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EXTRATERRITORIAL ENVIRONMENTAL PROTECTION OBLIGATIONS OF FOREIGN AFFAIRS AGENCIES: THE UNFULFILLED MANDATE OF NEPA

Nicholas A. Robinson*

I. INTRODUCTION

Since the adoption of the National Environmental Policy Act of 1969 [hereinafter NEPA],¹ federal agencies have fundamentally restructured their actions and decision-making in order to avert unintended injury to nature and man within the territorial jurisdiction of the United States.² At the same time, however, agencies charged with conducting the government's foreign affairs have resisted assessing the impact of their decisions which affect the environment abroad. This resistance ignores the interdependence of natural systems across frontiers and disregards the mandate of Congress embodied in NEPA.

Among the express purposes of NEPA is the promotion of "efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man. . . ."³ The "biosphere" embraces all living organisms, including man, whether found on the solid earth, in the waters, or in the atmosphere of our planet.⁴ In the Declaration of National Environmental Policy, Congress has given explicit recognition to "the profound impact of man's activity on the interrelations of all components of the natural environment" and has declared it the

continuing policy of the Federal Government . . . to use all practicable means . . . to create and maintain conditions under which man and nature can exist in productive harmony. . . .⁵

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1. National Environmental Policy Act of 1969 (NEPA), Pub. L. 91-190, 83 Stat. 852, 42 U.S.C. §§ 4321-47 (1970).

2. See the extensive analysis in F. Anderson, *NEPA in the Courts: A Legal Analysis of the National Environmental Policy Act* (1973).

3. NEPA § 2, 42 U.S.C. § 4321 (1970).

4. Webster's Third New International Dictionary (unabridged) (1968) defines "biosphere" as follows:

1. The part of the world in which life can exist including parts of the lithosphere, hydrosphere and atmosphere. 2. Living beings together with their environment.

5. NEPA § 101 (a), 42 U.S.C. § 4331 (a) (1970).

The mandate that all practicable means be marshalled to protect the harmony between man and nature is unambiguous. There is nothing in the language of these principles to suggest that the federal government must be concerned only with that small portion of man's environment which is located within the boundaries of the fifty states.

Despite the Act's clear injunction that "all agencies of the Federal Government shall"⁶ act to protect the biosphere, there has been only partial compliance with NEPA by the foreign affairs agencies. The particular provision which has triggered resistance by foreign affairs agencies is the requirement in Section 102 (2) (C) that a detailed statement of environmental impact be prepared.⁷ Refusal to comply has centered on agency actions involving other countries, such as grant-making, consultation, and policy-making. Both the inconsistencies among the agencies in their acceptance of NEPA's mandate, as well as the uneven application of the Act by those agencies which do acknowledge its strictures, raise serious questions of compliance. The State Department's original policy, although subsequently reversed, lies at the core of arguments asserted by noncomplying agencies today. Its early recalcitrance doubtless abetted, if not spawned, the continuing refusals by other agencies.

This article will therefore focus on the initial Department of State position, as set forth in a legal memorandum which interpreted the Act as not requiring compliance by a foreign affairs agency. It will then examine the language of the Act and its legislative history. Finally, the article will reveal a pattern of official self-insulation from national environmental policy, illustrated by the Export-Import Bank's continuing refusal to comply with NEPA's requirements. It will suggest that much remains to be done if NEPA is to be fully effective in governing the extraterritorial consequences of the federal government's actions.

II. EARLY CLAIM AGAINST NEPA'S EXTRATERRITORIALITY: THE INITIAL STATE DEPARTMENT POSITION

Issue was first joined on the impact statement requirement within five months after the enactment of NEPA, when the State Department submitted a memorandum [hereinafter Memorandum]⁸ to the Chairman of the Council on Environmental

6. NEPA § 102 (2), 42 U.S.C. § 4332 (2) (1970).

7. NEPA § 102 (2) (C), 42 U.S.C. § 4332 (2) (C) (1970).

8. Memorandum from Christian A. Herter, Jr., Special Ass't to the Sec'y for

Quality [hereinafter CEQ]. Commenting on CEQ's draft guidelines relating to Section 102 (2) (C), the State Department and the Agency for International Development [hereinafter AID] concluded that the impact statement duties would be applicable to very few of their activities. According to the Memorandum, this was

because the actions affecting the environment in which [their] agencies [participated], directly or indirectly, almost always [occurred] within the territorial jurisdiction of some other State.⁹

The assertion that action by a federal agency outside the United States was exempt from the requirements of NEPA was supported by an accompanying memorandum of law [hereinafter Legal Memorandum].¹⁰ Careful examination of the Legal Memorandum, however, suggests that the position was based not so much on legal authority as it was prompted by a desire not to be burdened with the Section 102 (2) (C) requirement of preparing a detailed statement of environmental impact.

As noted in the Legal Memorandum,¹¹ Section 101 of NEPA sets forth federal policies and goals;¹² Section 103 directs "all agencies of the Federal Government" to review their statutory authority, regulations, and policies to determine whether deficiencies or inconsistencies therein prevent full compliance with the Act;¹³ and Section 102 (2) requires "all agencies of the Federal Government" to comply with eight enumerated procedural requirements.¹⁴ The Legal Memorandum recognized that the foreign affairs agencies, with or without NEPA's authorization, might urge other nations to consider environmental factors in connection with projects

Envir. Affairs, Bur. of Int'l Scient. and Tech. Affairs, Dep't of State, to Russell Train, Chairman, Coun. on Envir. Quality, on Department of State and AID Comments on Draft Guidelines Pertaining to P.L. 91-190, Section 102 (2) (C) [hereinafter "Memorandum"], in Appendix to Hearings on the Administration of the NEPA Before the Subcomm. on Fisheries and Wildlife Conservation of the House Comm. on Merchant Marine and Fisheries, 91st Cong., 2d Sess. [hereinafter "Hearings"], at 546 (1970).

9. Id.

10. Legal Memorandum prepared by Office of the Legal Adviser, Dep't of State, Application of National Environmental Policy Act of 1969 to Actions of the Federal Government Occurring Outside the United States (undated) [hereinafter "Legal Memorandum"], Hearings, *supra* note 8, at 548.

11. Id. at 548-49.

12. NEPA § 101, 42 U.S.C. § 4331 (1970).

13. NEPA § 103, 42 U.S.C. § 4333 (1970).

14. NEPA § 102 (2), 42 U.S.C. § 4332 (2) (1970).

undertaken within their borders.¹⁵ And the Memorandum itself acknowledged the applicability of the Section 103 review requirements to the activities of the foreign affairs agencies.¹⁶ Indeed, consistent with the provisions of Sections 101 and 102 (2) (E), the State Department and AID undertook

a thorough review of their policies, regulations and procedures and [made] appropriate revisions to assure that proper consideration [was] given to environmental factors by the U.S. and foreign officials involved in each concerned action, even in the case of actions occurring within the territory of some other country.¹⁷

However, the Legal Memorandum questioned the applicability of Section 102 (2) (B) and Section 102 (2) (C) (i) - (v), to "major federal actions" which occur outside the jurisdiction of the United States.¹⁸ It pointed out that if the requirements for developing methods to evaluate environmental problems [§ 102 (2) (B)] and the impact statement requirement [§ 102 (2) (C)] *were* applicable to such actions, then the "international elements present" would make compliance with these provisions "much more difficult than would be the case in actions occurring within the U.S."¹⁹ After concluding that the language and legislative history of the Act did not provide a clear answer to the question of NEPA's extraterritorial application, the Legal Memorandum sought to construe the provisions according to "some traditional rules of legislative interpretation" and within "the broader context of the Act."²⁰ While it conceded that other sections of NEPA might be read to indicate a congressional intent that the Act's procedures be applied on a worldwide basis,²¹ the Legal Memorandum regarded the words "of the Nation" in the Annual Environmental Quality Report section [§ 201] as "strongly suggest[ing]" that application of the Act be limited to actions within this country.²²

Interpreting the statute according to the Restatement (Second) of Foreign Relations Law, the Legal Memorandum asserted

15. Legal Memorandum, *supra* note 10, at 556.

16. Memorandum, *supra* note 8, at 546.

17. *Id.* at 547.

18. Legal Memorandum, *supra* note 10, at 550.

19. *Id.* at 551.

20. *Id.* at 553.

21. *Id.*, citing section 102 (2) (E) with its expression of concern for "mankind's world environment."

22. Legal Memorandum, *supra* note 10, at 553.

that legislation does not usually apply extraterritorially in the absence of a clearly expressed intent to transcend the territorial jurisdiction of the enacting state.²³ If this rule were strictly applied, it would preclude NEPA from applying to actions which involve the oceanic resources. But since the high seas are "beyond the territory of any nation," the Legal Memorandum reasoned that the provisions of the Act could be applied and therefore that Section 102 environmental impact statements should be filed for foreign-affairs agency activities with an impact on the high seas.²⁴

Yet the Legal Memorandum determined that no such environmental impact statements were required for foreign-affairs agency activities within the territorial jurisdiction of another country. This view stemmed (1) from an examination of the NEPA provisions regarding consultations among federal, state and local officials;²⁵ and (2) from a review of the premises on which the Executive Order detailing the responsibilities of federal agencies and CEQ under NEPA had been based.²⁶ By implication, the Act was limited to the actions of American government officials concerned with the quality of the nation's environment. The primary justification for concluding that NEPA impact statements were not mandated with respect to foreign territories, however, was the assertion that an attempt to apply the Act's "systematic, interdisciplinary" approach would be "very difficult, if not impossible."²⁷ But NEPA's application to the activities of the foreign affairs agencies would be impracticable only if those agencies were to insist on controlling foreign projects. If the American agencies were merely to maintain a firm foreign policy of suggesting alternative project designs which would protect foreign territorial environments,²⁸ NEPA would still leave the ultimate decision-making to foreign governments.

In fact, this was precisely the policy which the Legal Memorandum advocated on a facultative basis: it suggested that Section 102 (2) (E) be utilized as a basis from which the foreign affairs agencies might urge other nations to

23. *Id.* at 553-54, citing Restatement (Second) of the Foreign Relations Law of the United States § 38 (1965).

24. By extension, Section 102 statements would presumably also be required for similar activities in outer space or Antarctica.

25. NEPA §§ 102(2) (C) and (F), 42 U.S.C. §§ 4332(2) (C) and (F) (1970).

26. Exec. Order No. 11,514, 3 C.F.R. 271 (1974).

27. Legal Memorandum, *supra* note 10, at 555.

28. See Coan, Hillis & McCloskey, *Strategies for an Environmentally Oriented Foreign Policy*, 14 Nat. Res. J. 87 (1974) [hereinafter "Coan, Hillis & McCloskey"].

pursue the policy set out in sec[ti]on] 101 and consider environmental factors in conjunction with projects within their borders, whether or not the United States is involved in those projects.²⁹

Hence, a conclusion that NEPA mandates the foreign affairs agencies to comply with the Section 102 requirements may be based on the Legal Memorandum's own internal chimera.

III. THE LANGUAGE AND LEGISLATIVE HISTORY OF NEPA MANIFEST THE ACT'S GLOBAL CONCERN

The straightforward language of Section 102 requires "all agencies of the federal government" to comply with NEPA;³⁰ "all agencies" must factor environmental considerations into decision-making³¹ and must file detailed reports with CEQ.³² The Section 103 requirement that agencies review their statutory authority, regulations, policies, and procedures to determine whether revisions are necessary to permit full compliance with the purposes of the Act is also directed to "all agencies of the Federal Government."³³ Nowhere in the Act is the Department of State or AID exempted from these all-inclusive mandates. *Expressum facit cessare tacitum*.³⁴ The plain meaning of the statutory language therefore suggests that the question raised in the Legal Memorandum—whether Section 102 applies to State Department or AID activities in other countries—should be answered in the affirmative. Accordingly, assistance programs, capital investment and resource surveys in less developed countries, and other projects in foreign lands pursuant to any United States law should be conducted only after the thorough environmental analysis required by the Act.

Furthermore, a distinction must be made between Title I and Title II of the Act: only Title I carves out the jurisdiction of NEPA; whereas Title II speaks in terms of the environment "of the Nation."³⁵ Addressing a single aspect of the Act's implementation, Title II is specifically limited to CEQ—and *not* to "all agencies." Consequently, the provisions of Title II should not be construed as

29. Legal Memorandum, *supra* note 10, at 556.

30. See *Calvert Cliffs Coordinating Comm., Inc. v. AEC*, 449 F.2d 1109, 1112 (D.C. Cir. 1971) (emphasis supplied).

31. NEPA § 102 (2) (A) and (B), 42 U.S.C. § 4332 (2) (A) and (B) (1970).

32. NEPA § 102 (2) (C), 42 U.S.C. § 4332 (2) (C) (1970).

33. NEPA § 103, 42 U.S.C. § 4333 (1970).

34. "That which is expressed supersedes that which is silent."

35. NEPA §§ 201 et seq., 42 U.S.C. §§ 4341 et seq. (1970).

restricting the territorial application of the Act. In light of the distinction outlined above, the Legal Memorandum's reliance on the limited scope of the annual report requirement in Title II³⁶ appears somewhat misplaced.

In fact, the statutory language renders NEPA's strictures applicable to activities affecting the ecosystem beyond the borders of the United States. The Legal Memorandum listed six instances in which the language of the Act referred to the global environment, and it acknowledged that such language might be said to support the Act's extraterritorial application.³⁷ Nevertheless, the Legal Memorandum regarded the single "of the Nation" reference in Section 201 as more persuasive, thereby dictating a limited application of the Act. Among NEPA's several references to man, the environment, or the biosphere are the Section 2 statement of purposes³⁸ and the Section 101 (a) declaration of federal policy.³⁹ That Congress intended NEPA to have global scope is further evidenced by Section 102 (2) (E), which mandates all agencies to:

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 *mankind's world environment*.⁴⁰

These provisions, taken together, indicate a Congressional intent that NEPA enjoy worldwide application by all federal agencies. As other federal policies must be interpreted and administered in compliance with NEPA, so too must the foreign policy of this country be made in light of the environmental policies set forth in the Act. At the same time, the instrumentalities of American foreign policy—confidential communications, negotiations, and the like—will continue to be protected under NEPA by the Congressional direction that NEPA be implemented only to "the fullest extent possible."⁴¹

36. Legal Memorandum, *supra* note 10, at 553; see text accompanying note 22 *supra*.

37. Legal Memorandum, *supra* note 10, at 552-53.

38. NEPA § 2, 42 U.S.C. § 4321 (1970).

39. NEPA § 101 (a), 42 U.S.C. § 4331 (a) (1970).

40. NEPA § 102 (2) (E), 42 U.S.C. § 4332 (2) (E) (1970) (emphasis supplied).

41. NEPA § 102, 42 U.S.C. § 4332 (1970). See text of § 102 in S. Rep. 91-296, 91st Cong., 1st Sess., (July 9, 1969) without this phrase; see also text of Conference Report, *infra* note 42, at H. 12634; and see the general discussion of "to the fullest extent possible," at H. 12635.

The legislative history of NEPA also indicates that the Act was designed to embrace the foreign activity of the State Department and AID. In the Senate debate Senator Henry M. Jackson declared that

Taken together, the provisions of Section 102 directs [*sic*] *any Federal agency* which takes action that it must take into account environmental management and environmental quality consideration.⁴²

In addition, the specific exclusion of two agencies, the Federal Water Pollution Control Administration and the National Air Pollution Control Administration,⁴³ is of some significance: it raises the inference that Congress intended the full force of the Act to apply to the State Department and AID. Furthermore, the House Report on the bill recognized the interdependence of the world's ecosystems and the need for careful environmental protection.⁴⁴ Thus, even before a Conference bill emerged, the House was considering the global problem.

Moreover, the comments of the State Department's own spokesman at the time Congress was contemplating the purposes and scope of NEPA emphasize the importance of extending NEPA's reach beyond the territorial boundaries of the U.S.:

The Department wishes to call attention to the fact, moreover, that the objective of the bill or, for that matter, of any proposition dedicated to the protection of the national environment, cannot be effectively achieved unless it recognizes that existing ecosystems are interrelated by nature or by the activities of man, and that the environmental forces affecting our natural resources disregard political and geographical frontiers.⁴⁵

42. 115 Cong. Rec. 40416 (1969) (emphasis supplied) (debate on the Conference Report on the National Environmental Policy Act of 1969, § 1075).

43. *Id.* at 40423.

44. The Report made a point of quoting the director of the Missouri Botanical Gardens:

The complexity of the earth's ecosystem and its component parts of individual ecosystems makes understanding of it and the management a massive challenge . . . Today we are manipulating an extremely complex system: The ecosystems of the earth, the units of the landscape, and we do not know the consequences of our action until it is too late.

H.R. Rep. No. 378, 91st Cong., 1st Sess. 5-6 (1969).

45. Letter from William B. Macomber, Jr., Assistant Secretary for Congressional Relations for the Department of State, to Senator Henry M. Jackson, reprinted in S. Rep. No. 296, 91st Cong., 1st Sess., App. at 43 (1969).

If, as the State Department spokesman urged, NEPA was to recognize the American interest in the global environment and at least to encourage international cooperation,⁴⁶ how then could the Department's own Legal Memorandum assert that Congress did not consider the issue of whether compliance with NEPA would be required if the U.S. were participating in or financing the development of a project which affected the environment of the project country but had no significant impact on the U.S. environment?⁴⁷

As a whole, the language and legislative history of NEPA "strongly suggest" that Congress intended to bring all activities of the foreign affairs agencies, even those taking place entirely within the territorial jurisdiction of another nation, within the scope of the Act.⁴⁸ This interpretation was reaffirmed in hearings on the oversight of NEPA's implementation held by the House Committee on Merchant Marine and Fisheries.⁴⁹ There the House Committee emphatically rejected the position of the State Department and AID:

Stated most charitably, the Committee disagrees with this interpretation of NEPA. The history of the Act makes it clear that the global effects of environmental decisions are inevitably a part of the decision-making process and must be considered in that context.⁵⁰

IV. THE STATE DEPARTMENT'S POSITION REJECTED AND REBORN

The extensive analysis of the early State Department position has been included not so much to document a weak and perhaps stolid recalcitrance to assume NEPA duties in one government de-

46. *Id.* at 44-45.

47. Legal Memorandum, *supra* note 10, at 550-51.

48. Apart from NEPA's legislative history, conservationists have pointed out that regardless of the location of a particular project and its environmental impact, the federal decision-making agency responsible for the project should nevertheless be subject to NEPA's mandate:

the federal government makes its decisions here in the United States whether to issue permits, authorize or guarantee loans, give grants-in-aid, insure investments, and carry out projects. These governmental decisions are "federal actions" in the sense of NEPA.

Coan, Hillis & McCloskey, *supra* note 28, at 102.

49. Administration of the National Environmental Policy Act, H.R. Rep. No. 316, 92nd Cong., 1st Sess. 33 (1971).

50. *Id.*

partment as to set the stage for the current controversies which relate to foreign affairs agencies other than the Department of State. While it may not be astonishing that the State Department has reversed its position, it is somewhat curious that other foreign affairs agencies have, in varying degrees, declined to follow suit.

The State Department's revised regulations acknowledge the duty to comply with NEPA by making environmental impact assessments.⁵¹ And a number of such assessments,⁵² covering matters from a marine pollution convention⁵³ to a pipeline border-crossing permit application,⁵⁴ have already been undertaken. AID, on the other hand, continues to adhere to the logic of the initial State Department position.⁵⁵ Administering many of its own financial assistance programs as a semi-autonomous branch of the State Department, AID has maintained that NEPA does not apply to its actions which have impact within another state's jurisdiction. However, the agency has partially complied with NEPA's mandate by developing operating procedures which are designed to evaluate the environmental impact of such projects.⁵⁶

In contrast, both the Export-Import Bank [hereinafter Eximbank] and the Overseas Private Investment Corporation [hereinafter OPIC] have adopted a "refusal to comply" posture. Eximbank has taken the position that the Section 102 (2) (C) impact statement requirement applies only to activities concerning the natural environment of the U.S. and does not therefore apply to the bank's operations.⁵⁷ While OPIC's president has expressed the agency's concern with the "environmental effects of OPIC-sponsored projects overseas,"⁵⁸ OPIC has still declined to file environmental impact statements. Its guidelines⁵⁹ simply request that ap-

51. See Dep't of State, Issuance of Final Department Procedures for Compliance with Federal Environmental Statutes, 37 Fed. Reg. 19167-68 (1972).

52. See Vol. 3, 102 Monitor 150 (June 1973).

53. Dep't of State, Envir. Impact Statement, Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (Feb. 2, 1973) (CEQ File No. 7301777 F), Vol. 3, 102 Monitor 124 (Mar. 1973).

54. Dep't of State, Envir. Impact Statement, Dome Pipeline Company Construction of a Hydrocarbon Pipeline between Windsor, Ontario, and Detroit, Michigan (Nov. 27, 1972) (CEQ File No. 25684 F).

55. For an extensive analysis of the AID position, see Strausberg, NEPA and AID, 7 Int'l Law. 46, 51 (1973), where the author concludes that "AID's position [of refusing to provide environmental impact statements] is tenuous." *Id.* at 46.

56. See 37 Fed. Reg. 22686-87 (1972).

57. Coan, Hillis & McCloskey, *supra* note 28, at 100.

58. Letter from Bradford Mills, President of OPIC, to the Sierra Club, dated September 10, 1971, quoted in Coan, Hillis & McCloskey, *supra* note 28, at 100.

59. OPIC General Policy and Guidelines, Eligibility of Projects, Environmental Considerations, No. 5.101, Oct. 26, 1971.

plicants undertake their own "environmental statements." But these environmental statements are neither subject to review by CEQ nor are they submitted to the foreign governments in whose countries the development or investment is planned. Since NEPA's purpose is "to ensure that the *federal agency making the decision* consider environmental value and the overall consequences of the proposed action,"⁶⁰ the federal agency—not the applicant or subcontractor—should prepare the required environmental impact statement. OPIC's guidelines, then, hardly comport with NEPA's directive.

Eximbank's position provided the first opportunity for a court to consider the applicability of NEPA to the activities of the foreign affairs agencies. In *Sierra Club v. AEC*⁶¹ the Sierra Club and three other environmental organizations⁶² brought suit to compel the Atomic Energy Commission [hereinafter AEC], Eximbank, and the State Department to file a NEPA impact statement with respect to an export program under which the U.S. sells nuclear power generating systems and enriched nuclear fuels to other countries.⁶³ Although the court ultimately dismissed plaintiffs' cross-motion for summary judgment as to Eximbank's obligation to comply with NEPA and publish procedures for the consideration of the environmental impact of its activities, the actual outcome of the litigation may be attributed to the peculiar facts of this case rather than the substantive merit of the arguments advanced by Eximbank. In fact, dicta in the court's memorandum-order substantially undercuts those arguments.

As the court observed, the "stance of the litigation" changed significantly after the action had been initiated. Specifically, subsequent to the filing of the complaint, AEC notified the court that it had decided to prepare a NEPA statement on the nuclear power export process. By so doing, AEC joined the State Department in recognizing NEPA's applicability to its activities. Eximbank, however, continued "to assert that it [had] no NEPA obligations whatsoever."⁶⁴ The case therefore proceeded against Eximbank alone as to the issues raised in the complaint, with the only remain-

60. *Conservation Soc'y of So. Vermont, Inc. v. Secretary of Trans.*, 362 F.Supp. 627, 632 (D. Vt. 1973) (emphasis by the court).

61. Civil No. 1867-73 (D.D.C., Aug. 3, 1974) (mimeo).

62. The other plaintiffs were the National Parks and Conservation Association, the Environmental Defense Fund, and the Natural Resources Defense Council.

63. See 42 U.S.C. § 2153 (1970), implemented by Exec. Order 10,841, 24 Fed. Reg. 7941 (1959), as amended by Exec. Order No. 10,956, 26 Fed. Reg. 7315 (1961); on enrichment, see 42 U.S.C. §§ 2074, 2201 (t) (1970).

64. *Sierra Club v. AEC*, Civil No. 1867-73, at 3 (D.D.C., Aug. 3, 1974) (mimeo).

ing issue as to the other defendants being whether the court should impose a time limit on AEC's preparation of the impact statement.⁶⁵

Of the grounds on which Eximbank moved for summary judgment,⁶⁶ the court saw merit only in the argument that Eximbank had no nuclear power export program.⁶⁷ But the court nevertheless dismissed the motion as moot in view of AEC's prior decision to prepare the requisite impact statement.⁶⁸ Distinguishing the case from one in which Eximbank would be "the sole federal agency involved,"⁶⁹ the court noted that Eximbank plays only a secondary role in the export program. That is, Eximbank does not participate directly in the negotiation of the intergovernmental agreements; and such agreements can and have been completed without the bank's participation.⁷⁰ Hence, under the peculiar facts of this case, Eximbank was not required to file an impact statement because the primary sponsoring agency, AEC, had already agreed to prepare one.⁷¹

In ruling that AEC alone was responsible for the preparation of an environmental impact statement on the nuclear power export program, the *Sierra Club* court never reached the precise issue of Eximbank's compliance with the Act. The court's ruling, however, depended entirely on the unique posture of the case: Eximbank's subordinate role in the negotiation of nuclear power exports and AEC's prior decision to prepare the NEPA statement. Nothing in the court's memorandum-order even intimated that the court would rule similarly under a slightly different set of facts—if, for example, Eximbank rather than AEC were the primary agency involved. Indeed, the court's express recognition of NEPA's all-inclusive man-

65. Against the opposition of the State Department, AEC, and four U.S. corporations who intervened as producers of nuclear power generating systems and/or enriched nuclear fuel, the court ultimately directed AEC to prepare the requisite NEPA statement within 12 months. Civil No. 1867-73, at 8.

66. According to the court, the four grounds asserted by Eximbank were:

(1) Eximbank has no export "program," (2) plaintiffs lack standing to sue, (3) plaintiffs' claims are political questions, and (4) NEPA does not apply to the export of nuclear facilities.

Civil No. 1967-73, at 3.

67. The *Sierra Club* court concluded that it was unnecessary to examine either the standing issue or the political question argument in great detail. *Id.* at 4. Although the court did not specifically discuss Eximbank's final argument (that NEPA had no application to the export of nuclear facilities), the court's memorandum-order made it apparent that the court preferred a literal construction of NEPA's direction to "all agencies."

68. Civil No. 1867-73, at 6, 8.

69. *Id.* at 6.

70. *Id.*

71. *Id.* at 5.

date—"NEPA makes no exceptions in directing 'all agencies of the Federal government' to comply with its provisions"⁷²—suggests that a test case challenging an Eximbank "failure to file" as a sponsoring agency might be successful.

At a minimum, the court implied that once AEC had made substantial progress in drafting an impact statement,⁷³ Eximbank would be obliged to comment on the "environmental amenities" of the nuclear power export program which it finances. Quoting with approval from an opinion of a Texas district court,⁷⁴ the *Sierra Club* court observed that non-sponsoring agencies "may not . . . merely sit by until contacted by a sponsoring agency."⁷⁵ Unless and until Eximbank at least develops a system of rules for consultation and comment under NEPA, the agency will violate the court's confidence that Eximbank shares "Congress' announced concern that federal agencies give 'environmental amenities . . . appropriate consideration in decisionmaking. . . .'"⁷⁶

V. CONCLUSION

The initial State Department position doubtless provided the rationale for the continuing refusals by other foreign affairs agencies to comply with NEPA. Just as the Department of State changed its views, however, so also may Eximbank, OPIC, and AID agree to adhere to NEPA—or the courts may require them to do so. But if the last five years reflect the future pace of compliance, NEPA faces a slow acceptance among the foreign affairs agencies. Should these agencies persist in taking a "business as usual" attitude, the scientific and philosophical interests protected by NEPA will be impaired.

A definitive statement as to NEPA's extraterritoriality, an issue left unresolved by the district court's memorandum-order in *Sierra Club v. AEC*, remains for a future case. However, if AEC's impact statement fails to deal with the question of the nuclear export program's impact abroad and/or if Eximbank refuses to comment, the

72. *Id.* at 4 (citation omitted).

73. Since AEC had just begun to prepare an environmental impact statement, the court was unwilling to grant plaintiff's request for an order directing Eximbank or the State Department to consult with AEC. *Id.* at 6-7.

74. *Sierra Club v. Froehlke*, 359 F.Supp. 1289 (S.D. Tex. 1973).

75. 359 F.Supp. at 1346, quoted in Civil No. 1867-73, at 7.

76. Civil No. 1867-73, at 7, quoting NEPA § 102(2)(B), 42 U.S.C. § 4332(2)(B) (1970). No appeal has been taken from the court's grant of partial summary judgment to plaintiffs and its denial of Eximbank's motion for summary judgment.

Sierra Club claims once again become viable. Even if AEC and Eximbank do comply, the same issue is bound to arise again with respect to other agencies. For example, a current dispute between CEQ and the Department of Transportation over the necessity of filing an impact statement on the Federal Highway Administration's involvement in completing the Pan American Highway through virgin tropical forest in the Darien Gap between Panama and Colombia⁷⁷ may be expected to erupt into litigation in the near future.

While ultimately all agencies may promulgate regulations to bring themselves into formal compliance with NEPA, it is likely that the debate is just beginning as to how the foreign affairs agencies may most effectively implement NEPA. How should environmental impact analysis proceed in aid programs, in defense operations,⁷⁸ or in commercial dealings facilitated by the government? Each of these areas is different. Rather than obfuscate the legitimate issues raised by a NEPA-like approach in these diverse fields, administrators should appeal to Congress to review the special problems created for them by NEPA. Studies could and should be undertaken.

Congress did not debate at length concerning the means for compliance with NEPA beyond the boundaries of the fifty states. It should do so now. Principle 21 of the Stockholm Declaration⁷⁹ has articulated the need for such debate more clearly than was the case in 1970 when NEPA became effective.

In the final analysis, the issue of how foreign affairs agencies comply with NEPA does not involve interference in the affairs of other nations. Rather, the aim is to assure that the United States itself is never responsible for unanticipated environmental injury anywhere. NEPA provides a restraint on U.S. action, not on the actions of other countries. How to assess environmental impact abroad may itself raise legitimate questions of methodology, but not of purpose. The goal of NEPA must be uniform if its scientific basis is to be given effect: the activities of federal agencies must be carried out only with as full an awareness as possible of their impact on the systems of the biosphere. Eventually, the foreign affairs agencies may come to appreciate this teaching.

77. Frank, *The Foreign Reach of NEPA*, ALI-ABA Course of Study: *International and Trade Aspects of Environmental Law* (R. Stein ed.) 147 (1974), citing 40 C.F.R. § 1500.11 (e) (1973).

78. See R. Russell, *Earth, Air, Fire and Water* (1974) for a discussion of the environmental aspects of military activity in various parts of the world.

79. Principle 21 recognizes both the right of a state to exploit its own resources as well as the state's corresponding "responsibility to ensure that activities within [its] jurisdiction or control do not cause damage to the environment" of another state or of an area beyond national jurisdictional limits. The full text of the Declaration is contained in the Report of the U.N. Conference on the Environment, U.N. Doc. A/Conf. 48/14, Annex II, at 2-7.