations, *supra* note 73, § 1508.—(b)(2).

104. Agency procedures must:

[e]nsure consideration in foreign environmental statements of: (i) Activities which are unlawful or strictly regulated in the United States in order to protect public health or safety; (ii) Activities which threaten natural, ecological, or environmental resources of global importance; and (iii) Activities which may have inadvertent adverse effects on other foreign countries.

Draft Regulations, *supra* note 73, § 1508.—(b)(3).

105. See text following note 56 *supra*; note 87 *supra*.

The operation of the FES procedures can be illustrated by applying them hypothetically to another Eximbank project. The Trans-Gabon Railroad is a Gabonese-planned project connecting that country's mineral-rich interior with the coast. Eximbank is providing \$4.6 million<sup>106</sup> of the projected cost, which exceeds \$1 billion. Because construction of the railroad may endanger the habitat of several animal species, Eximbank's involvement is at least arguably a major federal action that will significantly affect the Gabonese environment and would necessitate some sort of FES.<sup>107</sup> But if an FES were drafted, it would be very short. The threatened environmental damage is fairly slight and is limited entirely to Gabon. Although the project is large, the United States has not participated in planning it, other than by supplying engineering consultants. Furthermore, the Gabonese might justifiably resent an American investigation of an ongoing project. For all of these reasons, the draft regulations would call for a very brief FES covering only the information already available to the Bank.

The CEQ's draft regulations were designed to adapt NEPA to the special problems raised by applying the Act extraterritorially. While maintaining the presumption that federal agencies must evaluate all significant environmental effects, the draft regulations would not have required agencies to gather useless or unavailable information. The flexible provisions of the regulations would have kept the pressure on federal agencies to maximize environmental planning values, in keeping with the spirit of NEPA. At the same time, the draft regulations would have substantially reduced the chance that a federal agency might be crippled by useless and inappropriate environmental formalities.

### C. THE EXECUTIVE ORDER

President Carter's executive order represents a clear retreat from the draft regulations' plan for applying NEPA to overseas activities of U.S. Government agencies. The executive order creates two less stringent alternatives to the EIS: "bilateral or multilateral environmental studies"<sup>108</sup> and "concise reviews of the environmental issues."<sup>109</sup> Actions that affect the

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106. 124 CONG. REC. S16,854 (daily ed. Oct. 2, 1978) (remarks of Charles Brower). *But see Briefing, supra* note 94.

107. The threshold determination for every analysis under the draft regulations is whether NEPA would apply at all. *See* note 49 and text accompanying notes 49-52 *supra*.

108. Exec. Order No. 12,114, *supra* note 9, § 2-4(a)(ii).

109. *Id.* § 2-4(a)(iii).

global commons are the only ones for which a full EIS is required.<sup>110</sup> The executive order never authorizes agencies to prepare a full EIS when the environmental effects of overseas activities are limited to foreign countries.<sup>111</sup> Moreover, the form and content of the statement are left wholly to the agency's discretion. As a result, no agency need ever prepare more than a concise statement of environmental issues, except when the activity in question affects the United States or global commons.

This pervasive emphasis on administrative discretion is the executive order's most significant departure from the position taken by the draft regulations. By substituting precatory language for NEPA's action-forcing provisions, the order commits the entire process of assessing the environmental effects of foreign projects to agency discretion.<sup>112</sup> To allow agencies such wide latitude in establishing the terms on which they will evaluate the foreign effects of their own actions would impair effective judicial review. The authors of the order plainly intended this result.<sup>113</sup>

Several specific limitations further dilute the order's requirements. It does not require any environmental evaluation at all except for significant effects of toxic chemical or radiological hazards strictly regulated or illegal under U.S. law.<sup>114</sup> "Export licenses, permits and approvals" are expressly exempted, as are actions by the President, intelligence activities, and several other types of federal action.<sup>115</sup> Agencies may create further exceptions to their procedures in special circumstances, and may also modify the content, timing, and availability of documents for specified reasons.<sup>116</sup> These exceptions seem to have been carried over from the draft regulations without much thought. In the draft regulations the exceptions modified a stringent EIS requirement and thereby achieved a balance between competing policy considerations. But since the executive order permits agencies to limit their

110. *Id.* § 2-4(b)(i).

111. *Id.* § 2-4(b)(ii-iv). The order does, however, provide an option to produce an EIS for an action damaging to a global resource designated by the President.

112. The executive order's alternatives to the EIS would be unenforceable in court, *id.* § 3-1, whereas NEPA's strength has always depended on effective judicial review. *See, e.g.,* Calvert Cliffs' Coordinating Comm. v. Atomic Energy Comm'n, 449 F.2d 1109 (D.C. Cir. 1971); F. ANDERSON, *supra* note 4, at 23-26.

113. "This Order is solely for the purpose of establishing internal procedures for Federal agencies . . . and nothing in this Order shall be construed to create a cause of action." Exec. Order No. 12,114, *supra* note 9, § 3-1.

114. *Id.* § 2-3(c). Although nuclear plants are covered, nuclear fuel shipments are not. *Id.* § 2-5(a)(v). The nuclear fuel exception in particular has caused concern. *See* Wash. Post, Jan. 6, 1979, at A3, col. 1.

115. Exec. Order No. 12,114, *supra* note 9, § 2-5(a). Eximbank financing is specifically included. *Id.* § 3-4.

116. *Id.* § 2-5(b). *Cf.* Draft Regulations, *supra* note 73, § 1508.—(b)(2) (similar provision).

environmental review to a concise statement, there seems to be little reason to allow further reduction of this minimal duty.<sup>117</sup>

Another very serious problem raised by the executive order is that it does not implement NEPA. As a practical matter, the order fails to conform to the Act because it does not require the agency responsible for a project to prepare an EIS except when there is an effect on the global commons.<sup>118</sup> Legally, the President issued the order under his general authority rather than under NEPA.<sup>119</sup> Accordingly, the order has no direct effect on the duties imposed by NEPA, and agencies complying with the order may still be sued for failing to comply with the Act.<sup>120</sup>

The executive order thus does not determine NEPA's extraterritorial scope but merely establishes "internal procedures" for federal agencies—procedures that would continue in effect even if NEPA were repealed.<sup>121</sup> It is difficult to predict what effect the executive order will have on future attempts to apply NEPA to federal actions abroad. Courts will probably be extremely reluctant to take the initiative in establishing requirements beyond those set forth in the order.<sup>122</sup> Congress, however, is less likely to play a restrained role, making it possible that future legislative action may clarify or expand NEPA duties. Unfortunately the executive branch, whose job it is to clarify NEPA,<sup>123</sup> appears to have sidestepped its responsibilities.

### CONCLUSION

The controversy over NEPA's extraterritorial reach has not been settled, but its focus has shifted from legal to political issues. The clear trend in the law is towards limited extraterritoriality. The recent court decisions discussed in this Note "assume without deciding" that NEPA applies to adverse effects of federal actions everywhere.

In the debates concerning NEPA and Eximbank, two regulatory proposals and a legislative reaction, all occurring within the space of a year, have precluded a judicial response to the problem. The compromise presented by Executive Order 12,114 is seriously flawed, both because it leaves the issue of NEPA's extraterritoriality unsettled and because its pro-

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117. The exceptions do not apply in the case of an EIS covering effects on the global commons. Exec. Order No. 12,114, *supra* note 9, § 2-5(d).

118. See notes 112-13 *supra* and accompanying text.

119. Exec. Order No. 12,114, *supra* note 9, § 1-1.

120. See, e.g., U.S. EXPORT WEEKLY (BNA) No. 239, at A-1 (1979); *id.* No. 245, at A-6 (1979).

121. Exec. Order No. 12,114, *supra* note 9, § 3-1.

122. See notes 30-38 *supra* and accompanying text.

123. NEPA §§ 201(5), 204(3), 42 U.S.C. §§ 4341(5), 4344(3) (1976).

visions are unlikely to prevent the widespread environmental damage that can result from projects like the Aswan Dam.<sup>124</sup>

CEQ's approach, embodied in its draft regulations, had the flexibility to avoid the legitimate problems raised by applying NEPA in the international context. At the same time, it preserved the basic spirit and strength of the Act,<sup>125</sup> so that effective environmental planning could have continued except where it would have been inappropriate or useless. Congress, or preferably the executive branch, should reconsider NEPA's still-undefined extraterritorial reach and implement an effective and unambiguous solution along the lines drawn by the draft regulations.

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124. The executive order presumably would not require any statement, since dams do not pose radiological or toxic chemical hazards.

125. The draft regulations were entirely consistent with NEPA's command to agencies "to use all practicable means, consistent with other essential considerations of national policy," to implement the Act. NEPA § 101(b), 42 U.S.C. § 4331 (1976). The formula developed by CEQ in the draft regulations can be seen as an attempt to crystallize the "other essential considerations" that arise in the international forum.