WHAT'S GOOD FOR THE GOOSE IS GOOD FOR THE GANDER: A PLEA FOR CONGRESS TO AMEND THE NATIONAL ENVIRONMENTAL POLICY ACT TO APPLY TO THE EXTRATERRITORIAL ACTIONS OF THE FEDERAL GOVERNMENT

INTRODUCTION

By combining the broad language of the National Environmental Policy Act ("NEPA")[1] with its own "unquestionable authority . . . to redirect the emphasis of federal administrative agencies,"[2] Congress has forced those agencies to incorporate environmental concerns into their domestic decision-making process. But the environment and agency decisions come into conflict throughout the world, not just domestically.[3] When parties have suggested that NEPA's mandate be directed toward all these agency actions, however, contentious debate has arisen. There is no consensus on whether the expansive language of NEPA can be applied to agencies when they act outside the borders of the United States, its territories, and its possessions.

Unfortunately, there is little in NEPA's language or legislative history to cast light on the issue. While courts have been willing to interpret congressional intent for other issues on which NEPA is similarly silent,[4] they have been remarkably recalcitrant in articulating a coherent body of law regarding the statute's applicability to extraterritorial actions of the federal government. Even in the face of statements by the Council on Environmental Quality ("CEQ")[5] that NEPA does indeed apply to such actions of the federal government, the courts have shied from decisive action.

Recent events have energized the debate. After a decade and a half of dodging the crucial issue, last summer's decision in *Environmental Defense Fund v Massey* has provided the first definitive judicial opinion in the debate: NEPA does not apply extraterritorially.[6] Simultaneously, both House and Senate members proposed bills that would expressly amend NEPA to apply to the government's extraterritorial actions.[7] Two international compacts have also prompted discussion. Both the European Community and a subset of the United Nations have adopted agreements requiring assessment of the environmental effects of certain actions. The compacts are modelled after NEPA, and both are broadly extraterritorial in scope.[8]

Despite present interest, it is doubtful that additional discussion of the present evidence will resolve the debate over extraterritorial application of NEPA. Evidence within NEPA and its legislative history supports both sides, and many others have scoured the terrain and issued well-reasoned opinions. I will refrain from adding another view. Courts, agencies, Congress and others continue to debate the issue, however, and the environmental problems caused by US actions overseas only increase.

With the hope of encouraging action, I have written this paper to distill the issues and alleviate concerns about extraterritorial application. A brief discussion of NEPA's legislative history, agency interpretation, and judicial decisions illuminates its underlying philosophy and hints that extraterritorial application would best fulfill its intent. I will argue along the way that the *Massey* court's analysis was misguided and influenced too heavily by the short-sighted concerns of the present

administration. Congress should pass Senate Bill 1278 and House Bill 1271. Doing so would resolve the debate, cause minimal interference with foreign policy, and could provide long-run economic and ecological benefits for the United States and other nations throughout the world. The amendments would also eliminate the hypocrisy inherent in the present system, offering a lower standard of environmental protection to others that we do not tolerate for ourselves.

DOES NEPA APPLY TO THE VARIOUS FEDERAL AGENCIES WHEN THEY ACT OUTSIDE THE TERRITORIAL BOUNDARIES OF THE UNITED STATES?

A. Legislative History

NEPA was initiated by a joint House-Senate colloquium convened to discuss environmental policy. In its White Paper,[9] the colloquium recognized that political boundaries do not define the global environment or environmental problems, and declared that "[i]t is the policy of the United States that: Environmental quality and productivity shall be considered in a worldwide context."[10] While the colloquium members may have understood that this policy would be limited to decisions made within the borders of the United States, they did not perceive this as a barrier to the infusion of international relations with considerations of ecology or the guidance of domestic activities by the global character of ecological relationships.[11]

Other legislative references to NEPA's international implications are sparse. The House Report argues that "[i]mplicit in [section 4341] 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."[12] This language, however, refers only to the *effects* of projects governed by NEPA. Nothing makes it clear that the language covers (or does not cover) entirely extraterritorial actions — those which occur and whose effects are felt beyond the jurisdiction of the United States.[13]

Legislative history indicates that Congress had a broad definition of "environment" in mind when it adopted NEPA. As one drafter asserted, the term "environment" embraces not only the nation's life-support system, but also that of the world as a whole.[14] Admitting that the primary concern of Congress was the nation's own environmental policy, the drafter insisted that any rational domestic environmental policy must enable the United States to act as a leader in structuring international efforts to protect the earth's biosphere.[15]

B. The National Environmental Protection Act

The language of NEPA is no more illuminating than the legislative history. This is, in part, because NEPA is a policy act and relies on broad language to permit the tailored integration of its policies into each agency's regime.

NEPA's domestic scope is considerable. It guarantees public participation in the decision-making process of agencies by requiring them to predict "the environmental impact of the proposed action" before taking the action and courting its full effects.[16] While attempting to "assure for all Americans safe . . . surroundings," it emphasizes the responsibility each generation has "as trustee of the environment for succeeding generations."[17]

The Act's language also includes several expressions of concern for worldwide environmental issues. An environmental impact statement ("EIS") is required for "*every* . . . major Federal action[] significantly affecting the quality

of the [human] environment."[18] The EIS must discuss "*any* adverse environmental effects" and must identify "*any* irreversible and irretrievable commitment of resources."[19] Acknowledging the "worldwide and long-range character of environmental problems," NEPA also directs federal agencies to cooperate with foreign nations to achieve NEPA's objective of "anticipating and preventing a decline in the quality of [humankind's] world environment."[20] This language articulates a universal mandate and creates no explicit exception for proposed actions beyond the territorial US.

Admittedly, the statute does not explicitly require that federal agencies conduct an EIS concerning their actions abroad. But the language does indicate that "NEPA intend[ed] federal agencies to be []mindful of environmental effects occurring beyond the borders of the United States."[21] Furthermore, it applies to "*all* agencies of the Federal Government."[22] This all-inclusive language may easily be interpreted to support NEPA's extraterritorial application. Moreover, Congress realized that a substantial number of federal agencies are intimately involved in activities outside the United States. Absent an express exemption, it "must have anticipated that . . . NEPA . . . would include these agencies and their actions beyond the United States borders."[23]

Despite the Act's inclusive language addressing international impacts, *all* the federal agencies and *any* type of environmental impact, the statute lacks the requisite explicitness. In an attempt to resolve the uncertainty, the Council on Environmental Quality entered the debate.

C. The Council on Environmental Quality

Between 1976 and 1978, the CEQ detailed in a series of memoranda draft regulations governing the extraterritorial application of NEPA.[24] Finding that NEPA contained "no express or implied geographic limitation . . . to the US or any other area," the Council held that actions of the federal agencies were subject to the mandates of NEPA, no matter where they were to take place.[25] The draft regulations also introduced a "foreign environmental statement" that modified NEPA's EIS procedures to account for concerns about applying NEPA abroad. Under these modifications, agencies could withhold sections of the EIS or restrict public comment to address concerns of delayed action, diplomatic considerations, or interference with trade or sovereignty.[26]

With these draft regulations, CEQ sought "to ensure full consideration of activities that, first, would be unlawful or strictly regulated in the United States, second, would threaten natural resources of global importance, and, third, might have unanticipated adverse effects in other foreign countries."[27] These goals echo the customary norm of international law that a country must ensure that activities under its control do not harm another state's environment.[28]

D. Executive Order 12114

In the face of intense opposition from several federal agencies, CEQ's draft regulations were withdrawn.[29] The problem of interpreting NEPA remained, and in 1979 President Carter issued Executive Order 12114 in an attempt to reconcile the sides and resolve the issue once and for all.[30] Professing to be the government's exclusive and complete determination of the steps to be taken under NEPA for foreign actions, the Order was initially heralded as a successful compromise. It requires one of three forms of environmental assessment ("EA") where federal actions will significantly affect the global commons, globally important resources, or "innocent

bystander" nations — those not involved in the activity. The Order also requires an EA if the activity would be regulated under toxic or radioactive substance laws in the US.[31]

While the Order may be seen as an act of "good citizenship" and "a clear exercise of responsibility . . . that is consistent with the best principles of international conduct,"[32] its influence has been minimal for two reasons.[33] First, the order is rife with exceptions and modifications that were designed, among other considerations, to enable the agency to act promptly when necessary, avoid adversely impacting foreign relations, and avoid infringing on the sovereignty of other nations. Unfortunately, the exceptions created for activities with potential foreign policy conflicts are so numerous and broad that few actions need comply.

Second, the Order was not issued under the authority of NEPA and, in fact, it explicitly states that "nothing in [it] shall be construed to create a cause of action."[34] The failure of federal agencies to comply with the Order cannot, therefore, be challenged. When combined with the reluctance of recent administrations to enforce its provisions, the inability to enforce the Order has been fatal.[35] Between 1985 and 1988, compliance was required in only forty-five instances.[36] Executive Order 12114 did not end the NEPA controversy. Like so many other debates over the interpretation of NEPA, it fell to the courts to address the issue. They have done so, but only by answering questions presented on other, less politically charged grounds.

E. Litigation Regarding NEPA's Extraterritorial Application

Scattered cases have discussed the issue of NEPA's extraterritorial application both directly and tangentially, but their results had been inconclusive until the *Massey* decision last summer. Case after case avoided the crucial question, with individual holdings limited to the facts and policy considerations germane to the case at hand.

In *People of Enewetak v Laird*,[37] the court considered the application of NEPA to actions of the Department of Defense ("DoD") on one of the Pacific Island Trust Territories under United States administration. The DoD was planning to conduct simulated nuclear explosions on the island. The issue before the court was whether NEPA applied to United States Trust Territories.

The court began its analysis by noting that federal legislation applied to the Trust Territories only where Congress evinced such an intent — and according to the court, NEPA's language did not.[38] But NEPA's legislative history and prior case law prompted a closer look. The *Enewetak* court found evidence in NEPA's history that Congress was particularly concerned about the international implications of federal actions.[39] It further observed that NEPA's expansive language reflects "a concern for *all* persons subject to federal action which has a major impact on their environment."[40] On the basis of this evidence and the words of *Calvert Cliffs'*, which declared that "[t]he sweep of NEPA is extraordinarily broad, compelling consideration of *any and all* types of environmental impact of federal action,"[41] the court extended the Act to cover the territories.

After this conclusion, the court faltered. Arguing that the extension of NEPA to the Trust Territories did not raise foreign policy or "balance of world power" problems, the court found it unnecessary to decide the merits of the plaintiff's assertion that "NEPA follows every federal agency and is applicable anywhere in the world that such an agency takes action which will significantly affect the quality of the

human environment."[42]

The next major set of cases involving NEPA's extraterritorial application addressed the proposed construction of the Darien Gap segment of the Pan American Highway through Panama and Colombia. The proposal was hotly contested, as the highway would cut through a unique ecosystem "almost wholly undisturbed by any encroachment of modern civilization."[43]

The district court found the EIS deficient since it (1) failed to consider the potential domestic impact of a breakdown in the program to control the transmission of "foot and mouth" disease and (2) ignored the possibly fatal impacts on two indigenous tribes.[44] While the appeals court reversed, finding the EIS sufficient, both it and the district court agreed that the EIS had to consider the impact on indigenous populations.[45] It was, however, only the potential for *domestic* impacts that set the assessment into motion. Neither court addressed whether an EIS would be required if the only impacts were extraterritorial.

The third case, *Natural Resources Defense Council, Inc. v Nuclear Regulatory Commission ("NRDC v NRC")*,[46] involved a direct test of NEPA's extraterritorial application. The case concerned the construction of a nuclear power plant in the Philippines near an American military base that is situated between four volcanoes in an earthquake zone. The NRC decided to license the export of the technology without first evaluating the health, safety, and environmental impacts within the Philippines. The case presented a situation where the environmental effects would be felt solely within a foreign jurisdiction,[47] but the court again managed to escape the issue of extraterritorial NEPA application.

Basing its holding on narrow grounds relating to concerns about the Atomic Energy Act as amended by the Nuclear Non-Proliferation Act ("NNPA"),[48] the court upheld the decision of the NRC. In the case of nuclear exports, the court argued, "NEPA's putative extra-territorial reach [is] curbed," and it found "only that NEPA does not apply to NRC nuclear export licensing decisions — and not necessarily that the EIS requirement is inapplicable to some other kind of major federal action abroad."[49]

The judges disagreed on the underlying reasons for the decision. Judge Wilkey asserted that requiring an EIS would interfere with the President's ability to control export decisions[50] and delay NNPA's attempt to provide a predictable and expedited nuclear export process.[51] Judge Robinson agreed that potential interference with the NNPA was the deciding factor but argued that considerations of foreign policy actually favored requiring an EIS for potential extraterritorial effects.[52] As he pointed out, "[i]f anything ever should go wrong . . . '[t]he voice of many countries would quickly shift to criticism of the United States for permitting a dangerous export with insufficient attention to the risks to public health and safety and to the environment.'"[53]

NRDC v NRC has not been the only decision to recognize the special, protected status given to nuclear issues when challenged with claims of safety concerns and environmental impact.[54] But because its analysis is restricted to considerations unique to that context, it is not a useful guidepost in determining whether NEPA applies extraterritorially.

Greenpeace USA v Stone[55] came even closer to definitively deciding whether NEPA applies to federal actions abroad. *Greenpeace* involved a joint effort between the United States and German armies to transport chemical

weapons (100,000 rounds of nerve gas) owned by the United States from a storage facility in Germany to Johnston Atoll, an unincorporated US Territory in the Pacific Ocean, pursuant to an agreement President Reagan made with Chancellor Helmut Kohl to remove and destroy all obsolete munitions by 1992. Pursuant to Executive Order 12114, the DoD conducted three separate EAs covering all phases of the removal except the segment from the United States storage site in Germany to the port of Nordenham. This procedure was approved under German law by the Federal Minister of Transport and upheld by the German Administrative Court. Greenpeace challenged the segmentation of the removal action into three phases for the EIS and urged the preparation of a comprehensive EIS.[58]

As with *NRDC v NRC*, the foreign policy considerations presented ultimately outweighed the importance of NEPA's requirements. The court opined that application of the statute to the transfer already approved by Germany would indicate a lack of respect for the German government. It therefore held that a comprehensive EIS was not required but limited its holding to the unique facts of the case.[57] According to the court, NEPA does not apply to "joint actions taken on foreign soil based on an agreement made between the President and a foreign head of state."[58] The court was, however, persuaded that "Congress . . . *may* have intended under certain circumstances for NEPA to apply extraterritorially."[59] Although this was not such an instance, the court suggested, for example, that "where there has clearly been a total lack of environmental assessment by the federal agency or foreign country involved," an EIS *may* be required.[60]

Finally, last summer the District Court for the District of Columbia held definitively that NEPA does not apply to extraterritorial actions of the federal government. *EDF v Massey* involved the National Science Foundation's ("NSF") plans to use an incinerator located on its McMurdo Station in Antarctica to burn food and selected domestic waste.[61] The court's opinion was, however, less than comprehensive. Addressing the issue in only six paragraphs, it found no "plain statement of extraterritorial statutory effect" and refused to extend NEPA.[62] The court relied almost exclusively on the recent Supreme Court decision in *EEOC v Arabian American Oil Co.*,[63] which similarly limited Title VII of the Civil Rights Act. The *Aramco* Court argued that "legislation of Congress, unless contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States."[64]

The *Massey* court's summary analysis is incredibly flawed and shallow. First, it ignores the settled proposition that NEPA applies to actions affecting the global commons. The unique international political status of Antarctica would appear to place it within that category.[65] In addition, the Antarctic Protocol to which the United States is a party requires that "[t]he environmental impacts of proposed activities . . . be considered *in accordance with appropriate national procedures*" before the activities are commenced.[66]

Second, the concerns about interfering with foreign policy that arose in earlier cases did not exist under *Massey*. The NSF's station is under the supervisory jurisdiction of the United States. Furthermore, foreign relations have suffered by *not* applying NEPA in this case: the incineration of wastes may endanger a pristine area of the world protected by several multilateral treaties. The Protocol has even set 1999 as the absolute deadline for the phase out of waste disposal by incineration in Antarctica and encourages the parties to meet this goal "as soon as practicable."[67]

Third, the *Massey* court's nearly complete reliance on *Aramco* is unjustified. In that case, the Supreme Court used the presumption against extraterritorial application expressed in *Foley Bros.* as the basis for finding that without express statutory language, Title VII of the Civil Rights Act of 1964 did not apply overseas.[68] The policy behind *Foley Bros.* rebuttable presumption, however, was the desire to avoid the international discord that might result if the laws of the United States were applied in such a way that they clashed with those of another nation.[69] *Foley Bros.*, like *Aramco*, concerned labor practices in another country. Since the statutes were concerned with regulating domestic affairs, the Court would not risk international conflicts by extending its reach without specific proof of Congress' intent to do so.[70]

According to *Foley Bros.*, however, if the application of the domestic laws of the United States would not significantly infringe on the sovereignty of a foreign state, the presumption against extraterritoriality would not necessarily apply.[71] *Massey* — and other courts applying the presumption to NEPA — entirely overlook this condition.

Finally, the *Massey* court failed to notice the crucial distinctions between the types of regulation involved in the cases. In *Foley Bros.* and *Aramco*, the actors regulated are private parties. In NEPA cases, the actors regulated are branches of the government. Furthermore, the statutes involved in *Foley Bros.* and *Aramco* forbade specific conduct in other countries, whereas NEPA merely governs the decision-making process. Since that process takes place entirely within the United States, courts should be more willing to extend NEPA's application than that of regulations that govern private conduct that takes place wholly within other nations.

The legal analysis of NEPA's extraterritorial application has been inconclusive at best, and at worst short-sighted and misguided. Time after time, courts and respondents alike have plowed through NEPA's language and legislative history and come up dry. Courts lament their inability to extend the act yet consistently limit their holdings to the facts before them, emphasizing sensitive foreign policy implications. The only definitive opinion, *Massey*, is erroneous on the facts. NEPA's scope remains indeterminate.

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Despite the uncertainty, NEPA's requirement of a pre-decision statement of impacts and alternatives has successfully stimulated federal decision-makers to consider environmental impacts.[72] But the focus provided by NEPA is nowhere more important than in the international realm. Despite the growing trend in the international arena to adopt NEPA-type legislation, US agencies continue to refuse to submit their overseas actions to NEPA review. By doing so, the agencies "have damaged the environment irreversibly"[73] and run contrary to the "concept of the collective responsibility of nations for the quality and protection of the earth as a whole" that was expressed at the United Nations Conference on the Human Environment in Stockholm in 1972.[74] The flexibility of NEPA permits, and its underlying philosophy calls for, international application.

Agencies and other defendants involved in the extraterritorial debate are quick to point out that if Congress was concerned that NEPA was not being interpreted properly by the courts, it could amend the statute, as it did Title VII in the wake of the *Aramco* decision.[75] Congress is presently considering two bills that will do just that. The remainder of this paper will

discuss the varied policy reasons supporting such an amendment, rebut the legal arguments voiced in opposition, and conclude that Congress should adopt the amendments as soon as possible.

CONGRESSIONAL PROPOSALS TO EXTEND NEPA'S REACH

Over the last few years, Congress has considered several bills designed to clarify and extend the scope of NEPA's application. All of them would amend NEPA to ensure its international application.

Senate Bill 1089, introduced in 1989, clarified that "NEPA applies to all federal actions, not just those in the United States. It provides for the full consideration of environmental impacts on areas outside US jurisdiction [and] includes cumulative impacts of proposed Federal actions on global climate change, depletion of the ozone layer, and transboundary pollution."[76] Proponents of the bill acknowledged the controversial nature of the amendments, but asserted that the present extraterritorial exemption undercut NEPA's thrust.[77] The sponsors also contended that if President Bush was serious about his purported desire for the United States to become a leader in addressing international environmental challenges, the administration's position against NEPA's extraterritorial application would have to change.[78]

In the same year, the House considered House Bill 1113, which would have added a new section to NEPA to "ensure the formal assessment, in a manner [consistent with NEPA], of the significant effects of [each agency's] major actions, including extraterritorial actions, on the environment outside the jurisdiction of the United States and its trusts and possessions."[79] Rep. Studds (D-MA), who introduced the legislation, pointed to the hypocrisy of the United States' assumption of a leadership role in confronting international environmental problems: the United States generates the most greenhouse gasses, uses the most CFCs, and consumes the most fossil fuels, yet "not one Federal action has been systematically reviewed for its impact on the international environment — as required by NEPA — in this decade."[80]

Both S 1089 and HR 1113 were tabled for discussion in 1989. Their slightly revised successors, S 1278 and HR 1271, are presently before Congress. Either bill would ensure agency consideration of the impacts of federal actions on the global commons and on other nations. The first bill, HR 1271, was introduced in March of 1991 by Representative Studds. It would encourage US leadership in the international environmental realm. One means to that end is the amendment of Section 102(2)(F) to require agencies to "work vigorously" to forge multilateral agreements.[81]

Regarding agency actions on the environment outside the jurisdiction of the United States, the bill requires the CEQ to

> (a) . . . issue regulations under which each Federal agency shall —
>
> (1) ensure the consideration, pursuant to section 102 of [NEPA], of the effects of its actions, including extraterritorial actions, on the environment of the global commons outside the jurisdiction of any nation; and
>
> (2) ensure the formal assessment, consistent with the national security and foreign policy of the United States and in a manner that furthers the objectives of [NEPA], of the effects of its action, including extraterritorial actions, *on the environment*

within the jurisdiction of other nations.

(b) The regulations issued by the [CEQ] . . . shall include guidance for federal agencies for assessing the effects (including cumulative effects) of proposed action, on —

(1) global climate change; (2) depletion of the ozone layer; (3) the loss of biological diversity; (4) transboundary pollution; and (5) other matters of international environmental concern.[82]

True to NEPA's style, this section accords the agencies broad flexibility in considering each action by seeking to strike a balance with other factors of national importance. It offers federal agencies guidance as to the types of impacts that are of significant import in the international setting. At the same time, however, agencies have the discretion, based on their respective areas of expertise, to escape from NEPA's requirements if national security interests or foreign policy considerations so demand. But the "shall" language of the section also puts some teeth into the extraterritorial requirements for which it offers guidance.

The Senate's proposed NEPA amendments were introduced on June 11, 1991 as S 1278. Although substantially similar to the House amendments, the Senate bill more explicitly recognizes certain conflicts that may preclude NEPA application. For example, the bill would amend Section 102(2)(C) to read:

[each agency shall] include in every recommendation or report on proposals for legislation and other major federal actions, *including extraterritorial actions* (other than those taken to protect the national security of the United States, votes in international conferences and organizations, actions taken in the course of an armed conflict, strategic intelligence actions, armament transfers, or judicial or administrative civil or criminal enforcement actions), significantly affecting the quality of the human environment, a detailed statement . . . .[83]

If the listed exemptions are not sufficient, the bill also permits the President to "find, on a case-by-case basis, that it is in the paramount interest of the United States to exempt a major Federal action" from the EIS requirements of a revised Section 102(2)(C).[84] The exemption is a flexible one: the amendments set no boundaries and offer no guidance as to the type of actions that may qualify.

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By clarifying Congress' intent to extend NEPA's application, these two bills answer criticisms voiced by all sides of the debate. They are also consistent with the spirit of NEPA as a policy-oriented statute, imposing no formal mechanism of choice on an agency and merely clarifying that, if the government acts outside of the US, it must consider the environmental impacts of the proposed action. As law, the bills would merely further NEPA's main objective: in agency decision-making, the environment should weigh equally along with other legitimate concerns.

The bills are also responsive to concerns about extending NEPA to extraterritorial actions, including fears of interference with foreign policy and infringement upon the sovereignty of other nations. The following discussion addresses some of the more compelling factors fueling the debate and illustrates that the most commonly expressed fears about extending NEPA's application are ill-founded.

POLITICAL AND LEGAL ARGUMENTS AGAINST EXTENDING NEPA: POINT & COUNTERPOINT

A. Foreign Policy

The design of foreign policy is perhaps the most important activity the federal government undertakes with an effect on the global environment.[85] Despite the significant impact on the environment, many fear that imposing NEPA on projects outside the United States will present conflicts with foreign policy objectives. Additional bureaucratic requirements, it is argued, will damage relations, delay implementation of international development projects, violate principles of international comity and fairness, and place too much stress on foreign relations.[86] But this fear of bureaucratic stagnation glosses over several critical considerations. It is, ultimately, reactionary and baseless.

First, according to the Constitution, Congress has the power "to provide for the common defense and the general welfare."[87] A healthy environment is necessary for national and global security, and our welfare is utterly dependent upon it. In the interest of safeguarding against unknown and potentially severe adverse effects, applying NEPA to extraterritorial actions of the federal government is consistent with the constitutional powers of Congress. Pursuant to that Constitutional grant, Congress' role in foreign affairs is "a legislative component of powers of the United States that inhere in its sovereignty and nationhood."[88]

Second, implicit in the view that NEPA would "interfere" with foreign affairs is the assumption "that NEPA litigation is frivolous or of no public benefit and that statutory amendments cannot contain adequate exemptions to protect the United States' interest abroad."[89] This assumption slights NEPA's successes in the domestic sphere as well as its profound international influence: its ethic and even its very language have been adopted worldwide. Sanctioning NEPA's philosophy, the United Nations and various international bodies have written "a global environmental ethic . . . into treaties, resolutions, and administrative practice" worldwide.[90] "[T]he many recent developments in domestic and international environmental protection have provided a new background against which to measure . . . foreign policy concerns."[91] Within this new framework, NEPA can only assure consistency. It is hypocritical for the US to insist on an EIS for multinational bank development projects while simultaneously refusing to require one for our own agencies' actions overseas. To paraphrase an old adage, we must practice what we preach if we want others to listen and follow.

Third, this narrow perspective ignores the specific accommodations of foreign policy and national defense made in the existing statute and proposed legislation. Section 102 of NEPA requires that agencies comply only "to the fullest extent possible."[92] This flexibility is designed to avoid conflicts between NEPA's implementation and actions deemed essential to national or foreign policy. The proposed amendments add even more flexibility by providing certain explicit exemptions from EIS requirements and establishing (in S 1278) a Presidential waiver that may be used on a case-by-case basis. These provisions recognize the practical difficulties experienced while working within the jurisdiction of a foreign sovereign. Where lack of cooperation of a foreign nation or other considerations of foreign policy make exact compliance impossible, NEPA relieves agencies of that burden and "only mandates gathering and evaluating data that can reasonably be collected."[93] In this way, NEPA and its

amendments allow the agencies to protect essential relationships with other nations without compromising our national policy on the environment.

Fourth, the purported fear of foreign policy conflict merely illustrates the reality of the double role that is played by all nation states. Each country struggles to apply international legal principles while giving effect to the national interests expressed in its laws and regulations.[94] The United States has successfully managed this dual role in other legal areas, finding it necessary and proper to legislate extraterritorially to address antitrust, smuggling, and trademark issues. These laws, designed to protect discrete classes of individuals and the legal values they uphold, can hardly be considered more significant to the national interest than those protecting the environment, which directly affect the entire global population, present and future. To the extent that extraterritorial application of NEPA does conflict with the execution of foreign policy, it merely indicates the presence of the inherent conflict facing national actors in an international realm. Just as for other areas of interest, linking international and domestic law through the successful execution of this double role is crucial for environmental protection.

Finally, the foreign policy of the United States would be enhanced, not hampered, by the extraterritorial application of NEPA. Thus, at the request of nations with equal stakes in Antarctica, the NSF is spending hundreds of thousands of dollars to clean up sites it polluted there. "[T]he very failure of federal agencies to avoid environmental damage by complying with [NEPA] has resulted in ill will abroad."[95] The same failure also leads to lawsuits: the CEQ recently observed that the most frequent cause of action for cases filed under NEPA is for failure to prepare an EIS.[96] By ensuring that agencies engage in impact assessment, the NEPA amendments would avoid significant conflicts and litigation, thereby reducing the potential for delay. Requiring environmental review of all agency actions will present the sort of leadership image expected of the world's most affluent and powerful nation: the United States is as concerned about the environment and welfare of the world's many communities as it is about its own.

B. Jurisdiction

But can this leadership image be exported through the use of NEPA? Since "extraterritoriality is essentially a jurisdictional concept concerning the authority of a nation" to adjudicate rights, establish norms, and exercise power,[97] opponents of extension argue that doing so would not be a legitimate exercise of the United States' jurisdiction.

But three recognized bases for asserting jurisdiction would permit NEPA's extraterritorial application.[98] The first is the "objective territorial" principle. Under this doctrine, a nation has jurisdiction over actions it conducts extraterritorially if those actions have domestic effects. Since the Earth's environment is intimately interconnected, any action taken by the United States government, either at home, within its territories, or abroad, is certain to have some sort of domestic repercussion, such as global warming's effects on crop production, or depleting an important resource found only in another country. Since it is virtually impossible to safeguard the environment of the US without protecting that of other nations, this argument is a legitimate basis for the jurisdiction to apply NEPA to foreign actions of the federal government.[99]

The second possible basis for asserting NEPA's extraterritorial application is the "nationality" principle.

Under this principle, a country may assert prescriptive jurisdiction when a proposed action involves the activities of its nationals, either within or outside its territory.[100] An agency of the United States, therefore, is subject to US law in the performance of official duties, no matter where the performance takes place.[101] Accordingly, Congress may legitimately require that agency officials comply with NEPA when acting abroad in their official capacity.

Finally, the "universality" principle provides that a state may punish offenses of universal concern, such as piracy and terrorism.[102] As we have come to realize, environmental degradation is perhaps more of a threat to the global commons than acts of terrorism, if only because of the harm to future generations. On the basis of the concern expressed in recent flurries of international agreements designed to protect the environment, it is certainly within the jurisdiction of the US Congress to do its part to ensure that our own actors are not contributing to the piracy of the planet's health.

C. Sovereignty

The most fundamental substantive objection to NEPA's extraterritorial application is the impact it would have on the sovereignty of other nations. Would an environmental "double-checking" by the United States thrust us into the internal development decisions of foreign states, intruding into their internal affairs and improperly substituting our standards for their own? As one scholar noted, a "fundamental stumbling block in international law . . . has been the jealously-held sovereignties of 159 independent nation states, states that often were created — and behave — without regard to the common setting in which they exist."[103]

Each nation has the right to govern itself without interference from other nations, and as part of that right, to develop its natural resources as it sees fit.[104] At the same time, however, "[s]tates have . . . the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction."[105] Sovereignty, therefore, is the basis not only for a state's freedom of action, but also the state's responsibility for its actions that injure others.[106]

With the growing attention to environmental problems, more and more nations are agreeing to compromise their sovereignty somewhat in order to protect various resources "that might otherwise be lost to all."[107] As more nations adopt their own environmental assessment laws, the apprehension about interfering with another's sovereignty loses force. If a country requires the preparation of some sort of environmental assessment anyway, it should not consider the NEPA provisions to be an infringement on its sovereignty.[108]

Many fear that requiring an agency of the United States to prepare an EIS in another country would demand the intimate cooperation of that country and would ultimately subject its development program "to the critical and inherently political scrutiny of American comment."[109] This concern is overblown. Preparing an EIS involves no more intrusion and scrutiny than the widely accepted practice of preparing a feasibility study for foreign projects.[110] Consider as well the level of US intervention in other areas of international concern, such as human and civil rights, world financial markets, and the oil supply. Ultimately, the decision whether to intervene is one of policy, not practicality. Past administrations and Congress simply has not yet put environmental issues on parity with other

issues of international scope and importance.

Finally, NEPA primarily governs the procedural conduct of federal agencies, not the substance of individual actions. While agency choices lead to actions and impacts outside the United States, the decisions to assist projects, issue permits, grant loans, and insure investments are made at home. "The United States is not debarred from governing the conduct of *its own citizens* . . . in foreign countries when the rights of other nations or their nationals are not infringed."[111] Since NEPA's scope extends only to US actors, and primarily to US decisions, its extraterritorial application would not hinder the actions of foreign nations or their citizens in violation of international law. If another nation chooses to proceed with a project rejected for unacceptable risks by a US agency, it may do so, looking elsewhere for the desired assistance. Such a policy may lead to difficult decisions, but it does no more than require agencies to afford the people of other nations the same level of respect that they do our own citizens.[112]

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Extending NEPA would have little adverse effect upon our own foreign policy or the sovereignty of other nations. On the contrary, extraterritorial application would bring the US into line with accepted principles of international law, emphasize our role as leaders in the environmental arena, and guarantee consistency in our policies toward concerns overseas. These are, however, only a few of the host of issues that favor amending NEPA.

POLICY ARGUMENTS IN SUPPORT OF NEPA'S EXTRATERRITORIAL APPLICATION

A. Ecological Considerations

We operate in a political context comprised of scores of nations, each acting out of self-interest. Under the most extreme view of sovereignty, nations may develop their own natural resources with impunity as they see fit, whether their action is to squander, hoard, trade or ration. While most nations exhibit a more mild form of sovereignty, they retain a fierce sense of independence and isolation. In this milieu, laws regarding the environment exhibit vast differences, and multilateral agreements are difficult, if not impossible, to arrange.

But ecological effects do not recognize the isolation of human-imposed boundaries. The results of an individual government's regulations and decisions transcend its political boundaries to affect the global environment.

With this interconnectedness comes global responsibility. As one of the Earth's most prosperous and powerful countries, it is imperative that the United States take the lead and demonstrate its commitment to changing the course of current trends toward ozone depletion, global warming, species extinction, and other phenomena that are largely the result of our patterns of industrialization and consumption. NEPA's "look before you leap" philosophy and its integration of scientific information and methodology into policy development have made its implementation an important step toward this leadership. While ecological information is necessarily uncertain, NEPA provides a vehicle by which that uncertainty can be converted into action.

Unfortunately, the present US administration has fallen prey to environmental isolationism and has responded to uncertainty with delay, vowing to make research a priority but forestalling decisive action.[113] Other nations, however, have recognized the necessity of working together to prevent international environmental damage and have chosen to respond while studying.[114] The United States must as well.

By applying NEPA to international actions, the United States can simultaneously affirm the unity of environmental problems and develop solutions to solve those problems. Environmental Impact Assessment ("EIA") review of extraterritorial actions may either prompt beneficial actions or minimize the adverse effect of projects planned for other reasons. In any event, NEPA's extension would make US activities overseas a model for ecologically sensitive planning, and would do so while acting, rather than waiting, to preserve the environment.

B. Economic Considerations

Although a greater understanding of the relationship between economic development and environmental concerns is needed,, experience has shown that "good economic policies and good environmental policies are mutually reinforcing."[115] It is usually far cheaper and more effective in the long run to prevent environmental damage than to clean it up or otherwise address its consequences.[116] This is true on both national and individual levels. Even the global economy, ultimately dependent on the consumption of resources, relies on those smaller-scale activities that are so intimately affected by the quality of their environment.

Unfortunately, on a national level, shorter-term needs often outweigh longer-term perspectives. Foreign exchange necessary for development depends on resource exploitation. To the extent that the sale or lease of resources and land to industrialized nations will be affected by the EIS process, developing nations reject it, believing that it will impede their economic progress.[117] But the short-term view leads too quickly to the over-exploitation of fragile ecosystems that contain the natural resource base many developing countries need for future growth. Poorly considered development can thereby imperil the biological foundations of national, and ultimately global, economies.[118] Requiring an EIS before a project may be implemented, therefore, merely generates the information and analysis necessary to make the most well-informed decision. An EIS can take into consideration ecological and social factors and help design projects to suit local environments.[119] The EIS analysis may avert potentially devastating effects associated with a project, thereby protecting development, the environment, and the economy of the country. Feasibility studies (regularly conducted in the context of international trade) engage in essentially the same analysis from an economic point of view, yet rarely evoke the objections and accusations that plague proposed EIS analysis under NEPA.

On a smaller scale, American businesses and government officials make arguments against the extension of NEPA that are surprisingly similar to those made by developing countries. The vociferous American business community fears that its ability to compete in foreign markets "will be dramatically curtailed by rendering governmentally sponsored or approved exports subject to NEPA,"[120] that the imposition of domestic environmental regulations burdens international trade, and that lawsuits will cause serious delays and frighten away potential partners.[121] Such arguments are potent in a time of economic uncertainty,[122] and as a result the

broad principles embodied in NEPA often succumb to the pressures of short-term economic interests and political momentum.

But some companies that feared similar horrors with the domestic imposition of NEPA have found differently. They testify that the use of more efficient technologies and pollution control devices has actually boosted their profits and created new markets while relieving some of the threats of future litigation.[123] Even if the fears are valid, similar complaints arguing against NEPA application in the domestic context have been rejected in the courts,[124] which recognize that NEPA represents a reprioritization of national goals and requires some sacrifice for the greater good of environmental protection. Extraterritorial extension would simply further this goal.

In a perfect world, competitive advantage based on differing environmental laws could be eliminated by orchestrating them on an international scale.[125] Under such a regime, no one country would benefit from exploiting its own, or another's, environment. By strengthening our own environmental assessment rules, the US can encourage the trend toward such regulation. In the meantime, businesses may well find that ecological responsibility costs money. That tradeoff, however, is little different than the costs of workers' compensation, or unemployment insurance. Again, it is a question of priorities. Considering the potential harms stemming from inattention or active ignorance, some increased cost to business is a small price to pay for the added protection of the global environment.

C. Equitable Considerations

Developing countries have traditionally been suspicious of attempts by the industrialized nations to encourage environmental protection regimes. They are often worried that the movement "conceal[s] a neo-imperialist scheme to retard their economic growth" and to keep them in a perpetual state of dependency, casting them as both the subservient suppliers of underpriced raw materials and the consumers of the industrialized nations' output.[126] Opponents of this so-called environmental imperialism are quick to point out statistics that expose an element of hypocrisy in the alarmist reports of the industrialized world. Countless reports show that "the principal causes for the deterioration of the environment on a world-wide scale are the patterns of industrialization and consumption as well as waste in the developed countries."[127] When "each individual in the industrialized nations draws, on the average, thirty times more heavily on the limited resources of the earth than [a] fellow [being] in the developing countries[,] . . . simple facts inevitably raise the question of equality, of more equal distribution between countries and within countries."[128]

Several Latin American countries have spoken out against these inequalities of consumption and responsibility. They "urge the industrialized countries to assume full responsibility commensurate with their financial and technological resources to reverse the process of defacement of the environment."[129] The industrialized nations, being richer as well as greater consumers, have the resources and the room for change.[130] In contrast to the United States, many European countries have already taken measures to substantially reduce their emissions.[131] The US, the highest per capita consumer of food and energy in the world, should follow their lead and demonstrate its willingness to pay the price for the toll it takes on the international environment.

At the same time, compliance with

NEPA when acting abroad would lend much integrity to US actions and decisions and would strengthen its "political and moral force by eliminating the double standard that honesty is warranted at home, but not abroad."[132] Where the absence of an EIS permits the export of environmentally unsound practices which have been prohibited or made subject to strict control domestically, the hypocrisy of the United States stands as a significant barrier in encouraging international environmental protection. Applying NEPA to those actions is an important step in the right direction.

D. Poverty and Environmental Degradation: Mutually Reinforcing

Even if the industrialized nations took on their share of responsibility for protecting the international environment, the problem would not be solved. The foremost environmental problem in the world is the poverty of the Third World, and many developing countries see industrial growth as the only route by which to escape it.[133] As a result, many of these countries are all too eager to accept the polluting industries and unwanted toxic and hazardous wastes of the industrialized world in exchange for debt relief, agricultural assistance, and a few jobs. Yet the exorbitant debt many of them acquired in the aftermath of "de-colonialization" continues to motivate their transformation into net exporters of capital to the creditor countries at the cost of intolerable social, economic, and environmental sacrifices.[134] The Latin American and Caribbean Summit Declaration asserted that the underdevelopment and environmental deterioration experienced in the Third World are "factors in a vicious circle that condemns millions of people to a quality of life beneath the norms of human dignity."[135] It is only by disrupting this cycle that the steady motion toward environmental ruin can be averted. The United States can play a significant role in that disruption.

Because of its reliance on overseas resources, the magnitude of its international trade, and the numerous activities of its agencies abroad, the United States plays the principal role in determining how the world's resources are allocated and, ultimately, exhausted. With this preeminent position and the repercussions of its activities comes a concomitant moral and political responsibility "to ask questions . . . before it asks the world to blindly leap off environmental cliffs."[136] Although no one country can maintain the health of the biosphere unilaterally, the influence of the United States is so pervasive and powerful "that we cannot ignore our pivotal role in protecting and improving world environmental health."[137]

Our position of power and affluence is not inevitable. Along with the "new world order" will likely come a reordering of resource allocations and priorities. If we are to protect our national interests, it is imperative that we "move toward an entirely new, ecologically oriented foreign policy that places its greatest emphasis on the global balances among population, resources and environmental quality."[138] One important step will be for the US to uphold Principle 21 of the Stockholm Convention, which states, in part, that

> states have . . . the responsibility to ensure that activities within their jurisdiction *or control* do not cause damage to the environment of other states or of areas beyond the limits of a national jurisdiction.[139]

The House and Senate bills would take on that responsibility. Investigating the impacts of a proposed activity abroad will identify possible adverse effects, just as the EIS process does at home. In conjunction with Principle 21, extending NEPA to extraterritorial actions will guarantee that the United States does

not impose deleterious effects on other, bystander nations.

CONCLUSION

NEPA's success is indisputable. Landmark legislation at the time of its introduction, it is no longer unique in its approach to protecting the environment. It is by many estimates the most widely heralded and followed US law in the world: approximately eighty-seven nations and most of the international and multinational development banks have followed the United States' lead and adopted EIA-type laws of their own. All of these laws were modelled after NEPA.[140] In addition, there have been a number of international organizations created to protect and preserve the environment.[141] Their agreements and conventions exhibit a remarkable unity of mind and common philosophy toward environmental protection. Unfortunately, many of these laws and organizations are largely ineffective. To assist them in their development, the US must continue to grow in its environmental commitment to the international realm.

All the arguments commonly raised against extending NEPA's application to cover extraterritorial actions actually favor the broader scope. Moreover, environmental protection is integral to a host of other economic and ethical issues that concern us daily. Just as we attempt to lead in those areas, our responsibilities as one of the most powerful and prosperous nations in the world militate a new stewardship on the part of our government. Congress should act this session to amend NEPA and show the rest of the world that they, too, have a right to a healthy and safe environment.

- Michelle B. Nowlin

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1. Pub L No 91-190, 83 Stat 852 (1970), codified at 42 USC §§ 4321-4361 (1988).

2. Lynton K. Caldwell, *Science and the National Environmental Policy Act: Redirecting Policy Through Procedural Reform* 53 (U of Alabama, 1982).

3. See, for example:

> "[T]he Air Force has polluted soil and groundwater at virtually every one of its airfields in Europe. In Japan, lead and mercury have been detected . . . at a Navy station . . . . In Guam, an aquifer that supplies drinking water to much of the island's population has been contaminated by a carcinogen dumped by the Navy and Air Force . . . . There also undoubtedly has been massive environmental damage from projects overseas sponsored by the Bureau of Reclamation and the Army Corps of Engineers."

Bruce S. Manheim, Jr., *Pollution Law Goes Abroad*, Natl L J 15, 15 (Oct 14, 1991) (citing Worldwatch Institute study).

4. For examples of cases in which courts have been willing to interpret Congressional intent regarding NEPA, see generally *Marsh v Oregon Natural Resources Council*, 490 US 360, 371 (1989) (holding that NEPA is purely a procedural statute that does not mandate substantive decisions); *Vermont Yankee Nuclear Power Corp. v NRDC*, 435 US 519 (1978) (agencies need only examine "feasible" alternatives under environmental impact analysis; NEPA does not require an agency to adopt any particular internal decision-making structure); *Sierra Club v Siegler*, 695 F2d 957, 978 (5th Cir 1983) (Where NEPA applies, the lead agency must prepare an environmental impact statement that includes "at least a broad, informal cost benefit analysis . . . of the economic, technical and environmental costs and benefits of a particular action."); *Calvert Cliffs' Coordinating Comm. v US Atomic Energy Commission*, 449 F2d 1109 (DC Cir 1971) (environmental issues must be considered at every important stage in the decision-making process). See also Scott C. Whitney, *Should the National Environmental Policy Act Be Extended to Major Federal Decisions Significantly Affecting the*

Environment of Sovereign Foreign States and the Global Commons? 1 Vill Envir L J 431, 432 ("NEPA contains no provisions specifically authorizing enforcement, judicial review, or citizen suits," yet courts have construed its provisions as creating enforceable nondiscretionary duties).

5. The CEQ was created by NEPA to issue its interpretive and implementing regulations. 42 USC §§ 4342-4344.

6. 772 F Supp 1296 (D DC 1991).

7. HR 1271, 102d Cong, 1st Sess (Mar 5, 1991); S 1278, 102d Cong, 1st Sess (June 11, 1991), in 137 Cong Rec S7631 & S7633 (June 12, 1991). See text accompanying notes 81-84 for a detailed discussion of these two bills.

8. See European Community Council Directive: On the Assessment of the Effects of Certain Public and Private Projects on the Environment, Art 7 (June 27, 1985) (requiring environmental impact assessment (EIA) for extraterritorial actions within the EC) (Doc No 85/337/EEC) (requiring environmental impact assessment (EIA) for extraterritorial actions within the EC); United Nations Conference on Environmental Impact Assessment in a Transboundary Context (done at Espoo, Finland, Feb 25, 1991), in 30 ILM 800 (1991) (requiring signatories engaging in activities with transboundary effects to notify the affected nations and permit them to participate in the EIA).

9. Congressional White Paper on a National Policy for the Environment, in 115 Cong Rec 29078 (Oct 8, 1969) ("White Paper").

10. Id at 29081. See also the statement of Dr. Dillon Ripley summarizing "the feeling of the colloquium": "[T]o speak about environmental quality without at least referring to the fact of the international components and consequences of even our activity as Americans . . . appears to me to be somewhat shortsighted." Id at 29080.

11. Id at 29079-80 & 29085. The colloquium considered NEPA to be an evolving statute which would adapt with changing ecological knowledge. Members reiterated the need for continued study of ecology in order to better understand environmental alternatives. Id at 29081.

12. National Environmental Policy Act of 1969, HR Rep No 91-378, 91st Cong, 1st Sess 9 (1969), in 1969 USCCAN 2751, 2759.

13. Several cases have held that domestic conduct with extraterritorial effects is covered by the EIS requirements under the "objective territorial" principle. See text accompanying note 99 for a review of case law in this regard.

14. The National Environmental Policy Act of 1969, Hearings on S 1075, S 237 & S 1752 before the Senate Committee on Interior & Insular Affairs, 91st Cong, 1st Sess 128 (1969) (statement of Lynton K. Caldwell).

15. Id at 128-29.

16. 42 USC § 4332(2)(C)(i).

17. 42 USC § 4331(b)(1)-(2).

18. 42 USC § 4332(2)(C) (emphasis added).

19. 42 USC § 4332(2)(C)(ii) & (v) (emphasis added).

20. 42 USC § 4332(2)(F).

21. Forthcoming CEQ Regulations to Determine Whether NEPA Applies to Environmental Impacts Limited to Foreign Countries, 8 ELR 10111, 10112 (1978) ("CEQ Regulations").

22. 42 USC § 4332(2) (emphasis added).

23. Joan R. Goldfarb, *Extraterritorial Compliance With NEPA Amid the Current Wave of Environmental Alarm*, 18 BC Envir Affairs L Rev 543, 593 (1991) ("It appears that approximately 29 out of the 102 agencies on the CEQ's list of agency liaisons (over 25%) are designed to participate in extraterritorial activities.") (citing Updated List, Federal Agencies: National Environmental Policy Act Liaisons, 55 Fed Reg 36683, 33683-86 (1990).

24. See CEQ Regulations (cited in note 21).

25. Id at 10112-13 (citing CEQ, Memorandum to Heads of Agencies on Applying the EIS Requirement to Environmental Impacts Abroad (Sept 24, 1976); CEQ, Memorandum to Heads of Agencies on Draft Regulations (40 CFR § 1508.13) to Implement the National Environmental Policy Act (Dec 12, 1977)).

26. CEQ Regulations at 10112-13 (citing CEQ, Memorandum to Heads of Agencies on Draft Regulations (40 CFR § 1509.__) to Implement the National Environmental Policy Act (NEPA) for Agency Activities Affecting the Environment in Foreign Nations and the Global Commons (Jan 11, 1978)).

27. CEQ Regulations at 10112.

28. Restatement (Third) of the Foreign Relations Law of the United States § 601(1)(b) (1987) ("Restatement of Foreign Relations"). See also Declaration of the United Nations Conference on the Human Environment, Principle 21 (June 16, 1972), in 11 ILM 1416, 1420 (1972) (UN Doc A/CONF48/14 & Corr 1 (1972)) ("Stockholm Declaration").

29. President Orders Environmental Review of International Actions, 9 ELR 10011, 10016 (1979).

30. Exec Order 12114 (Jan 4, 1979), 3 CFR 365 (1980), in 42 USC § 4321 (1988) (covering environmental effects abroad of major federal actions) ("EO 12114" or "Order").

31. Id at § 2-3.

32. Caldwell, *Science and the NEPA* at 25 (cited in note 2).

33. See generally *Environmental Law Handbook* 274 (Govt Institutes, 11th ed 1991).

34. EO 12114 at § 3-1 (cited in note 30).

35. See *Environmental Law Handbook* at 274 (cited in note 33).

36. 135 Cong Rec S5990 (June 1, 1989) (statement of Sen. Lautenberg (D-NJ)).

37. 353 F Supp 811 (D Hawaii 1973).

38. Id at 814-15.

39. Id at 816-17.

40. Id at 816. See also 115 Cong Rec 40416-17 (Dec 20, 1969) (comments of Sen. Jackson (D-WA)).

41. *Enewetak*, 353 F Supp at 817 (citing *Calvert Cliffs'*, 449 F2d at 1122) (emphasis added).

42. *Enewetak*, 353 F Supp at 817 n10.

43. *Sierra Club v Coleman*, 421 F Supp 63, 65 (D DC 1976), vacated as *Sierra Club v Adams*, 578 F2d 389 (DC Cir 1978).

44. *Coleman*, 421 F Supp at 65-67.

45. *Adams*, 578 F2d at 396; *Coleman*, 421 F Supp at 65-66.

46. 647 F2d 1345 (DC Cir 1981).

47. Id at 1366. If impacts on the global commons had been implicated, the NRC could have considered those impacts in the EIS as a policy choice. In such a case, sovereignty issues are not as delicate, and since the United States is a major user of the global commons, it "has a responsibility to see that its own activities do not unnecessarily degrade the environmental quality of such areas." *Matter of Westinghouse Electric Corp.*, 11 NRC 631, 651-52 (1980).

48. Atomic Energy Act of 1954, 42 USC §§ 2011-2296 (1988); Nuclear Non-Proliferation Act of 1978, 22 USC §§ 3201-3282 (1988) ("NNPA").

49. *NRDC v NRC*, 647 F2d at 1348 & 1366.

50. Id at 1358.

51. The NNPA "superimpose[s] a special perspective on the singular goal NEPA serves

in the wholly domestic context. For international nuclear transactions, it appears to be the will of Congress that *bilateral or multilateral cooperation respecting the environment take precedence over unilateral American efforts.*" Id at 1348 (emphasis added).

52. Id at 1372. Judge Robinson also argued that conducting an EIS would not be "exporting" NEPA: Because the decision and licensing procedure under the NNPA "takes place entirely within the United States, . . . domestic law completely expends its force then and there." Id at 1384 n138. He also, however, noted that "Congress has not issued any plain mandate to NRC to safeguard the environment or even the citizens of recipient countries." Id at 1380 (citations omitted).

53. Id at 1378 (quoting Letter from Sen. Pell (D-RI) to the NRC (Nov 9, 1979)).

54. See, for example, *Pacific Gas & Electric Co. v State Energy Resources Conservation & Development Comm'n*, 461 US 190, 205 (1983) (federal government has occupied the entire field of nuclear safety concerns).

55. 748 F Supp 749 (D Hawaii 1990), appeal dismissed 924 F2d 175 (9th Cir 1991).

56. Id at 752-54.

57. Id at 759.

58. Id at 757.

59. Id at 759 (emphasis in original). This sort of case-by-case application was anticipated by NEPA, which empowers federal agencies "to use all practicable means, *consistent with other essential considerations of national policy*," to comply with and follow NEPA's directives. 42 USC § 4331(b) (emphasis added).

60. *Greenpeace*, 748 F Supp at 761.

61. *Massey*, 772 F Supp at 1296-97.

62. Id at 1297.

63. 111 S Ct 1227 (1991).

64. Id at 1230 (citing *Foley Bros. v Filardo*, 336 US 281, 285 (1949)).

65. See the Antarctic Treaty, Art IV, [1961] 12 UST 794, TIAS No 4780 (done at Washington, DC, Dec 1, 1959) (no national acts give rise to a claim of sovereignty on the continent); Antarctic Treaty Consultative Parties: Final Act of the Eleventh Antarctic Treaty Special Consultative Meeting and the Protocol on Environmental Protection to the Antarctic Treaty, Preamble, in 30 ILM 1455, 1460 (1991) (done at Madrid, Oct 4, 1991) (recognizing Antarctica as a "special conservation region") ("The Protocol"). See also Douglas M. Zang, *Frozen in Time: The Antarctic Mineral Resource Convention*, 76 Cornell L Rev 722, 760-68 (1991) (student note); John J. Barceló, III, *The International Legal Regime for Antarctica*, 19 Cornell Intl L J 155, 160 (1986).

66. The Protocol, Annex I, Art 1, ¶ 1, in 30 ILM at 1473 (emphasis added) (cited in note 65).

67. The Protocol, Annex III, Art 3, ¶ 2, in 30 ILM at 1480 (cited in note 65).

68. *Aramco*, 111 S Ct at 1230-36.

69. See id at 1230.

70. See id at 1230-34; *Foley Bros.*, 336 US at 285-86.

71. *Foley Bros.*, 336 US at 284 (citing *Blackmer v US*, 284 US 421, 437 (1932)).

72. To the extent that NEPA has fallen short of its full potential, one commentator hints that much blame can be placed on the indifference of past administrations. Caldwell, *Science and the NEPA* at 78 (cited in note 2).

73. Manheim, *Pollution Law Goes Abroad* at 15 (cited in note 3).

74. Lynton K. Caldwell, *International Environmental Policy: Emergence and Dimensions* 55 (Duke, 2d ed 1990).

75. Civil Rights Act of 1991 at § 109, Pub L No 102-166, 105 Stat 1071, 1077 (1991), amending 42 USCA § 2000e (West Supp 1991) (entitled "Protection of Extraterritorial

Employment").

76. S 1089, 101st Cong, 1st Sess (June 1, 1989), in 135 Cong Rec S5990 (June 1, 1989). The relevant text would amend 42 USC § 4332(2)(C) to "includ[e] extraterritorial actions (other than those taken to protect the national security of the United States, actions taken in the course of an armed conflict, strategic intelligence actions, armament transfers, or judicial or administrative civil or criminal enforcement actions)."

77. 135 Cong Rec S5990 (June 1, 1989) (statement of Sen. Lautenberg (D-NJ)).

78. The administration has consistently blocked efforts to confirm NEPA's application. Administration officials have indicated that President Bush will veto the proposed legislation presently before Congress that would amend NEPA to apply to the international environment. See Manheim, *Pollution Law Goes Abroad* at 15-16 (cited in note 3).

79. HR 1113, 101st Cong, 1st Sess (Feb 23, 1989), in 135 Cong Rec H6836 (Oct 10, 1989).

80. 135 Cong Rec H6838 (Oct 10, 1989) (statement of Rep. Studds (D-MA)).

81. "[Each agency shall] recognize the global and long-range character of environmental problems and work vigorously to develop and implement policies, plans, and actions designed to support national and international efforts to enhance the quality of the global environment." HR 1271 (cited in note 7). Contrast this with the section as it presently reads: "[Each agency 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 initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of [hu]mankind's world environment." 42 USC § 4332(2)(F).

82. HR 1271 (emphasis added) (cited in note 7).

83. S 1278 (emphasis added) (cited in note 7).

84. Id.

85. Eugene V. Coan, Julia N. Hillis, & Michael McCloskey, *Strategies for International Environmental Action: The Case for an Environmentally Oriented Foreign Policy*, 14 Nat Res J 87, 97 (1974).

86. Goldfarb, 18 BC Envir Affairs L Rev at 565 (cited in note 23).

87. US Const, Art I, § 8.

88. Restatement of Foreign Relations § 1, reporter's note 1 (citations omitted) (cited in note 28).

89. Stanley Millan, *Wanted: NEPA, Dead or Alive. Reward: Our Global Environment*, 22 Envir Rptr (BNA) 2081, 2084 (1991).

90. Caldwell, *Science and the NEPA* at 50 (cited in note 2).

91. Goldfarb, 18 BC Envir Affairs L Rev at 569 (cited in note 23).

92. 42 USC § 4332.

93. Eric S. Hunter, *The Filipino Nuke Stays Afloat While the D.C. Circuit Remains at Sea: The Need for Environmental Impact Statements Covering Foreign Territories*, 15 NYU J Intl L & Pol 435, 473 (1982-83) (student note).

94. Oscar Schachter, *International Law in Theory and Practice* at 383 (M. Nijhoff, 1991).

95. Manheim, *Pollution Law Goes Abroad* at 16 (cited in note 3).

96. CEQ, *21st Annual Report on Environmental Quality* 232 (1991).

97. Mary A. McDougall, *Extraterritoriality and the Endangered Species Act of 1973*, 80 Georgetown L J 435, 445 (1991) (citations omitted).

98. See Restatement of Foreign Relations

§§ 402(1)(a)-(b) & 404 (cited in note 28).

99. This principle was essentially the basis for the court's holding in *Sierra Club v Coleman*, which required an EIS for actions in Panama because of the potential for transmitting disease into the US. See discussion accompanying notes 43-45.

100. Restatement of Foreign Relations § 402(2) (cited in note 28). See also *Steele v Bulova Watch Co.*, 344 US 280, 282 (1952) (US may assert jurisdiction over its own citizens).

101. See Coan, 14 Nat Res J at 94 (cited in note 85).

102. Restatement of Foreign Relations § 404, comment b (cited in note 28). While universal jurisdiction has traditionally been exercised in the area of criminal law, its application to non-criminal law is not precluded. Id.

103. Zygmunt J.B. Plater, *Environmental Law and Policy* 1031 (West, 1992).

104. Restatement of Foreign Relations § 206, comment b & reporter's note 1 at 96 (each state has right to exercise "permanent sovereignty" over its wealth) (cited in note 28).

105. Stockholm Declaration (cited in note 28). See also *US v Canada*, 3 Rep Intl Arbitral Awards 1905 (1949) (The *Trail Smelter Case*) (Sulphur dioxide emissions from a Canadian plant caused environmental damage in Washington state. The tribunal held that Canada must compensate the US government for the damage.); *France v Spain*, 12 Rep Intl Arbitral Awards 281 (1957) (The *Lake Lanoux Arbitration*) (France planned to divert waters along the Spanish border. The tribunal required it to consider the potential adverse effects on Spain's water supply.); *United Kingdom v Albania*, [1949] ICJ 4, 22 (The *Corfu Channel Case*) (Every state has an "obligation not to allow knowingly its territory to be used for acts contrary to the rights of other states.").

106. Frank P. Grad, 3 *Treatise on Environmental Law* § 13.02[2][b] at 13-36 (1990).

107. Caldwell, *International Environmental Policy* at 22 (cited in note 74). For examples of some of these agreements, see Treaty Banning Nuclear Weapons Tests in the Atmosphere, in Outer Space and Under Water, [1963] 14 UST 1313, TIAS No 5433 (1963) (done at Moscow, Aug 5, 1963); Convention on International Trade in Endangered Species of Wild Fauna and Flora with Appendices, 1973, [1976] 27 UST 1087, TIAS No 8249 (1973) (done at Washington, DC, Mar 3, 1973); Convention on Long-Range Transboundary Air Pollution, [1981-82] 34 UST 3043, TIAS No 10541 (1979) (done at Geneva, Nov 13, 1979); Vienna Convention for the Protection of the Ozone Layer, TIAS No 11097 (1985) (done at Vienna, Mar 22, 1985); Canada-United States: Agreement on Air Quality, in 30 ILM 676 (1991) (signed at Ottawa, Mar 13, 1991). See also the Hague Declaration on the Environment, in 28 ILM 1308, 1309 (1989) (done at The Hague, Mar 11, 1989) (recognizing the need to relinquish some claim to sovereignty and embrace cooperation to protect the world's resources and long term health); Paris Economic Summit: Economic Declaration, ¶ 33, in 28 ILM 1293, 1296 (1989) (done at Paris, July 15-16, 1989) ("We will work together to achieve the common goals of preserving a healthy and balanced global environment in order to meet shared economic and social objectives and to carry out obligations to future generations.").

108. See Nicholas C. Yost, *NEPA: A System That Works — Everywhere*, 8 Envir Forum 28, 30 (Nov-Dec 1991); Goldfarb, 18 BC Envir Affairs L Rev at 596 (cited in note 23).

109. John T. Burhams, *Exporting NEPA: The Export-Import Bank and the National Environmental Policy Act*, 7 Brooklyn J Intl L 1, 15 (1981).

110. 2 *Grad Treatise* § 9.06[2] at 9-268 to 9-269 (cited in note 106).

111. *Steele*, 344 US at 285-286 (citations omitted) (emphasis added).

112. See Yost, 8 Envir Forum at 30 (cited in note 108); Caldwell, *Science and the NEPA* at 24 (cited in note 2) ("There is no apparent

reason why the United States should act abroad, in violation of principles and procedures established for its own conduct, to assist projects that might either have a deleterious effect upon the neighbors of countries in which the project was undertaken or upon substantial numbers of people of the host country either now or in the future.").

113. See Jessica Tuchman Matthews, *The Greenhouse Effect: Apparently It's For Others to Worry About*, Wash Post A19 (July 4, 1990). Despite the rhetoric, the amount spent on the research and development of pollution control technology amounted to less than .01% of GNP in 1989. CEQ, *21st Annual Report* at 270-71 (cited in note 96).

114. Many European nations have concluded "that present scientific understanding, while riddled with uncertainties, is nonetheless adequate to merit launching a major policy response." Matthews, *The Greenhouse Effect* at A14 (cited in note 113).

115. Paris Economic Summit: Economic Declaration, ¶ 37, in 28 ILM at 1297 (cited in note 107).

116. Edith Brown Weiss, Introductory Note to a Special Section of Documents on the Environment, in 28 ILM 1300, 1302 (1989).

117. Goldfarb, 18 BC Envir Affairs L Rev at 587 (cited in note 23).

118. For example, "[t]he erosion and soil deterioration that accompany deforestation exacerbate drought conditions, possibly contributing to famines like that in Ethiopia." 134 Cong Rec S11950 (Sept 8, 1988) (statement of Sen. Symms (D-ID)). A letter from the Sierra Club to the Senate reports that multinational development banks have lent $25 billion to third world countries to finance a variety of development projects. "Ironically, many of the projects intended to enhance the well-being of these countries have done just the opposite, wreaking tremendous damage on the environment and inflicting hardship on indigenous peoples." 135 Cong Rec S16666 (Nov 21, 1989). See generally Chris Wold & Durwood Zaelke, *Establishing an Independent Review Board at the European Bank for Reconstruction and Development: A Model for Improving MDB Decisionmaking*, 2 Duke Envir L & Policy Forum 59 (1992).

119. 135 Cong Rec S16667 (memorandum by Edward E. Yates, CEQ Staff Attorney, on Environmental Impact Assessment: What It Is and Why International Development Organizations Need It).

120. 2 *Grad Treatise* § 9.06 at 9-266 (cited in note 106).

121. Because NEPA applies to any federal action, any agency decision to finance, assist, conduct, regulate or approve a private entity's venture is subject to NEPA's guidelines. The breadth of this reach is significant; in fact, NEPA continues to be a primary basis for challenges to public and private development decisions in the United States. See *Environmental Law Handbook* at 250 (cited in note 33).

122. The 90-day moratorium on new regulation announced by President Bush in his 1992 State of the Union address epitomizes the belief that governmental interference is costly to industry and impedes economic progress. For the text of the announcement, see *State of the Union: Transcript of President Bush's Address on the State of the Union*, NY Times A16 (Jan 29, 1992).

123. See David Kirkpatrick, *Environmentalism: The New Crusade*, Fortune 44 (Feb 12, 1990); Robert A. Frosch & Nicholas E. Gallopoulos, *Strategies for Manufacturing*, Scientific American 144 (Sept 1989).

124. See, for example, *Calvert Cliffs'*, 449 F2d at 1109.

125. 3 *Grad Treatise* § 13.01[3] at 13-18 (cited in note 106).

126. Caldwell, *International Environmental Policy* at 48 (cited in note 74). See also 3 *Grad Treatise* § 13.01[4] (cited in note 106). The industrialized nations' philosophy is, for some, illustrated by export of polluting industries to developing countries. See the discussion in the text accompanying notes 133-134.

127. The Amazon Declaration, ¶ 8, in 28 ILM 1303, 1305 (1989) (adopted at Manaus, Brazil, May 6, 1989). See also The Latin American and Caribbean Summit Declaration of Brasilia on the Environment, ¶ 12, in 28 ILM 1311, 1313 (1989) (adopted at Brasilia, Mar 31, 1989).

128. Caldwell, *International Environmental Policy* at 57 (quoting Olaf Palme's address at Stockholm) (citations omitted) (cited in note 74).

129. The Latin American and Caribbean Summit Declaration, ¶ 12, in 28 ILM at 1313 (cited in note 127).

130. See Hague Declaration on the Environment, in 28 ILM at 1309 (cited in note 107).

131. This is particularly impressive, since "most of these countries are already twice as energy-efficient as the United States." Matthews, *The Greenhouse Effect* at A14 (cited in note 113).

132. Denise E. Antolini, *Extending NEPA Is in Our National Interest*, 8 Envir Forum 26, 27 (Nov-Dec 1991).

133. Burhams, 7 Brooklyn J Intl L at 1 (cited in note 109).

134. The Amazon Declaration, ¶¶ 6-7, in 28 ILM at 1305 (cited in note 127).

135. Latin American and Caribbean Declaration, ¶ 3, in 28 ILM at 1312 (cited in note 127).

136. Antolini, 8 Envir Forum at 26 (cited in note 132).

137. Coan, 14 Nat Res J at 88 (cited in note 85).

138. Id.

139. Stockholm Declaration (emphasis added) (cited in note 28).

140. For a collection of environmental assessment laws world-wide, see *Environmental Impact Assessment* (draft) (Dec 1990) (Center for International Environmental Law (CIEL-US) Companion Paper) (available from CIEL-US office, 1621 Connecticut Ave. NW, Suite 300, Washington, DC 20009-1076).

141. See Goldfarb, 18 BC Envir L Rev at 578-79 (cited in note 23).