

## Agency Responses to Executive Order 12,114: A Comparison and Implications

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# AGENCY RESPONSES TO EXECUTIVE ORDER 12,114: A COMPARISON AND IMPLICATIONS

United States federal agencies are involved in a considerable number of foreign activities that may adversely affect the environment. The National Environmental Policy Act of 1969<sup>1</sup> (NEPA) requires agencies to assess the impact their activities have on the domestic environment. Their obligation under NEPA to protect foreign environments is less clear.<sup>2</sup> In January, 1979, President Carter issued Executive Order 12,114, entitled "Environmental Effects Abroad of Major Federal Actions" (Order), to clarify agencies' responsibilities.<sup>3</sup> The Order attempts to balance concerns about foreign policy and national security with the need for effective environmental review. The efficacy of the Order is necessarily dependent upon the adequacy of agency regulations issued under it.

This Note will, after reviewing the debate over NEPA's extra-territorial scope, discuss the Order. It will then analyze and compare the regulations three agencies issued in response to the Order. Finally, the Note will offer recommendations aimed at ensuring an effective and uniform global environmental policy.

## I

### THE NATIONAL ENVIRONMENTAL POLICY ACT

NEPA establishes an environmental protection policy for federal agencies.<sup>4</sup> By enacting NEPA Congress articulated a policy

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

2. See notes 10-20 *infra* and accompanying text.

3. Exec. Order No. 12,114, 3 C.F.R. 356 (1979 Compilation), *reprinted in* 42 U.S.C. § 4321, at 597 (Supp. III 1979) (signed Jan. 4, 1979) [hereinafter cited as Exec. Order].

For discussions of the nature of executive orders, see R. MORGAN, *THE PRESIDENT AND CIVIL RIGHTS* 4-9 (1970); Levinson, *Presidential Self-Regulation Through Rulemaking: Comparative Comments on Structuring the Chief Executive's Constitutional Powers*, 9 VAND. J. TRANSNAT'L L. 695, 710-18 (1976); STAFF OF SENATE SPECIAL COMM. ON NATIONAL EMERGENCIES AND DELEGATED POWERS, 93D CONG. 2D SESS., SUMMARY OF EXECUTIVE ORDERS IN TIMES OF WAR AND NATIONAL EMERGENCY: A WORKING PAPER (Comm. Print 1974); COMM. ON GOVERNMENT OPERATIONS, 85TH CONG., 1ST SESS., EXECUTIVE ORDERS AND PROCLAMATIONS: A STUDY OF A USE OF PRESIDENTIAL POWERS, (1957), *reprinted in National Emergency Hearings Before the Special Comm. on the Termination of the Nat'l Emergency of the U.S., Part 3*, 93D CONG., 1ST SESS. 863 (1973).

4. The purposes of [NEPA] are: To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the

designed "to create and maintain conditions under which man and nature can exist in productive harmony."<sup>5</sup> Congress also created the Council on Environmental Quality (CEQ),<sup>6</sup> which is authorized to issue regulations implementing NEPA, assist and advise the President, study the environment, and monitor federal agencies' compliance with NEPA.<sup>7</sup>

All federal agencies are required by the Act to include environmental considerations in their decision-making processes if they undertake "major Federal actions significantly affecting the quality of the human environment."<sup>8</sup> An agency's analysis of the environmental effects of a proposed action is contained in an Environmental Impact Statement (EIS) prepared by the agency.<sup>9</sup>

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understanding of the ecological systems and natural resources important to the Nation, and to establish a Council on Environmental Quality.

NEPA, § 2, 42 U.S.C. § 4321 (1976).

5 *Id.* § 101(a), 42 U.S.C. § 4331 (1976). For further discussion of NEPA's purposes, see S REP. NO. 296, 91st Cong., 1st Sess. 8-10 (1969). A useful compilation of NEPA's legislative history is in ENVIRONMENTAL PROTECTION AGENCY, 1 LEGAL COMPILATION, A. GENERAL 407 (1973).

6 NEPA, § 202, 42 U.S.C. § 4342 (1976).

7 *Id.* § 204, 42 U.S.C. § 4344 (1976).

As part of the executive branch, the CEQ is responsible for providing administrative interpretation of NEPA, pursuant to Exec. Order No. 11,514, 3 C.F.R. 902 (1966-70 Compilation), *reprinted in* 42 U.S.C. § 4321, at 1722 (1976), *as amended by* Exec. Order No. 11,991, 3 C.F.R. 123 (1977 Compilation), *reprinted in* 42 U.S.C. § 4321, at 1600 (Supp. II 1978). Initially CEQ performed its monitoring function by issuing guidelines. Exec. Order No. 11,514, § 3(h), 3 C.F.R. 902, 904 (1966-70 Compilation), *reprinted in* 42 U.S.C. § 4321, at 1722, 1723 (1976). In 1977 President Carter issued an Executive Order that permitted CEQ to issue regulations instead of guidelines. Exec. Order No. 11,991, § 1, 3 C.F.R. 123, 124 (1977 Compilation), *reprinted in* 42 U.S.C. § 4321, at 1600 (Supp. II 1978). More significantly, he ordered federal agencies to comply with the CEQ regulations unless a statute required otherwise. *Id.* § 2. For an early evaluation of the CEQ, see Liroff, *The Council on Environmental Quality*, [1973] 3 ENV'T'L L. REP. 50051.

8 NEPA, § 102(2)(C), 42 U.S.C. § 4332(2)(C) (1976). The CEQ has interpreted the term *human environment*, to mean the global environment. See note 12 *infra*.

NEPA procedures were not intended to be ends in themselves, but rather the means to compel implementation of the law's purposes. See generally S REP. NO. 296, 91st Cong., 1st Sess. 4-17 (1969). Section 102 of NEPA prescribes the content of an Environmental Impact Statement and contains other general provisions. It is referred to as the "action-forcing" section, and helps further the policies announced in the purposes clause. *Id.* at 19-21

9 An EIS consists of

a detailed statement by the responsible official on—

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

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

Section 102(2)(E), provides that agencies must "study, develop, and describe appropriate alternatives." *Id.* § 102(2)(E), 42 U.S.C. § 4332(2)(E). The current CEQ regulations

NEPA's language does not specify the extent of its reach.<sup>10</sup> As a result, the Act's extraterritorial scope has been a subject of controversy ever since its inception.<sup>11</sup> The CEQ has consistently main-

describe alternatives analysis as "the heart of the environmental impact statement." 40 C.F.R. § 1502.14 (1980). According to the CEQ, an EIS

[s]hould present the environmental impacts of the proposal and the alternatives in comparative form, thus sharply defining the issues and providing a clear basis for choice among options by the decisionmaker and the public. In this section agencies shall:

- (a) Rigorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated.
- (b) Devote substantial treatment to each alternative considered in detail including the proposed action so that reviewers may evaluate their comparative merits.
- (c) Include reasonable alternatives not within the jurisdiction of the lead agency.
- (d) Include the alternative of no action.
- (e) Identify the agency's preferred alternative or alternatives, if one or more exists, in the draft statement and identify such alternative in the final statement unless another law prohibits the expression of such a preference.
- (f) Include appropriate mitigation measures not already included in the proposed action or alternatives.

*Id.* See generally 2 F. GRAD, TREATISE ON ENVIRONMENTAL LAW § 9.02[2][c][iv] (1980) for a discussion of case law developments on the scope of NEPA's alternatives analysis requirement. See also W. RODGERS, ENVIRONMENTAL LAW § 7.9(c) (1977) (alternatives analysis must be included in an EIS).

10. NEPA's language includes broad references to both national and international concerns. For example, references to "man and his environment," NEPA, § 2, 42 U.S.C. § 4321 (1976); the "human environment," *id.* § 102(2)(C), 42 U.S.C. § 4332(2)(C); the "natural environment," *id.* § 101(a), 42 U.S.C. § 4331(a); the "importance of restoring and maintaining environmental quality to the overall welfare and development of man," *id.*, and the term "biosphere," *id.* § 2, 42 U.S.C. § 4321; could indicate a congressional intent that NEPA apply to federal agency action anywhere in the world. Conversely, the statute refers to "the Nation," *id.*; and "future generations of Americans," *id.* § 101(a), 42 U.S.C. § 4331(a), references that imply NEPA should apply only to agency actions within the United States. For a discussion of the statutory language and its various interpretations, see Note, *Exports and Environmental Responsibility: Applying NEPA to the Export-Import Bank*, 12 CORNELL INT'L L.J. 247, 249-51 (1979). See also 2 F. GRAD, *supra* note 9, § 9.05 (NEPA, § 102(2)(E) indicates extraterritorial application).

Perhaps the best approach to interpreting the language at issue is offered by Charles Warren who, as Chairman of the CEQ, described the above references as "indicative rather than definitive." Warren, *A Look Before We Leap—Applying NEPA to U.S. Actions Abroad*, reprinted in 124 CONG. REC. S6515, S6515 (daily ed. Apr. 27, 1978).

11. For detailed discussions of the policy arguments for and against extraterritorial application of NEPA, see Note, *The Extraterritorial Scope of NEPA's Environmental Impact Statement Requirement*, 74 MICH. L. REV. 349 (1975) (argues for extraterritorial application); Note, *The Scope of the National Environmental Policy Act: Should the 102(2)(C) Impact Statement Provision be Applicable to a Federal Agency's Activities Having Environmental Consequences Within Another Sovereign's Jurisdiction?*, 5 SYRACUSE J. INT'L L. & COM. 317 (1978) (statutory construction shows no extraterritorial effect). See also *Export-Import Bank Act Amendments of 1978: Hearings on S.3077 Before the Subcomm. on Resource Protection of the Senate Comm. on Environment and Public Works*, 95th Cong., 2d Sess. 219-20 (1978) (Senator Muskie's assertion that NEPA applies extraterritorially) [hereinafter cited as *Eximbank Hearings*].

tained that NEPA applies extraterritorially.<sup>12</sup> Although no court has explicitly held that NEPA may reach anywhere in the world, several courts have suggested as much.<sup>13</sup> Analyses of the Act's scope based

12. The Council's 1974 guidelines required an assessment of the "effects of the proposed action as it affects both the national and international environment." 40 C.F.R. § 1500.8(a)(3)(i) (1974). In his 1976 memorandum to all agencies, former CEQ Chairman Russell W. Peterson indicated NEPA's EIS requirement applies to U.S. actions abroad. *Memorandum to Heads of Agencies on Applying the EIS Requirement to Environmental Impacts Abroad*, 42 Fed. Reg. 61,068 (1977), reprinted in [1977] 8 ENVIR. REP. (BNA) 1192.

In a companion memorandum the CEQ elaborated upon its position that NEPA has extraterritorial effect. *Memorandum on the Application of the EIS Requirement to Environmental Impacts Abroad of Major Federal Actions*, 42 Fed. Reg. 61,068 (1977), reprinted in [1977] 8 ENVIR. REP. (BNA) 1192. In 1978, the CEQ issued draft regulations that provided "'Human Environment' shall be interpreted comprehensively to include the natural and physical environment and the interaction of people with that environment. *The human environment is not confined to the geographical borders of the United States.*" Application of the National Environmental Policy Act (NEPA) to United States Activities Abroad. Preliminary Draft Regulations for Application of the National Environmental Policy Act to Federal Activities Abroad, § 1508.13 124 CONG. REC. S6513, S6513-14 (daily ed. Apr. 27, 1978) (emphasis added) [hereinafter cited as CEQ Draft Regs.]. These regulations never went into force.

13. In *Wilderness Society v. Morton*, 463 F.2d 1261 (D.C. Cir. 1972) the court granted standing to Canadian environmentalists to challenge pipeline routes passing through Canada. Standing was premised upon a determination that the Canadians' interests were within the zone of interests protected by NEPA. The holding is clouded, however, because environmental impacts within the U.S. were also involved.

In *National Organization for the Reform of Marijuana Laws (NORML) v. United States Dep't of State*, [1978] 11 ENVIR. REP. CASES (BNA) 1841, 1844-45 (D.D.C. June 8, 1978), NORML sought declaratory and injunctive relief against several federal agencies for their participation in the paraquat spraying of marijuana and poppy plants in Mexico. NORML claimed that the U.S. government had violated NEPA by failing to prepare an EIS prior to its support of the paraquat program. *Id.* at 1841-42. The U.S. government did commence preparation of an EIS on the domestic impact of the Mexican eradication program, and indicated a willingness to file an environmental analysis of the program's impact on Mexico. *Id.* at 1844. In acquiescing to this intention, the court assumed without deciding that NEPA has extraterritorial scope.

Further, in *Sierra Club v. Adams*, 578 F.2d 389 (D.C. Cir. 1978), environmentalists sought to compel the Department of Transportation to assess the environmental effects of the construction of a segment of the Darien Gap Highway in Panama and Columbia. Plaintiffs having standing with regard to the domestic ramifications of a potential spread of hoof and mouth disease also sought standing to challenge the EIS on the expected basis of environmental effects on an Indian culture. The court held that since plaintiffs had standing on the domestic issue they were entitled to challenge extraterritorial impacts as well. On the merits the court "emphatically reject[ed] the assertion by the Government that something less than a thorough discussion" of the impact on the Indians was appropriate in the EIS. *Id.* at 396. The court went on, however, to find the Department's EIS adequately addressed the Indian issue. *Id.*

Lastly, in *Gemeinschaft zum Schutz Des Berliner Baumbestandes v. Marienthal*, [1978] 12 ENVIR. REP. CASES (BNA) 1337 (D.D.C. Nov. 9, 1978), the court denied a motion for a preliminary injunction sought by a West German environmental group. The group alleged that the U.S. Army, in aiding in the construction of an apartment complex in West Berlin, had not complied with NEPA's EIS requirements before beginning construction. The court concluded that the U.S. Army's involvement in the project was insufficient to constitute a "major federal action" and thus trigger NEPA. *Id.* at 1337-38. For a thorough discussion of the *Gemeinschaft* ruling, see 20 HARV. INT'L L.J. 175 (1979).

on its legislative history also vary,<sup>14</sup> due largely to the paucity of the legislative record created during NEPA's passage.<sup>15</sup> Finally, some commentators suggest that NEPA's drafters simply did not consider the question of extraterritoriality.<sup>16</sup>

Objections to an expansive reading of NEPA's applicability rest on foreign policy, economic, and national security grounds. Critics of extraterritorial application argue that applying NEPA abroad

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14. Proponents of NEPA's extraterritorial application point to certain aspects of the Act's legislative history to support their view. Senator Henry Jackson, NEPA's sponsor, introduced the *Congressional White Paper on a National Policy for the Environment* into the records of the NEPA debates. 115 CONG. REC. 29,078 (1969). The statement of national environmental policy proposed in the *White Paper* provides, in part:

Environmental quality and productivity shall be considered in a worldwide context, extending in time from the present to the long-term future.

... Although the influence of the U.S. policy will be limited outside of its own borders, the global character of ecological relationships must be the guide for domestic activities. Ecological considerations should be infused into all international relations.

World population and food production must be brought into a controlled balance consistent with a long-term future continuation of a satisfactory standard of living for all.

*Id.* at 29,081-82. Senator Jackson urged extraterritorial application of NEPA when he argued: "We must seek solutions to environmental problems on an international level because they are international in origin and scope. The earth is a common resource, and cooperative effort will be necessary to protect it." *Id.* at 40,417. In a report on NEPA's administration, the Committee on Merchant Marine and Fisheries indicated: "*The history of the Act makes it quite clear that the global effects of environmental decisions are inevitably a part of the decision-making process and must be considered in that context.*" H.R. REP. NO. 316, 92nd Cong., 1st Sess. 33 (1971) (emphasis in original). Conversely in CONGRESSIONAL RESEARCH SERVICE, LIBRARY OF CONGRESS, APPLICATION OF THE NATIONAL ENVIRONMENTAL POLICY ACT'S ENVIRONMENTAL IMPACT STATEMENT REQUIREMENT WHEN A FEDERAL ACTION IMPACTS ONLY WITHIN THE TERRITORIAL JURISDICTION OF A FOREIGN NATION, reprinted in 124 CONG. REC. S16,850 (daily ed. Oct. 2, 1978), the author concludes:

There is no language in NEPA that can be pointed to with certainty to support a contention that the EIS requirement would apply to a major Federal action occurring in a foreign nation and the environmental impact is limited to that territory.

... In the absence of any clear statutory expression or congressional intent, and considering the rules of statutory construction and principles of international law, the more persuasive argument would appear to be on the side which professes that NEPA does not apply in such situations.

*Id.* at S16,852.

15. Cortner, *A Case Analysis of Policy Implementation: The National Environmental Policy Act of 1969*, 16 NAT. RESOURCES J. 323, 330-32 (1976) (discussion of legislative history). 2 F. GRAD, *supra* note 9, § 9.01[4][h] (legislative history is uninformative).

16. See [1979] 9 ENVTL L. REP. (ELI) 10011 ("President Orders Environmental Review of International Actions"); Comment, *Federal Agency Responsibility to Assess Extraterritorial Environmental Impacts*, 14 TEX. INT'L L.J. 425, 431-32 (1979). See also F. ANDERSON, NEPA IN THE COURTS 1-14 (1973); Comment, *Controlling the Environmental Hazards of International Development*, 5 ECOLOGY L.Q. 321, 352 (1976).

impinges upon the sovereignty of other nations.<sup>17</sup> The export community believes it would be unduly disadvantaged if required to evaluate the environmental impact of products, services or financing it provides other countries.<sup>18</sup> Agencies administering foreign assistance programs argue that adherence to NEPA standards will generate political problems.<sup>19</sup> Finally, critics contend the President's ability to conduct foreign affairs would be severely undermined if NEPA is given extraterritorial effect.<sup>20</sup>

## II EXECUTIVE ORDER 12,114

In response to the controversy over NEPA's scope, the CEQ circulated draft regulations instructing agencies to meet modified NEPA requirements for their overseas activities.<sup>21</sup> Widespread dis-

17 See, e.g., Brower, *The Legal Parameters of NEPA—Does the CEQ's Grasp Exceed Its Reach?*, reprinted in 124 CONG. REC. S6518 (daily ed. Apr. 27, 1978). Brower feels the U.S. is imposing its environmental standards on other countries in the course of requiring agencies to adhere to NEPA standards on projects exclusively within another nation's territory. *Id.* at S6519. He believes that extraterritorial application of NEPA is ill-advised "lest our misdirected good intentions be allowed to rise to the level of 'unwarranted encroachment upon the sovereignty of [a foreign] state.'" *Id.* Brower does not contend, however, that NEPA does not extend to major federal actions affecting the global commons. *Id.*

Legal questions concerning the extraterritorial jurisdiction of domestic law cause considerable confusion. The presumption in the common law is that U.S. law will not apply in another jurisdiction unless the statute involved expressly so provides. RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 38, Comment b (1965). *But see* Strausberg, *The National Environmental Policy Act and The Agency for International Development*, 7 INT'L LAW. 46, 54-56 (1973) (rationale for the Restatement is inapplicable where consideration of environmental factors need not interfere with another sovereign's authority).

International law also suggests no country should have the right to harm another country's environment. See United Nations Conference on the Human Environment: Final Documents, *Declaration of the United Nations Conference on the Human Environment*, Principle 21, reprinted in 11 INT'L LEGAL MATERIALS 1416, 1420 (1972).

18 See generally *Eximbank Hearings*, *supra* note 11, at 60-85 (statements on effect of NEPA on various forms of exports). For a thorough discussion of the problems of applying NEPA to Eximbank, see Note, *supra* note 10, at 254-59.

19 *Administration of the National Environmental Policy Act Part 2: Appendixes to Hearings Before the Subcomm. on Fisheries and Wildlife Conservation of the House Comm. on Merchant Marine and Fisheries*, 91st Cong., 2d Sess. 550-51 (1970) (memorandum of Christian Herter, Special Assistant to the Secretary of State for Environmental Affairs). See generally Strausberg, *supra* note 17, at 46-69 (discussion of NEPA's application to the Agency for International Development).

20 OFFICE OF THE GENERAL COUNSEL, DEPARTMENT OF DEFENSE, THE APPLICATION OF THE NATIONAL ENVIRONMENTAL POLICY ACT TO MAJOR FEDERAL ACTIONS WITH ENVIRONMENTAL IMPACTS OUTSIDE THE UNITED STATES pt. V, § A, reprinted in 124 CONG. REC. S19,358, S19,377 (daily ed. Oct. 14, 1978).

21 CEQ Draft Regs., *supra* note 12. The draft regulations defined the *human environment* as extending beyond the borders of the United States. *Id.* § 1508.13. See note 12 *supra* for the text of § 1508.13. The draft regulations required EIS procedures be followed only for major actions abroad whose significant environmental impacts affected (1) the U.S. and its trust territories; (2) the global commons such as the oceans; or, (3)

satisfaction among the agencies followed,<sup>22</sup> prompting the President to instruct the CEQ and the State Department to negotiate a more acceptable approach. Ultimately, Executive Order 12,114 was issued as the executive branch's policy statement on environmental review of extraterritorial federal actions.<sup>23</sup>

#### A. REQUIREMENTS OF THE ORDER

Executive Order 12,114 was issued pursuant to the President's authority under the Constitution and laws of the United States.<sup>24</sup> While constituting the government's "exclusive and complete determination" on environmental effects outside the U.S., the Order also purports to further NEPA policies.<sup>25</sup>

The Order requires federal agencies participating in actions with significant effects abroad to issue regulations implementing an environmental review procedure.<sup>26</sup> Actions subject to review are those affecting: (1) the global commons;<sup>27</sup> (2) a foreign nation not

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Antarctica. CEQ Draft Regs, *supra* note 12, § 1506.13(a). The draft regulations provided for the exceptional circumstances that may occur during an agency's foreign activities. For major actions significantly affecting the environment of one or more foreign nations, federal agencies were to prepare "Foreign Environmental Statements." An agency would take into account in a Foreign Environmental Statement such factors as: (1) diplomatic considerations; (2) availability of information; (3) commercial competition; (4) commercial confidentiality; and (5) the extent of the agency's role in the proposed activity. *Id.* § 1508.—(b)(2). The agency also had to account for activities that were unlawful or strictly regulated in the U.S., that threatened important global resources, or that may have adverse effects on foreign countries. *Id.* § 1508.—(b)(3).

22. See [1978] 8 ENVIR. REP. (BNA) 1462. The commentary lists the Departments of Commerce, Defense, State and Treasury, the Nuclear Regulatory Commission and the Export-Import Bank as critics of the proposed regulations. *Id.* at 1463. See also *Eximbank Hearings*, *supra* note 11, at 86-127 (comments by various agencies on the CEQ regulations).

23. Exec. Order, note 3 *supra*. For a brief analysis of the Order see [1979] 9 ENVIR. REP. (BNA) 1691. For more detailed analyses see Gaines, "Environmental Effects Abroad of Major Federal Actions": An Executive Order Ordains a National Policy, 3 HARV. ENV'T L. REV. 136 (1979); Recent Development, *Executive Order on Extraterritorial Environmental Impacts*, 13 J. INT'L L. & ECON. 455 (1979); Comment, *Federal Agency Responsibility to Assess Extraterritorial Environmental Impacts*, 14 TEX. INT'L L.J. 425, 445-51 (1979).

One commentator argues agency practice, judicial holdings, and internal executive branch debates have diminished the importance of the extraterritorial issue. [1979] 9 ENV'T L. REP. (ELI) 10011 ("President Orders Environmental Review of International Actions").

24. Exec. Order, *supra* note 3, at preamble.

25. *Id.* § 1-1. The Order also furthers the purposes of the Marine Protection, Research, and Sanctuaries Act of 1972, 33 U.S.C. §§ 1401-1444 (1976), and the Deepwater Port Act of 1974, 33 U.S.C. §§ 1501-1524 (1976), but is the exclusive determination of federal agency procedures only as regards NEPA. Exec. Order, *supra* note 3, § 1-1. This Note focuses exclusively upon the relation of the Order to NEPA's purposes.

26. *Id.* § 2-1. If regulations were previously promulgated as a result of litigation they are not invalidated by the Order. *Id.* § 2-4(c).

27. The Order does not define global commons but does indicate it includes areas "outside the jurisdiction of any nation (e.g., the Oceans or Antarctica)." *Id.* § 2-3(a).



participating in the project;<sup>28</sup> (3) a foreign nation receiving products strictly regulated in the U.S.;<sup>29</sup> (4) a foreign nation receiving a project involving strictly regulated radioactive substances;<sup>30</sup> and (5) a protected global resource.<sup>31</sup> The various actions are analyzed by means of different environmental review documents: The EIS, the environmental study, and the concise review.<sup>32</sup> An EIS must be prepared for actions affecting the global commons.<sup>33</sup> Actions affecting a foreign nation are subject to an environmental study or to a concise review.<sup>34</sup> Any one of the three types of documents may be used in analyzing effects on a global resource.<sup>35</sup>

An agency may limit the scope of actions to be reviewed by providing for exemptions, modifications, or categorical exclusions.<sup>36</sup> Exemptions are allowed for activities involving special foreign relations matters,<sup>37</sup> emergency relief,<sup>38</sup> and Presidential actions.<sup>39</sup> Modifications permit an agency to vary the contents, timing, or availability of a particular review document.<sup>40</sup> An agency may modify an environmental document in order to let the agency act

28. *Id.* § 2-3(b).

29. *Id.* § 2-3(c)(1). The product must be strictly regulated in the U.S. "because its toxic effects on the environment create a serious public health risk." *Id.*

30. *Id.* § 2-3(c)(2).

31. *Id.* § 2-3(d).

32. *Id.* § 2-4(a). Presumably the EIS incorporates a more stringent environmental analysis than either the environmental study or concise review. The environmental study is distinguished from the concise review in that the study is jointly produced by the U.S. and other nations or the study is conducted by an international entity of which the U.S. is a member. *Id.* § 2-4(a)(ii). The concise review is, presumably, conducted only by the U.S. *Id.* § 2-4(a)(iii).

33. *Id.* § 2-4(b)(i).

34. *Id.* § 2-4(b)(ii) to -4(b)(iii).

35. *Id.* § 2-4(b)(iv).

36. *Id.* § 2-5. Actions affecting the global commons, however, may not be limited unless permitted by law. *Id.* § 2-5(d).

37. The Order provides an exemption for actions taken in the interest of national security, *id.* § 2-5(a)(iii), in an armed conflict, *id.*, in gathering intelligence, *id.* § 2-5(a)(iv), in transferring arms, *id.*, in exporting nuclear activities, *id.* § 2-5(a)(v), and in voting in international organizations and conferences, *id.* § 2-5(a)(vi).

38. *Id.* § 2-5(a)(vii).

39. *Id.* § 2-5(a)(ii).

An exemption is provided for "actions not having a significant effect on the environment outside the United States as determined by the agency." *Id.* § 2-5(a)(i). Whether this section adds anything to the Order is unclear. An agency is required to make an environmental analysis if it is engaged in a major federal action significantly affecting the non-U.S. environment. *Id.* § 2-3. Thus the exemption appears to state the obvious: if there is no significant effect, there is no action significantly affecting the non-U.S. environment, and therefore no review is required.

One can read the exemption, however, as exempting actions that have multiple effects that, cumulatively, significantly affect the environment, but individually do not cause a *significant* effect. Such a construction prevents the exemption from being a truism, but at the cost of less environmental analysis. Whether this interpretation was contemplated by the drafters is unknown.

40. *Id.* § 2-5(b).

promptly,<sup>41</sup> to avoid adverse consequences on foreign affairs,<sup>42</sup> or to ensure appropriate consideration of various diplomatic and commercial concerns.<sup>43</sup> Categorical exclusions exclude from review groups of actions, as distinguished from individual projects, that do not significantly affect the environment.<sup>44</sup>

Other provisions place various limits on the Order's applicability. For example, the Order states it does not create a cause of action.<sup>45</sup> The definition of "environment" is limited to "natural and physical [ones] and excludes social, economic and other environments."<sup>46</sup> Substituting a *significant harm* standard for a *significantly affecting* one further reduces the number of actions to be reviewed under the Order.<sup>47</sup> Finally, if an action affects the global commons as well as a foreign nation, an agency need prepare an EIS only for effects on the global commons.<sup>48</sup>

## B. A BRIEF COMPARISON OF THE ORDER AND NEPA

Executive Order 12,114 evidences a significant departure from original NEPA directives.<sup>49</sup> While NEPA supposedly struck a balance between environmental and foreign policy concerns, it empha-

41. *Id.* § 2-5(b)(i).

42. The modification is permitted when necessary to "avoid adverse impacts on foreign relations or infringement in fact or appearance of other nations' sovereign responsibilities." *Id.* § 2-5(b)(ii).

43. An agency may modify a document to indicate consideration of:

- (1) diplomatic factors;
- (2) international commercial, competitive and export promotion factors;
- (3) needs for governmental or commercial confidentiality;
- (4) national security considerations;
- (5) difficulties of obtaining information and agency ability to analyze meaningfully environmental effects of a proposed action; and
- (6) the degree to which the agency is involved in or able to affect a decision to be made.

*Id.* § 2-5(b)(iii).

44. *Id.* § 2-5(c). The Order does not define categorical exclusion. The CEQ regulations define a categorical exclusion as "a category of actions which do not individually or cumulatively have a significant effect on the human environment." 40 C.F.R. § 1508.4 (1980).

45. "This Order is solely for the purpose of establishing internal procedures for Federal agencies to consider the significant effects of their actions on the environment outside the United States, its territories and possessions, and nothing in this Order shall be construed to create a cause of action." Exec. Order, *supra* note 3, § 3-1.

46. *Id.* § 3-4.

47. *See* note 75 *infra*.

48. *Id.* § 3-5.

49. The question of the Act's extraterritorial effect remains unsettled. The Order does not expressly apply NEPA to extraterritorial actions. Rather the Order represents the government's "exclusive and complete determination" of the procedures to be taken by the federal agencies with respect to their foreign activities. *Id.* § 1-1. One commentator argues that the President has ruled that NEPA does not apply overseas, thus agency's foreign actions are subject only to the less-stringent procedures of the Order. *See* Comment, *Federal Agency Responsibility to Assess Extraterritorial Environmental Impacts*, 14

sized the environment.<sup>50</sup> The Order, however, tilts the scales in favor of foreign policy concerns, and differs from NEPA in several important respects as a result.<sup>51</sup> The Order's provisions permitting limitations on environmental assessment allow agencies to avoid significant environmental review.<sup>52</sup> Also, the environmental documents to be prepared by agencies pursuant to the Order are less exacting and less detailed than those required under NEPA.<sup>53</sup>

Certain provisions of the Order are legitimate compromises between NEPA's policy of full disclosure and competing foreign pol-

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TEX. INT'L L.J. 425, 451-52 (1979). See also Gaines, *supra* note 23, at 146 (Order cannot, logically, extend NEPA abroad).

50. NEPA specifically refers to international obligations in § 102(2)(F). This section requires 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." NEPA, § 102(2)(F), 42 U.S.C. § 4332(2)(F) (1976). This rather broad directive has understandably lent itself to discordant interpretations. On the one hand, the section implies that agencies have some obligation to recognize the global character of environmental problems, an obligation which would be met by the preparation of an EIS when major federal actions pose a threat of environmental degradation. On the other hand, one can argue an agency's sole responsibility under the Act is to seek cooperation with other countries on activities within their borders. Such cooperation would not necessarily involve EIS preparation. See Brower, *Is NEPA Exportable?*, 43 ALB. L. REV. 513, 514-15 (1979).

51. NEPA requires preparation of an EIS whenever major federal actions significantly affect the human environment, NEPA, § 102(2)(C), 42 U.S.C. § 4332(2)(C) (1976), whereas the Order requires an EIS only when actions significantly affect the U.S. or the environment outside the jurisdiction of any nation. Exec. Order, *supra* note 3, § 2-3(a). While the regulations implementing NEPA allow modifications in limited situations, 40 C.F.R. § 1507.3(b)-.3(e) (1980), the Order provides for much broader modifications in an agency's review documents. Exec. Order, *supra* note 3, § 2-5(b). Unlike NEPA, the Order states "nothing in [the] Order shall be construed to create a cause of action." *Id.* § 3-1. The Order also fails to provide for public review of draft impact statements or for access to finalized documents.

52. The actions listed in § 2-5(a), see note 37 *supra*, are exempted "because procedural considerations render formal environmental assessment impossible or because overriding national policy negates the relevance of environmental concerns." Gaines, *supra* note 23, at 153-54. The exemptions for licenses, permits, and any nuclear activity not involving a nuclear production or utilization facility are nonetheless considered troublesome in their broadness. Comment, *Federal Agency Responsibility to Assess Extraterritorial Environmental Impacts*, 14 TEX. INT'L L.J. 425, 448 (1979). According to one commentator, however, the exemption provisions comport well with current NEPA practice. See Gaines, *supra* note 23, at 154.

The Order permits agencies to adopt categorical exclusions for situations "involving exceptional foreign policy and national security sensitivities and other such special circumstances." Exec. Order, *supra* note 3, § 2-5(c). Agencies could use the discretion afforded them by the definition to avoid strict compliance with the policies of the Order. See notes 81-83 *infra* and accompanying text.

53. The Order requires different types of environmental documents for different types of environmental effects. See notes 32-35 *supra* and accompanying text. Conversely the CEQ regulations implementing NEPA provide only for preparation of an EIS. 40 C.F.R. § 1502.3 (1980). NEPA's EIS is a detailed statement of the environmental analysis. *Id.* § 1502.

icy interests.<sup>54</sup> Other provisions, however, conflict with the Act's policies.<sup>55</sup> The Order leaves resolution of these conflicting interests to the various agencies. Therefore, to evaluate the Order's effectiveness, one must examine the various regulations issued by agencies pursuant to the Order.

### III AGENCY REGULATIONS

The following is an analysis of three agencies' responses to Executive Order 12,114: the Department of Defense (Defense); the Agency for International Development (AID); and the Export-Import Bank (Eximbank). An examination of these agencies' regulations is warranted in part by the number of foreign activities in which they are involved.<sup>56</sup> More significantly, the regulations enacted by the three represent the broad spectrum of possible responses to the Order.

#### A. DEPARTMENT OF DEFENSE REGULATIONS

##### 1. *Enactment*

The Department of Defense (Defense) was the first agency to promulgate regulations<sup>57</sup> pursuant to the Order.<sup>58</sup> Defense issued its final rules without first promulgating proposed rules. The public

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54. For example, § 2-5(b) allows modifications in the timing, contents, and availability of documents to allow expedited action, or to prevent adverse impacts on foreign relations. *Id.* § 2-5(b)(i). *See also* note 43 *supra*. The Order defines *environment* as exclusively the natural and physical one and explicitly excludes social, economic, and other environments. *Id.* § 3-4. This is in sharp contrast to the CEQ regulations that require a discussion of effects on social and economic environments when they are interrelated with the effects on the natural and physical environments. 40 C.F.R. § 1508.14 (1980). Imposing environmental assessment requirements on agencies with regard to other nations' social and economic environments, however, would pose delicate foreign relations problems and would be difficult to implement. *But see* [1979] 9 ENV'T L. REP. (ELI) 10,011 (Order EIS is not as useful a policy tool as a NEPA EIS).

55. *See* notes 57-133 *infra* and accompanying text for an analysis of conflicts between NEPA policy and the Order's provisions. Much of the discussion focuses on the limited public review, the uncertain definitions of the "major action significantly affecting the environment" standard, and the cause of action disclaimer.

56. In fiscal year 1978, Eximbank issued \$2.8 billion in direct loans to support 66 projects worth \$4.6 billion in exports—an average loan of nearly \$42 million to support an average export worth \$70 million. These amounts were calculated from data contained in [1978] EXPORT-IMPORT BANK ANN. REP. 18.

In fiscal year 1979, AID authorized \$1.2 billion in loans and \$2.7 billion in grants. OFFICE OF PLANNING AND BUDGETING, BUREAU FOR PROGRAM AND POLICY COORDINATION, AGENCY FOR INTERNATIONAL DEVELOPMENT, U.S. OVERSEAS LOANS AND GRANTS AND ASSISTANCE FROM INTERNATIONAL ORGANIZATIONS, JULY 1, 1945—SEPT. 30, 1979 6 (1979).

57. Environmental Effects Abroad of Major Department of Defense Actions, 32 C.F.R. § 197 (1980). The Defense regulations were issued in final form April 12, 1979. 44 Fed. Reg. 21,786 (1979).

58. The CEQ characterized the Defense regulations as "seriously deficient" and con-

was thereby effectively excluded from the process of regulation formulation.<sup>59</sup> While the Order does not require agencies to present proposals for comment, public participation in development of other environmental regulations has always been encouraged.<sup>60</sup> Public comment on proposed regulations can identify ambiguities and inconsistencies in regulations that otherwise would escape an agency's notice.<sup>61</sup> The CEQ admonished Defense for its failure to solicit public comment, indicating it was "counterproductive to publish legally vulnerable procedures which do not carry out the President's intent."<sup>62</sup>

The Order requires agencies to consult with the CEQ and the State Department before placing regulations into effect.<sup>63</sup> Defense, however, published its final procedures without consulting either body.<sup>64</sup> One of the primary purposes of the Order is to require agencies to become informed about their environmental obligations and their actions' effects on foreign policy;<sup>65</sup> Defense's failure to require consultation with the CEQ and Department of State necessarily thwarts that goal. Defense also failed to provide for the regular consultation with other agencies that the Order mandates.<sup>66</sup> Conse-

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veying a "negative, begrudging attitude toward implementation of the Executive Order." Letter from CEQ General Counsel Nicholas C. Yost to Department of Defense Counsel Deanne C. Scimer 2 (May 31, 1979) (on file at the *Cornell International Law Journal*). [hereinafter cited as Letter].

59. Letter, *supra* note 58, at 1-2.

60. For example, CEQ regulations require agencies to: "(a) Make diligent efforts to involve the public in preparing and implementing their NEPA procedures. (b) Provide public notice of NEPA-related hearings, public meetings, and the availability of environmental documents. . . . (c) Hold or sponsor public hearings or public meetings whenever appropriate. . . . (d) Solicit appropriate information from the public." 40 C.F.R. § 1506.6(a)-(d).

Section 1507.3 provides that implementing procedures "shall be adopted only after an opportunity for public review . . ." *Id.* § 1507.3(a).

61. For an example of public comments leading to agency correction of problems in proposed regulations, see 41 Fed. Reg. 26,913 (1976) (AID regulations).

62. Letter, *supra* note 58, at 2. In light of the Order's cause of action disclaimer, it is unclear whether the regulations may be termed "legally vulnerable" for the agency's failure to solicit public comment. At most, the White House may object to undesirable provisions and request they be altered to reflect White House intent. See Gaines, *supra* note 23, at 158.

63. Exec. Order, *supra* note 3, § 2-1.

64. Letter, *supra* note 58, at 1-2. The Order, which went into effect January 4, 1979, Exec. Order, *supra* note 3, at 357, gave agencies eight months in which to promulgate procedures to implement it. *Id.* § 2-1. The adoption process was therefore to be completed by September 4, 1979. Defense published its final procedures April 12, 1979, nearly five months before the deadline. 44 Fed. Reg. 21,786 (1979).

65. Exec. Order, *supra* note 3, § 1-1.

66. Section 2-4(d) of the Order provides: "In order to avoid duplication of resources, agencies in their procedures shall provide for appropriate utilization of the resources of other Federal agencies with relevant environmental jurisdiction or expertise." *Id.* § 2-4(d).

quently, Defense is likely to waste resources by duplicating the efforts of other agencies.<sup>67</sup>

## 2. Cause of Action Disclaimer

The Defense regulations provide "nothing in [them] shall be construed to create a cause of action."<sup>68</sup> Presumably this disclaimer is intended to prevent private parties from bringing suits to force Defense to comply with its regulations. Because Defense exceeded its authority by providing for a disclaimer not authorized by the Order, the disclaimer is arguably invalid.<sup>69</sup> This conclusion is reinforced by the Order's drafting history.<sup>70</sup> As the CEQ noted, the disclaimer is "an improper and inadvisable effort to preclude judicial review of [Defense's] compliance with its own procedures."<sup>71</sup>

## 3. Standards and Definitions

The Order requires environmental review of "major federal actions significantly affecting the environment of" the global commons or foreign nations.<sup>72</sup> The Defense regulations separately define the key terms *federal actions* and *major actions*, instead of

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67. One of the goals of the CEQ's NEPA procedures is the reduction of unnecessary paperwork. See 40 C.F.R. § 1500.4 (1980). One means of furthering this goal is regular consultations with other agencies. *Id.* § 1500.4(k).

68. 32 C.F.R. § 197.1 (1980).

69. In *Peters v. Hobby*, 349 U.S. 331 (1955) the Court held that a Loyalty Review Board regulation permitting the Board on its own motion to review an agency's loyalty board determination was invalid because the regulation was not authorized by the Executive Order creating the Loyalty Review Board. Furthermore, the Court held the President's failure to disapprove of the regulation did not signify his acquiescence in it. *Id.* at 345.

The Defense cause of action disclaimer is invalid under the *Peters* holding. The Order does not authorize cause of action disclaimers for agencies; only the Order is permitted a disclaimer. Therefore, agency disclaimers exceeding the authorization of the Order are invalid.

70. In an earlier draft of the Order two possible versions of the disclaimer were considered. The State Department's version stated that the Order *and* agency procedures did not create a cause of action; CEQ's provided only that the Order did not create a cause of action. Draft Executive Order in Reviewing Effects of Major Federal Actions Abroad, reprinted in [1979] 9 ENVIR. REP. (BNA) 568. At the advice of the Justice Department, the latter approach was adopted with minor changes. COUNCIL ON ENVIRONMENTAL QUALITY, COMMENTS ON DEPARTMENT OF DEFENSE PROCEDURES IMPLEMENTING EXECUTIVE ORDER 12,114 (APRIL 12, 1979) 1 (1979) (on file at the *Cornell International Law Journal*) [hereinafter cited as CEQ COMMENTS]. See *Peter v. Hobby*, 349 U.S. 331, 343-44 (1955) (drafting history of executive order is relevant in construing the order).

The final version of the disclaimer provides:

*Rights of Action.* This Order is solely for the purpose of establishing internal procedures for Federal agencies to consider the significant effects of their actions on the environment outside the United States, its territories and possessions, and nothing in this Order shall be construed to create a cause of action.

Exec. Order, *supra* note 3, § 3-1.

71. CEQ COMMENTS, *supra* note 70, at 1.

72. Exec. Order, *supra* note 3, § 2-3.

treating *major federal actions* as one unit.<sup>73</sup> This bifurcation results in an evaluation of only those actions directly implemented or funded by the U.S. government that involve substantial expenditures of time, money, and resources, and that affect large geographic areas or result in substantial environmental effects.<sup>74</sup> As CEQ notes, reading the two definitions together places "an excessively high threshold" on Defense actions that must be reviewed.<sup>75</sup> CEQ recommends

73 32 C.F.R. § 197.3(b) (1980) provides.

*Federal Action* means an action that is implemented or funded directly by the United States Government. It does not include actions in which the United States participates in an advisory, information-gathering, representational, or diplomatic capacity but does not implement or fund the action; actions taken by a foreign government or in a foreign country in which the United States is a beneficiary of the action, but does not implement or fund the action; or actions in which foreign governments use funds derived indirectly from United States funding.

The terms "direct" and "indirect" are undefined, an omission the CEQ characterizes as a "potentially significant loophole." CEQ COMMENTS, *supra* note 70, at 2. The loophole arises when "direct" is construed narrowly and "indirect" expansively.

32 C.F.R. § 197.3(e) (1980) provides:

*Major Action* means an action of considerable importance involving substantial expenditures of time, money, and resources, that affects the environment on a large geographic scale or has substantial environmental effects on a more limited geographical area, and that is substantially different or a significant departure from other actions, previously analyzed with respect to environmental considerations and approved, with which the action under consideration may be associated. Deployment of ships, aircraft, or other mobile military equipment is not a major action for purposes of this part.

The CEQ criticizes the final sentence of the section, since deployment of military equipment may have a significant effect on the global commons. CEQ COMMENTS, *supra* note 70, at 2.

CEQ regulations define *major federal actions* as ones "with effects that may be major and which are potentially subject to Federal control and responsibility." 40 C.F.R. § 1508.18 (1980) (emphasis added). The use of probabilistic terms such as "may" and "potentially" makes the CEQ standard more expansive than that of Defense.

74 The narrow Defense standard results from reading together 32 C.F.R. § 197.3(b) and (c) (1980).

75 CEQ COMMENTS, *supra* note 70, at 2. The CEQ is especially disturbed by the potential harm to the global commons that may result from actions unreviewable under the Defense standard. *Id.* CEQ asserts its *major federal action* standard, 40 C.F.R. § 1508.18 (1980), not that of Defense, should apply to the global commons. CEQ COMMENTS, *supra* note 70, at 2.

The Defense regulations refer to "actions that do significant *harm* to the environment." 32 C.F.R. § 197 (Enclosure 1) (A) (1980) (emphasis added). The CEQ, criticizing the use of *harm* as "plainly inconsistent" with the Order, suggests the term should be deleted. CEQ COMMENTS, *supra* note 70, at 4-5. Despite CEQ's interpretation, however, the Order supports Defense's use of *harm*.

The Order provides: "[A]n action significantly affects the environment if it does significant harm to the environment even though on balance the agency believes the action to be beneficial to the environment." Exec. Order, *supra* note 3, § 3-4. The CEQ contends the clause requires an agency to make a harm determination after an initial decision that the action significantly affects the environment but is beneficial. CEQ COMMENTS, *supra* note 70, at 4-5. CEQ misinterprets the clause. The plain language of the Order above requires an agency to find an action significantly affecting the environment if there is significant harm, regardless of whether on balance the action results in a benefit. Thus an agency cannot avoid preparation of an environmental document merely because the

that the terms be merged to lower the threshold for review to one consistent with the intent of the Order.<sup>76</sup>

#### 4. Failure to Assess Alternatives

The Defense regulations require alternatives analysis for actions affecting the global commons but fail to require similar analysis for actions affecting foreign nations or global resources.<sup>77</sup> This omission is significant because alternatives analysis lies at the heart of any meaningful environmental assessment.<sup>78</sup> Agency study of possible

action, on balance, is beneficial. Defense, therefore, is justified in using a "significant harm" standard since such standard requires preparation of the appropriate environmental document. No action *within the scope of the Order* goes unreviewed because of Defense's standard.

Nevertheless, the *significant harm* standard is not as inclusive as that of NEPA. The NEPA standard requires review of "actions significantly affecting" the environment. NEPA, § 102(2)(C), 42 U.S.C. § 4332(2)(C) (1976). *Affecting* means "will or may have an effect on." 40 C.F.R. § 1058.3 (1980). Thus the NEPA standard focuses on significant effects. The regulations defining *significantly* provide: "Impacts . . . may be both beneficial and adverse. A significant effect may exist even if the Federal agency believes that on balance the effect will be beneficial." *Id.* § 1508.27(b)(1). Thus an action significantly affects if it has a significant harm *or* a significant beneficial impact. The Order limits review to only the case of a significant harm. Exec. Order, *supra* note 3, § 3-4.

76. CEQ COMMENTS, *supra* note 70, at 2.

77. Agencies involved in actions significantly affecting the global commons must file an EIS. Exec. Order, *supra* note 3, § 2-4(b)(i). The Defense regulations governing the global commons, 32 C.F.R. § 197 (Enclosure 1) (1980), require that an EIS include "an informed consideration of the environmental effects of the proposed action on the global commons *and the reasonable alternatives.*" *Id.* § 197 (Enclosure 1) (D)(1) (emphasis added).

The regulations requiring analysis of considerations regarding other nations and protected global resources, *id.* § 197 (Enclosure 2), do not require alternatives analysis. These actions are reviewed in general environmental studies, *id.* § 197 (Enclosure 2) (D)(1), or environmental reviews, *id.* § 197 (Enclosure) (E)(2). As to environmental studies, "[t]he precise content of each study must be flexible because of such considerations as the sensitivity of obtaining information from foreign governments, the availability of . . . information, and other factors identified under "Limitations" . . . ." *Id.* § 197 (Enclosure 2) (D)(4). The "Limitations" section allows case-by-case review and modification of procedures to reflect foreign policy concerns. *Id.* § 197 (Enclosure 2) (D)(6). Similarly,

[a]n environmental review is a survey of the important environmental issues associated with the proposed action that is to be considered by the [Defense] component concerned in the decision-making process. It does not include all possible environmental issues and it does not include the detailed evaluation required in an environmental impact statement. . . . There is no foreign government or international organization participation in its preparation, and the content therefore may be circumscribed because of the availability of information and because of foreign relations sensitivities.

*Id.* § 197 (Enclosure 2) (E)(4).

78. One commentator argues "[a] substantive evaluation of a project is utterly dependent upon an understanding of other possible courses of conduct." W. RODGERS, *supra* note 9, § 7.9(c), at 792. See also Jordan, *Alternatives Under NEPA: Toward an Accommodation*, 3 *ECOLOGY L.Q.* 705 (1973) ("[T]he need for careful consideration of alternatives was in the forefront of congressional concern"). See note 9 *supra* for an explanation of alternatives analysis.



alternatives often results in the discovery of less harmful but equally effective actions.<sup>79</sup> Conversely, neglecting alternatives analysis precludes an agency from possibly mitigating the adverse environmental impacts of proposed actions.<sup>80</sup>

### 5. Exemptions, Modifications and Exclusions

To a certain extent, Defense has complied with the Order's provisions on exemptions and categorical exclusions. With respect to actions affecting the global commons, Defense permits categorical exclusions but has not yet utilized that authorization.<sup>81</sup> The Defense procedure for establishing an exclusion, however, does not coincide with the standards established by the Order.<sup>82</sup> Thus actions that

79. See, e.g. *Environmental Defense Fund, Inc. v. Froehle*, 473 F.2d 346, 348-52 (8th Cir. 1972).

80. An extreme example of what adverse environmental impacts are possible in the absence of adequate environmental review is provided by the Westinghouse nuclear reactor project in the Philippines. The Export-Import Bank authorized loans to permit the Philippine government to buy the reactor, and the Nuclear Regulatory Commission approved a license for its export. When these plans were being made, Executive Order 12,114 was not in effect and the federal agencies concerned did not consider NEPA applicable to the action. As a result, the agencies did not file an environmental impact statement, assessment or environmental review. If the agencies had developed an EIS or comparable document, they would have realized that the Philippine Islands are located in an earthquake and volcanic belt. Moreover, the Islands lack a stable salt formation suitable for disposal of nuclear waste. Radioactive wastes therefore must be shipped to and disposed of at international burial sites. For more detailed accounts of the reactor case, see Wicker, *Looking Before Leaping*, N.Y. Times, June 20, 1978, at A17, col. 1; Wash. Post, Aug. 31, 1979 at A4, col. 1.

81. 32 C.F.R. § 197 (Enclosure 1) (C)(8) (1980). Categorical exclusions must be listed in attachment 1. *Id.* As of this writing Defense has not listed any exclusions.

82. Defense regulations provide a categorical exclusion "for actions that normally do not, individually or cumulatively, do significant harm to the environment." *Id.* The exclusion is authorized by Exec. Order, *supra* note 3, § 2-5(c). See also note 44 *supra* for the CEQ definition of a categorical exclusion. Section 2-5(c), however, is limited by § 2-5(d), Exec. Order, *supra* note 3, § 2-5(d), which provides that with respect to the global commons § 2-5 limitations, of which categorical exclusion are one, are prohibited "unless permitted by law." *Id.*

The term "permitted by law" is not defined in the Order. If it is to have any effect, however, it must mean, at least, that agency regulations issued pursuant to the Order are not sufficient "law" to permit the agency to use limitations. Otherwise an agency could avoid any review by issuing the appropriate regulations. Acts of Congress, court decisions and executive orders presumably would be sufficient "law."

CEQ criticized as being vague the Defense regulation providing that the appropriate Defense official shall "modify . . . any of the enclosures to this part in a manner consistent with the policies set forth in this part." 32 C.F.R. § 197.5(a)(2) (1980). CEQ COMMENTS, *supra* note 70, at 5. CEQ has misconstrued the regulation. The reference to "the policies set forth in this part" must refer to § 197.4 entitled "Policy" which provides: "Executive Order 12114 . . . prescribes the exclusive and complete procedural measures and other actions to be taken by the Department of Defense to further the purpose of the National Environmental Policy Act with respect to the environment outside the United States." 32 C.F.R. § 197.4 (1980) (emphasis added). The reference to policies in § 197.5(a)(2) necessarily incorporates § 197.4(e) which prescribes the exclusive procedures to be followed by Defense. One of the Order's procedures is that of creating modi-

should be reviewed under the Order may escape review under the Defense regulations. The regulations pertaining to modifications and those exemptions and exclusions for effects on foreign nations or global resources comply with the Order.<sup>83</sup>

## B. AGENCY FOR INTERNATIONAL DEVELOPMENT REGULATIONS

### 1. *Enactment*

Unlike the Defense procedures, regulations issued by the Agency for International Development (AID) comply with not only the Order's provisions but its policy as well.<sup>84</sup> In this respect the AID regulations represent the most complete recognition by an agency of the spirit of NEPA. An examination of the regulations' history, however, reveals AID's cooperation was not entirely self-initiated. Rather, unusual circumstances influenced the development of AID's current procedures.

In settlement of a suit instituted by the Environmental Defense Fund, AID agreed in 1975 to file a programmatic EIS<sup>85</sup> on its international pesticide activities and pest management programs.<sup>86</sup> In

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fications. Exec. Order, *supra* note 3, § 2-5(b). Thus Defense has properly allowed for modifications.

83. Defense's general exemptions parallel those of the Order. Compare 32 C.F.R. § 197 (Enclosure 2) (C)(3)(a)(1)-(C)(3)(a)(10) (1980) with Exec. Order, *supra* note 3, § 2-5(a)(i)-5(a)(vii). Defense issues exemptions on both a case-by-case basis and a class basis. 32 C.F.R. § 197 (Enclosure 2) (C)(3)(b) (1980).

CEQ criticized Defense for the use of class exemptions because the Order's authorization for additional exemptions, Exec. Order, *supra* note 3, § 2-5(c), implicitly requires a case-by-case determination. CEQ COMMENTS, *supra* note 70, at 3.

CEQ's concern is unwarranted. Defense has a legitimate interest in exempting classes of actions that fall within the emergency, foreign policy, and national security standard of the Order. See Exec. Order, *supra* note 3, § 2-5(c). Clearly Defense should be able to use a class exemption with respect to national security actions. Moreover, the class exemption is an economic measure. Without it Defense would be forced to continually use resources for a review process that will always result in an exemption. In addition, Defense has agreed to consult with CEQ before any such class is created. 32 C.F.R. § 197 (Enclosure 2) (C)(3)(b)(2) (1980).

84. *Agency for International Development Environmental Procedures*, 45 Fed. Reg. 70,239 (1980) (to be codified in 22 C.F.R. § 216). AID is an independent agency within the Department of State that was established to provide aid to developing countries in the form of capital projects and technical assistance. In addition to assisting in land alteration and industrial development projects, AID finances agricultural activities involving pesticides, chemical fertilizers, fungicides and herbicides that have the potential to cause serious environmental effects. See Comment, *Controlling the Environmental Hazards of International Development*, 5 *ECOLOGY L.Q.* 321, 337-41 (1976).

85. A programmatic EIS is one with "comprehensive analyses of agency programs involving numerous actions with environmental effects." W. RODGERS, *supra* note 9, § 7.9(a), at 785.

86. *Environmental Defense Fund, Inc. v. Agency for International Development*, 6 ENV'T L. REP. (ELI) 20,121 (D.D.C. 1975) (order approving stipulation).

At that time, AID's international pesticide activities and pest management programs included financing the procurement and use of pesticides in twenty Third World countries. *Id.* (introductory paragraph).

addition, AID agreed to promulgate environmental regulations applying NEPA to all AID activities.<sup>87</sup> AID published environmental regulations in compliance with the court settlement in June, 1976.<sup>88</sup>

Following the enactment of Executive Order 12,114, AID amended its procedures to reflect the definitions and requirements of the Order.<sup>89</sup> AID's stated purpose in making the changes was to make AID's environmental procedures more effective and efficient and to reduce unnecessary paperwork and delay.<sup>90</sup> Unlike Defense, AID solicited comments on its regulations<sup>91</sup> and modified the regulations in accordance with some of the criticisms received.<sup>92</sup>

## 2. *Use of Alternatives Analysis*

The primary documents used by AID, the EIS and the Environmental Assessments, require alternatives analysis. An EIS analyzing effects in the U.S. must comply with the CEQ regulations<sup>93</sup> that require rigorous analysis of all reasonable alternatives.<sup>94</sup> An EIS analyzing effects on the global commons or a foreign nation must "generally follow the CEQ Regulations, but will take into account the special consideration and concerns of A.I.D."<sup>95</sup> This clause,

87 "AID will propose, solicit and consider public comments on, and adopt environmental regulations, to assist AID in implementing the requirements of NEPA, such NEPA regulations to be adopted in consultation with the CEQ." *Id.* § 9. All aspects of AID's activities were subject to the regulations of § 9. *Id.* § 11.

88 41 Fed. Reg. 26,913 (1976) (codified in 22 C.F.R. § 216 (1980)).

89 45 Fed. Reg. 70,239 (1980) (to be codified in 22 C.F.R. § 216).

The AID regulations create a complex environmental review procedure. For actions not exempted, categorically excluded, or subject to mandatory review the process begins with preparation of an Initial Environmental Examination (IEE). *Id.* § 216.3(a)(1). An IEE "is the first review of the reasonably foreseeable effect of a proposed action on the environment." *Id.* § 216.1(c)(2). Included in the IEE is the Threshold Decision, *id.* § 216.3(a)(2), on "whether a proposed Agency action is a major action significantly affecting the environment." *Id.* § 216.1(c)(3). An EIS, or an Environmental Assessment (EA), a detailed study of the reasonably foreseeable effects on the environment, *id.* § 216.1(c)(4), is required if a positive Threshold Decision is made. *Id.* § 216.3(a)(2)(iii). If the action jeopardizes an endangered species then the Threshold Decision is positive and the EIS or EA must discuss alternatives available to mitigate harm to the species. *Id.* § 216.5. An EIS is prepared if the U.S. or the global commons is affected, otherwise an EA is used. *Id.* § 216.7(a). At its discretion, AID may prepare environmental studies or environmental reviews instead of an EA. *Id.* § 216.9. The contents of these documents are not specified by the regulations.

AID need not prepare an EIS or EA if: a substantial number of similar analyses have been previously prepared; or, a programmatic statement exists; or, AID's design of the project avoids any significant effects. *Id.* § 216.3(a)(3).

90 45 Fed. Reg. 70,239 (1980) (summary).

91 44 Fed. Reg. 56,378 (1979).

92 See 45 Fed. Reg. 70,239-43 (1980) (AID discussion of comments on proposed regulations).

93 45 Fed. Reg. 70,249 (1980) (to be codified in 32 C.F.R. § 216.7(b)).

94 40 C.F.R. § 1502.14 (1980).

95 45 Fed. Reg. 70,249 (1980) (to be codified in 22 C.F.R. § 216.7(c)).

sanctioning deviations from the CEQ regulations, appears to reflect AID's understanding of the Order's modification provision.<sup>96</sup> AID's *special consideration and concerns* standard exceeds the Order's modification standard to the extent AID has concerns not covered by the Order's precise language.

An Environmental Assessment must include an alternatives analysis<sup>97</sup> paralleling that required by the CEQ.<sup>98</sup> An Environmental Assessment may, however, be replaced by environmental studies or reviews of environmental issues.<sup>99</sup> The regulations offer no guidance on the kind of alternatives analysis required in these latter documents. AID has, however, indicated it will use these documents only in extraordinary circumstances.<sup>100</sup>

### 3. Classification of Actions

AID subjects all of its actions to an environmental review procedure, except those for which a specific exemption or a categorical exclusion is provided.<sup>101</sup> The enumerated exemptions include disaster and emergency relief and programs involving "exceptional foreign policy sensitivities."<sup>102</sup> These exemptions are entirely consistent with the Order's provisions.<sup>103</sup> AID also identifies three situations in which categorical exclusions are appropriate: where there is no effect on the environment; where AID has little control over specific use of the funds; or, where the action is a well-controlled research activity.<sup>104</sup> In each case, use of an exclusion is permitted by the Order.<sup>105</sup>

96. Exec. Order, *supra* note 3, § 2-5(b). See notes 40-43 *supra* and accompanying text.

97. 45 Fed. Reg. 70,247-48 (to be codified in 22 C.F.R. § 216.6(a)).

98. Compare *id.* 70,248 (to be codified in 22 C.F.R. § 216.6(c)(3)) with 40 C.F.R. § 1502.14 (1980) (CEQ alternatives analysis).

99. 45 Fed. Reg. 70,249 (1980) (to be codified in 22 C.F.R. § 216.9).

100. In comments preceding the regulations, AID says it:

intends to continue to assess environmental consequences of proposed actions by means of Environmental Assessments. However, A.I.D. believes it is useful, in extraordinary circumstances, for the Administrator to have the opportunity to approve the use of other documents authorized under the Executive Order . . . . Such authority will be used sparingly and only when the Administrator concludes that it is appropriate and adequate to address environmental concerns.

45 Fed. Reg. 70,243 (1980) (comment 16). Nevertheless, AID is not legally bound to follow the above comment.

101. 45 Fed. Reg. 70,244 (1980) (to be codified in 22 C.F.R. § 216.2(a)).

102. *Id.* (to be codified in 22 C.F.R. § 216.2(b)(1)).

103. Exec. Order, *supra* note 3, § 2-5(a)(vii) provides a disaster and emergency relief exemption while § 2-5(c), *id.*, permits an exemption for foreign policy sensitivities.

104. 45 Fed. Reg. 70,244 (1980) (to be codified in 22 C.F.R. § 216.2(c)(1)). AID identified fifteen categorical exclusions within the three categories. *Id.* 70,244-45 (to be codified in 22 C.F.R. § 216.2(c)(2)).

105. Exec. Order, *supra* note 3, § 2-5(c).

#### 4. Standards and Disclaimers

AID defines an action with *significant effects* outside the U.S. as an action doing significant harm to the environment,<sup>106</sup> and defines the *environment* as natural and physical ones.<sup>107</sup> Each of these definitions agrees with those of the Order.<sup>108</sup> Finally, AID did not include a cause of action disclaimer in its regulations.

### C. EXPORT-IMPORT BANK REGULATIONS

#### 1. Enactment

Like AID, the Export-Import Bank of the United States (Eximbank)<sup>109</sup> formulated environmental procedures in settlement of a lawsuit. In *Natural Resources Defense Council v. Export-Import Bank*,<sup>110</sup> the plaintiff alleged that certain Eximbank-funded projects required preparation of an EIS. The parties settled the suit after Eximbank agreed to implement procedures to consider the environmental impacts of its foreign activities.<sup>111</sup> According to the stipulation of dismissal, Eximbank was required to adopt procedures in compliance with Executive Order 12,114, which had just been issued.<sup>112</sup> In August, 1979 Eximbank published the implementing procedures,<sup>113</sup> to which the CEQ gave final approval.<sup>114</sup> As was

106. 45 Fed. Reg. 70,244 (1980) (to be codified in 22 C.F.R. § 216.1(c)(11)).

107. *Id.* (to be codified in 22 C.F.R. § 216.2(c)(10)).

108. Exec. Order, *supra* note 3, § 3-4.

109. The Bank's primary statutory function is to aid in facilitating exports and imports. 12 U.S.C. § 635(a)(1) (1976).

110. *Natural Resources Defense Council, Inc. v. Export-Import Bank*, [1979] 9 ENV'T L. REP. (ELI) 20,145 (D.D.C., Feb. 23, 1979) (order approving stipulation of dismissal). For a summary of the complaint see [1981] ENV'T L. REP. (ELI) 65,444.

111. [1979] 9 ENV'T L. REP. (ELI) 20,145.

112. Significantly, the case was dismissed without prejudice. *Id.* § 5. The Natural Resources Defense Council (NRDC), therefore has the right to bring further legal action regarding Eximbank's compliance with its environmental obligations. As of this writing NRDC does not plan such action. Conversation with S. Jacob Scherr, General Counsel for NRDC (Nov. 3, 1980).

The parties also stipulated that neither party, by agreeing to the settlement, took any position concerning the applicability of NEPA to Eximbank. [1979] 9 ENV'T L. REP. (ELI) 20,145.

113. Procedures for Compliance with Executive Order 12,114 (January 4, 1979) 13 C.F.R. § 409 (1980).

114. 44 Fed. Reg. 50,811 (1979) (supplementary information). Actions affecting the U.S. are controlled by 12 C.F.R. § 408, while any extraterritorial effects are governed by § 409. 12 C.F.R. § 409.8(a) (1980).

The § 408 procedures implementing NEPA are much less detailed than those prepared by other agencies. Eximbank explained that:

[i]n view of the Bank's sole statutory function of providing financial assistance in support of the export of U.S. goods and services and, therefore, the low probability of any significant adverse impact upon the environment within the United States resulting from any transaction for which Eximbank may be asked to provide assistance, Eximbank has concluded that the procedures as drafted do not need to contain additional detail. In the exceptional circumstance where

required by the settlement stipulation, Eximbank consulted with the CEQ before drafting its regulations. Eximbank also solicited and considered comments regarding the proposed regulations.<sup>115</sup>

## 2. Substantive Provisions

The Eximbank regulations do not comply fully with the Order, nor do they completely accord with NEPA policies. For example, Eximbank bifurcates determinations of whether its activities are major actions significantly affecting the environment. The General Counsel determines whether the action is *major*,<sup>116</sup> while the Engineer decides whether the action *significantly affects* the environment.<sup>117</sup> This approach could result in actions escaping review that would have been reviewed if the standard were not bifurcated.<sup>118</sup>

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there may be significant adverse impacts upon the environment of the United States. Eximbank expects to consult closely with the CEQ.

44 Fed. Reg. 50,811 (1979) (supplementary information).

115 44 Fed. Reg. 50,811 (1979) (supplementary information).

116. Primary responsibility for determining whether financing constitutes a major action falls upon the General Counsel. 12 C.F.R. § 409.8(b) (1980). Factors that the Counsel may consider are:

- (1) the percentage that Eximbank financing represents of the total cost of the project,
- (2) the percentage that Eximbank financing represents of the total financing for U.S. goods being purchased,
- (3) the function of the procurement for which Eximbank financing is requested,
- (4) the likelihood the project will go forward whether or not it is financed by Eximbank, and
- (5) the degree of control that Eximbank has over the planning and execution of the project.

12 C.F.R. § 409.8(b)(1)-(5) (1980).

The regulations do not define "major action." They do provide that their terms are to have the same meaning as the Order's. *Id.* § 409.2. Unfortunately, the Order also fails to define "major action." Eximbank could adopt the CEQ's definition of "major federal action" which includes "actions with effects that may be major and which are potentially subject to Federal control and responsibility." 40 C.F.R. § 1508.18 (1980).

117. The Engineer considers whether the project will significantly affect the global commons or a non-participating foreign nation, whether the project will produce a product prohibited by U.S. federal law, and whether it may have significant effects on natural or ecological resources of global importance designated for protection under § 2-3(d) of the Order. 12 C.F.R. § 409.8(c) (1980).

118. The separate determinations by the General Counsel and the Engineer of *major action* and *significant effect*, see notes 116-17 *supra* and accompanying text, create a two part Eximbank test: (1) existence of a major action and (2) existence of a significant effect. The General Counsel makes the major action determination after consulting the Engineer and other officials, 12 C.F.R. § 409.8(b) (1980), but there is no consultation requirement as to the Engineer's determination of significant effect. See *id.* § 409.8(c). The order of the determinations is decided on a case-by-case basis. *Id.* § 409.8(d). If either determination is negative the other need not be made. *Id.* If the first determination Eximbank makes indicates an action is not *major*, it avoids any determination on significance—even if the action has severe environmental impacts. Thus, unlike CEQ's approach, the Eximbank procedures result in an independent meaning for *major*. Conversely, the CEQ's regulations provide that "[m]ajor reinforces but does not have a meaning independent of significantly." 40 C.F.R. § 1508.18 (1980). Thus actions that

Another problem is that the regulations, while requiring the use of available information and a systematic, inter-disciplinary analysis,<sup>119</sup> do not acknowledge the need for alternatives analysis.<sup>120</sup> Thus Eximbank fails to provide for the analysis most essential to effective environmental review. Finally, Eximbank attempts to avoid judicial review by including a cause of action disclaimer in its regulations.<sup>121</sup>

### 3. Limitations

The Eximbank limitation regulations adhere to the Order's language and policy. The regulations incorporate the Order's wording for the exemption<sup>122</sup> and modification provisions.<sup>123</sup> The use of categorical exclusions is restricted as well—only three programs enjoy such exclusions.<sup>124</sup> As required by the Order, the limitations do not apply to actions affecting the global commons unless otherwise

are not major, if major has an independent meaning, must be reviewed under NEPA when the action's significant effect makes the action major. Eximbank's bifurcation avoids this result

Although the Order was intended to provide agencies flexibility in making environmental decisions it was not intended to permit an agency's evasion of review by adopting a standard not used elsewhere. Rather, agencies can use the exemption, modification, and categorical exclusion provisions to achieve the desired flexibility. Bifurcating the *major actions significantly affecting the environment* standard runs counter to the purposes of the Order

119 Eximbank officials are to use "relevant technical information . . . readily available from other Federal agencies with relevant expertise or other sources" 12 C.F.R. § 409.8(e) (1980). This is consistent with the Order. See Exec. Order, *supra* note 3, § 2-4(d).

120 See 12 C.F.R. §§ 409.8(e), 409.10 (1980) (alternatives analysis is not required in determinations or environmental documents). For a discussion of the importance of alternatives analysis, see notes 77-80 *supra* and accompanying text. Section 409.9(a) requires preparation of an "Environmental Document" in the form of an EIS if the global commons is affected. Section 409.9(b) requires an "Environmental Document" in the form of an environmental study or concise environmental review if a foreign nation is affected or a harmful product is exported to it. 12 C.F.R. § 409.9 (1980).

An "Environmental Document" need only review the "anticipated significant environmental effects of the physical project," not the reasonable alternatives. *Id.* § 409.10(a). Thus an "Environmental Document" EIS arguably does not require alternatives analysis. This definition of an EIS as an "Environmental Document" is not derived from the Order, which only speaks in terms of "Environmental Impact Statements." Exec. Order, *supra* note 3, §§ 2-4(a)(i), 2-4(b)(i).

121 "Nothing in these procedures shall be construed to create a cause of action." 12 C.F.R. § 409.14 (1980). See notes 68-71 *supra* and accompanying text for a discussion of the validity of the cause of action disclaimer.

122 The regulations incorporate by reference the Order's provisions regarding specific exemptions, 12 C.F.R. § 409.12(a) (1980), and adopts the Order's general limitation language. *Id.* § 409.12(b).

123. Compare 12 C.F.R. § 409.13 (1980) with Exec. Order, *supra* note 3, § 2-5(b).

124 The programs excluded are Exporter Credit Insurance and Guarantees, Discount Loans, and Cooperative Financing Facility credit. 12 C.F.R. § 409.12(c)(1)(i)-12(c)(1)(iii) (1980).

The programs excluded are those not likely to have significant environmental effects and those for which Eximbank has little say in how the program funds are to be used by a foreign government. *Id.* § 409.12(c)(2).

authorized by law.<sup>125</sup>

#### D. SIGNIFICANCE OF THE REGULATIONS

The foregoing analysis of agency response to Executive Order 12,114 reveals defects in the Order that hinder the furtherance of NEPA's purposes. The discretion afforded agencies by the Order allows them to circumvent important aspects of a meaningful environmental analysis.<sup>126</sup> For example, the Order permits agencies to fragment the *major federal action significantly affecting the environment* standard in a manner that considerably narrows the required review.<sup>127</sup> The failure of several agencies to require alternatives analysis may similarly frustrate meaningful environmental review.<sup>128</sup>

Even when an agency provides a proper standard and requires alternatives analysis, as AID did, other infirmities result from the broad discretion granted agencies by the Order. While AID carefully defines environmental assessment, the agency's description of the contents of its substitute documents is vague.<sup>129</sup> In addition, AID fails to provide a standard for deciding when to use the substitute procedures.

Various agency actions taken pursuant to the Order evince a general reluctance to provide for meaningful environmental analysis of overseas activities. The most significant of these are the cause of action disclaimers.<sup>130</sup> Aside from their potential legal vulnerability, the disclaimers demonstrate agencies' unwillingness to be bound by their own regulations. Failure to consult with the CEQ or to invite public comment on the regulations also reinforces the perception that certain agencies are unwilling to undertake serious environmental analysis.<sup>131</sup> Finally, the various limitation provisions can be eas-

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125. *Id.* §§ 409.12(a)-.12(b), 409.13 (1980) (references to restrictions on the Order's limitation provisions).

126. Differences between the agencies' responses are partially attributable to differences between the agencies' objectives and organizational characteristics. Differences in the political pressures operating on them also undoubtedly influence agency attention to NEPA and to the Order. See generally Andrews, *Agency Responses to NEPA: A Comparison and Implications*, 16 NAT. RESOURCES J. 301, 318-20 (1976).

That the Eximbank and initial AID regulations were the products of judicial actions is also significant. It is unlikely Defense could have taken the liberties it did had it formulated its procedures in response to a court's directive. In light of the differences between the three sets of regulations, it appears agencies may be more motivated by political pressures emanating from environmentalists and the courts than by commitments to NEPA objectives.

127. See notes 72-76 & 116-18 *supra* and accompanying text.

128. See notes 77-80, 93-100 & 120 *supra* and accompanying text.

129. See notes 93-100 *supra* and accompanying text.

130. See notes 68-71, 108 & 121 *supra* and accompanying text.

131. See notes 57-67 *supra* and accompanying text.



ily manipulated to constrict the scope of an agency's review.<sup>132</sup>

Regulations issued pursuant to the Order reflect its positive aspects as well. The Order was designed to allow agencies the flexibility to balance their environmental responsibilities with the foreign policy considerations inherent in any overseas activity. Each agency should be able to formulate procedures tailored to meet its environmental and foreign policy concerns. Such an approach properly results in some variation in agency procedures. Further, before Executive Order 12,114 was issued, most federal agencies refused to acknowledge *any* obligation to consider environmental review of their foreign activities.<sup>133</sup> Now they must evaluate the environmental effects of certain of their actions abroad. The Order can thus be viewed as a modest first step in adapting NEPA policy to foreign activities. The Order nevertheless allows agencies too much discretion in making environmental analyses, as evidenced by the widely disparate responses reflected by the Defense, AID and Eximbank procedures.

#### IV LIMITING AGENCY DISCRETION IN EVALUATING MAJOR FEDERAL ACTION HAVING A SIGNIFICANT EFFECT ABROAD

The chances for further congressional or Presidential action clarifying agencies' responsibilities for the environmental effects of their foreign activities appear dim. Congress has not acted to resolve NEPA's extraterritorial scope, even though the controversy is over a decade old. The Reagan administration's deregulation efforts suggest it is unwilling to impose more stringent environmental review requirements.<sup>134</sup> Therefore the agencies themselves must take the initiative to clarify their responsibilities.

The relevant federal agencies could take several actions that would significantly increase their compliance with the Executive Order. First, alternatives analysis should be required in all environmental documents. Only by effectively analyzing alternatives can an agency fully appreciate the environmental costs of an action.

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132. See notes 81-83 & 101-05 *supra* and accompanying text.

133. See notes 17-20 *supra* and accompanying text.

134. The approach of the current administration is exemplified by Exec. Order No. 12,290, 46 Fed. Reg. 12,943 (1981), which revoked an executive order that required notification to foreign countries before certain hazardous products could be exported. President Reagan revoked the order so the Export Administrative Act could be "implemented with the minimum regulatory burden." *Id.*

Second, agencies should use an EIS, prepared according to the CEQ's NEPA rules, for actions affecting the global commons. The standard for environmental review of all actions should be that of NEPA unless special circumstances arise that necessitate the lessening of the scope of review. Foreign policy reasons dictate less stringent review when effects on foreign nations occur. Effects on the global commons, by definition, do not affect other nations, thus the foreign policy rationale no longer applies. In addition, the global commons contains valuable animal, plant, and mineral resources that must be adequately protected. Only a full-scale EIS provides an agency with the basis for reasoned decision-making regarding such resources.

Third, agencies should provide for regular consultation with the CEQ and the State Department. Such interaction would, ideally, assure an agency's cognizance of the environmental and foreign policy issues inherent in its action. Finally, agencies that issued regulations without allowing public comment should reissue them after public comment in order to remove potential legal challenges to them.

The agencies' own interests are served by adopting the above proposals. The current state of the law is that NEPA's extraterritorial scope is indefinite; the federal courts have not yet decided how far it extends. If agencies take affirmative measures to ensure environmental review the courts may give considerable deference to the Executive Order and limit NEPA's scope accordingly. Conversely, if agencies persist in conduct that avoids meaningful environmental review, the courts might be disposed to interpret NEPA as having extraterritorial effect, thus requiring of agencies an environmental review more stringent than that required by the Executive Order.

## V CONCLUSION

Executive Order 12,114 purports to require effective environmental analysis by agencies engaged in major federal actions abroad. Regulations issued pursuant to the Order demonstrate the broad discretion afforded agencies in formulating their environmental reviews. Some discretion is necessary in light of the foreign policy concerns common to different agencies, but too much leeway invites a shirking of U.S. agencies' obligations to safeguard the environment.

At this time, Congress and the President are unlikely to amend the Order to better clarify agencies' environmental responsibilities. The agencies themselves, on the other hand, have the means and

the capability to adapt their procedures towards that end. Agencies should take advantage of their ability to establish a more sound and uniform global environmental policy; indeed, it is in their best interest to do so.

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