1994

Governmental Hypocrisy and the Extraterritorial Application of NEPA

Silvia M. Riechel

Follow this and additional works at: http://scholarlycommons.law.case.edu/jil

Part of the International Law Commons

Recommended Citation
Available at: http://scholarlycommons.law.case.edu/jil/vol26/iss1/4

This Note is brought to you for free and open access by the Student Journals at Case Western Reserve University School of Law Scholarly Commons. It has been accepted for inclusion in Case Western Reserve Journal of International Law by an authorized administrator of Case Western Reserve University School of Law Scholarly Commons.
Governmental Hypocrisy and the Extraterritorial Application of NEPA

Silvia M. Riechel*

I. INTRODUCTION

With the growing recognition of global environmental problems such as climate change, acid rain, the loss of living species, and air and ocean pollution, governments and their citizens are searching for more ways to sustain and improve not only their environment but also the environment of the entire planet.1 We now know the wide-range effects of environmental disasters such as nuclear accidents,2 oil spills,3 and toxic waste.4 Throughout the world, we have seen the destruction of the rain forests and their living species,5 the thinning of the ozone layer and the disruption of the climate.6 “[E]nvironmental degradation is rarely confined to specific geographic areas and can prove costly to all nations, be it in the form of ocean dumping, deforestation, greenhouse gases, or ozone depletion.”7 Our civilization is now capable of affecting

---

1 J.D. Candidate, Case Western Reserve University School of Law (1994).
2 See generally James J. Ferris, United Effort Can Produce a Decade of the Environment, USA TODAY, Jan. 1992 (Magazine), at 66 (discussing how several environmental statutes may be utilized in an united effort to restore the environment).
3 See, e.g., Joyce Barnathan & Steven Strasser, The Chernobyl Syndrome, NEWSWEEK, May 12, 1986, at 22 (detailing the April, 1986 nuclear accident at Chernobyl).
4 See generally George J. Church, The Big Spill, TIME, Apr. 10, 1989, at 38 (discussing the Exxon Valdez oil spill).
6 See Harriet Shapiro, Destruction of Rain Forests, Warns a Conservationist, Is Endangering Many Species - Including Our Own, PEOPLE WKLY., Nov. 28, 1988, at 165 (Dr. Russel Mittermeier explains the destruction of the rain forests and the life within.).
8 “[T]he [United States] is in surprisingly good shape environmentally, in comparison with its past or with other nations.” Landfills and Forests, FORBES, Sept. 14, 1992, at 316, 316.

Such environmental threats are what Vice President Gore, in his book, calls “strategic” threats because they affect the global ecological system. See GORE, supra note 4, at 29.
the entire biosphere, and because of this new capability, our relationship with the environment has been transformed. In our effort to compensate for this transformation, we should recognize the critical importance of environmental regulation and reexamine our environmental laws for rationality and efficiency.

The National Environmental Policy Act (NEPA) of 1969 is among the earliest efforts by the United States to implement effective environmental regulation. "The underlying substantive problem [to which NEPA was addressed] was the apparent necessity for better maintenance of the human environment, and especially of those natural systems that undergird human life and various components of human well-being." By requiring all federal agencies to complete an environmental impact statement (EIS) for every "major Federal action[] significantly affecting the quality of the human environment[,]" the United States has instigated a plan to monitor and decrease the impacts that its actions would have on the global environment. To the extent that NEPA has modified how the federal government treats the environment and controls degradation, NEPA has proven to be a successful vehicle for environmental protection.

In recent years, there has been a debate about how far NEPA should reach in regard to governmental actions outside of the United States. Judicial decisions have looked for congressional intent in the

---

8 Gore, supra note 4, at 30. Gore cites two key changes in our civilization that account for the change in our relationship with the earth: the surge in human population, and the acceleration of the scientific and technological revolution.


statute's language to apply NEPA extraterritorially,\(^5\) and have found either that there is no such intent\(^6\) or that, despite possible congressional intent, foreign policy concerns demand that NEPA not be applied outside the United States in those particular cases.\(^7\)

A study of the extraterritorial application of other U.S. statutes reveals a distinct pattern: courts have not applied "nonmarket"\(^8\) statutes such as NEPA and other environmental and labor laws extraterritorially because of the lack of congressional intent or potential policy conflicts. On the other hand, in interpreting "market"\(^9\) statutes such as antitrust, securities, and taxation laws, courts have had little difficulty in finding the requisite congressional intent and favorable policy arguments.\(^10\) This market/nonmarket distinction is indicative of the strong influence of governmental interest in statutory interpretation.\(^11\) This Note asserts that in following this distinction, courts have not only implemented bad environmental policy in their decisionmaking, but they have also misread the


16 See, e.g., 772 F. Supp. at 1297.


A recent D.C. Circuit Court opinion did apply NEPA to a federal action outside the United States stating that NEPA raises no extraterritorial issues at all, but it limited this holding to federal actions occurring only in Antarctica. See Environmental Defense Fund, Inc. v. National Science Found., 986 F.2d 528, 529 (D.C. Cir. 1993). See also infra notes 104-17 and accompanying text.


19 See Turley, supra note 18, at 601; infra note 129 (discussing "market" statutes such as the Federal Securities Exchange Act and the tax and bankruptcy codes).

20 See infra part V.A.

21 Turley, supra note 18, at 637-38.
statutory language of NEPA and misapplied the presumption against extraterritoriality. NEPA must be applied to all federal actions regardless of where they occur in order for the United States to maintain its contribution to global environmental protection. Otherwise the United States is effectively stating that American citizens are more worthy of protection from environmental dangers than citizens of other nations. The environment cannot withstand this kind of governmental hypocrisy.

The first two sections of this Note will provide an introduction to NEPA and the notion of extraterritoriality. Decisional law relating to the extraterritorial application of NEPA will then be reviewed followed by an analysis of the statute and the arguments for extraterritorial application. This section includes a comparison of NEPA with other statutes whose extraterritorial application has been debated and an examination of the public policy concerns surrounding NEPA. Finally, the conclusion will propose judicial and legislative reform.

II. THE NATIONAL ENVIRONMENTAL POLICY ACT

The purpose of NEPA is

[t]o declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; [and] to enrich the understanding of the ecological systems and natural resources important to the Nation . . . .

The enactment of NEPA accompanied a growing awareness of domestic and global environmental problems. The "heart" of NEPA is the environmental impact statement (EIS) which is provided for in § 4332. An EIS must include the environmental impact of the activity,

24 DANIEL R. MANDELKER, NEPA LAW AND LITIGATION: THE NATIONAL ENVIRONMENTAL POLICY ACT § 1:01 (1984) ("The heart of NEPA is the environmental impact statement which the statute requires on all major federal actions significantly affecting the quality of the human environment.").
25 § 4332 provides that (2) all agencies of the Federal Government shall- . . . (C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement ["EIS"] by the responsible official on- . . . (iv) the relationship between local short-term uses of man's environment and the mainte-
adverse environmental effects that cannot be avoided, alternatives, the relationship between "uses of man's environment" and long term productivity, and "any irreversible and irretrievable commitments of resources." The process of drafting an EIS is a time-consuming process. Several drafts are usually required and there must be at least a forty-five day comment period. The final drafts are generally lengthy, usually fifty to one hundred pages long, and occasionally extra personnel are hired specifically to write them. In addition to the time spent preparing an EIS, further delay to an agency action may be caused by administrative challenges and civil litigation.

Much criticism has been leveled at NEPA and the EIS process because of its tendency to generate litigation, the uncertainty about its success in producing environmentally responsible decision-making by agencies, the inadequacy of the science to support impact analyses, nance and enhancement of long-term productivity . . . .

42 U.S.C. § 4332
26 Id. at § 4332(C).
27 For an example of an accounting of an EIS-drafting process, see Barbara-Ann G. Lewis, Cost Indexing the Environment, THE SIERRA CLUB BULL., June-July 1975, reprinted in JACKSON B. BATTLE, ENVIRONMENTAL LAW: ENVIRONMENTAL DECISIONMAKING AND NEPA 129 (1986). See also ANDREWS, supra note 11, at 67, 137 (showing tables of the estimated man hours required to prepare certain environmental impact statements: for example, 443 hours for non-controversial projects and 1798 for controversial projects).
29 40 C.F.R. § 1506.10(c) (1992).
30 See MARTIN S. BAKER ET AL., ENVIRONMENTAL IMPACT STATEMENTS: A GUIDE TO PREPARATION AND REVIEW 225-307 (1977) (providing the summary sheets and tables of contents for eleven different EIS').
See also 40 C.F.R. § 1502.7 (1992) ("The text of final environmental impact statements . . . shall normally be less than 150 pages and for proposals of unusual scope or complexity shall normally be less than 300 pages."); PERCIVAL, supra note 10, at 1025 ("While federal regulations provide that an EIS generally should not exceed 150 pages in length, many are far longer: the EIS on an offshore oil lease sale is likely to be several hundred pages, while the EIS for licensing of a nuclear power plant may reach several thousand.").
31 Lewis, supra note 27, at 130.
At first glance this requirement [§ 4332] may have seemed innocuous enough; but it has bred the familiar — or notorious — environmental impact statements now securely internalized in federal bureaucratic action, a powerful weapon in the environmentalist's litigation arsenal, and the bane of any industry desiring to expedite projects requiring federal approval.
Id. at 112.
33 Caldwell, supra note 13, at 21.
34 PERCIVAL, supra note 10, at 1081; Caldwell, supra note 13, at 20.
35 Caldwell, supra note 13, at 20.
and the ineffectiveness of the Council on Environmental Quality (CEQ).36 Although NEPA may not have met all of the expectations of its initial supporters, many agree that it has succeeded in producing more environmentally-sensitive planning and in reducing government-sponsored environmental damage.37 In response to the criticism, many have proposed that the government could avoid the time and cost of litigation by stopping environmentally destructive proposals at the agency level.38 Likewise, concern about federal agencies skewing scientific data in the EIS to meet their political agendas is more appropriately directed at the agencies and officials themselves and not at the Act that they are implementing.39 Furthermore, scientific uncertainty is not unique to environmental issues. The inadequacy of scientific data is an obstacle that must be overcome in many fields such as agriculture, medicine, economics, and criminology.40 Criticism about the CEQ, however, is more difficult to refute. The CEQ’s advisory potential has not been fully utilized and its recommendations have sometimes gone unheeded.41 Most agree that more attention must be given to this executive agency and the realization of its purported functions.42 Despite their shortcomings, however, NEPA and the EIS requirement have proven to be an “essential means to an important policy end: better planning and decision making . . . .”43

NEPA requires that all federal agencies prepare an EIS for “every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment.” Among the problems with interpreting NEPA has been the question of which federal actions are covered. Several federal agencies have refused to acknowledge NEPA’s application to their international

36 Id. at 22. “[NEPA] has survived without strong and focused support from Congress, the executive branch, or outside interests. Indeed, the Act has been buffeted with criticism — often misinformed or misguided — from all sectors.” Id. at 20. For more information about the CEQ, see infra note 164.

37 See PERCIVAL, supra note 10, at 1084; Caldwell, supra note 13, at 22.

38 Caldwell, supra note 13, at 21.

39 Id. at 20-21.

40 Id. at 20.

41 See id. at 22 (“The EIS alone cannot compel adherence to the principles of NEPA. The EIS is necessary but insufficient as an action-forcing procedure; it has prevented ill-conceived actions, but it cannot advance positive measures.”). For more information on the CEQ, see infra note 164.

42 See PERCIVAL, supra note 10, at 1083; Caldwell, supra note 13, at 22.

43 Caldwell, supra note 13, at 20. “In retrospect, the NEPA strategy appears to have been the best and, indeed, has succeeded beyond the expectations of some of its authors.” Id. at 22.

activities. Although NEPA does not define the words "Federal actions", the term has been broadly defined by the courts to include federal projects, state and local programs funded by federal assistance, private development authorized by federal permits, and rulemaking and adjudication by federal agencies.

It must also be noted that NEPA does not contain exemptions for any federal activities. The EIS requirement “appl[ies] to all federal agencies even though their legislation does not require the consideration of environmental concerns.” The only exceptions are those allowed by the Federal courts. In fact, NEPA provides that the Federal government “use all practicable means” to fulfill the mandate of NEPA.

There is no provision in NEPA expressly addressing the application of NEPA outside the United States, and NEPA’s legislative history provides no guidance. The language of NEPA, however, seems to indicate that the EIS requirement should reach federal activities all over the world.

---

45 The following agencies have refused to acknowledge such an application: the Defense Department, the Agency for International Development (AID), the Export-Import Bank (Eximbank), and the Overseas Private Investment Corporation (OPIC). See supra note 14, at 350.

46 MANDELMER, supra note 24, § 1:01. See also Note, supra note 14, at 358 (“The phrase ['agencies of the Federal Government'] is unqualified and its clear and natural meaning is that every federal agency, regardless of the locus of its activities, was intended to be included.”).

47 MANDELMER, supra note 24, § 1:03.

48 Id.

Among the exceptions to NEPA that have been recognized are critical military projects, enforcement/pollution control agencies, executive responsibilities, and emergencies. See 40 C.F.R. § 1506.11 (1992); DELOGU, supra note 23, at 31. See also Environmental Defense Fund, Inc. v. National Science Found., 986 F.2d 528, 535 (D.C. Cir. 1993) (“[T]he government may avoid the EIS requirement where U.S. foreign policy interests outweigh the benefits derived from preparing an EIS.”); Exec. Order No. 12,114, 44 Fed. Reg. 1957, 1959 (1979) (Exemptions are listed in section 2-5.). These exceptions prevent any interference with necessary military defense measures. It may be noted, however, that even these exceptions are against the policy of global environmental protection.

49 42 U.S.C. § 4331(b). See MANDELMER, supra note 24, at § 5:06 (“NEPA does not exempt any federal agency from its requirements, and indeed provides that they shall comply ‘to the fullest extent possible . . .’.”). See also 40 C.F.R. § 1500.2(f) (1992); infra note 166 and accompanying text.

50 See, e.g., S. 1075, 91st Cong., 1st Sess. (1969) (the Senate bill for NEPA); H.R. 12549, 91st Cong., 1st Sess. (1969) (the House bill for NEPA); 115 CONG. REC. 19,008-13 (1969) (Senate adopts its version of the bill); 115 CONG. REC. 26,568-91 (1969) (House adopts its version of the bill). For an extensive review of NEPA’s legislative history, see Note, supra note 14, at 365-71 (concluding that “although the legislative history is not conclusive evidence of congressional intention to apply [the EIS section] extraterritorially, it does demonstrate clearly that Congress was concerned with the environmental problem on a worldwide as well as on a national scale.”).
Much of the language in NEPA relates to the global environment and global relations. For example, in § 4321, the "Congressional declaration of purpose," refers to "harmony between man and his environment" and the "health and welfare of man." Section 4331, "Congressional declaration of national environmental policy," refers specifically to the "general welfare" and "restoring and maintaining environmental quality to the overall welfare and development of man," and its general tone indicates concern for the global environment. Finally, § 4332 refers to the "human environment" and "man's environment" and states that

(2) all agencies of the Federal Government shall . . . (F) 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 . . . .

This language expresses congressional intent to consider global environmental effects when implementing NEPA, and governmental concern for all those affected by environmental impacts of federal actions. "NEPA's purpose does not lie in the preservation of the peace and order for a particular community. NEPA does not purport to protect only the United States's environment and biosphere; the statute's purposes transcend territorial boundaries."
III. THE PRESUMPTION AGAINST EXTRATERRITORIALITY

The continuing debate about whether NEPA's requirements should apply to activities occurring outside the United States is tantamount to the issue of whether to apply NEPA extraterritorially. Extraterritoriality is defined as the application of laws beyond the limits of the enacting state.\(^5\) "[I]t is essentially a jurisdictional concept concerning the authority of a nation to adjudicate the rights of particular parties, to establish the norms of conduct applicable to events or persons outside its borders, or to exercise power to compel conduct."\(^5\)

The first case to deal with the extraterritorial application of a U.S. statute was *American Banana Co. v. United Fruit Co.*\(^7\) In this case, the defendant, an Alabama banana-growing corporation, incited the seizure of the plaintiff's banana plantation in Costa Rica by the Costa Rican government. The plaintiff brought suit against the defendant under the Sherman Antitrust Act which protects trade from monopolies. Recognizing that the defendant's action was done outside the jurisdiction of the United States, the court stated that the "universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done."\(^5\)\(^8\) If the United States were to deem an act done outside its borders illegal, it would be interfering with the sovereignty of another nation.\(^5\)\(^9\) Such considerations "lead in a case of doubt to a construction of any statute as intended to be confined in its operation and effect to the territorial limits over which the lawmaker has general and legitimate power."\(^5\)\(^6\)\(^0\) Therefore, the court interpreted the Sherman Act to apply only to those subject to United States legislation, and held the anti-competitive acts of the defendant done in Costa Rica, where they were legal, outside U.S. jurisdiction.

The presumption against extraterritoriality as it presently exists operates whenever a showing of congressional intent to regulate abroad is absent. This standard was established in *Foley Bros. v. Filardo.*\(^6\)\(^1\) This case was brought by an American citizen working for an American contractor on a construction project in Iran and Iraq under a contract

---


\(^6\) McDougall, supra note 14, at 445. See also Environmental Defense Fund, Inc. v. National Science Found., 986 F.2d 528, 530 (D.C. Cir. 1993).

\(^7\) 213 U.S. 347 (1909).

\(^8\) Id. at 356.

\(^9\) Id.

\(^10\) Id. at 357.

\(^1\) 336 U.S. 281 (1949).
with the United States. The plaintiff claimed a violation of the Eight Hour Law\textsuperscript{62} which fixed maximum workdays and applied to "[e]very contract made to which the United States . . . is a party . . . ."\textsuperscript{63} The court stated that the question to be answered in this case was not whether Congress has the power to extend the law to actions in foreign countries, which was the issue addressed in \textit{American Banana}, but whether Congress \textit{intended} to do this.\textsuperscript{64} The court reasoned that Congress meant to apply a statute within its territorial jurisdiction unless a contrary intent is evident.\textsuperscript{65} This is based on the assumption that Congress is primarily concerned with domestic conditions. In this case, the court found no intent to apply the Eight Hour Law to work performed in foreign countries, and concluded that the word "every" in "[e]very contract made to which the United States . . . is a party . . . ." was inserted only to clarify the application of the law to private property within the United States.\textsuperscript{66}

The presumption against extraterritoriality was later clarified in \textit{United States v. Mitchell}\textsuperscript{67} which reversed the conviction of an American citizen for violating the Marine Mammal Protection Act (MMPA)\textsuperscript{68} by capturing dolphins within the three mile limit of the Commonwealth of the Bahamas. The court held that the criminal prohibitions of the Act do not reach the territorial waters of foreign states.\textsuperscript{69} In so holding, the court recognized that Congress does have the power to control the conduct of American citizens overseas because "citizenship alone is generally recognized as a relationship sufficient to justify the exercise of jurisdiction by a state."\textsuperscript{70} The question therefore is not congressional authority but congressional intent, and until such intent is shown to rebut the presumption against extraterritoriality, no statute should be applied outside the United States.\textsuperscript{71} To negate any intent to apply the Marine Mammal Protection Act extraterritorially, the court cited its statutory construction, legislative history and other surrounding circumstances, specifically pointing out that the MMPA is based upon the control that sovereigns such as the United States have on natural

\begin{footnotes}
\item[63]  Id. § 324.
\item[64]  336 U.S. at 284-85.
\item[65]  \textit{Id}.
\item[66]  \textit{Id}. at 287.
\item[67]  553 F.2d 996 (5th Cir. 1977).
\item[69]  553 F.2d at 997.
\item[70]  \textit{Id}. at 1001.
\item[71]  \textit{Id}. at 1002.
\end{footnotes}
resources within their territories.\textsuperscript{72}

It must be noted, however, that judicial denials of extraterritorial application do not always endure. In 1991, the Supreme Court denied extraterritorial application of Title VII of the Civil Rights Act of 1964\textsuperscript{74} in \textit{E.E.O.C. v. Arabian American Oil Co. (Aramco)}\textsuperscript{74} Title VII prohibits discriminatory practices based on race, color, religion, sex or national origin. Despite the broad language of Title VII regarding its application to an employer if it is engaged in an "industry affecting commerce[,]\textsuperscript{75}" the expansive definitions of commerce "between a State and any place outside thereof[,]\textsuperscript{76}" and the EEOC's position that Title VII did apply abroad, the court refused to grant extraterritorial jurisdiction, instead adhering to the presumption against extraterritoriality.\textsuperscript{77} While acknowledging that the arguments are "plausible," the court held that they were not sufficient evidence of a clearly expressed congressional intent.\textsuperscript{78} The Court recognized that "Congress has the authority to enforce its laws beyond the territorial boundaries of the United States[,]\textsuperscript{79}" but whether or not this authority has been exercised is a matter of statutory construction and congressional intent.\textsuperscript{80} In response to the Court's decision,\textsuperscript{81} a bill to extend the geographical coverage of Title VII was introduced in Congress and enacted as part of the Civil Rights Act of 1991.\textsuperscript{82} The definition of employee now includes the statement, "[w]ith respect to employment in a foreign country, such term includes an individual who is a citizen of the United States."\textsuperscript{83} Although the presumption against extraterritoriality is deeply rooted in our legal system, this legislative reversal of \textit{Aramco} demonstrates that the government is capable of adapting to further the best interests of its citizens.

\textsuperscript{72} \textit{Id.}
\textsuperscript{74} 111 S. Ct. 1227 (1991) (The plaintiff was working for Aramco, a Delaware corporation, at its principal place of business in Dhahran, Saudi Arabia.).
\textsuperscript{75} 42 U.S.C. § 2000e(h).
\textsuperscript{76} \textit{Id.} at § 2000e(g).
\textsuperscript{77} 111 S. Ct. at 1231.
\textsuperscript{78} \textit{Id.}
\textsuperscript{79} \textit{Id.} at 1230.
\textsuperscript{80} \textit{Id.}
\textsuperscript{81} One of the purposes of the Civil Rights Act of 1991 was "to respond to recent decisions of the Supreme Court by expanding the scope of relevant civil rights statutes in order to provide adequate protection to victims of discrimination." Civil Rights Act of 1991, Pub. L. No. 102-166, § 3(4), 105 Stat. 1071, 1071 (1991). See also Yamakawa, supra note 18, at 112.
\textsuperscript{82} 42 U.S.C. § 2000e.
\textsuperscript{83} \textit{Id.} at § 2000e(f).
IV. INTERPRETATIONS OF NEPA

Deliberation over the extraterritorial application of NEPA began shortly after NEPA was enacted. Interestingly, the first cases to examine the reach of this statute assumed that it applied extraterritorially. For example, in People of Enewetak v. Laird the court granted an injunction of the Pacific Cratering Experiments on Enewetak Atoll until an EIS was prepared stating simply that "NEPA is framed in expansive language that clearly evidences a concern for all persons subject to federal action which has a major impact on their environment — not merely United States' citizens located in the fifty states." In Sierra Club v. Adams in 1978, the court concluded that an EIS was appropriate for United States participation in the construction of a highway in Panama and Columbia. The court stated in a footnote that it assumed NEPA applied to this action because the government brief stated that it never questioned its application to this case. Following this case, the court in National Organization for the Reform of Marijuana Laws (NORML) v. United States Department of State stated that

in view of defendants' willingness to prepare an "environmental analysis" of the Mexican effects of United States support of that nation's narcotics eradication program, together with the EIS required by NEPA as to the impact of that program upon the United States, the court need not reach the issue and need only assume without deciding, that NEPA is fully applicable to the Mexican herbicide spraying program.

Among the first decisions denying NEPA extraterritorial application

84 See Natural Resources Defense Council, Inc. v. Nuclear Regulatory Comm'n, 647 F.2d 1345, 1367 n.120 (D.C. Cir. 1981); Goldfarb, supra note 14, at 559. See also supra note 17 and accompanying text.
86 Id. at 816. See also People of Saipan v. United States Dep't of Interior, 356 F. Supp. 645, 650 (D. Haw. 1973) (dismissing the action for an injunction of the construction and operation of a hotel on public land in Saipan until an EIS was completed because it was not a federal action) which cited Enewetak while stating that NEPA applies to all areas under United States control, no matter where those areas are located, and therefore, the presumption against extraterritoriality is not an issue.
87 578 F.2d 389 (D.C. Cir. 1978).
88 Id. at 391-92 n.14.
90 Id. at 1233. The court did not enjoin United States participation in the herbicide spraying until an EIS was completed, however, because it concluded that the public interest in preventing the importation of marijuana outweighed the necessity for prior EIS and that the political aspects of this situation require the court to defer to the other governmental branches. Id. at 1234.
was that of the Nuclear Regulatory Commission in *Babcock & Wilcox*.\(^9\) In finding that an EIS did not need to be completed before issuing a license to sell nuclear reactor components to West Germany, the Commission stated that § 4332(2)(F) regarding the recognition of worldwide environmental problems only signifies the need for international cooperation and not the application of NEPA outside of the United States.\(^9\)

This idea was considered more extensively in *Natural Resources Defense Council Inc. v. Nuclear Regulatory Commission* in 1981.\(^9\) In this case, the Natural Resources Defense Council (NRDC) challenged the Nuclear Regulatory Commission’s (NRC) authorization of the exportation of a nuclear reactor and other nuclear material to the Philippines, asserting that an EIS is required for this action. The D.C. Circuit disagreed. Like the court in *Babcock*, the D.C. Circuit concluded that NEPA was primarily concerned with international cooperation instead of unilateral environmental protection through its application,\(^9\) but the court added a qualification: “I find only that NEPA does not apply to NRC nuclear export licensing decisions - and not necessarily that the EIS requirement is inapplicable to some other kind of major federal action abroad.”\(^9\)

Thus, the court did not preclude the extraterritorial application of NEPA in all situations, but only with respect to these facts.

In 1990, the District Court of Hawaii also refused to apply NEPA outside U.S. boundaries in *Greenpeace U.S.A. v. Stone*.\(^9\) This case involved an effort by environmental groups to obtain a preliminary injunction prohibiting the transportation of chemical munitions from Germany to the Johnson Atoll in the central Pacific until the Army completed satisfactory EIS’ in compliance with NEPA. The court considered the presumption against extraterritoriality,\(^9\) the plain language of NEPA,\(^9\) and foreign policy implications.\(^9\) Although the court stated that it believes that Congress intended to *encourage* the consideration of the global impact of domestic actions by federal agencies and “*may have intended under certain circumstances for NEPA to apply*  

\(^{91}\) 5 N.R.C. 1332 (1977).  
\(^{92}\) Id. at 1338-39.  
\(^{93}\) 647 F.2d 1345 (D.C. Cir. 1981).  
\(^{94}\) Id. at 1366.  
\(^{95}\) Id.  
\(^{96}\) 748 F. Supp. 749.  
\(^{97}\) Id. at 758.  
\(^{98}\) Id. at 759.  
\(^{99}\) Id.
extraterritorially[.] the court held that the application of NEPA to actions outside the United States would cause foreign policy conflicts and interfere with the decisionmaking functions of the United States and foreign sovereigns. Again, however, the court limited its decision to these facts.

By the time this case reached the Ninth Circuit, the issue was moot because the transfer of the munitions had already occurred. Again, the door was left open for the application of NEPA to activities outside the United States.

The most recent case to consider the extraterritorial application of NEPA is Environmental Defense Fund, Inc. v. National Science Foundation involving the Environmental Defense Fund’s (EDF) attempt to enjoin the National Science Foundation (NSF) from incinerating food wastes in Antarctica until an EIS was completed. The lower court had relied upon the presumption against extraterritoriality in finding that NEPA would not apply beyond United States borders. The district court examined the language of the statute and concluded that although Congress used broad language in NEPA’s statement of purpose, there is no plain expression of congressional intention to apply NEPA extraterritorially. Curiously, the court mentioned that if it did have jurisdiction over this matter, that is, if NEPA did apply extraterritorially, it would not have allowed the NSF to get away with this activity so easily.

The court must emphasize that this decision is limited to the specific and unique facts which are presented here. In other circumstances, NEPA may require a federal agency to prepare an EIS for action taken abroad, especially where United States agency’s action abroad has direct environmental impacts within this country, or where there has clearly been a total lack of environmental assessment by the federal agency or foreign country involved.

---

100 Id.
101 Id. at 761.
102 Id. at 1297.
103 Greenpeace USA v. Stone, 924 F.2d 175 (9th Cir. 1991), dismissing as moot, 748 F. Supp. 749 (D. Haw. 1990).
104 986 F.2d 528 (D.C. Cir. 1993).
106 Id. at 1297.
107 Id. at 1298 (“While the Court is compelled to conclude that NEPA does not apply extraterritorially . . . the Court is concerned with the manner in which NSF undertook the Environmental Impact Statement and had the Court had subject matter jurisdiction under . . . NEPA . . . the outcome in the present action may have been different.”).
The Circuit Court of Appeals for the District of Columbia reversed the district court holding that the presumption against the extraterritorial application of statutes described in *Aramco* does not apply where the conduct regulated by the statute occurs primarily, if not exclusively, in the United States, and the alleged extraterritorial effect of the statute will be felt in Antarctica—a continent without a sovereign, and an area over which the United States has a great measure of legislative control.\(^\text{108}\)

The Circuit Court stated that the district court erred when it failed to consider "the threshold question of whether the application of NEPA to agency actions in Antarctica presents an extraterritorial problem at all."\(^\text{109}\) The court emphasized the procedural nature of NEPA and its effect of creating a process by which agency officials in the United States can consider environmental consequences of their decisionmaking.\(^\text{110}\) This decisionmaking is a uniquely domestic function.\(^\text{111}\) The court also noted the broad language of NEPA\(^\text{112}\) and the absence of any foreign policy conflicts.\(^\text{113}\)

The Circuit Court stressed the unique status of Antarctica as a global commons.\(^\text{114}\) The court stated that even if the presumption against extraterritoriality did apply, its force would be weakened since its purpose in preventing conflict with the laws of other nations is void in situations where there is no law with which to conflict.\(^\text{115}\) The importance of this point was accentuated by the court's assertion that it does not decide how NEPA may apply to cases involving actual foreign sovereigns unlike Antarctica.\(^\text{116}\)

Although the D.C. Circuit Court took a step in the right direction

---

\(^{108}\) 986 F.2d at 529 (the case was remanded to the district court for a determination of whether the EIS completed by the NSF was adequate).

\(^{109}\) Id. at 532.

\(^{110}\) Id. ("NEPA is designed to control the decisionmaking process of U.S. federal agencies, not the substance of agency decisions.").

\(^{111}\) Id. at 536.

\(^{112}\) Id. ("[NEPA] is clearly not limited to actions of federal agencies that have significant environmental effects within U.S. borders. This Court has repeatedly taken note of the sweeping scope of NEPA and the EIS requirement.").

\(^{113}\) Id. at 535 ("Since NEPA imposes no substantive requirements, U.S. foreign policy interests in Antarctica will rarely be threatened, except perhaps where the time required to prepare an EIS would itself threaten international cooperation . . . or where the foreign policy interests at stake are particularly unique and delicate." (citations omitted)).

\(^{114}\) Id. at 533-34.

\(^{115}\) Id. at 533.

\(^{116}\) Id. at 537.
in holding NEPA applicable to federal actions in Antarctica, it did not go far enough. Although most have recognized that Antarctica is a global commons, few seem to have recognized that it is certainly not the only one. Our air, water, and atmosphere are global commons as well and should therefore be considered through the NEPA process before any federal action takes place. By holding that the presumption against extraterritoriality is not raised by the application of NEPA to activities in a global commons, the court was able to reach an environmentally sound result that was clearly warranted in this circumstance. This departure from the presumption against extraterritoriality is a possible solution to the unsettling trend of environmental degradation.\footnote{\textsuperscript{117}}

V. THE EXTRATERRITORIAL APPLICATION OF NEPA

Although the courts could infer extraterritoriality from statutory language, it would be easier if Congress expressly stated whether or not a statute should apply outside the United States. Unfortunately, Congress does not always have the foresight when it writes the nation's laws to predict the importance of the inclusion or exclusion of such simple statements. On the other hand, an examination of different groups of statutes suggests that Congress does, at times, have the foresight because it has clearly proclaimed extraterritorial application when such application furthers its interest and left the language ambiguous when extraterritorial application would hinder its interests.\footnote{\textsuperscript{118}} This is the theory underlying the market/nonmarket distinction discussed in Part V.A.

There are many arguments in favor of the abandonment of this distinction and against the denial of extraterritorial application of NEPA. First, there is no legal integrity in the market/nonmarket distinction.\footnote{\textsuperscript{119}} No clear test is consistently used in extraterritoriality cases and the courts are hindering the diplomatic relations of the United States by allowing the government to cater to its self-serving motivations.

Second, even if the courts were to continue using the congressional intent test that they currently use for environmental statutes like NEPA, the language of NEPA calls for global environmental protection.\footnote{\textsuperscript{120}} The statute evinces a congressional purpose to consider the environmental effects of all federal actions regardless of their locations. This apparent purpose coupled with executive interpretations\footnote{\textsuperscript{121}} favoring extraterritorial...
al application of NEPA supports a finding of corresponding congressional intent, explained further in Part V.B.

Finally, Part V.C. will illustrate that the extraterritorial application of NEPA is a good environmental policy because it (at least) gives the impression of being concerned about the environmental welfare of people outside the United States, it does not interfere with the laws of other sovereigns, and exemptions are available for exceptional situations.122

A. The Market-Nonmarket Distinction

NEPA is among several environmental statutes that are not uniformly applied extraterritorially. An examination of U.S. statutes reveals that "nonmarket" statutes,123 including environmental statutes like NEPA, the Resource Conservation and Recovery Act (RCRA),124 and the Marine Mammal Protection Act125 are not applied extraterritorially because of a lack of "clearly expressed intent."126 For example, in United States v. Mitchell127 the court denied extraterritorial application of the Marine Mammal Protection Act because it could not find clear congressional intent to apply the statute outside the United States. In so holding, the court did not consider the general purpose of the statute, to protect marine mammals, and how this purpose would be furthered by extraterritorial application in this case.

"Market" statutes,128 on the other hand, such as antitrust and securities laws,129 are applied extraterritorially by less stringent territorial

---

122 See infra notes 172-84 and accompanying text.
123 See supra note 18.
124 42 U.S.C. §§ 6901-6992k. See, e.g., Amlon Metals, Inc. v. FMC Corp., 775 F. Supp. 668 (S.D.N.Y. 1991) in which the court denied extraterritorial application of the RCRA where an American corporation supplied hazardous substances to a British corporation and stored them at the British facility. The court found that there was no congressional intent and no evidence in the legislative history supporting extraterritorial application.
126 See 553 F.2d at 1002.
127 553 F.2d 996.
128 See supra note 18.

The bankruptcy and taxation codes are also market statutes which are applied extraterritorially, but they contain express language calling for this application. In the tax code, see, e.g., 26 U.S.C. § 61 (1988) ("Gross income means all income from whatever source derived . . . ."); 26 C.F.R. § 1.1-1B (1993) (U.S. citizens are liable for tax from whatever source
standards. Antitrust and securities laws are among the clearest examples of market statutes. Antitrust laws were the first to be applied outside the United States. As the world marketplace grew, the courts expanded their interpretations of these laws to encompass the business and politics of international trade. Among the extraterritoriality tests used for antitrust and securities statutes is the "effects" or "intended effects" test, which "permit[s] [extraterritorial application] whenever an actual or presumed anticompetitive effect on American markets [can] be shown" or when "fraudulent foreign acts have domestic effects." Another test used in the interpretation of antitrust laws is the "conflicts test" which considers the activity's effect on the foreign commerce of the U.S., whether there has been a cognizable violation of the statute at issue, and whether international comity and fairness support extraterritorial application of U.S. law. A third test used primarily for securities statutes is the "conduct test" which considers whether conduct in the United States facilitates action outside the United States. These activities may have

---

130 See, e.g., United States v. Sisal Sales Corp., 274 U.S. 268 (1927) where the court sustained antitrust charges against American companies for a conspiracy to monopolize Mexican sisal exports.

131 Turley, supra note 18, at 609.

132 Id. at 611. See, e.g., United States v. Aluminum Co. of America, 148 F.2d 416, 443 (2d Cir. 1945) where the court applied the Sherman Act extraterritorially to cover ALCOA's attempted monopoly of aluminum ingot because of its effect on the American marketplace.

"Although American Banana [holding that the Sherman Act did not apply extraterritorially] has never been formally overruled, the Supreme Court quickly saw the impossible limitations that [its] original rule would place on the United States." Turley, supra note 18, at 609 (discussing American Banana Co. v. United Fruit Co., 213 U.S. 347 (1909)).

See also Environmental Defense Fund, Inc. v. National Science Found., 986 F.2d 528, 531 (D.C. Cir. 1993) ("[T]he presumption is generally not applied where the failure to extend the scope of the statute to a foreign setting will result in adverse effects within the United States. Two prime examples of this exception are the Sherman Anti-Trust Act, 15 U.S.C. §§ 1-7 (1976), and the Lanham Trade-Mark Act, 15 U.S.C. § 1051 et seq. (1976), which have both been applied extraterritorially where the failure to extend the statute's reach would have negative economic consequences within the United States.").

133 Turley, supra note 18, at 615.

134 Id. at 612. See, e.g., Timberlane Lumber Co. v. Bank of America, 549 F.2d 597 (9th Cir. 1976) (sustaining a Sherman Act challenge to an alleged conspiracy to monopolize the milling of Honduran lumber based on the considerations listed above).

very little effect within the United States.¹³⁶ "[T]hese tests largely presuppose that the [statutes] can apply abroad and primarily consider whether extraterritorial application is justified in the particular case."¹³⁷ Thus, the courts do not adhere to strict statutory construction in these cases, but instead examine them on a case-by-case basis¹³⁸ and consider implied congressional purpose and policy.¹³⁹ Such an analysis practically assures a finding of extraterritoriality.¹⁴⁰

Another class of statutes that are applied extraterritorially include such laws as the Federal Child Pornography Statute¹⁴¹ and U.S. drug laws, such as the Maritime Drug Law Enforcement Act (MDLEA).¹⁴² Yet another test, apparently related to the subject matter of the laws, seems to be utilized in the consideration of the application of these statutes. Although they are not clearly market or nonmarket statutes, they do involve similar policy considerations. Drugs and pornography may have market effects and courts do seem to engage in outcome determinative analyses, but their primary consideration appears to be the nature of these heinous offenses.¹⁴³ The United States, therefore, has no

Maxwell, 468 F.2d 1326 (2d Cir. 1972) involving a claim under the Securities Exchange Act regarding stock neither listed nor sold in the United States. The court upheld the claim on the ground that action in the United States expedited the sale of the stock in the United Kingdom. Id. at 1335.

See also 986 F.2d at 531 ("[T]he presumption against extraterritoriality is not applicable when the conduct regulated by the government occurs within the United States. By definition, an extraterritorial application of a statute involves the regulation of conduct beyond U.S. borders. Even where the significant effects of the regulated conduct are felt outside U.S. borders, the statute itself does not present a problem of extraterritoriality, so long as the conduct which Congress seeks to regulate occurs largely within the United States."). Note that decisionmaking regarding NEPA occurs largely within the United States. See infra note 179.

¹³⁶ Turley, supra note 18, at 616.
¹³⁷ Id. at 617.
¹³⁸ Id. at 637.
¹³⁹ Robert A. Kellan, Case Comment, Jurisdictional Boundaries of the Anti-Fraud Provisions of the Federal Securities Laws, 15 SUFF. TRANSNAT'L L.J. 420, 428 (1991) (The "trend of the courts [is] to focus on the intent and purpose behind the federal securities laws in order to properly consider the issue of jurisdiction.").
¹⁴⁰ Turley, supra note 18, at 634.
¹⁴¹ 18 U.S.C. § 2251 (1988 & Supp. IV 1992). See United States v. Thomas, 893 F.2d 1066, 1068 (9th Cir. 1990) (finding that the Act applies to Thomas' acts in Mexico despite the absence of a provision for extraterritorial application, because the exercise of extraterritorial power may be inferred from the nature of the act and Congress' efforts to eradicate such crimes).
¹⁴³ Sandra W. Magliozzi, Case Comment, Federal Child Pornography Statute Applies to Extraterritorial Acts, United States v. Thomas, 893 F.2d 1066 (9th Cir. 1990), 14 SUFF.
choice but to enforce the act to save its domestic and international reputation.\textsuperscript{144} Whichever test the courts are using, they are not relying on clear congressional intent, but rather on an inference of congressional intent from policy considerations.\textsuperscript{145} While the courts are ostensibly using an established method of statutory construction in the interpretation of U.S. laws, they are actually applying outcome-determinative tests with clearly disparate results.\textsuperscript{146}

In summary, nonmarket environmental and employment statutes, in contrast to the market, drug, and pornography statutes, have normally\textsuperscript{147} been interpreted using the "clearly expressed intent" standard.\textsuperscript{148} The territorial analysis of the market statutes is conspicuously absent\textsuperscript{149} and the presumption against extraterritoriality has become essentially irrebuttable.\textsuperscript{150} There is no basis for such a clear distinction and no legal integrity in its perpetuation.

Characteristics of market statutes that have allowed extraterritorial application are also present in nonmarket statutes. It follows that market tests could be used on nonmarket statutes. Both market and nonmarket

\textsuperscript{144} See Magliozzi, supra note 143, at 612 (congressional intent is inferred from the nature of the offense and other legislative acts).

\textsuperscript{145} Turley, supra note 18, at 638.

\textsuperscript{146} The Endangered Species Act, 16 U.S.C.A. §§ 1531-1544 (West 1985 & Supp. 1993), is somewhat of an anomaly because it is an environmental statute that at one time was applied extraterritorially. In \textit{Defenders of Wildlife v. Lujan}, 911 F.2d 117 (8th Cir. 1990), rev'd 112 S. Ct. 2130 (1992), an environmental group challenged a regulation promulgated by the Secretary of the Interior in 1986 that limited the applicability of the Act's consultation provision to agency actions "in the United States or upon the high seas." \textit{Id.} at 118. The consultation provision requires agencies to consult with the Secretary of the Interior to ensure that their projects do not jeopardize endangered species. 16 U.S.C. § 1536(a)(2). The Eighth Circuit held that the regulation was invalid and the statute is applicable outside the United States. This decision was only a "short-lived breakthrough," however, because it was reversed by the Supreme Court in \textit{Lujan v. Defenders of Wildlife}, 112 S. Ct. 2130 (1992); Wendy S. Albers, \textit{Lujan v. Defenders of Wildlife: Closing the Courtroom Door to Environmental Plaintiffs — The Endangered Species Act Remains Confined to United States Borders}, 15 LOY. L.A. INT'L & COMP. L.J. 203, 203 (1992). This reversal left the regulation intact so that now the Endangered Species Act does not reach agency actions in foreign countries. \textit{Id.} at 204. For a critical analysis of the Supreme Court's decision, see \textit{id.}.

\textsuperscript{147} Id. at 617.

\textsuperscript{148} Id. at 623.
statutes have substantial territorial effects. It is also true that nonmarket statutes are as unintrusive, if not less intrusive, than market statutes: environmental statutes regulate only Federal actions. NEPA, in particular, is a procedural statute and therefore does not affect the substantive laws of other countries.

Finally, the consideration of governmental interests in market and nonmarket cases is clearly askew. There is a clear judicial bias in favor of market interests. For the most part, statutes applied extraterritorially earn or at least save the United States money. It is true that the application of environmental statutes increases the cost of doing business overseas, but this is a necessary and relatively minute cost to pay for environmental protection. The courts have not recognized impending environmental dangers and concerns, thereby exposing governmental hypocrisy and injuring diplomatic relations between the United States and the countries whose environments it is exploiting. The government should not be allowed to cater only to "altruistic and self-serving motivations" when determining extraterritorial applications.

---

151 Id. at 639-40.
152 Id. at 640-43.
153 Id. at 647-48. E.g. 42 U.S.C. § 4332 ("laws of the United States . . . and (2) all agencies of the Federal Government . . . ").
154 See, e.g., 16 U.S.C. §§ 1361-1407. See also supra note 68 and accompanying text.
155 See Greenpeace USA v. Stone, 748 F. Supp. 749, 757 (D. Haw. 1990), appeal dismissed as moot, 924 F.2d 175 (9th Cir. 1991) ("NEPA is essentially a procedural statute"); Note, supra note 14, at 353.
156 Turley, supra note 18, at 651.
157 E.g., the securities, antitrust, tax, and bankruptcy laws, supra note 129.
158 NEPA’s EIS requirement increases the cost of every project because the preparation of an EIS takes time, effort, and may produce delays. For an example of the effort required to complete an EIS, see ANDREWS, supra note 11, at 67, 137; Lewis, supra note 27.
159 Spracker & Naftalin, supra note 7, at 1051.
160 For example, Vice President Gore cites the U.S. economic system’s favoritism of quantifiable assets as “the single most powerful force behind what seem to be irrational decisions about the global environment.” GORE, supra note 4, at 182-83. Moreover, [i]he bad things economists want to ignore while they measure the good things are often said to be too difficult to integrate into their calculations. After all, the bad things usually cannot be sold to anyone, and the responsibility for dealing with their consequences can often be quietly pushed on to someone else. Therefore, since the effort to keep track of the bad things would complicate the valuation of the good things, the bad things are simply defined away as external the process and called externalities.

Id. at 188-89. An example of this “external” treatment of the environment is in calculating a country’s GNP. For example, a country includes in its GNP the amount it receives on the sale
Of course this issue could be viewed from a different perspective: in the long term, environmental regulations may be beneficial to the economy. Consideration of the environmental impacts of an action will help the United States, as well as the foreign country in which the action is taking place, to maximize the environmental benefits of the project. Additionally, consideration of the environment now will decrease the expense of cleaning up unnecessary waste later. Congressional concerns expanded with the marketplace, and now they must develop with the unifying environment.

B. NEPA and Global Environmental Protection

It is a plausible argument that the distinction between market and nonmarket statutes cannot be eliminated because of erroneously entrenched custom in judicial practice or because of administrative difficulties. Even if this were true, however, there are still arguments that NEPA must be applied extraterritorially because of the gravity of its subject matter. The acute importance of the environment warrants every effort at conservation. This concern for global environmental protection is evident in the purpose and language of NEPA: for example, NEPA calls for the recognition of the "worldwide and long-range character of environmental problems" and the support of programs to "prevent[] a decline in the quality of mankind's world environment." The importance of the environment is also recognized by executive interpretations of NEPA. The most significant of these interpretations is that of the Council on Environmental Quality (CEQ). The CEQ was established in § 4342 of NEPA "to appraise programs and activities of the Federal Government in the light of the policy set forth in subchapter I of this chapter . . . and to formulate and recommend national policies to promote the improvement of the quality of the environment." The

\footnote{63}\footnote{64}
CEQ has stated that federal agencies must "to the fullest extent possible: . . . use the NEPA process to identify and assess the reasonable alternatives to proposed actions that will avoid or minimize adverse effects of these actions upon the quality of the human environment." Additionally, the CEQ requires federal agencies to "[u]se all practicable means consistent with the requirements of the Act and other essential considerations of national policy, to restore and enhance the quality of the human environment and avoid or minimize possible adverse effects of their actions upon the quality of the human environment." The CEQ interprets "human environment" in a comprehensive manner to include the natural and physical environment and its relationship to the people within it. Although the interpretation of the agency that is responsible for a statute's enforcement is entitled to substantial deference by courts and other branches of the government, the CEQ's proclamation appears to have been disregarded by courts analyzing NEPA.

the annual production of environmental quality reports. MANDELKER, supra note 24, §§ 2:08-09.

The CEQ promulgates interpretive regulations, found at 40 C.F.R., that bind all federal agencies. "These regulations, which reflect much of the case law that had developed under the statute, are the first recourse for analysis of any NEPA problem. They spell out many of the details of the NEPA process, and they receive considerable deference from the courts." PERCIVAL, supra note 10, at 1025. As explained in this section, the courts have not deferred to the CEQ's interpretation of NEPA in regard to its extraterritorial application.


Id. § 1500.2(f).

Id. § 1508.14.

We have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer, and the principle of deference to administrative interpretations has been consistently followed by this Court whenever decision as to the meaning or reach of a statute has involved reconciling conflicting policies, and a full understanding of the force of the statutory policy in the given situation has depended upon more than ordinary knowledge respecting the matters subjected to agency regulations . . . .

. . . . If this choice represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute, we should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned.

The CEQ clearly supports the extraterritorial application of NEPA, and the courts should defer to its judgment.

Another executive interpretation of NEPA emphasizing the importance of the global environment is Executive Order 12114 issued by President Jimmy Carter in 1979, ten years after NEPA went into effect. The objective of this Executive Order was to "further the purpose of the National Environmental Policy Act, with respect to the environment outside the United States, its territories and possessions." This Executive Order emphasizes the importance of the global environment and the United States' contribution to its protection by including a broad range of federal actions within the scope of NEPA. These interpretations must be considered by the courts when determining the extraterritoriality of NEPA.

C. Environmental Policy

The world is now faced with "global problems such as climate change, ozone depletion, acid rain, ocean pollution and protection of living resources. These problems are quintessentially global in nature." It has also been noted that "[e]nvironmental disasters have become the norm rather than the exception in world news today. Contamination from toxic waste, deforestation, oil spills, and other disasters have captured world attention in recent years as have the underlying causes: accidents, resource mismanagement, and most recently, environmental

\[\text{footnotes}

\footnote{For a review of additional CEQ action on this topic, see Goldfarb, supra note 14, at 571-73.}

\footnote{Exec. Order No. 12,114, 44 Fed. Reg. 1957 (1979).}

\footnote{Actions included in this Executive Order are}

(a) major Federal actions significantly affecting the environment of the global commons outside the jurisdiction of any nation . . . (b) major Federal actions significantly affecting the environment of a foreign nation not participating with the United States and not otherwise involved in the action; (c) major Federal actions significantly affecting the environment of a foreign nation which provide to that nation . . . [a product that produces another product or emission that is prohibited or regulated by the U.S.]; (d) major Federal actions outside the United States, its territories and possessions which significantly affect natural or ecological resources of global importance . . . .

\footnote{44 Fed. Reg. 1957 (1979).}


\footnote{Whitney, supra note 14, at 470.}
NEPA is among the most effective ways the U.S. government can monitor and control its impact on the global environment. Furthermore, lower environmental standards in other countries provide the United States with a greater incentive to do its part. The government must utilize NEPA to its fullest extent.

Among the policy aspects that are a cause for concern when determining extraterritorial application of NEPA is the sovereignty of foreign countries. "The agencies and the courts fear, perhaps most of all, that requiring NEPA compliance for actions in foreign countries would be an infringement upon the sovereignty of foreign governments." Some argue that the EIS process may impede technological advancement in other countries, particularly in developing countries. However, environmental problems are especially acute in lesser developed countries which makes environmental protection and control of the U.S. environmental impact all the more pertinent. Moreover, NEPA applies only to U.S. actions by U.S. agencies and does not affect the substantive laws of any country.

---

173 Ernsdorff, supra note 14, at 133.
174 For a review of other methods, see, e.g., Whitney, supra note 14, at 453-63 (discussing the Agency for International Development (AID) and Multinational Development Banks (MDBs)).
175 Spraker & Naftalin, supra note 7, at 1043 ("Dissatisfied with both the pace and substantive content of these regulatory efforts [in Europe and elsewhere], some environmental groups have attempted to extend judicially the application of U.S. environmental standards to ventures in other countries.").
176 Goldfarb, supra note 14, at 567. See also id. at 595-99 (proposing a balancing approach).
177 "A typical developing nation's economy could depend on offering resources and land to industrialized nations. Such nations may resist the environmental impact assessment process because they believe restricting environmentally unsafe technology would impede their progress." Goldfarb, supra note 14, at 587.

On the other hand, some industrialized nations seem willing to help developing countries whose economies may be harmed by efforts to protect the environment. See, e.g., Hague Declaration on the Environment, Mar. 11, 1989, reprinted in 28 I.L.M. 1308 (1989) (signed by twenty-four states, including Australia, Brazil, Canada, France, the Federal Republic of Germany, India, Japan, Kenya, Venezuela, and Zimbabwe). "The international community and especially the industrialized nations have special obligations to assist developing countries which will be very negatively affected by changes in the atmosphere [ozone layer deterioration] although the responsibility of many of them for the process may only be marginal today." Id. at 1309.

178 Vice President Gore states that many of the programs for Third World countries have been catastrophic because the environment was ignored in efforts to jump-start the industrial sector. Industrialized countries must understand that the Third World has no choice but to develop economically; however, they must do so in an environmentally sensitive manner so as not to worsen the problems of poverty, hunger, and disease. Gore, supra note 4, at 279-80.

179 See supra notes 12-17 and accompanying text. See also Environmental Defense Fund, Inc. v. National Science Found., 986 F.2d 528, 532 (D.C. Cir. 1993) ("NEPA is designed to control the decisionmaking process of U.S. federal agencies, not the substance of agency decisions . . . . Because the decisionmaking processes of federal agencies take place almost exclusively in this
Other arguments against the extraterritorial application of NEPA include concerns that it would result in practical difficulties for federal agencies operating abroad, interfere with the implementation of U.S. foreign policy, hinder confidential negotiations, and cause delay. In response to these concerns, NEPA provides enough flexibility to accommodate such needs. For example, there is an exemption available for military activities in times of war. It is not mandatory that confidential information be disclosed in environmental impact statements; however, even if such information is disclosed, it is not necessarily available for release to the public. In regard to the delay caused by EIS because of the necessity for public comment, the CEQ has authority to make alternative arrangements in certain circumstances. "NEPA, unlike many environmental statutes, does not dictate agency policy or determine the fate of contemplated action . . . . After weighing environmental considerations, an agency decisionmaker remains free to subordinate the environmental concerns revealed in the EIS to other policy concerns." The best way to protect the environment is to require all agencies to fully comply with the EIS mandate allowing an adequate amount of time for public comment, but, at the same time, recognizing the need for a certain degree of flexibility in the process.

In summary, the NEPA process works to ensure that environmental considerations are taken into account in every federal agency decision. Such consideration is desirable because it helps the United States do its part in the prevention of environmental degradation. The courts must...

---

Note, supra note 14, at 373.

Id. at 378.

See supra note 48.

Note, supra note 14, at 374.


It has been argued that the entire "congressional intent" test is wrong: [T]he extraterritorial application of NEPA would not transgress accepted principles of international law since the imposition of its procedures on federal agencies abroad would not infringe on either foreign sovereignty or the rights of foreign nationals. Thus, a court should not require a "clear indication" of legislative intent in order to apply the Act to the extraterritorial activities of federal agencies. Rather . . . a court should consider all the relevant manifestations of congressional intent to determine "whether, if Congress had thought about the point, it would have wished to" extend the scope of NEPA's procedural mandate. Note, supra note 14, at 357-58 (The author then concludes that Congress would have wanted NEPA to apply extraterritorially.)
recognize the importance of this goal by eliminating senseless distinctions among statutes and recognize the stated purpose of NEPA to protect the global environment.

VI. PROPOSAL

In Environmental Defense Fund, Inc. v. National Science Foundation, the D.C. Circuit Court took a positive step in the application of NEPA to a federal action in Antarctica, but this decision fell short of the ideal resolution of the issue. The courts must recognize that the global commons encompass the entire globe and are not limited to pristine areas without a sovereign such as Antarctica. By following the example of the D.C. Circuit and eliminating the consideration of the presumption against extraterritoriality in NEPA cases, the courts could achieve the national environmental policy of global environmental protection.

In the alternative, the courts could achieve this clearly desirable goal by abolishing the senseless market/nonmarket distinctions they have established in the interpretation of U.S. statutes. One method that the courts could utilize is a blanket market test: for example, if the regulated conduct occurs within the United States (e.g. federal agency decisionmaking for NEPA), the statute should apply. This method would restore legal integrity to the judicial process of statutory interpretation.

A final method that could be implemented to achieve the extraterritorial application of NEPA is a congressional amendment. What is needed is the insertion of a statement proclaiming that NEPA is meant to apply to federal actions outside the United States. The statutory amendment process aside, this method of reform may be the easiest because it would call for little judicial interpretation and no piecemeal judicial revision of precedents. The problem of whether or not to infer congressional intent from the statutory language would be alleviated, but the market/nonmarket distinctions in statutory interpretations would be left substantially intact. Therefore, the best way to achieve the extraterritorial application of NEPA, and the elimination of the governmental

166 986 F.2d 528.
167 This is the "conduct test" discussed supra part V.A.
168 For example, in § 4321 after the statement of purpose or at the end of § 4332, a provision could be added that states: "This Act applies to all federal actions regardless of their occurrence within or outside of the territorial boundaries of the United States." The amendment to the Civil Rights Act of 1964, extending the application of Title VII to American employees of United States companies abroad, is an excellent precedent for the analogous amendment to NEPA.
hypocrisy evident in market/nonmarket distinctions, is through the establishment of a market test for all statutes, as well as a congressional amendment to NEPA, definitively declaring its reach to encompass all federal actions regardless of where they occur.

"Congress did not engage in lengthy debate when it drafted and enacted NEPA. The legislature therefore was not fully aware of the implications of the statute."¹⁸⁹ Now is the time for Congress to recognize not only the dominion of NEPA, but also that the protection of the environment is imperative. "[I]f we do not lead the world on this issue, the chances of accomplishing the massive changes necessary to save the global environment will be negligible. If the United States does choose to lead, however, the possibility of success becomes much greater."¹⁹⁰ The extraterritorial application of NEPA is one way for the United States to take responsibility for the impact of its actions abroad, as well as at home, and to be a leader in the attainment of global environmental protection.

¹⁸⁹ Goldfarb, supra note 14, at 556.
¹⁹⁰ Gore, supra note 4, at 177.

Other methods of global environmental protection, especially international cooperation, are available but have yet to be proven entirely effective. See, e.g., Whitney, supra note 14, at 461-62 (The United States participates in Multilateral Development Banks (MDBs) which provide aid to Third World countries. In the course of its participation in these activities, the U.S. has tried to use diplomatic pressure upon the MDBs and donor nations to incorporate environmental analyses into their decisionmaking; however, because the U.S. is only one of several nations that take part in the MDBs' activities, its recommendations hold no particular force and, therefore, are not always considered.); Ernsdorff, supra note 14, at 133-34 (The Agency for International Development (AID) has adopted environmental assessment procedures for the projects it supports around the world, but some believe that these procedures are not stringent enough.).

Among recent attempts at international environmental protection was the June, 1992, United Nations Conference on Environment and Development (The Earth Summit) held in Rio de Janeiro. See 31 I.L.M. 814 (1992). However, commentators have noted the "inept performance by the Bush Administration . . . " at the conference. Stephen L. Kass & Michael B. Gerrard, After Rio, N.Y.L.J., Aug. 28, 1992, at 3,3. The United States refused to sign the Convention on Biological Diversity, one of the two conventions resulting from the conference, and failed to assume the leadership position that many assumed it would. See id. at 3; Jacob D. Werksam, Undermining the Summit: The United States Ignores International Environmental Law at Its Peril, L.A. Daily J., June 10, 1992, at 6,6.