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**The European Community Directive -- An Alternative  
Environmental Impact Assessment Procedure After Massey?**

by

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**The European Community Directive -- An Alternative  
Environmental Impact Assessment Procedure After Massey?**

**I. Introduction**

**A. The Need for Pollution Prevention**

In a recent speech to the National Press Club, the U.S. Environmental Protection Agency Administrator, Carol M. Browner, discussed the kind of world her generation would pass on to its successors.<sup>1</sup> She asked whether it would be a world where a person could take a deep breath of fresh air and admire the clear blue sky, or drink a glass of cold water out of the tap, or eat fresh, wholesome food from America's farmlands. Will it be possible to enjoy swimming in the ocean in the summertime, or to go for a hike in the Everglades? Ms. Browner commented that the Clinton Administration is firmly committed to what she called an entirely new approach. Rather than attempting to figure out what to do with environmental problems after their occurrence, the new administration would focus on preventing pollution from occurring in the first place.<sup>2</sup>

Nearly ninety years before Ms. Browner's declaration of a purportedly novel approach to pollution control, however,

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<sup>1</sup>Carol M. Browner, Administrator, U.S. Environmental Protection Agency, Address at the National Press Club Meeting (June 30, 1993) (transcript available at the Environmental Protection Agency Public Affairs Office).

<sup>2</sup>*Id.*

President Theodore Roosevelt called for foresight in his 1908 Conference on Conservation. He declared:

We have become great in a material sense because of the lavish use of our resources, and we have just reason to be proud of our growth. But the time has come to inquire seriously what will happen when our forests are gone...when the soils shall have been further impoverished and washed into streams. These questions do not relate only to the next century or to the next generation. One distinguishing characteristic of really civilized men is foresight...and if we do not exercise that foresight, dark will be the future.<sup>3</sup>

Not until the last half of the 20th Century did the United States Congress act upon President Roosevelt's relatively early exhortation. In a history of the American environmental movement, journalist Philip Shabecoff writes that "[t]he federal government, which frequently moves at a glacial pace in dealing with social problems, responded in the 1960s and 1970s with surprising speed to the rising concern over the deterioration of the environment."<sup>4</sup> He stated that a series of laws "churned out" by Congress in the 1970s "... must be regarded as one of the great legislative achievements of the nation's history."<sup>5</sup> One of

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<sup>3</sup>President Theodore R. Roosevelt, Address at the 1908 White House Conference on Conservation, in PROCEEDINGS OF A CONFERENCE OF GOVERNORS IN THE WHITE HOUSE, Washington, D.C., May 13-15, 1908, 3-12 (1909).

<sup>4</sup>Philip Shabecoff, *A Fierce Green Fire: The American Environmental Movement* 129 (1993). The book surveys the origins and evolution of the diverse environmental movement, and offers often provocative analysis about why, for all its popularity, the movement hasn't, in his view, succeeded in "greening" American politics.

<sup>5</sup>*Id.*

those laws, the National Environmental Policy Act (NEPA),<sup>6</sup> was signed into law by President Nixon on January 1, 1970.<sup>7</sup>

Senator Henry M. Jackson, NEPA's principal sponsor, commented during debates on the Act that it culminated efforts which originated in 1959 to formulate a comprehensive statement for the nation to conserve its resources and to develop a national environmental policy.<sup>8</sup> Senator Jackson recognized that throughout much of American history, "the goal of managing the environment for the benefit of all citizens has often been overshadowed and obscured by the pursuit of narrower and more immediate economic goals."<sup>9</sup> The problems NEPA was designed to cure were outlined in a Congressional White Paper entitled, "A National Policy for the Environment." It stated that "[t]he United States, as the greatest user of natural resources and manipulator of nature in all history, has a large and

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<sup>6</sup>42 U.S.C. §§ 4321-4370c (1988).

<sup>7</sup>According to Dinah Bear, General Counsel of the Council on Environmental Quality during the Reagan and Bush administrations, NEPA was "... the first of the major environmental laws enacted in the environmental decade of the 1970s, and its passage stimulated the type of citizen involvement and environmental litigation that has become characteristic of the environmental area as a whole." Dinah Bear, *NEPA at 19: A Primer on an "Old" Law with Solutions to New Problems*, 19 ENVTL. L. REP. (Envtl. L. Inst.) 10,060, 10,060 (Feb. 1989). For a discussion of NEPA's legislative history, see FREDERICK ANDERSON, *NEPA IN THE COURTS* 1-4 (1973), and ENVIRONMENTAL LAW INSTITUTE, *LAW OF ENVIRONMENTAL PROTECTION* § 9.02(2) (1987).

<sup>8</sup>115 CONG. REC. 29,067 (1969).

<sup>9</sup>*Id.* at 29,069.

obvious stake in the protection and wise management of man-environmental relationships everywhere."<sup>10</sup> NEPA was intended, at least in part, to set in place a regime which would compel decisionmakers to be more sensitive to the potential environmental consequences of their actions.

#### B. Environmental Impact Assessment

Policy makers need to know which beliefs about facts are credible and which arguments about values are sound. The credibility of a belief (for example, that the earth is round) depends on credible evidence and expert opinion, not the amount that people are willing to bet that it is true."<sup>11</sup>

Congress enunciated the policies and goals of the National Environmental Policy Act in section 101. It declared "... that it is the continuing policy of the Federal Government, in cooperation with State and local governments ... to create and maintain conditions under which man and nature can exist in productive harmony..."<sup>12</sup> To assist the federal government in creating and maintaining those conditions, Congress spelled out a procedure designed to let "... [p]olicy makers know which beliefs about facts are credible and which arguments about values are sound."

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<sup>10</sup>*Congressional White Paper on a National Policy for the Environment*, 115 CONG. REC. 29,078 (1969), introduced into the records of the debates on NEPA by Senator Jackson on Oct. 8, 1969.

<sup>11</sup>Mark Sagoff, *The Economy of the Earth* 37 (1988).

<sup>12</sup>42 U.S.C. § 4331(a) (1988).

Section 102(C), the action-forcing provision of the statute,<sup>13</sup> requires federal agencies to complete a detailed environmental impact assessment (EIA) with each recommendation for a major federal action with significant environmental effects.<sup>14</sup>

### C. International Environmental Impact Assessment

Since the United States adopted the EIA process in 1970, more than seventy-five jurisdictions have required EIA by law.<sup>15</sup> The process has become a proven technique used to

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<sup>13</sup>40 C.F.R. § 1500.1(a) (1992). Some consider the mandate expressed within NEPA to be so pervasive that it has been called an "environmental bill of rights." See, e.g., Comment, *NEPA's Role in Protecting the World Environment*, 131 U. PA. L. REV. 353, 355 (1982). Other commentators lament, however, that the courts have reduced the statute to a "mere full disclosure bill." See, e.g., Philip M. Ferester, *Revitalizing the National Environmental Policy Act: Substantive Adaptations From NEPA's Progeny*, 16 HARV. ENVTL. L. REV. 207, 207 (1992).

<sup>14</sup>42 U.S.C. § 4332(2)(C) (1988).

<sup>15</sup>Nicholas A. Robinson, *The 1991 Bellagio Conference on U.S.-U.S.S.R. Environmental Protection Institution: International Trends in Environmental Impact Assessment*, 19 B.C. ENVTL. AFF. L. REV. 591, 591 (1992). Professor Robinson includes an appendix identifying the EIA statutes of various jurisdictions. As another author stated, "EIA now is a commonplace legal term not only in English-speaking countries from Australia to Zambia," but in many other nations as well. Peter H. Sand, *Lessons Learned in Global Environmental Governance*, 18 B.C. ENVTL. AFF. L. REV. 213, 256-57 (1991). For an overview of the efforts of the United States and European countries to meet environmental challenges, including those surrounding environmental impact assessments, see Lothar Gundling, *Public Participation in Environmental Decision-Making*, in *TRENDS IN ENVIRONMENTAL POLICY AND LAW* 131, 136 (Michael Bothe ed., 1980) and Myles McSwiney, *The European Community Perspective*, in *UNDERSTANDING U.S. AND EUROPEAN ENVIRONMENTAL LAW* 132, 132-38 (Turner T.



ensure decisionmakers avoid or minimize unanticipated adverse effects upon the environment, and for institutionalizing the foresight which President Roosevelt said distinguished the truly civilized.<sup>16</sup> It is now considered the first and probably the most important step in preserving the quality of the environment.<sup>17</sup> EIA provides

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Smith, Jr. & Pascale Kromarek ed., 1989). See generally David A. Wirth, *A Matchmaker's Challenge: Marrying International Law and American Environmental Law*, 32 VA. J. INT'L L. 377 (1992) (describing the rapid growth of environmental protection measures in international law).

<sup>16</sup>Robinson, *supra* note 15, at 591. Lynton K. Caldwell, one of the drafters of NEPA, states that although the statute in many ways may be accounted a success, its principal accomplishments have not been those sought after during the course of the statute's initial formulation. He opines that, although NEPA's precepts are widely accepted as beneficial, an internalization within the body politic sufficient to compel official commitment to a realization of NEPA's objectives has often been lacking. Lynton K. Caldwell, *NEPA at Twenty: A Retrospective Critique*, 5 NAT. RESOURCES & ENV'T 6, 50 (1990).

<sup>17</sup>Louis L. Bono, *The Implementation of the EC Directive on Environmental Impact Assessments with the English Planning System: A Refinement of the NEPA Process*, 9 PAC. ENVTL. L. REV. 155, 155 (1991). Professor Nicholas A. Robinson notes that each jurisdiction which has adopted the EIA process has tailored it to meet the needs and level of socioeconomic development and traditions of that particular jurisdiction. He identifies seven trends in EIA practices: (1) EIA works in all political systems; (2) the pioneering process works best when an independent authority is available to oversee its implementation; (3) EIA can effectively provide local people with an opportunity to be heard and to participate in decisionmaking affecting their environment; (4) the process effectively marshals environmental data for decisionmakers; (5) because decisionmakers often initially resist EIA, its value and usefulness is not always easy to establish at the outset; (6) there is a tendency to adopt the process only for large projects; and (7) the process is not uniformly successful. Robinson, *supra* note 15, at 593-96.

citizens and groups with the tools to challenge governmental actions effectively.<sup>18</sup>

In the European Community, the preventive dimension is also a crucial aspect of environmental policy. This was perhaps best expressed in the Community's first environmental action programme launched in 1973: "The best environmental policy consists in preventing the creation of pollution or nuisances at source, rather than subsequently trying to counteract their effects. Effects on the environment should be taken into account at the earliest possible stage in all the technical planning and

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<sup>18</sup>According to one commentator, some say NEPA was needed because federal decisionmakers are unable to forget they were once little children:

As children, the saying goes, they kicked dogs, burned cats, and pulled the wings off of bugs. As adult bureaucrats, many still have the same propensities, except instead of tormenting little critters, bigger game is victimized. So, NEPA tells federal decision makers, like little children crossing streets, to "look both ways." They are to look at the project and at reasonable, alternative ways of building the project, and then they are to look at doing no project at all.

Stanley Millan, *Wanted: NEPA, Dead or Alive - Reward: Our Global Environment*, 22 ENV'T REP. (BNA) 2081, 2081 (Dec. 27, 1991). At a roundtable held at Yale Law School in April 1992, panelists agreed that through facilitation of citizen input, NEPA and similar laws have had "a tremendous, fundamental, and generally positive effect on government decisionmaking." EARTH RIGHTS AND RESPONSIBILITIES: HUMAN RIGHTS AND ENVIRONMENTAL PROTECTION 25 (Conference Report, Yale Law School, 1992).

decisionmaking processes."<sup>19</sup> Environmental impact assessment integrates ecological awareness into all planning and decisionmaking, especially agriculture, industry, energy, transport, tourism, and regional development. As such, it is viewed by the European Community as the major weapon in the battle against degradation.<sup>20</sup>

#### D. Direction of Analysis

This paper will examine the similarities and differences between the "father" of EIA legislation,<sup>21</sup> the United States' National Environmental Policy Act, and one of its important progeny, the 1985 European Community Directive<sup>22</sup> requiring member nations to assess the environmental effects of major projects, both private and public.

First, the paper will discuss NEPA's policy and its objectives. It will then analyze the background and procedures of the regulations implementing the statute's

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<sup>19</sup>EC, Directorate General XI, quoted in *EEC, The European Community and Impact Studies*, 1991 EUR. ENVTL. Y.B. (Doxer Institute, Milan) 144 (distributed in the United States by BNA Books) [hereinafter *The EEC and Impact Studies*].

<sup>20</sup>*Id.*

<sup>21</sup>Bono, *supra* note 17, at 155.

<sup>22</sup>Council Directive on the Assessment of the Effects of Certain Public and Private Projects on the Environment, Council Directive 85/337/EEC, 1985 O.J. (L 175) 40 [hereinafter EC Directive].

environmental impact assessment requirements. The paper will next examine the opportunities for public participation under NEPA. It will conclude the discussion of NEPA with an exploration of the international problems associated with its application. A similar analytical approach to the European Community Directive will follow the analysis of the National Environmental Policy Act.

## II. Environmental Impact Assessment in the United States - NEPA

### A. Policy and Objectives

In section 101 of NEPA Congress enunciated its findings and declared an environmental policy for the nation. First, it referred to the profound impact human activity has had on the interrelations of all elements of the natural environment, in particular, "... the profound influences of population growth, high density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances."<sup>23</sup> It recognized the requirement to restore and maintain environmental quality for the overall welfare and development of man, and declared a continuing policy of the federal government, in cooperation with state and local governments, and concerned public and private organizations, to use all practicable measures to create and maintain conditions for man and

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<sup>23</sup>42 U.S.C. § 4331(a) (1988).

nature to exist in productive harmony.<sup>24</sup>

The section also requires the federal government to use its resources, "consistent with national policy," so that the nation may:

(1) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;

(2) assure for all Americans safe, healthful, productive, and aesthetically and culturally pleasing surroundings;

(3) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;

(4) preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity and variety of individual choice;

(5) achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; and

(6) enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.<sup>25</sup>

These broad outlines of the statute make it nearly impossible to think of any environmental issue of current concern--whether related to disturbing predictions of ozone depletion or climate change, degradation of ecosystems, or

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<sup>24</sup>*Id.*

<sup>25</sup>42 U.S.C. § 4331(b) (1988). Congress also recognized the responsibility of each individual to environmental preservation and enhancement. 42 U.S.C. § 4331(c) (1988). NEPA has become known as the environment's Magna Carta. The aspirational language of the statute "... conveyed the hope of a nation embarking on a formidable task: reversing a national environmental decline, caused in disproportionate amount by the federal government itself." Michael C. Blumm, *Symposium on NEPA at Twenty: The Past, Present and Future of the National Environmental Policy Act -- Introduction: The National Environmental Policy Act at Twenty: A Preface*, 20 ENVTL. L. 447, 447 (1990).

the extinction of endangered species--that is not in some way encompassed within the Act.<sup>26</sup>

Section 102 of NEPA sets out a broad requirement that, as much as possible, all policies, regulations, and public laws of the United States are to be interpreted and administered in a manner consistent with the policies established by the Act.<sup>27</sup> It calls upon all federal agencies to utilize a systematic, interdisciplinary approach to insure the natural and social sciences are used in all plans and decisions which may have an impact on the human environment.<sup>28</sup>

In implementing this interdisciplinary approach, federal agencies are to identify and develop procedures to insure environmental amenities and values are properly quantified and appropriately considered in governmental decisionmaking.<sup>29</sup> Congress directed the agencies to consult with the Council on Environmental Quality (CEQ), which was established by Title II of NEPA, and was charged with the responsibility of developing national policies to foster environmental quality improvement to meet the goals of the

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<sup>26</sup>Bear, *supra* note 7, at 10,061.

<sup>27</sup>42 U.S.C. § 4332 (1988).

<sup>28</sup>42 U.S.C. § 4332(A) (1988).

<sup>29</sup>42 U.S.C. § 4332(B) (1988).

statute.<sup>30</sup>

## B. Environmental Impact Assessment

As a method of implementing the policies and general guidelines of the Act's national environmental policy, Congress included the familiar section 102(2)(C), and directed the responsible official of all federal agencies to include, in proposals for legislation and other major federal actions significantly affecting the quality of the human environment, a detailed statement, now commonly

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<sup>30</sup>42 U.S.C. § 4342 (1988) and 42 U.S.C. § 4344 (1988). NEPA established the CEQ in the Executive Office of the President. It is composed of three members appointed by the President, with the advice and consent of the Senate. 42 U.S.C. § 4342 (1988) Included within its responsibilities are preparation of an annual report on environmental quality, and documentation and definition of environmental trends. 42 U.S.C. § 4344 (1988) The Clinton administration has proposed replacement of the CEQ with a new White House Office of Environmental Quality. Critics of the proposal have raised concerns over the ability of the new office to carry on the statutorily mandated functions of the CEQ. *Cabinet-Level EPA: "Not If, But How," ENVTL. & ENERGY STUDY CONF. WKLY. BULL.*, Feb. 22, 1993, at B10, B11. Conservation groups have objected to the proposal because much of the CEQ's authority to coordinate and enforce environmental policy would be transferred to the Environmental Protection Agency. Tom Kenworthy, *Clinton Plan on CEQ Sparks Tiff With Environmentalists*, *Wash. Post*, Mar. 25, 1993, at A22. See also *Senate Rejects Stripped-Down Cabinet Bill, Proceeds to Consider Broader Legislation*, 23 ENV'T REP. (BNA) 3222 (Apr. 30, 1993), *Senate Approves EPA Cabinet Legislation, Adds Provision Creating New Equity Office*, 24 ENV'T REP. (BNA) 3 (May 7, 1993), and *Supplemental Funding for CEQ to be Sought if Functions Not Given to EPA, Stokes Says*, 24 ENV'T REP. (BNA) 387 (July 2, 1993).

referred to as an environmental impact statement (EIS).<sup>31</sup>

The statement must include an analysis of:

- (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 irretrievable commitments of resources which would be involved in the proposed action should it be implemented.<sup>32</sup>

#### 1. CEQ Regulations - Background

Shortly after President Nixon signed NEPA into law, he issued Executive Order 11,514 which, among other things, directed the CEQ to issue guidelines on preparing environmental impact statements.<sup>33</sup> After the CEQ issued interim guidelines in 1971, and revised guidelines in 1973, President Carter issued Executive Order 11,991 in 1977, directing the CEQ to issue binding regulations to federal agencies; the objective was to make the process more uniform and efficient, and to respond to comments on the earlier guidelines, as well as the case law which had developed up

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<sup>31</sup>The CEQ issued regulations which define an Environmental Impact Statement as "a detailed written statement as required by section 102(2)(C) of the Act." 40 C.F.R. § 1508.11 (1992).

<sup>32</sup>42 U.S.C. § 4332(2)(C) (1988).

<sup>33</sup>Exec. Order No. 11,514, 3 C.F.R. § 902 (1966-1970), as amended by Exec. Order No. 11,991, 3 C.F.R. § 123 (1977).



to that time.<sup>34</sup> The regulations were to incorporate all of the procedural requirements of NEPA, and to include provisions for referral of conflicts between agencies regarding the environmental impacts of proposed federal actions to the CEQ.<sup>35</sup> In preparing the new regulations, CEQ

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<sup>34</sup>Exec. Order No. 11,991, 3 C.F.R. § 123 (1977). An early case suggesting that the sweep of NEPA was extraordinarily broad, compelling consideration of any and all types of environmental impact of federal action, was *Calvert Cliffs Coordinating Committee v Atomic Energy Commission*, 449 F.2d 1109 (D.C. Cir. 1971). Writing for the court, Judge Skelly Wright correctly prophesied that the case was just the beginning of what promised to become a flood of new litigation seeking protection of the natural environment. He stated that the duty of the court was to see that the important purposes of the new environmental legislation were not lost or misdirected in the vast corridors of the federal bureaucracy. Judge Wright also asserted that consideration of the environment under NEPA required more than pro forma ritual, but full consideration of action to avoid adverse consequences and full exercise of substantive discretion at every important stage of an agency's proceedings. The "detailed statement" requirement was designed to ensure that agency decisionmakers took into account all approaches to a particular project, including its abandonment, which would alter the environment. 449 F.2d at 1111. (The case was disapproved on other grounds in another case involving a power plant, *Vermont Yankee Nuclear Power Corp. v Natural Resources Defense Council, Inc.*, 435 U.S. 519, 98 S.Ct. 1197 (1978) and disagreed with by multiple cases, as stated in *National Latino Media Coalition v Federal Communications Commission*, 816 F.2d 785 (D.C. Cir. 1971).)

<sup>35</sup>*Id.* For a discussion of the development of CEQ guidelines and regulations, see Bear, *supra* note 7, at 10,061-62. See also Nicholas C. Yost, *Streamlining NEPA - An Environmental Success Story*, 9 B.C. ENVTL. AFF. L. REV. 507 (1981-82). Mr. Yost served as General Counsel of the Council on Environmental Quality during the Reagan Administration. The new regulations, unlike the predecessor guidelines, were not confined to section 102(2)(C) (environmental impact statements). The regulations applied to the whole of section 102(2), and were to be "read together as a whole in order to comply with the spirit and letter of the law." The CEQ intended that judicial review

attempted to obtain and respond to the views of numerous parties, private as well as public. The regulations were designed to reduce the delay and paperwork associated with the NEPA process, and to make the process more valuable to decisionmakers.<sup>36</sup>

## 2. The Environmental Impact Assessment Process

The CEQ regulations implementing the procedural obligations of NEPA apply to "all agencies of the federal government."<sup>37</sup> The regulations exclude Congress, the judiciary, and the President, including those performing staff functions for the President.<sup>38</sup> The regulations do not address the applicability of the various procedural requirements to specific agency actions, but are generic in nature. Instead, each federal agency and department is required to prepare its own NEPA procedures addressing that

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of agency compliance with the regulations occur only after an agency had filed the final environmental impact statement, or made a final finding of no significant impact, or if an agency took action which would result in irreparable injury. 40 C.F.R. § 1500.3 (1992). See *infra* notes 42-61 and accompanying text.

<sup>36</sup>Bear, *supra* note 7, at 10,062.

<sup>37</sup>40 C.F.R. § 1508.12 (1992).

<sup>38</sup>"Federal agency" also includes, for purposes of the regulations, states and units of general local government and Indian tribes assuming NEPA responsibilities under section 104(h) of the Housing and Community Development Act of 1974. 40 C.F.R. 1508.12 (1992).

agency's compliance in relation to its particular mission."<sup>39</sup> An agency's procedures are adopted only after an opportunity for public review, and after the CEQ has reviewed them to ensure they conform with NEPA and implementing regulations.<sup>40</sup>

Agency procedures must establish specific criteria for and identification of three classes of actions: Those normally requiring preparation of an environmental impact assessment; those which do not require either an environmental impact statement or an environmental assessment (categorical exclusions); and those which normally require an environmental assessment, but not necessarily an environmental impact statement.<sup>41</sup>

"Categorical exclusion" refers to those actions which, based upon procedures adopted by a federal agency in accordance with the regulations implementing NEPA, have been found to have no significant individual or cumulative impact on the human environment.<sup>42</sup> Because these actions do not significantly affect the environment, neither an environmental assessment nor an environmental impact

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<sup>39</sup>40 C.F.R. § 1507.3 (1992).

<sup>40</sup>40 C.F.R. § 1507.3(a) (1992).

<sup>41</sup>40 C.F.R. § 1507.3(b) (1992).

<sup>42</sup>40 C.F.R. § 1508.4 (1992).

statement is required.<sup>43</sup> For these actions, the decisionmaker need only compare the activity with the list of categorical exclusions provided in agency regulations for which the headquarters has already done the "leg work" in finding that minimal impacts are involved.<sup>44</sup> For example, the Army has determined that military classroom training is categorically excluded from the requirements of NEPA. Field training exercises in which weapons and vehicles are used are not automatically exempt from NEPA requirements. Normally, an environmental assessment is necessary to determine the impacts of the field training, unless a wartime emergency exists.<sup>45</sup>

An environmental assessment is a concise public document designed to achieve any of the following purposes: to provide sufficient analysis and evidence to determine whether to prepare an environmental impact statement; to aid an agency's compliance with NEPA when an environmental impact statement is not necessary; and to facilitate preparation of an environmental impact statement if one is

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<sup>43</sup>An agency may decide to prepare environmental assessments even though it is not required to do so; also, agencies must establish procedures to provide for extraordinary circumstances in which an action may have a significant environmental effect, even though it is normally excluded. 40 C.F.R. § 1508.4 (1992).

<sup>44</sup>Millan, *supra* note 18, at 2082-83.

<sup>45</sup>*Id.*

required.<sup>46</sup> An environmental assessment should not contain lengthy descriptions or detailed information which an agency may have gathered. Instead, it should briefly discuss the need for the proposal, the environmental effects of the action, the alternatives considered, and list the agencies and persons consulted.<sup>47</sup>

An environmental assessment leads to one of two conclusions: either a Finding of No Significant Impact (FONSI), or a finding that preparation of an environmental impact statement is required. A FONSI briefly presents the reasons why an action not categorically excluded will not have a significant impact on the human environment, and for which an environmental impact assessment will not be prepared. It includes the environmental assessment, or a summary, and notes any other environmental documents related to it.<sup>48</sup>

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<sup>46</sup>40 C.F.R. § 1508.9 (1992). Although the regulations do not include a page limit for an environmental assessment, the CEQ advises agencies that such assessments should normally be 10 to 15 pages in length. Question 36a, *Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations*, 46 Fed. Reg. 18,026, 18,036 (1981).

<sup>47</sup>40 C.F.R. 1508.9(b) (1992). Section 102(2)(E) of NEPA requires federal agencies to "Study, develop and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources." 42 U.S.C. § 102(2)(E) (1988).

<sup>48</sup>40 C.F.R. § 1508.13 (1992). Stanley Millan explains the importance of the distinction between what he calls a "little" study and a "big" study. The little study, or an environmental assessment, might cost tens and thousands of dollars and take months to complete, yet entail little

Federal agencies have been criticized for subjecting the environmental assessment and FONSI process to two types of abuse. First, the analysis is sometimes so limited that it is debatable whether the decision not to prepare a detailed EIS is sound. On the other hand, the environmental assessment often takes on all of the characteristics of an EIS, which may suggest decisionmakers are attempting to avoid the more rigorous public participation requirements of the EIS.<sup>49</sup>

The primary purpose of an EIS is to serve as an action-forcing device to ensure NEPA's policies and goals are infused into the ongoing programs and actions of the federal government. It is to provide a complete, fair discussion of significant environmental impacts, and inform decisionmakers and the public of the reasonable alternative which would avoid or minimize adverse impacts or enhance the quality of the human environment. Agencies are to focus on the significant environmental issues and alternatives, and to avoid unnecessary paperwork and the accumulation of extraneous background data. The statement is to be concise and to the point, and supported by evidence that the agency

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public involvement. On the other hand, a big study, an environmental impact statement, may cost hundreds of thousands of dollars (or even much more), involve years of study, and require significant public involvement. Millan, *supra* note 18, at 2083.

<sup>49</sup>Bear, *supra* note 7, at 10,063. See *infra* notes 62-69 and accompanying text for a discussion of public participation requirements.

has made the necessary environmental analyses. It is meant to be more than a mere disclosure document,<sup>50</sup> but is to be used by federal officials together with other relevant material to make decisions and plan actions.<sup>51</sup>

The threshold requirement for preparation of an EIS is the statutory threshold of a "proposal for legislation and other major federal actions significantly affecting the quality of the human environment."<sup>52</sup> CEQ regulations define a "proposal" to exist at the stage in the development of an action when an agency has a goal and is preparing to make a decision on one or more alternative ways of accomplishing that goal. The agency should be able to meaningfully evaluate the effects of the action.<sup>53</sup>

A "major federal action" encompasses a wide range of actions, including adoption of rules, regulations, and interpretations of policy under the Administrative Procedure Act (APA), legislative proposals, treaties, and international conventions or agreements, and adoption of

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<sup>50</sup>But see Stephen L. Kass & Michael B. Gerrard, *NEPA Abroad*, N.Y. L.J., Nov. 22, 1991, at 3, in which the authors state that "NEPA is, in effect, a full-disclosure act that requires each federal agency to consider the environmental impacts of its proposed actions...." See also *Natural Resources Defense Council, Inc. v. Morton*, 458 F.2d 827, 833 (D.C. Cir. 1972).

<sup>51</sup>40 C.F.R. § 1502.1 (1992).

<sup>52</sup>42 U.S.C. § 4332(2)(C) (1988).

<sup>53</sup>40 C.F.R. 1508.23 (1992).

programs.<sup>54</sup> An action also includes circumstances where the responsible official fails to act and that failure is reviewable by courts or administrative tribunals under the APA or other applicable law as agency action.<sup>55</sup>

Specifically excluded as "actions" under NEPA are judicial or administrative enforcement actions (both civil and criminal) and funding assistance solely in the form of revenue sharing funds distributed under the State and Local Financial Assistance Act of 1971, when there is no federal agency control over the subsequent use of such funds.<sup>56</sup>

"Significantly" as used in the statute requires decisionmakers to consider both context and intensity. Context means that the significance of a federal action must be analyzed in several contexts, such as society as a whole, the region affected, affected interests, and the locality. Significance will vary with the setting of the proposed action, and both long- and short-term effects are relevant.<sup>57</sup> Intensity refers to the severity of the impact. Relevant factors in evaluating the impact of an action included in CEQ regulations are: the degree to which the proposed action may affect public health or safety; unique characteristics of the geographic area; the degree to which

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<sup>54</sup>40 C.F.R. § 1508.18(b) (1992).

<sup>55</sup>40 C.F.R. § 1508.18 (1992).

<sup>56</sup>40 C.F.R. § 1508.18(a).

<sup>57</sup>40 C.F.R. 1508.27(a) (1992).



the action's effects on the quality of the human environment are likely to be highly controversial, uncertain, or involve unique or unknown risks; the degree to which the action may establish a precedent for future actions; the degree to which the action may adversely affect locations listed in or eligible for listing in the National Register of Historic Places, or may cause loss or destruction of significant scientific, cultural, or historical resources; the degree to which the action may adversely affect an endangered or threatened species or its habitat; and whether the action threatens a violation of federal, state, or local law.<sup>58</sup>

Once an agency decides to prepare an EIS, it must engage in a "scoping process" to determine the scope of the issues to be addressed in the EIS, and to identify the significant issues related to a proposed action. If more than one federal agency is either proposing an action or involved in the same action, this is the appropriate time to allocate responsibilities among lead and cooperating agencies. During this process the agency or agencies should set any time and page limits, and generally structure the process so that all identifiable participants are informed and involved at the appropriate time.<sup>59</sup>

After completion of the scoping process a draft EIS is prepared. The CEQ regulations detail precisely the

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<sup>58</sup>40 C.F.R. 1508.27(b) (1992).

<sup>59</sup>40 C.F.R. § 1501.7 (1992).

requirements of an EIS, from cover sheet to appendices.<sup>60</sup> The "heart" of the EIS is the alternatives section. It should present the environmental impacts of a proposal and the alternatives in comparative form, and sharply define the issues to provide a clear basis for a choice among options. In the alternatives section agencies are required to: rigorously explore and objectively evaluate all reasonable alternatives, discussing the reasons for elimination of any alternatives; devote sufficient treatment to each alternative for reviewers to evaluate their comparative merits; include reasonable alternatives not within the jurisdiction of the lead agency; include the no action alternative; identify the agency's preferred alternative or alternatives; and include appropriate mitigation measures not already included in the proposal.<sup>61</sup>

#### C. Public Participation Under NEPA

Federal agencies must make diligent efforts to involve the public in preparing and implementing their NEPA procedures. In the case of environmental assessments, neither the assessment nor the FONSI are filed in a central location (unlike an EIS, which is filed with the Office of Federal Activities in the Environmental Protection Agency). However, they are public documents, and the agency

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<sup>60</sup>40 C.F.R. § 1502.10 (1992).

<sup>61</sup>40 C.F.R. § 1502.14 (1992).

responsible for their preparation must provide an appropriate opportunity for the public to participate.<sup>62</sup> Agencies have discretion in selecting the level of public circulation, but there are two situations in which an agency must make a FONSI available for 30 days. First, if the proposed action is, or is closely similar to, an action which would normally require an EIS; and second, if the nature of the proposed action is without precedent in the agency's experience.<sup>63</sup>

If the agency decides to prepare an EIS, it publishes a Notice of Intent in the Federal Register. The notice describes the proposed action and possible alternatives, the agencies intent to prepare an EIS, the proposed scoping process, and any planned scoping meetings and the name and address of an agency contact person.<sup>64</sup> Once the draft EIS is prepared, it is circulated for at least 45 days for public comment and review.<sup>65</sup> Federal agencies with jurisdiction by law or special expertise regarding any of the relevant environmental impacts are expected to comment, although this may take the form of a "no comment" letter.<sup>66</sup> At the conclusion of the comment period, the agency must

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<sup>62</sup>40 C.F.R. § 1506.6 (1992).

<sup>63</sup>40 C.F.R. § 1501.4(e)(2) (1992).

<sup>64</sup>40 C.F.R. § 1508.22 (1992).

<sup>65</sup>40 C.F.R. § 1506.10(c) (1992).

<sup>66</sup>40 C.F.R. 1503.2 (1992).

evaluate all comments and respond to the substantive comments in the final EIS.<sup>67</sup>

At the time of a decision, the decisionmaker signs a Record of Decision (ROD). The ROD identifies the decision, states which alternatives were considered in making the decision, identifies the environmentally preferred alternatives, and discusses the factors that were balanced by the decisionmaker.<sup>68</sup> The ROD also states whether all practical methods to avoid or minimize environmental harm are being adopted, and if not, why not. Additionally, the ROD includes a description of enforcement and monitoring programs, if applicable.<sup>69</sup>

#### D. Enforcement of NEPA

Although NEPA contains no explicit provision concerning judicial review, early appellate court decisions held that federal compliance with NEPA's procedural provisions was judicially enforceable.<sup>70</sup> Section 701(a) of the Administrative Procedure Act (APA) provides the basis

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<sup>67</sup>40 C.F.R. 15103.4(b) (1992).

<sup>68</sup>40 C.F.R. 1505.2 (1992).

<sup>69</sup>*Id.*

<sup>70</sup>*Calvert Cliffs Coordinating Committee v Atomic Energy Commission*, 449 F.2d 1109 (D.C. Cir. 1971). See also ANDERSON, *supra* note 7, at 16; NEPA litigation statistics and a discussion of significant case law is found in the NEPA chapter of each Annual Report on Environmental Quality, published annually by the CEQ.

for judicial review of NEPA-mandated activities.<sup>71</sup> The provision states that agency decisions are presumptively subject to judicial review, unless a statute expressly prohibits judicial review,<sup>72</sup> or where "agency action is committed to agency discretion by law."<sup>73</sup> Because NEPA does not expressly prohibit judicial review, the only APA issue arising in NEPA litigation is whether the action is committed to agency discretion by law.<sup>74</sup>

Early federal cases suggested that the APA's presumption of reviewability allowed judicial review on the merits of administrative decisions in order to ensure compliance with the Congressional declarations of national environmental policy in NEPA section 101.<sup>75</sup> In *Calvert Cliffs Coordinating Committee v. Atomic Energy Commission*,<sup>76</sup> the D.C. Circuit Court considered the adequacy of Atomic Energy Commission rules adopted to govern the Commission's consideration of environmental values. The court found that

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<sup>71</sup>5 U.S.C. § 701 (1988).

<sup>72</sup>5 U.S.C. § 701(a) (1) (1988).

<sup>73</sup>*Id.* § 701(a) (2).

<sup>74</sup>Citizens desiring to sue a federal agency for failure to meet NEPA's requirements must first show they have been injured, and must focus on project-specific impacts rather than on broad-range ramifications of a future project in which the injury is only speculative. Millan, *supra* note 18, at 2082.

<sup>75</sup>See *supra* notes 23-25 and accompanying text.

<sup>76</sup>449 F.2d 1109 (D.C. Cir. 1971).

the policy declarations of section 101 imposed distinct substantive duties on agencies, and that environmental values required consideration comparable with other statutory mandates.<sup>77</sup> Judge Skelly Wright wrote:

In some instances environmental costs may outweigh economic and technical benefits and in other instances they many not.

The reviewing courts probably cannot reverse a substantive decision on the merits, under section 101, unless it be shown that the actual balance of costs and benefits that was struck was arbitrary or clearly gave insufficient weight to environmental values. But if the decision was reached procedurally without individualized consideration and balancing of environmental values--conducted fully and in good faith--it is the responsibility of the courts to reverse.<sup>78</sup>

The opinion emphasized that mere procedural compliance with NEPA's impact statement provisions would be insufficient if environmental considerations were clearly undervalued or if the final decision was not the product of good faith study.<sup>79</sup> Several subsequent decisions followed the lead of *Calvert Cliffs* in appearing to hold that the proper role of the judiciary under NEPA extended to a review

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<sup>77</sup>449 F.2d at 1112.

<sup>78</sup>449 F.2d at 1113, 1115.

<sup>79</sup>The court also sought to establish the link between NEPA's substantive and procedural requirements. In what some scholars consider dictum, the court stated that, while the substantive policies allow room for discretion and may not "require particular substantive results in particular problematic instances," the EIS procedure is designed to ensure that all federal agencies, in fact, exercise the substantive discretion given to them. 449 F.2d at 1112. See FRANK GRAD, 2 TREATISE ON ENVIRONMENTAL LAW § 9.04, at § 9.222 (1984).

of the merits of administrative decisions.<sup>80</sup>

The Supreme Court limited the holdings of *Calvert Cliffs* and its successors in a series of cases beginning with *Kleppe v. Sierra Club*.<sup>81</sup> In that case, the Court addressed a decision of the Department of Interior not to prepare an EIS to study the regional cumulative impacts of the development of coal reserves in the northern Great Plains. The holding of the case was limited to the question of whether NEPA required preparation of regional EISs in addition to national and local EISs. However, Justice Powell declared in a footnote that:

Neither the statute nor its legislative history contemplates that a court should substitute its judgement for that of the agency as to the environmental consequences of its actions. The only role for a court is to insure that the agency has taken a "hard look" at environmental consequences; it cannot "interject itself within the area of discretion of the executive as to the choice of the action to be taken."<sup>82</sup>

Although the Court stated that the judiciary should not actively interfere with administrative decisions, it stopped

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<sup>80</sup>See, e.g., *Environmental Defense Fund v. Corps of Engineers*, 470 F.2d 289 (8th Cir. 1972), cert. denied, 412 U.S. 931 (1973); *Sierra Club v. Froehlke*, 486 F.2d 946 (7th Cir. 1973); *Scenic Hudson Preservation Conference v. Federal Power Commission*, 453 F.2d 463 (2d Cir. 1971), cert. denied, 407 U.S. 926 (1972); *Natural Resources Defense Council, Inc. v. Morton*, 458 F.2d 827 (D.C. Cir. 1972). The Tenth Circuit rejected the idea that courts should examine the substantive merits of an agency's decision in *National Helium Corp. v. Morton*, 455 F.2d 650 (10th Cir. 1971).

<sup>81</sup>427 U.S. 390 (1976).

<sup>82</sup>427 U.S. at 410 n.21 (quoting *Natural Resources Defense Council v. Morton*, 458 F.2d 827, 838 (1972)).

short of prohibiting the judiciary from reviewing EISs to ensure that the final decision was not arbitrary.

In *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Counsel*,<sup>83</sup> the Supreme Court continued to chip away at substantive review of NEPA. The Court remarked that:

NEPA does set forth significant substantive goals for the Nation, but its mandate to the agencies is essentially procedural. It is to insure a fully informed and well-considered decision, not necessarily a decision the judges of the Court of Appeals or of this Court would have reached had they been members of the decisionmaking unit of the agency. Administrative decisions should be set aside in this context, as in every other, only for substantial procedural or substantive reasons as mandated by statute, not simply because the court is unhappy with the result reached.<sup>84</sup>

Although this passage was more specific than the *Kleppe* footnote, commentators who desired the courts to review the substantive merits of section 101 of NEPA believed the door was not yet closed.<sup>85</sup>

The door seemed to close even more in the next Supreme Court opinion dealing with NEPA review, *Strycker's Bay Neighborhood Council, Inc. v. Karlen*,<sup>86</sup> in which the Court held that, in reviewing an agency decision subject to NEPA's procedural requirements, "the only role for a court is to

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<sup>83</sup>435 U.S. 519 (1978).

<sup>84</sup>435 U.S. at 558 (citations omitted).

<sup>85</sup>See, e.g., James A. Henderson & Richard N. Pearson, *Implementing Federal Environmental Policies: The Limits of Aspirational Commands*, 78 COLUM. L. REV. 1429, 1458 (1978).

<sup>86</sup>444 U.S. 223 (1979).



insure that the agency has considered the environmental consequences; it cannot "interject itself within the area of discretion of the executive as to the choice of the action to be taken."<sup>87</sup> To many, the door was slammed shut ten years later with the decision of *Robertson v. Methow Valley Citizens Council*.<sup>88</sup> After Justice Stevens noted that section 101 of NEPA declares broad national commitments to environmental quality, he skipped to the action-forcing procedures of section 102(2)(C). He stated that the EIS should serve two main purposes: to ensure that agencies consider environmental impacts, and to ensure that they disclose the relevant information to the public.

The Court narrowed its interpretation of NEPA in the following language:

Although these [EIS] procedures are almost certain to affect the agency's substantive decision, it is now well settled that NEPA itself does not mandate particular results, but simply prescribes the necessary process. If the adverse environmental effects of the proposed

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<sup>87</sup>44 U.S. at 227-28 (quoting *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21 (1976)). Looking to the Supreme Court's decisions in *Kleppe* and *Strycker's Bay*, the Court of Appeals for the District of Columbia Circuit wrote:

Just as NEPA is not a green Magna Carta, federal judges are not the barons at Runnymede. Because the statute directs agencies only to look hard at the environmental effects of their decisions, and not to take one action or another, federal judges correspondingly enforce the statute by ensuring that federal agencies comply with NEPA's procedures, and not by trying to coax agency decisionmakers to reach certain results. *Citizens Against Burlington v. Busey, Inc. v. Busey*, 938 F.2d 190 (D.C. Cir. 1991).

<sup>88</sup>490 U.S. 332 (1989).

action are adequately identified and evaluated, the agency is not constrained by NEPA from deciding that other values outweigh the environmental costs ... Other statutes may impose substantive environmental obligations on federal agencies, but NEPA merely prohibits uninformed--rather than unwise--agency action.<sup>89</sup>

In the view of one analyst, this reading of the law reduces a court's role in reviewing decisions made pursuant to NEPA's procedures to a purely mechanical exercise.<sup>90</sup>

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<sup>89</sup>490 U.S. at 350-51.

<sup>90</sup>Ferester, *supra* note 13, at 222. See Terry Davies & Frances Irwin, *The Institutional Challenge - The Environment Should be a Factor in all of Society's Decisions*, EPA J. (May-June 1992), at 53, in which the authors state that while the NEPA process has mitigated damage from major development projects, it has been less successful in changing basic goals and approaches of programs. They believe that, as a result of mixed court interpretations, programmatic impact statements continue to be rare. They also assert that NEPA could be broadened to inject environmental factors into other governmental decisionmaking processes, particularly budgeting. David Shilton, an attorney with the U.S. Department of Justice, argues that the Supreme Court has not singled out NEPA for hostile treatment, but that it subjects NEPA to the same principles of statutory construction and administrative law principles that the Court applies to other statutes. David C. Shilton, *NEPA'S Evolution -- The Decline of Substantive Review: Is the Supreme Court Hostile to NEPA? Some Possible Explanations for a 12-0 Record*, 20 ENVTL. L. 551 (1990). See also Robinson, *supra* note 15, at 600 (although NEPA requires disclosure of environmental impacts and the means of mitigating them, the Supreme Court views it as a procedural statute); Lynton K. Caldwell, *The National Environmental Policy Act: Retrospect and Prospect*, 6 ENVTL. L. REP. (Envtl. L. Inst.) 50,030 (1976); and Richard E. Levy & Robert L. Glicksman, *Judicial Activism and Restraint in the Supreme Court's Environmental Law Decisions*, 42 VAND. L. REV. 343 (1989).

## B. NEPA and International Problems

Almost from the time of its enactment, legal scholars have debated whether NEPA should be given extraterritorial effect. The elements of those debates are found in the analysis in the recent case of *Environmental Defense Fund, Inc. v. Massey*,<sup>91</sup> in which the Court of Appeals for the District Court of Columbia held that government agencies must perform impact studies on decisions affecting the environment of Antarctica, even though those impacts occur outside the territorial United States.<sup>92</sup>

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<sup>91</sup>986 F.2d 528 (D.C. Cir. 1993).

<sup>92</sup>In the case of *Public Citizen v. United States Trade Representative*, 1993 WL 232434 (D.D.C.), the U.S. District Court for the District of Columbia ruled that the U.S. Trade Representative is required to prepare an EIS on the North American Free Trade Agreement (NAFTA). Judge Charles Richey said NEPA "unambiguously requires" an EIS on all proposals for legislation. He did not address the traditional arguments for and against extraterritorial application of NEPA, but ruled that requiring the preparation of an EIS on the NAFTA before its submission to Congress is required by the statute's clear language and is consistent with the policies behind it. Judge Richey also found that the exercise of APA jurisdiction was not a violation of separation of powers, because NAFTA had already been drafted and approved by the three countries involved, and the preparation of an EIS would not interfere with the President's authority. See also *NAFTA EIS Ruling Seen Giving U.S. Negotiators Increased Clout in Side Agreement Talks*, NAT'L ENV'T DAILY (BNA), July 2, 1993; *NAFTA Environmental Impact Statement Required for Trade Pact, Court Rules*, NAT'L ENV'T DAILY (BNA), July 2, 1993; *Court Says EIS Needed for NAFTA; Administration Seeks Speedy Appeal*, 24 ENV'T REP. (BNA) 433 (July 9, 1993); *NAFTA Commerce Secretary Reaffirms Administration Support for NAFTA*, NAT'L ENV'T DAILY (BNA), July 19, 1993. For a discussion of the application of the National Environmental Policy Act to NAFTA, see M. Diane Barber, *Bridging the Environmental Gap: The Application of NEPA to the Mexico-United States Bilateral*

## 1. Facts of the Case

The National Science Foundation (NSF) operates the McMurdo Station research facility in Antarctica under the auspices of the United States Antarctica Program.<sup>93</sup> The station is the largest of three year-round installations over which NSF operates exclusive control. To dispose of its food wastes at McMurdo Station, NSF burned them in an open landfill until early 1991, when it decided to improve its environmental practices by discontinuing the practice of burning food wastes in the open by October 1991.

NSF decided to cease open burning even earlier when it discovered asbestos in the landfill. By the summer of 1991 NSF started to burn the wastes in an interim incinerator until delivery of a state-of-the-art incinerator. The Environmental Defense Fund (EDF) contended that NSF failed to comply with NEPA by not fully considering the consequences of the decision to resume incineration. EDF alleged that incineration might produce highly toxic pollutants which could be hazardous to the environment.

## 2. Analysis of the Court

### a. Executive Order 12,114

The court briefly examined Executive Order

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*Trade Agreement*, 5 TUL. ENVTL. L.J. 429 (1992).

<sup>93</sup>The court summarized the facts at 986 F.2d 529-30.

12,114, which requires federal agencies to prepare environmental analyses for "major Federal actions significantly affecting the environment of the global commons outside the jurisdiction of any nation (e.g., the oceans or Antarctica)."<sup>94</sup> The court noted that, under certain circumstances, the Executive Order may require agencies to prepare an environmental analysis for major federal actions affecting the environment in foreign nations.<sup>95</sup> Because the Executive Order explicitly states

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<sup>94</sup>986 F.2d at 530; Exec. Order No. 12,114 § 2-3a, 44 Fed. Reg. 1957 (1979), reprinted in 42 U.S.C.A. § 4321 app. at 247-49 (West Supp. 1991) [hereinafter Executive Order].

<sup>95</sup>986 F.2d at 530. The Executive Order requires an environmental analysis for the following:

- (a) major Federal actions significantly affecting the environment of the global commons outside the jurisdiction of any nation (e.g., the oceans or Antarctica);
- (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:
  - (1) a product, or physical project producing a principal product or an emission or effluent, which is prohibited or strictly regulated by Federal law in the United States because its toxic effects on the environment create a serious public health risk; or
  - (2) a physical project which in the United States is prohibited or strictly regulated by Federal law to protect the environment against radioactive substances.
- (d) major Federal actions outside the United States, its territories and possessions which significantly affect natural or ecological resources of global importance designated for protection under this subsection by the President, or, in the case of

that it does not create a cause of action, however, the court refused to apply the order to the facts of the case.<sup>96</sup>

b. Presumption Against Extraterritoriality

Extraterritoriality is the jurisdictional concept regarding a nation's authority to adjudicate the rights of parties or to establish norms of conduct applicable to activities or persons outside its borders. According to the presumption against extraterritoriality, United States statutory laws should apply only to conduct which occurs within, or has effect within, the territory of the United States.<sup>97</sup> The purpose of the presumption is to avoid a clash between our laws and those of other nations

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such a resource protected by international agreement binding on the United States, by the Secretary of State.

Executive Order, *supra* note 46, at § 2-3. The Order provides for exemptions for national security and other foreign policy considerations. *Id.* at § 3-1.

<sup>96</sup>986 F.2d at 530. Several articles have criticized the Executive Order because of its failure to provide a cause of action. See, e.g., Francis M. Allegra, Note, *Executive Order 12,114 - Environmental Effects Abroad: Does it Really Further the Purpose of NEPA?*, 29 CLEV. ST. L. REV. 109 (1981); Glenn Pincus, Note, *The NEPA Abroad Controversy: Unresolved by an Executive Order*, 30 BUFF. L. REV. 611 (1981); and Sue D. Sheridan, Note, *The Extraterritorial Application of NEPA Under Executive Order 12,114*, 13 VAND. J. TRANSNAT'L L. 173 (1980).

<sup>97</sup>986 F.2d at 530.

which may result in international conflict.<sup>98</sup>

The *Massey* court noted that there are at least three categories of cases for which the presumption against extraterritorial application of a nation's statutes does not apply.<sup>99</sup> The first involves those statutes in which Congress clearly expresses its intent that the statute apply to conduct occurring in other nations. Second, the presumption is not applicable if the scope of the statute must be extended to a foreign setting to avoid adverse effects within the United States. Examples include the Sherman Anti-Trust Act<sup>100</sup> and the Lanham Trade-mark Act,<sup>101</sup> both of which have been applied extraterritorially because failure to extend the reach of the statutes would have adverse consequences within the United States. Finally, the presumption against extraterritoriality does not apply if the regulated conduct occurs largely within the United States.

According to the Court of Appeals, the lower court bypassed the threshold question of whether NEPA application

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<sup>98</sup>*Id.* For an excellent discussion of the presumption against extraterritoriality, see Joan R. Goldfarb, *Extraterritorial Compliance with NEPA Amid the Current Wave of Environmental Alarm*, 18 B.C. ENVTL. AFF. L. REV. 543, 547-53 (1991).

<sup>99</sup>986 F.2d at 531. See also Note, *Developments in the Law -- International Environmental Law*, 104 HARV. L. REV. 1484, 1609-39 (1991).

<sup>100</sup>15 U.S.C. §§ 1-7 (1988).

<sup>101</sup>15 U.S.C. § 1051 (1988).

to agency actions in Antarctica presents an extraterritoriality problem at all. Specifically, the lower court did not determine whether NEPA attempts to regulate conduct in the United States or in another sovereign nation. Furthermore, it did not evaluate whether NEPA would clash with the laws of other nations so as to potentially result in international discord.<sup>102</sup>

c. Regulated Conduct Under NEPA

The court stated that NEPA is "... designed to control the decisionmaking process of U.S federal agencies, not the substance of agency decisions."<sup>103</sup> The statute does not dictate a policy or determine the fate of a contemplated act, it requires only that an agency consider certain factors in exercising its discretion, and sets out the procedure for decisionmakers to follow. In the *Massey* court's view, the decisionmaking process itself can take place almost exclusively in the United States. The court concluded that, since the conduct NEPA seeks to regulate occurs within the United States (i.e., the decision to construct an incinerator), and because NEPA imposes no substantive requirements which might be construed to govern conduct outside the nation, the presumption against

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<sup>102</sup>986 F.2d at 532.

<sup>103</sup>*Id.*



extraterritoriality does not apply to the facts of the case.<sup>104</sup>

d. The Unique Status of Antarctica

The court found further support for its conclusion in an opinion of the Supreme Court indicating that if the United States has some measure of control over the area at issue, the presumption against extraterritoriality is much weaker.<sup>105</sup> If there is no potential for a clash between U.S. laws and those of another nation, there is little reason to apply the presumption against extraterritoriality.<sup>106</sup>

The United States exercises some measure of legislative

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<sup>104</sup>In the last paragraph of its opinion, the court states "[w]e find it important to note, however, that we do not decide today how NEPA might apply to actions in a case involving an actual foreign sovereign...." 986 F.2d 537. Notwithstanding this disclaimer, the broad language the court used when it discussed the regulated conduct under NEPA would lead one to conclude that its opinion should not be read in so narrow a fashion. Cf. John T. Burhans, *Exporting NEPA: The Export-Import Bank and the National Environmental Policy Act*, 7 BROOK. J. INT'L L. 1 (1981), in which the author argues that NEPA does not require preparation of an EIS for "...projects entirely conceived, planned, regulated and implemented wholly within the territory of another sovereign." *Id.* at 13.

<sup>105</sup>*Equal Employment Opportunity Commission v. Arabian American Oil Co.*, 111 S.Ct. 1227, 1230 (1991).

<sup>106</sup>The court referred to an earlier decision in which it held that, because Antarctica was not a foreign country, but a continent most frequently analogized to outer space, the presumption against extraterritoriality should not apply to cases arising there. *Beattie v. United States*, 756 F.2d 91 (D.C. Cir. 1984).

control over the continent of Antarctica, which, the court noted, like the high seas and outer space, is not governed by a single sovereign. The United States is responsible for air transportation to the continent, and has control over search and rescue operations. Furthermore, the United States has exclusive jurisdiction over McMurdo Station, as well as other research facilities established under the United States Antarctic Program.<sup>107</sup>

e. Foreign Policy Considerations

The National Science Foundation was unable to persuade the court that the EIS requirement would interfere with efforts to cooperate with other nations in solving environmental problems in Antarctica.<sup>108</sup> The Foundation argued that NEPA's procedural requirements would conflict with the Protocol on Environmental Protection to the Antarctic Treaty,<sup>109</sup> if it is adopted by all proposed signatories. The Foundation asserted that, because the Protocol requires an environmental assessment for actions with relatively minor impacts, compared to NEPA's requirement for an EIS only if an agency's action would have significant impacts, the two regimes are not compatible, and

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<sup>107</sup>*Id.*

<sup>108</sup>986 F.2d at 534.

<sup>109</sup>Protocol on Environmental Protection to the Antarctic Treaty, with Annexes, XI ATSCM, reprinted in 30 Int'l Legal Materials 1461 (1991).

would result in a conflict between U.S. laws and other international requirements.<sup>110</sup> The difference in the two standards presented no conflict, according to the court, because NEPA would require fewer studies than the Protocol.<sup>111</sup> The court observed that a researcher's intellect would not be strained by indicating in a single document "... how the environmental impact of the proposed action is more than 'minor' and also more than 'significant.' "<sup>112</sup>

Looking to the language of § 102(2)(F) of NEPA, the court also rejected the Foundation's argument that the statute's application would result in conflicts with other nations if injunctions issued in the United States were to slow agency action in Antarctica. Section 102(2)(F) calls upon federal 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 ...."<sup>113</sup> The court distinguished earlier decisions in which

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<sup>110</sup>986 F.2d at 535.

<sup>111</sup>*Id.*

<sup>112</sup>*Id.*

<sup>113</sup>42 U.S.C. 4332(2)(F) (1988). This provision of NEPA has been cited by both proponents and opponents of extraterritorial application of NEPA as support for their respective positions. See, e.g., Burhans, *supra* note 104, at 4; the author cites § 102(2)(F) for the proposition that

it held that the EIS requirement must yield to foreign policy considerations.<sup>114</sup>

f. NEPA's Plain Language and Interpretation

The Foundation's last argument, that the plain language of the statute precluded application of NEPA to the facts of the case, was also summarily dismissed by the court. Section 102(2)(C), the court stated, "is clearly not limited to actions of federal agencies that have significant environmental effects within U.S. borders."<sup>115</sup> The court referred to the language of the Congressional declaration of purpose in § 2 of the statute, which states that NEPA is meant to "encourage productive and enjoyable harmony between man and his environment" and to "promote efforts which will prevent or eliminate damage to the environment and

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agencies are to "... employ only a cooperative and diplomatic approach toward solution of international environmental problems. But cf. Goldfarb, *supra* note 98, at 555, which argues that "[t]his provision ... is the statute's most express authorization for extraterritorial application."

<sup>114</sup>*Natural Resources Defense Council v. Nuclear Regulatory Commission*, 647 F.2d 1345 1366 (D.C.Cir. 1981) (U.S. policy interests in nuclear exportation were "unique and delicate), and *Committee for Nuclear Responsibility v. Seaborg*, 463 F.2d 796 (D.C.Cir. 1972) (injunction refused where the Atomic Energy Commission cited potential harm to national security and foreign policy interests). See also Goldfarb, *supra* note 98, at 588, contending that courts should assume that NEPA applies extraterritorially, unless the agency is able to show a compelling foreign policy conflict.

<sup>115</sup>986 F.2d at 536.

biosphere."<sup>116</sup> To provide additional support for its position that Congress was concerned with more than just the domestic impact of federal decisions when it enacted NEPA, the court looked to § 102(2)(F), which requires agencies to "recognize the worldwide and long-range character of environmental problems."<sup>117</sup>

Almost as an afterthought, the court concluded with a remark that prior to President Carter's issuance of Executive Order 12,144, the CEQ had taken the position that NEPA applies to actions of federal agencies in Antarctica.<sup>118</sup> The court summarily dismissed the Foundation's contention that, because the CEQ had changed its position since the Executive Order was issued, the early interpretation was entitled to little deference. The court viewed CEQ's position as reasonable, and fully supported by

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<sup>116</sup>Id. citing 42 U.S.C. § 4321 (1988).

<sup>117</sup>986 F.2d at 536, citing 42 U.S.C. § 4332(2)(F). As indicated *supra* at note 113, NEPA's language can be viewed as supporting either side of the argument concerning extraterritorial application of the statute. Although the court refers to language in §§ 2 & 102(2)(F) in support of its view, several references in §§ 101 and 102 appear to limit NEPA's application to the territorial United States. For example, § 101(b) exhorts agencies "to use all practical means ... to the end that the Nation may ... (2) assure for all Americans safe, healthful ... surroundings ...; [and] (4) preserve important historic, cultural, and natural aspects of our national heritage...." (*emphasis added*). 42 U.S.C. 4331 (1988). But cf. Goldfarb, *supra* note 98, at 554, and Nicholas C. Yost, *American Governmental Responsibility for the Environmental Effects of Actions Abroad*, 43 ALB. L. REV. 528, 529 (1979), for interpretations similar to the court's.

<sup>118</sup>986 F.2d at 536.

NEPA's plain language.<sup>119</sup>

### III. Environmental Impact Assessment in the European Community - the EC Directive

#### A. Background

##### 1. The European Community

The European Community was created in 1957 by the Treaty of Rome.<sup>120</sup> The primary purposes were to ensure

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<sup>119</sup>For a discussion of the debate between the State Department and CEQ regarding the extraterritorial application of NEPA, see Bear, *supra* note 7, at 10,066-67. See also Yost, *supra* note 117, at 537, in which the author concludes that Executive Order 12,114 embodies a procedure sensitive to both environmental and foreign policy considerations. Several senators and representatives have introduced legislation to require federal agencies to consider the global impact of their activities. See, e.g., Goldfarb, *supra* note 98, at 569-73. According to a professional staff member with Congressman Studds, a leading proponent of such legislation, because of uncertainty following the *Massey* case and the administration's decision not to seek review, prospects for reintroduction during this session of Congress are remote. Interview with Thomas Koskos, Professional Staff of the House Merchant Marine and Fisheries Committee, Subcommittee on Environment and Natural Resources (Apr. 2, 1993). See *Administration Seems Ready to Accept Ruling that NEPA Applies to Antarctica*, ENV'T REP. (BNA) No. 47, at 3030 (Mar. 19, 1993). After the *Massey* court's ruling the General Accounting Office and the National Security Council initiated reviews to ascertain Department of Defense implementation of Executive Order 12,114, and to further study the implications of extraterritorial application of NEPA. Memorandum of Lewis D. Walker, Deputy Assistant Secretary of the Army (Environment, Safety and Occupational Health) (April 9, 1993) (on file with author).

<sup>120</sup>Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11 [hereinafter Treaty of Rome]. Member states include Belgium, Britain, Denmark, France, Germany, Greece, Ireland, Italy, Luxembourg, Portugal, Spain, and The Netherlands.

the economic and social progress of the member states, and to improve the living and working conditions of their inhabitants.<sup>121</sup> The Community is composed of four principal institutions: the Commission, the Parliament, the Council of Ministers, and the Court of Justice.

The Commission is responsible for the initiation of legislation, and for supervising member state implementation and application of Community law.<sup>122</sup> Commissioners are nominated by their national governments and appointed to four-year terms by the Council.<sup>123</sup> Each Commissioner has one or more areas of responsibility, and the Commission is segregated into "Directorates-General," each responsible for specified fields. Directorate-General XI has jurisdiction over environmental matters.<sup>124</sup>

The Council of Ministers is ultimately responsible for making or adopting laws, and is composed of representatives of member states, normally the ministers responsible for the subject matter at issue (for example, if environmental protection is at issue, the national environmental ministers

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<sup>121</sup>Treaty of Rome, *supra* note 115, Preamble.

<sup>122</sup>*Id.* art.155.

<sup>123</sup>The larger countries (Britain, France, Germany, Italy, and Spain) each nominate two Commissioners, and the remainder nominate one Commissioner each. *Id.*

<sup>124</sup>Turner T. Smith Jr. & Roszell D. Hunter, *The European Community Environmental Legal System*, 22 ENVTL. L. REP. (Envtl. L. Inst.) 10,106, 10,107 (Feb. 1992). The current Commissioner with responsibility for environmental matters is Carlo Ripa di Meana of Italy. *Id.*

will attend). The Chairmanship rotates, with six-month terms among the member states.<sup>125</sup>

Representatives from each member state are elected to serve on the European Parliament. Depending on the legal basis of proposed legislation, the parliament's role ranges from merely commenting on the legislation to a significantly more complex analysis known as a "cooperation procedure."<sup>126</sup>

The Court of Justice, composed of thirteen judges, has jurisdiction over Community law matters. Six advocates-general assist the judicial body with "reasoned submissions" on cases brought before the Court. The judges and advocates-general are nominated by the member states, then appointed by the Council of Ministers for six-year renewable terms. The Court is limited to declaring that a member state is failing in its obligations under the Treaty of Rome, and does not possess the power to impose sanctions.<sup>127</sup>

## 2. Community Environmental Law

Although there had been several isolated acts of secondary legislation with environmental implications earlier,<sup>128</sup> Community environmental law came into its own at

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<sup>125</sup>*Id.*

<sup>126</sup>*Id.* at 10,107-08.

<sup>127</sup>*Id.*

<sup>128</sup>*See, e.g.* Council Directive No. 67/548 on the Classification, Packaging and Labelling of Dangerous Substances, 1967 OJ. (196) 1, as amended by Council



about the same time as a significant proportion of its U.S. counterpart.<sup>129</sup> The 1972 United Nations Conference on the Human Environment in Stockholm was a major impetus for the development of Community environmental law, and it resulted in the well-known Principle 21 of the Stockholm Declaration, which provides:

States have, in accordance with the Charter of the United Nations and the principle of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.<sup>130</sup>

Principle 21 has since come to be accepted internationally as a principle of "hard law."<sup>131</sup>

Not until 1985 did the Single European Act (SEA) incorporate Title VII, titled Environment, into the Treaty of Rome.<sup>132</sup> Title VII establishes the Community's authority to initiate environmental law and policy-making activities,

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Directive No. 79/831, 1979 O.J. (L 259) 10.

<sup>129</sup>See *supra* notes 4-7 and accompanying text.

<sup>130</sup>Declaration of the United Nations Conference on the Human Environment, U.N.Doc. A/Conf.48/14 & Corr.1, reprinted in 11 I.L.M. 1416, 1420 (1972).

<sup>131</sup>Francois A. Mathys, *International Environmental Law: A Canadian Perspective*, 3 PACF Y.B. INT'L L. 91, 93 (1991). See also Philippe Sands, *European Community Environmental Law: The Evolution of a Regional Regime of International Environmental Protection*, 100 YALE L.J. 2511 (1991).

<sup>132</sup>Single European Act, Feb. 17, 1986, O.J. (No. L 169) 1 (1987) [hereinafter SEA].

signifies its commitment to protection of the environment, and reaffirms the Community's right to pursue a comprehensive environmental policy.<sup>133</sup> Corresponding with the development of environmental law in the United States, the SEA provided that Community action shall be preventive, and that environmental damage should be rectified at its source.<sup>134</sup>

### 3. The EC Directive

The European Community Commission first proposed an environmental impact assessment measure to the Council on June 16, 1980.<sup>135</sup> This initial draft was the product of twenty-one revisions, and built upon EIA provisions already existing in member states. Britain had adopted a "Town and Country Planning System" in 1990; France had instituted its form of assessment in the 1976 Law for the Protection of

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<sup>133</sup>Cynthia B. Schultz & Tamara R. Crockett, *Developing a Unified European Environmental Law and Policy*, 14 B.C. INT'L & COMP. L. REV. 301, 303-04 (1991). See also Tamara R. Crockett & Cynthia B. Schultz, *The Integration of Environmental Policy and the European Community: Recent Problems of Implementation and Enforcement*, 29 COLUM. J. TRANSNAT'L L. 169 (1991) (discussing the growing concern of European citizens for more cohesive environmental laws and policies).

<sup>134</sup>SEA, *supra* note 132, art. 130R(2). According to one commentator, the Community legal order is a significant step in the progressive development of international law. By building upon the historic foundations of traditional international law, it can contribute to development of international environmental law in other regions. Sands, *supra* note 131, at 2520.

<sup>135</sup>Bono, *supra* note 17, at 156.

Nature; the Republic of Ireland had implemented a discretionary system in its Local Government (Planning and Development) Act of 1976; and the Federal Republic of Germany provided for environmental impact assessment in a Cabinet Resolution of 1976.<sup>136</sup> The proposal also drew upon the experience of the United States with NEPA.<sup>137</sup> The proposal eventually adopted in 1985 is much less detailed than the original proposal, and it did not attempt to resolve many of the procedural issues initially addressed.<sup>138</sup>

On July 5, 1985 the Council adopted the Directive on the Assessment of the Effects of Certain Public and Private Projects on the Environment (hereinafter EC Directive, or

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<sup>136</sup>Malcolm Grant, *Implementation of the EC Directive on Environmental Impact Assessment*, 4 CONN. J. INT'L L. 463, 464 (1989). The public scrutiny involved in the amendments of the Directive constituted a rare example in the Community where the political bargaining was not behind closed doors; instead, the measure was sharply debated in national parliaments, among the public, and in the European media. ECKARD REHBINDER & RICHARD STEWART, *INTEGRATION THROUGH LAW, EUROPE AND THE AMERICAN FEDERAL EXPERIENCE*, 2 ENVIRONMENTAL PROTECTION POLICY 105 (Patrick Del Duca ed., 1985).

<sup>137</sup>Bono, *supra* note 17, at 157.

<sup>138</sup>REHBINDER & STEWART, *supra* note 136, at 104. The original proposal contained two categories of projects: one identifying projects for which assessments would be mandatory; and one listing projects subject to a more complex assessment. Identification with a particular category depended upon the potential impact on the environment. The dominant criticism of the proposal was the vagueness with which the projects were listed, with no criteria or thresholds to assist in the determination process. Bono, *supra* note 17, at 158.

Directive).<sup>139</sup> The Preamble to the Directive, citing the 1973<sup>140</sup> and 1977<sup>141</sup> environmental action programmes, stresses that the best environmental policy consists in preventing the creation of pollution at the source, rather than later trying to counteract its effects. The EC

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<sup>139</sup>EC Directive, *supra* note 22. A "directive" under the EC system sets binding objectives for members states, but leaves the choice of the form and method to be used up to the national authorities. Each member state must enact its own laws and practices in a manner consistent with the directive. *The EEC and Impact Studies*, *supra* note 19, at 144-45. A Community regulation, on the other hand, "shall have general application. It shall be binding in its entirety and directly applicable in all member states." Treaty of Rome, *supra* note 120, art. 189. As a practical matter, national measures may be necessary to effectively implement a regulation, just as administrative regulations are often promulgated in the United States to give effect to Congressional enactments. Smith & Hunter, *supra* note 124, at 10,108-09. Unlike the United States, where states' measures are often merely a reiteration of independently applicable federal requirements, in the European Community, there are often wide variances between the Community's legislation and the directly applicable member state law. *Id.* One author compared the problem the EC has faced in implementing an effective environmental policy with the federalism problems of the United States in the 1950s and 1960s. Jody M. Reitzes, *The Inconsistent Implementation of the Environmental laws of the Environmental Community*, 22 ENVTL. L. REP. (Envtl. L. Inst.) 10,523, 10,526 (Aug. 1992). An additional problem some member states have faced is that they are themselves federations, or have delegated substantial governmental powers to regional authorities. If a regional authority fails to fulfill an obligation of an EC directive or regulation, it is the national government, not the regional authority, which is brought before the European Court. John T. Lang, *The Development of European Community Constitutional Law*, 25 INT'L LAW. 455, 466 (1991). As with many U.S. environmental laws, the Treaty of Rome permits member states to adopt measures more stringent than the Community directives and regulations under specified circumstances. Treaty of Rome, *supra* note 120, art. 100a.

<sup>140</sup>1980 O.J. (C 169) 14.

<sup>141</sup>1982 O.J. (C 66) 89.

Directive, like NEPA, its predecessor, affirmed "... the need to take effects on the environment into account at the earliest possible stage in all technical planning and decisionmaking processes."<sup>142</sup>

In addition to the desire to achieve the Community's objectives in the sphere of protection of the environment and the quality of life, the Directive included as one of its goals avoiding disparities between the EIA laws in force in several of the member nations which might create

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<sup>142</sup>EC Directive, *supra* note 22, Preamble. The need to take environmental considerations into account at the earliest possible stage of development was the subject of an internal communication of the Commission adopted on June 2, 1993. The document stressed the need for a systematic evaluation of the impact of new proposals and consideration of their environmental costs. The communication stipulated that the Commission will:

- (1) evaluate the potential consequences for the environmental of all proposals (through an environmental impact assessment);
- (2) describe and justify the impact as well as the environmental costs and benefits of legislative proposals with a significant impact on the environment;
- (3) examine its contribution to the integration of environmental considerations into Community policy on a regular basis (using an evaluation by each DG of its environmental record);
- (4) designate an official within each DG to be responsible for ensuring that legislative proposals take the environment into account as well as the need to contribute to sustainable models of development;
- (5) create a special coordination unit within DG XI (Environment); and
- (6) prepare a code of conduct for the Commission's own activities (covering purchasing policies, waste prevention and disposal and energy conservation).

**Environmental Protection: Environmental Impact Assessments to be Systematised**, EUR. ENV'T (Eur. Information Serv.) No. 0411 (June 8, 1993).

unfavorable competitive conditions, thereby directly affecting the functioning of the common market.<sup>143</sup>

## B. Environmental Impact Assessment

### 1. Background

The Preamble to the Directive provides that consent for public and private projects which are likely to have a significant impact on the environment should be granted only after assessment of the likely environmental effects.<sup>144</sup> For the purposes of the Directive, a "project" is defined as "the execution of construction works or of other installations or schemes, or other interventions in the natural surroundings and landscape including those involving the extraction of mineral resources."<sup>145</sup>

The Directive defines "development consent" to mean "the decision of the competent authority or authorities which entitles the developer to proceed with the project."<sup>146</sup> The

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<sup>143</sup>EC Directive, *supra* note 22, Preamble. The authority relied upon for the Directive was Article 100 of the Treaty of Rome. Article 100 provides: "The Council shall, acting unanimously on a proposal from the Commission, issue directives for the approximation of such provisions laid down by law, regulation or administrative action in Member States as directly affect the establishment or functioning of the common market." Treaty of Rome, *supra* note 120, art. 100.

<sup>144</sup>EC Directive, *supra* note 22, Preamble.

<sup>145</sup>*Id.* art. 1.2.

<sup>146</sup>*Id.*

member states designate the "competent authority or authorities" to be responsible for performing the duties under the Directive within their respective jurisdictions.<sup>147</sup>

The assessment is to be carried out on the basis of appropriate information supplied by project developers, which may be supplemented by the authorities and persons concerned with the particular project.<sup>148</sup> This differs from the NEPA requirement that the federal agency promoting the project or action perform the environmental impact statement.

The Directive specifically excludes projects serving the national defense of the member states.<sup>149</sup> A similar exclusion is found in NEPA, which calls upon federal agencies to carry out the policies of the act in a manner "consistent with other essential considerations of national

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<sup>147</sup>Id. art. 1.3.

<sup>148</sup>Id. Preamble. "Developer" refers to the applicant for authorization, if the project is private, or the public authority which initiates a project. Id. art. 1.2. This provision of the Directive is similar to the CEQ's NEPA regulations, which provide that if an agency requires an applicant to submit information for potential use by the agency in preparing an EIS, the agency should assist the applicant by outlining the types of information required. 40 C.F.R. § 1506.5 (1992) The agency must then independently evaluate the information submitted, and is responsible for its accuracy. If the agency chooses to use the information submitted by the applicant in the EIS, then the names of the persons responsible for the independent evaluation must be included in the list of preparers. 40 C.F.R. § 1502.17 (1992).

<sup>149</sup>EC Directive, *supra* note 22, art 1.4.

policy."<sup>150</sup> Moreover, section 102(2)(C) of NEPA provides that information is to be made available to the public under the Freedom of Information Act.<sup>151</sup> Section 552(b)(1) of the Freedom of Information Act allows the government to deny public disclosure of matters properly classified pursuant to an executive order in the interest of national defense.<sup>152</sup> In the case of *Weinberger v. Catholic Action of Hawaii/Peace Educ. Project*,<sup>153</sup> the Supreme Court held that Congress, in enacting NEPA, had already set the balance between the public's need to be informed and the government's need for secrecy when it provided that any information kept from the public under the exemption need not be disclosed in an EIS. The Court ruled that the U.S. Navy was not required to include in a publicly disclosed EIS any reference to the presence of nuclear weapons when their presence was only contemplated.<sup>154</sup>

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<sup>150</sup>42 U.S.C. § 4331(b) (1988).

<sup>151</sup>42 U.S.C. § 4332(C) (1988).

<sup>152</sup>5 U.S.C. § 552(b)(1) (1988).

<sup>153</sup>454 U.S. 139 (1981).

<sup>154</sup>*Id.* at 146. The Court held, however, that even if NEPA did not compel issuance of a public EIS concerning the nuclear weapons, the Navy was required to inject environmental considerations into its decisionmaking process. *Id.* See also *Hudson River Sloop Clearwater v. Department of the Navy*, 836 F.2d 760 (2d Cir. 1989) (holding that the Navy had not waived the national security exemption merely by testifying that ships that may use a proposed homeport on Staten Island would be capable of carrying nuclear weapons).



The Directive also excludes projects the details of which are adopted by legislation of Community member states.<sup>155</sup> In this instance, the objectives of the Directive--most importantly that of supplying sufficient information to decisionmakers to permit informed decisions--are considered to be achieved through the legislative process.<sup>156</sup> This provision may be compared to the "functional equivalence" doctrine in the United States, applicable when a statute provides for orderly consideration of diverse environmental factors, and strikes a balance between the advantages and disadvantages of full compliance with NEPA.<sup>157</sup>

The Directive did not follow the NEPA approach under which an agency must evaluate proposals to determine whether they constitute "major Federal actions significantly

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<sup>155</sup>EC Directive, *supra* note 22, art. 1.5.

<sup>156</sup>*Id.*

<sup>157</sup>See William M. Cohen, *Practical Considerations in Litigating Cases Under the National Environmental Policy Act*, 795 ALI-ABA 93 (1993). An early case applying the functional equivalency doctrine to the Clean Air Act was *Portland Cement Association v. Ruckelshaus*, in which the court held that "what is decisive, ultimately, is the reality that, section 111 of the Clean Air Act, properly construed, requires the functional equivalent of a NEPA impact statement." 486 F.2d 374, 384 (D.C. Cir. 1973). For a critical analysis of the functional equivalency doctrine see Sandra P. Montrose, Comment, *To Police the Police: Functional Equivalence to the EIS Requirement and EPA Remedial Actions Under Superfund*, 33 CATH. U.L. REV. 863 (1984).

affecting the quality of the human environment."<sup>158</sup>

Instead, it lists projects for which an assessment is mandatory (see Appendix I),<sup>159</sup> and projects for which the members states may conduct an assessment if they consider the characteristics of the project so require (see Appendix II).<sup>160</sup>

Most of the projects for which an environmental impact assessment is mandatory would usually require an EIS in the United States. The list includes such projects as thermal power stations and other combustion installations with a heat output of 300 megawatts,<sup>161</sup> express highways,<sup>162</sup> and chemical waste incinerators.<sup>163</sup>

In determining whether to conduct an assessment for those projects identified in Appendix II, member states are to consider the nature, size, and location of the project.<sup>164</sup> Although an assessment for these projects is discretionary, the member states may specify certain types of projects for which they always will perform an

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<sup>158</sup>As those terms have been implemented by CEQ regulations and interpreted by the courts.

<sup>159</sup>EC Directive, *supra* note 22, art. 4.1 (listed in Annex I to the Directive).

<sup>160</sup>*Id.* art. 4.2 (listed in Annex II to the Directive).

<sup>161</sup>*Id.*, Annex I, ¶ 2.

<sup>162</sup>*Id.*, Annex I, ¶ 7.

<sup>163</sup>*Id.*, Annex I, ¶ 9.

<sup>164</sup>*Id.* art. 2.1.

assessment, or they may establish criteria or thresholds to determine which of these projects will be subject to an assessment.<sup>165</sup> The list of projects in this second category is extensive, and consists of projects related to agriculture,<sup>166</sup> mining and drilling,<sup>167</sup> energy industries,<sup>168</sup> metal processing,<sup>169</sup> and other manufacturing and industrial processes.

The fact that the Directive specifies projects requiring assessments and provides thresholds is viewed as a step in avoiding the pitfalls which have caused a significant portion of the NEPA litigation.<sup>170</sup> However, as Dinah Bear, most recent General Counsel of the CEQ, explained, NEPA's development and enforcement is closely intertwined with NEPA litigation. "Indeed," she writes, "the ease with which litigants have been able to avail themselves of the judicial system has been viewed as either a major strength or a serious shortcoming of the environmental impact assessment

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<sup>165</sup>*Id.* art. 4.2.

<sup>166</sup>*Id.*, Annex II, ¶ 1.

<sup>167</sup>*Id.*, Annex II, ¶ 2.

<sup>168</sup>*Id.*, Annex II, ¶ 3.

<sup>169</sup>*Id.*, Annex II, ¶ 4.

<sup>170</sup>Bono, *supra* note 7, at 158. The author cites statistics showing that within six years of NEPA's enactment, 654 cases had been filed, of which 363 asserted that an EIS was required. *Id.* n. 18. See also Grant, *supra* note 136, at 463 (more than 1000 lawsuits were filed within nine years after NEPA was enacted).

in the United States, depending upon the viewpoint of the observer."<sup>171</sup> She points out that the number of cases brought under NEPA has been decreasing.<sup>172</sup>

## 2. The Environmental Impact Assessment Process

The EC Directive sets out the procedures which must be incorporated into the legislation of member states. Article 3 identifies fairly general requirements, imposing upon member states the obligation to ensure an environmental impact assessment appropriately identifies, describes and assesses the direct and indirect impact of a project on the following factors: "human beings, fauna and flora; soil, water, air, climate and the landscape; the inter-action between the factors mentioned in the first and second indents; and material assets and the cultural heritage."<sup>173</sup> This article fairly closely corresponds with the exhortations of section 101 of NEPA requiring federal agencies to "use all practicable means" to accomplish the general goals identified in the statute.<sup>174</sup>

The Directive requires the member states to adopt measures to ensure developers supply, in the appropriate

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<sup>171</sup>Bear, *supra* note 7, at 10,068.

<sup>172</sup>*Id.*

<sup>173</sup>EC Directive, *supra* note 22, art. 3.

<sup>174</sup>42 U.S.C. § 4331(b) (1988). See *supra* notes 23-26 and accompanying text.

format, information set out in Annex III.<sup>175</sup> The

information must include:

- a description of the physical characteristics of the whole project and the land-use requirements during the construction and operational phases;
- a description of the main characteristics of the production processes, for instance, nature and quantity of the materials used; and
- an estimate, by type and quantity, of expected residues and emissions (water, air and soil pollution, noise, vibration, light, heat, radiation, etc.) resulting from the operation of the proposed project.<sup>176</sup>

Where appropriate, the developer must discuss the main alternatives studied, and indicate the main reasons for the selection of any particular alternative, taking into account the environmental effects.<sup>177</sup>

The assessment must include a description of the aspects of the environment likely to be significantly impacted by a proposed project, taking into account the effect on the population, fauna, flora, soil, water, air, and climatic factors. It must also consider material assets, such as the architectural and archaeological heritage, landscape, and the interrelations between all of these factors.<sup>178</sup>

The developer must describe the likely effects of the proposal on the environment resulting from: the project

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<sup>175</sup>EC Directive, *supra* note 22, art. 5.

<sup>176</sup>*Id.*, Annex III, ¶ 1.

<sup>177</sup>*Id.*, Annex III, ¶ 2.

<sup>178</sup>*Id.*, Annex III, ¶ 3.

itself; the natural resources used; pollutant emission, nuisances created, and waste elimination. The forecasting methods relied upon to assess the effects on the environment must be a part of the description.<sup>179</sup> Additionally, the Directive obliges the developer to describe not only the direct effects, but also any indirect, secondary, or cumulative effects. The description must include any short-, medium- or long-term impacts; permanent and temporary impacts; and positive and negative impacts of the project.<sup>180</sup>

The developer's assessment must explain measures expected to prevent, reduce, and where possible, offset any significant adverse impacts on the environment. It must indicate any difficulties, such as technical deficiencies or lack of know-how, encountered in compiling the information required.<sup>181</sup> Finally, a non-technical summary is

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<sup>179</sup>*Id.*, Annex III, ¶ 4.

<sup>180</sup>*Id.*, Annex III, n. 1.

<sup>181</sup>*Id.*, Annex III, ¶ 7. According to one scholar, "The EC Directive does not cut across the right of Member States to exercise political, social and economic judgments in their broadest sense; its effect is limited to increasing the significance of environmental effects in the decision-making process." Grant, *supra* note 136, at 467. Compare Professor Grant's analysis with the language of the U.S. Supreme Court in the *Methow Valley* case, in which the Court said "NEPA merely prohibits uninformed--rather than unwise--agency action." 490 U.S. 332, 351 (1989).

required.<sup>182</sup>

These measures are generally comparable with the EIS requirements under NEPA. Although they lack the precision and detail required pursuant to NEPA, especially as implemented by the CEQ regulations,<sup>183</sup> some consider the flexibility of the Community EIA process to offer an advantage over its American predecessor, asserting that it is "designed to ensure consideration of environmental effects by both the sponsor of a project and the competent national authority."<sup>184</sup> Significantly absent is the requirement for discussion of the "no-action" alternative.<sup>185</sup>

Probably the most frequent objection to the Community environmental impact assessment process has been related to the inconsistency in the implementing measures member states

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<sup>182</sup>*Id.*, Annex III, ¶ 6. Member states are also to ensure authorities with relevant information in their possession share it with the developers responsible for preparing an assessment. The Directive calls upon member states to do so "[w]hen they consider it necessary." *Id.* art. 6. These authorities would play a consultative role similar to that played by the Environmental Protection Agency in the environmental assessment process. 40 C.F.R. § 1506.9 (1992).

<sup>183</sup>See *supra* notes 31-61 and accompanying text.

<sup>184</sup>REHBINDER & STEWART, *supra* note 136, at 104. See also, Stephen L. Kass & Michael B. Gerrard, *International Impact Assessment*, N.Y. L.J., Oct. 25, 1991, at 3 (discussing the differences between NEPA and other impact assessment procedures).

<sup>185</sup>See *supra* note 61 and accompanying text.

have adopted.<sup>186</sup> Like NEPA, the individual national programs generally offer substantial discretion to decisionmakers. Unlike NEPA they are often short on formal studies and analysis of alternatives.<sup>187</sup>

For example, Belgium and Italy are considered among the worst offenders in implementing environmental directives. Belgium's difficulties are in large measure a result of its political structure, in that it must rely upon three relatively autonomous regions to implement the directives of the community.<sup>188</sup> Likewise, the role of the Italian central government is often confined to adopting framework laws or decrees, leaving to regional or local authorities the responsibility of breathing life into the directives.<sup>189</sup>

The level of official awareness in Germany is also

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<sup>186</sup>See, e.g., Reitzes, *supra* note 139. For a brief analysis of the EIA procedures for each of Community's member states, see *The EEC and Impact Studies*, *supra* note 19, at 145-68. For an analysis of the Directive's implementation in the United Kingdom, see Bono, *supra* note 17, 162-86, and Grant, *supra* note 136, 468-77. See also *Problems Exist in Many Environmental Impact Assessments, University Charges*, 15 INT'L ENVTL. REP. (BNA) 271 (May 6, 1992) (reporting upon a study of U.K.'s Manchester University which concluded that sixty percent of eighty-three environmental impact statements submitted in Great Britain between July 1988 and early 1991 were unsatisfactory).

<sup>187</sup>Millan, *supra* note 18, at 2084.

<sup>188</sup>Reitzes, *supra* note 139, at 10,525. The three regions, Flanders, Brussels, and Wallonia, are responsible for environmental matters and for executing the European Community directives. *Id.*

<sup>189</sup>*Id.*



considered low. The German "states," or Länder, often bear responsibility for transposing EC directives into legislation;<sup>190</sup> however, they favor implementing the directives through internal circulars, a method the European Court of Justice has determined to be invalid, or unenforceable.<sup>191</sup> An explanation for the states resorting to the use of internal circulars may be that the method avoids the need to amend national environmental legislation, which is frequently highly sophisticated. Because local authorities in Germany generally have limited knowledge about the European Community's provisions and their scope, the legislation they adopt sometimes omits important aspects of the EC directives.<sup>192</sup>

Denmark has been relatively successful in transposing EC directives into national legislation. The country's success is attributed to the high level of environmental awareness that exists in the country and within its official bodies. The Danish parliament closely monitors the actions of its national minister in the European Parliament. The government avoided the difficulties associated with the federal systems in several of the other Community members,

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<sup>190</sup>*Id.* For a discussion of the legislative authority of the German federal government as compared to the authority of German länder, see Turner T. Smith, Jr. & Renee R. Falzone, *Foreign Legal Systems--A Brief Review*, 11 INT'L ENVTL. REP. (BNA) 621 (Nov. 1988).

<sup>191</sup>Reitzes, *supra* note 139, at 10,525.

<sup>192</sup>*Id.*

and adoption of an environmental directive represents a binding commitment by the Danish government and its parliament.<sup>193</sup>

C. Public Participation Under the EC Directive

Article 6 of the Directive instructs member states to ensure that requests for development consent and information gathered during the assessment process are made available to the public, and the public concerned must be given the opportunity to express an opinion before a project is initiated.<sup>194</sup> The member states may determine the particular arrangements for providing information to the public. The Directive states that arrangements identified in implementing legislation may:

- determine the public concerned;
- specify the places where the information can be consulted;
- specify the way in which the public may be informed, for example by bill-posting within a certain radius, publication in local newspapers, organization of exhibitions with plans, drawings, tables, graphs, models;
- determine the manner in which the public is to be consulted, for example, by written submissions, by public enquiry; and

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<sup>193</sup>*Id.* See also *Members Seen Using Different Criteria in Implementing Impact Assessment Directive*, 14 INT'L ENVTL. REP. (BNA) 216 (Apr. 24, 1991) (noting that the EC members have exercised considerable latitude in implementing the Directive).

<sup>194</sup>EC Directive, *supra* note 22, art. 6.2.

-- fix appropriate time limits for the various stages of the procedure in order to ensure that a decision is taken within a reasonable period.<sup>195</sup>

When a decision is made, the competent authorities are to inform the concerned public of the content of decision, and any conditions, as well as the reasons and considerations on which the decision is based (if the member state's legislation so provides).<sup>196</sup> Again, the member states determine the arrangements for release of a decision to the public.<sup>197</sup>

The public participation provisions of the EC Directive, like the measures dealing with the EIA procedure itself, lack the detail and precision of NEPA and its implementing regulations.<sup>198</sup> The public participation requirements are vague, and provide little improvement over the original proposal put forward by the Commission.<sup>199</sup> That proposal was criticized as not bringing to the Community the beginning of a new kind of community-wide participatory public decisionmaking, but merely a development of existing administrative procedures.<sup>200</sup>

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<sup>195</sup>*Id.* art 6.3.

<sup>196</sup>*Id.* art. 3.

<sup>197</sup>*Id.*

<sup>198</sup>See *supra* notes 62-69 and accompanying text.

<sup>199</sup>Millan, *supra* note 18, at 2084.

<sup>200</sup>REHBINDER & STEWART, *supra* note 136, at 108.

#### D. Enforcement of the EC Directive

The Treaty of Rome assigned the responsibility of overseeing member state implementation and application of directives to the Commission. Article 155 requires the Commission to "ensure that the provisions of this treaty and the measures taken by the institutions pursuant thereto are applied."<sup>201</sup> The Treaty also enables the Commission to bring actions against a member state before the Court of Justice if it fails to implement and apply Community law.<sup>202</sup>

The most effective source of information regarding inadequate implementation of environmental directives comes from complaints of private individuals and businesses that are dissatisfied with the measures their own countries have taken.<sup>203</sup> The Commission has published a standard complaint form to attempt to facilitate the lodging of complaints. The form specifies the information necessary for the

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<sup>201</sup>Treaty of Rome, *supra* note 120, art. 155.

<sup>202</sup>*Id.* art. 169. Article 169 provides:

If the Commission considers that a Member State has failed to fulfil an obligation under this Treaty, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations.

If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice. *Id.*

<sup>203</sup>Reitzes, *supra* note 139, at 10,525. See also Smith & Hunter, *supra* note 119, at 10,113.

Commission to undertake an investigation. Complaints do not amount to legal actions, however, and do nothing more than provide a means for individuals to notify the Commission of Community law violations.<sup>204</sup>

A drawback to the complaint system is that it is based entirely on the efforts of the individuals making the complaints.<sup>205</sup> In practice, implementation of EC environmental directives has depended upon the climate of public opinion within the Community, and has been effective only when "green" pressure groups have become involved.<sup>206</sup> These groups, however, tend to become interested only if members are personally affected by a potential hazard.<sup>207</sup>

If the Commission receives information which convinces it that a member state has failed to fulfill its obligations under the Treaty of Rome by not implementing an environmental directive, the Commission may send a formal letter of notice specifying the issues of contention.<sup>208</sup> The letter affords the member state the opportunity to explain its conduct or legislation, and to provide the

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<sup>204</sup>Smith & Hunter, *supra* note 124, at 10,113.

<sup>205</sup>Reitzes, *supra* note 139, at 10,525. Of course, the same may be said about enforcement of NEPA. See generally Denis Binder, *NEPA, NIMBYs and New Technology*, 25 LAND & WATER L. REV. 11 (1990).

<sup>206</sup>Reitzes, *supra* note 139, at 10,525.

<sup>207</sup>*Id.*

<sup>208</sup>*Id.* at 10,114.

Commission the chance to convince the member state to rectify its errors.<sup>209</sup> The formal letter of notice defines the issues, and matters not raised in the letter may not be raised later during judicial proceedings in the European Court.<sup>210</sup>

If the dispute is not resolved to the satisfaction of the Commission, it may apply to the Court of Justice.<sup>211</sup> However, because the Court of Justice is limited to declaring an infringement of Treaty obligations by a member state, the "conclusions the Member State draws from the judgment and how it complies with the Court's findings is left to that Member State."<sup>212</sup> The discretion involved in implementing the EC Directive and the limited role of the Court of Justice limit the value of judicial review.<sup>213</sup>

Although challenges to the implementation of the EC Directive may also be brought in the domestic courts of member states, their role is also often limited. For example, in the British case of *Michael Browne v. An Bord*

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<sup>209</sup>*Id.*

<sup>210</sup>*Id.*

<sup>211</sup>*Id.* Because the function of the Commission is to oversee implementation of the Treaty of Rome, it does not need to otherwise establish a legal interest to bring the action. *Id.*

<sup>212</sup>*Id.* (quoting Ludwig Kramer, Monitoring the Application of Community Directives on the Environment 4 (unpublished and undated manuscript)).

<sup>213</sup>See Grant, *supra* note 136, at 477. See also Millan, *supra* note 18, at 2084.

*Pleanala*,<sup>214</sup> the Court refused to quash a development scheme without a showing that the individual was individually harmed, and, more importantly from the perspective of implementation of the EC Directive, the Court held that the EC Directive did not apply to projects for which applications were submitted prior to the date the Directive came into force in Britain.<sup>215</sup>

The European Community Environmental Commissioner, Ripa di Meana, threatened to take Great Britain to the European Court of Justice, asserting that the British Court had misconstrued the Directive.<sup>216</sup> He argued that seven major projects in Great Britain should not proceed because they lacked sufficient environmental studies, and he attributed this failure to adequately study the projects to the British Court's inaccurate interpretation.<sup>217</sup>

Although the Commissioner later withdrew the threat to take Great Britain to the Court of Justice,<sup>218</sup> the

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<sup>214</sup>1 C.M.L.R. 3 (Ir. H. Ct. 1990).

<sup>215</sup>*Id.*

<sup>216</sup>Bono, *supra* note 17, at 183-84. See also *Several EC Member States To Be Charged With Failing To Implement EIS Directive*, 15 INT'L ENVTL. REP. (BNA) 12 (Jan. 15, 1992) (the Commissioner said he deplored the lack of progress in implementing the Directive throughout the EC, and that the United Kingdom had not been singled out. The Commission had opened Article 169 proceedings against 10 member states).

<sup>217</sup>Bono, *supra* note 17, at 183-84.

<sup>218</sup>*U.K. Conservation Group Calls for Reform of EC Environmental Impact Assessment Law*, 15 INT'L ENVTL. REP. (BNA) 551 (Aug. 26, 1992).

inadequate implementation of Community environmental law generally led the European Parliament to adopt resolutions on the need for monitoring the application of environmental directives.<sup>219</sup> The resolutions preceded an Environmental Implementation Report which found that member states rarely implemented environmental directives in a timely manner, and that it is often difficult to determine whether all of the obligations of a particular directive have been fully implemented.<sup>220</sup>

The Environmental Commissioner has stated that the Commission's policing procedures need urgent reform.<sup>221</sup> He suggested that the European Court of Justice should use its power to issue an injunction to halt construction of a project, if necessary, while a case proceeds, and that the Court should have more enforcement powers.<sup>222</sup> The Commissioner also proposed an environmental inspectorate to

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<sup>219</sup>Smith & Hunter, *supra* note 124, at 10,112.

<sup>220</sup>*Id.* at 10,112-13. The Report was published by the Environmental Commission in 1990, and related the inadequacies, nation-by-nation, in implementation of European Community environmental law. It also detailed the difficulties it had encountered in attempting to monitor national compliance. *Id.*

<sup>221</sup>*The Dirty Dozen*, THE ECONOMIST, July 20, 1991, at 52.

<sup>222</sup>*Id.* See also Reitzes, *supra* note 139, at 10,526-28, in which the author concludes that the Community requires stronger institutions to enforce its environmental directives and regulations.



monitor the activities of EC members.<sup>223</sup>

#### E. The EC Directive and International Problems

The EC Directive provides for assessment of activities occurring in one member state which may affect the environment of another member of the Community in Article 7. A member state may have reason to believe that a project within its territory is likely to have significant effects on the environment in another's territory. At the request of the other member, the party in whose territory the project is proposed is to forward the same EIA information to the other member state at the same time it makes it available domestically.<sup>224</sup> The information serves as the basis for bilateral consultations related to the project.<sup>225</sup> When a decision on the project is made, any member state whose environment may be affected by its

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<sup>223</sup>*Id.* See also *The Green Man in Brussels*, THE ECONOMIST, Apr. 25, 1992, at 60 (describing the success of the Environmental Commissioner in highlighting how often EC governments had broken Community environmental rules, and in mobilizing public opinion). A newly reconstituted "work programme" for the Commission identified measures to improve the integration of environmental measures into the Community's other common policies. The programme calls for major initiatives in environmental impact assessment. *European Commission: Environment Policy Priorities for 1993-94*, EUR. ENV'T (Eur. Information Serv.) No. 0405 (Mar. 2, 1993).

<sup>224</sup>EC Directive, *supra* note 22, art. 7.

<sup>225</sup>*Id.*

neighbor's activities must be informed of the decision.<sup>226</sup>

Recognizing the fact that Community compliance with the transboundary provisions of the Directive has been weak, on February 12, 1993 the European Parliament endorsed the Convention on Environmental Impact Assessment in a Transboundary Context (hereinafter EIA Convention),<sup>227</sup> signed by twenty-seven countries in Espoo, Finland in February 1991.<sup>228</sup> Members of the Parliament claimed the new instrument would help to improve application of Community law.<sup>229</sup>

Like NEPA and the EC Directive, the Convention focuses on the need for pollution prevention. According to the Preamble, the parties recognized:

... the need to give explicit consideration to environmental factors at an early stage in the decision-making process by applying environmental impact assessment, at all appropriate levels, as a necessary tool to improve the quality of information presented to

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<sup>226</sup>*Id.* art. 9. The Chernobyl accident near Kiev in 1986 demonstrated clearly the potential disastrous effects the activities in one country may have on the environment of its neighbors. Kass & Gerrard, *supra* note 184, at 3.

<sup>227</sup>Done at Espoo, Finland, Feb. 25, 1991, U.N. Doc. E/ECE/1250, reprinted in 30 I.L.M. 800 [hereinafter EIA Convention].

<sup>228</sup>*Parliament Endorses Convention on Environmental Impact Assessments*, 16 INT'L ENVTL. REP. (BNA) 118 (Feb. 24, 1993) [hereinafter *Parliament Endorses*]. The signatories include a majority of European states, the United States, and Canada, and will take effect after 16 signatories deposit instruments of ratification, acceptance, approval or assession with the U.N. Secretary-General. Kass & Gerrard, *supra* note 184, at 28.

<sup>229</sup>*Id.*

decision-makers so that environmentally sound decisions can be made paying careful attention to minimizing significant adverse impact, particularly in a transboundary context.<sup>230</sup>

The Convention directs the parties to take the necessary measures to "prevent, reduce and control significant adverse transboundary environmental impact from proposed activities."<sup>231</sup> The substantive and procedural provisions of the Convention correspond closely with the EC Directive. Notable exceptions are: In addition to the projects identified in the EC Directive for which an assessment is mandatory (Appendix I of the Convention), it adds a number of infrastructure and investment projects, such as oil and gas pipelines, paper mills, and groundwater abstraction; and it creates a post-project evaluation procedure which allows for verification of the original environmental impact assessment.<sup>232</sup> Additionally, although an assessment is required only at the project level, states are encouraged to apply EIA principles to policies, plans, and programs as well.<sup>233</sup>

For activities not listed in Appendix I, the parties may negotiate as to whether the activities are likely to cause a

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<sup>230</sup>EIA Convention, *supra* note 227, Preamble.

<sup>231</sup>*Id.* art. 2.1.

<sup>232</sup>*Parliament Endorses*, *supra* note 228.

<sup>233</sup>EIA Convention, *supra* note 227, art. 2.7. The Environmental Commissioner has proposed that the EC Directive also apply to programs and policies. *The Green Man in Brussels*, *supra* note 223.

significant adverse transboundary impact, and whether they should be treated as if they were listed.<sup>234</sup> In making such a determination, the states should consider the size of the project, its location, the effects on humans, valued species or organisms, potential future uses of an affected area, and additional pollutant loading that cannot be sustained by the carrying capacity of the environment.<sup>235</sup>

When an activity for which an assessment is mandatory is proposed, the originating state must notify any affected party as early as possible, and no later than it informs its own public.<sup>236</sup> The affected party shall respond within the time specified in the notice, acknowledge receipt, and indicate whether it intends to participate in the EIA procedure.<sup>237</sup> If the affected party does not respond, an assessment is not required unless required under the domestic laws of the originating state.<sup>238</sup> If a party believes it would be affected by an activity of another party and it has not received notification, the affected party may request that information be exchanged to determine whether such an impact will occur. The Convention provides for an Inquiry Commission if the parties are unable to agree

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<sup>234</sup>*Id.*, Appendix III.

<sup>235</sup>*Id.*

<sup>236</sup>*Id.* art. 3.1.

<sup>237</sup>*Id.* art. 3.3.

<sup>238</sup>*Id.* art. 3.4.

as to whether a project in the territory of one party will affect another party's environment.<sup>239</sup>

If a dispute arises concerning the interpretation or application of the Convention, the parties agree to negotiate a solution.<sup>240</sup> The parties may accept in advance the jurisdiction of the International Court of Justice, or arbitration as provided in Appendix VII of the Convention.<sup>241</sup>

#### IV. Conclusion

For business and governmental decisionmakers familiar with the demands of NEPA, the differences between EIA requirements in the United States and European countries can be critical factors in the approach they take to new projects or developments. In Europe, advisors to those making decisions must be familiar not only with the EC Directive, but also, if applicable, with the EIA Convention.

Fortunately, those instruments have adopted many of the same basic ingredients which already exist in the U.S. implementation regime. However, areas where the European model diverges from NEPA can be particularly important, for example, to those in charge of United States activities in Europe.

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<sup>239</sup>Id. art 3.7.

<sup>240</sup>Id. art. 15.

<sup>241</sup>Id.

For decades many U.S. citizens and lawmakers have been calling for a reduction in forces in Europe.<sup>242</sup> Following the fall of the Berlin Wall in November 1989 the demand for closing overseas installations became even stronger. Representative Pat Schroeder expressed the attitude of many critics when she said, "here we are with all these installations in West Germany protecting West Germany from East Germany, except it's all one Germany, and all the East Germans are now in West Germany, shopping at the mall."<sup>243</sup> She suggested the American people were "... getting sick and tired of being the 911 number for the rest of the world."<sup>244</sup>

In 1991 Congress approved closure of thirty-eight sites in Germany, thirteen in Britain, eight in Italy, five in Spain, and one in the Netherlands. Additionally the Pentagon announced plans to close or pare operations at 314 sites in Europe, with an overall goal to close about

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<sup>242</sup>See, e.g., *Senators Warn of Nuclear Crisis*, N.Y. TIMES, Dec. 21, 1970, at A1. A Senate subcommittee report cautioned that the United States' policy of ringing the Soviet Union and Communist China with tactical nuclear weapons could provoke an international crisis. *Id.* The report also implied, however, that reductions in foreign troop commitments or closing overseas bases could be accomplished with no impairment of national security or the foreign policy of the United States. *Id.* at A9.

<sup>243</sup>Gwen Ifill, *Closing of Bases Wins Final Approval*, N.Y. TIMES, July 31, 1991, at A13.

<sup>244</sup>*Id.*

one-third of its 1,600 overseas facilities by 1995.<sup>245</sup>

Assessment of environmental impacts may be required prior to closing many of the larger installations, and for major federal actions proposed for the installations which remain.

Although the debate continues as to whether NEPA applies extraterritorially,<sup>246</sup> Executive Order 12,114 requires federal agencies to conduct an analysis of actions affecting the environment of a foreign nation not participating with the United States or otherwise involved in an action.<sup>247</sup> An analysis is also required for major federal actions significantly affecting a foreign nation's environment if the action provides to the nation a product or a physical project which produces an emission or effluent prohibited or strictly regulated in the United States because it creates a serious public health risk.<sup>248</sup> Either of these provisions may apply to a new project on an installation. The former, in particular, might reasonably apply to a closing installation; for example, an installation may contain hazardous wastes which could be released into the

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<sup>245</sup>*Id.* For a discussion of the creation of the Base Closure Commission, which preceded the decision to close numerous military installations, and of the environmental hazards extant at many bases, see Raymond T. Swenson et al., *Resolving the Environmental Complications of Base Closure*, *FED. FACILITIES ENVTL. J.*, Autumn 1992, at 282.

<sup>246</sup>See *supra* notes 91-114 and accompanying text.

<sup>247</sup>Executive Order, *supra* note 93, § 2-3(b).

<sup>248</sup>*Id.* § 2-3(c)(1).

environment if not properly managed following closure.<sup>249</sup>

Department of Defense Directive 6050.7, Environmental Effects Abroad of Major Department of Defense Actions,<sup>250</sup> implements Executive Order 12,114. It identifies as its objective the furtherance of foreign policy and national security interests, at the same time taking into consideration important environmental concerns.<sup>251</sup> The Directive then identifies the environmental impact assessment procedures for major federal actions abroad.<sup>252</sup>

Several activities are exempt from the requirements of the Directive. They are: Actions determined not to significantly harm the environment outside the United

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<sup>249</sup>For a description of the history and magnitude of hazardous waste quandaries now facing the military, see generally David Morrison, *Caught Off Base*, NAT'L J., Apr. 1, 1989, at 801; John M. Broder, *U.S. Military Leaves Toxic Trail Overseas*, L.A. TIMES, June 18, 1990, Part A, at 1, in which the author details the dilemma facing officials of what he calls "the world's most extensive industrial enterprise." See also John M. Broder, *Pollution 'Hot Spots' Taint Water Sources*, L.A. TIMES, June 18, 1990, Part A, at 16.

<sup>250</sup>March 31, 1979, 32 C.F.R. § 197 (1991). A major action is defined as:

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 actions under consideration may be associated. *Id.* § 197.3(e).

<sup>251</sup>*Id.* § 197.4(a).

<sup>252</sup>*Id.*, Enclosure 2 and attachments.



States; actions taken by or pursuant to the President's direction in the course of armed conflict; actions taken by or pursuant to the President's direction when the national security or national interest is involved; activities of intelligence components; actions regarding arms transfers; votes and other activities in international conferences and organizations; disaster and emergency relief actions; actions involving export licenses and permits (other than those involving nuclear activities); and most actions relating to nuclear activities or material.<sup>253</sup> Other exemptions may be made on a case-by-case or a class (a group of related actions) basis.<sup>254</sup>

Two alternative studies are provided for in the Directive. The first, an environmental study, is an analysis of the likely environmental consequences of the action that is to be considered. It consists of a review of the affected environment, significant actions taken to avoid environmental harm or otherwise to improve the environment, and significant environmental considerations and actions of other participating nations, bodies, or organizations.<sup>255</sup>

An environmental study is a cooperative action between the United States and another nation participating in an action, and not a unilateral action undertaken by the United

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<sup>253</sup>*Id.*, Enclosure 2, ¶ C-3.

<sup>254</sup>*Id.*

<sup>255</sup>*Id.*, Enclosure 2, ¶ D.

States. Its requirements with respect to preparation, content, and distribution in the international context are to remain flexible, with specific procedures to be determined on a case-by case basis.<sup>256</sup>

Alternatively, a federal agency may perform an environmental review, which is a survey of the important environmental issues involved in an activity. It identifies the issues, and reviews what, if any, consideration has been or can be given to the environmental aspects by the United States or any foreign nation involved in the action. Like the environmental study, the requirements regarding preparation, content, and distribution are to remain flexible, with procedures to be determined on a case-by-case basis.<sup>257</sup>

The DOD Directive states that the Department shall act with care within a foreign nation's jurisdiction because "the stewardship of these areas is shared by all the nations of the world."<sup>258</sup> It continues, "[t]reaty obligations and the sovereignty of other nations must be respected, and restraint must be exercised in applying United States laws within foreign nations unless Congress has expressly provided otherwise."<sup>259</sup> These requirements should call for

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<sup>256</sup>Id.

<sup>257</sup>Id.

<sup>258</sup>Id. § 197.4(b).

<sup>259</sup>Id. § 197.4(c).

an analysis of relevant provisions of the North Atlantic Treaty Organization Status of Forces Agreement (NATO SOFA)<sup>260</sup> and the local laws of those countries which may be affected by major federal actions in Europe, compared to the assessment provisions of the Directive itself.

The NATO SOFA makes no direct reference to protection of the environment. Instead, its language is similar to that of the DOD Directive, and it obliges parties sending forces into the territory of another state to respect the receiving states' laws. The Agreement declares,

[i]t is the duty of a force...as well as their dependents to respect the law of the receiving State, and to abstain from any activity inconsistent with the spirit of the present Agreement ... It is also the duty of the sending State to take necessary measures to that end."<sup>261</sup>

As U.S. decisionmakers in Europe turn their attention to local laws regarding environmental assessment procedures, they will find inconsistency and often inadequate implementation of the EC Directive.<sup>262</sup> Two of the states receiving criticism for their environmental legislation, Germany and Great Britain, have maintained a significant

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<sup>260</sup>Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of their Forces, June 19, 1951, 4 U.S.T. 1792, T.I.A.S. No. 2846, 199 U.N.T.S. 67.

<sup>261</sup>*Id.* art. II.

<sup>262</sup>See *supra* notes 191-92 and notes 216-23 and accompanying text.

contingent of U.S. forces since the end of World War II,<sup>263</sup> and are likely to be confronted with the need to perform environmental assessments in the future.

With a "flexible" approach required by the DOD Directive, little guidance from the relevant international agreement, and potentially inadequate local laws implementing the EC Directive, federal officials face the likelihood of future litigation in attempting to meet the environmental assessment requirements of Executive Order 12,114. The *Massey* case has failed to resolve the now decades-long debate regarding whether NEPA should apply overseas. In fact, the decision has probably fueled the controversy.<sup>264</sup>

Rather than continuing to leave scholars and decisionmakers guessing as to its intent regarding NEPA's extraterritorial application, Congress should make explicit its purpose. In the European context in particular, where conceptually, if not always in practice, the environmental assessment process has been adopted, application of NEPA is unlikely to clash with the laws of other nations or result in international conflict.<sup>265</sup>

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<sup>263</sup>For a discussion of the U.S. force structure overseas, see generally United States General Accounting Office (GAO), Report NSIAD-91-195, *Overseas Basing, Air Force and Army Processes for Selecting Bases to Close in Europe*, April 24, 1991.

<sup>264</sup>See *supra* note 119 and accompanying text.

<sup>265</sup>See *supra* notes 97-98 and accompanying text.

## **ANNEX I**

### **PROJECTS SUBJECT TO ARTICLE 4.1**

1. Crude-oil refineries (excluding undertakings manufacturing only lubricants from crude oil) and installations for the gasification and liquefaction of 500 tonnes or more of coal or bituminous shale per day.
2. Thermal power stations and other combustion installations with a heat output of 300 megawatts or more and nuclear power stations and other nuclear reactors (except research installations for the production and conversion of fissionable and fertile materials, whose maximum power does not exceed 1 kilowatt continuous thermal load).
3. Installations solely designed for the permanent storage or final disposal of radioactive waste.
4. Integrated works for the initial melting of cast-iron and steel.
5. Installations for the extraction of asbestos and for the processing and transformation of asbestos and products containing asbestos: for asbestos-cement products, with an annual production of more than 20,000 tonnes of finished products, for friction material, with an annual production of more than 50 tonnes of finished products, and for other uses of asbestos, utilization of more than 200 tonnes per year.
6. Integrated chemical installations.
7. Construction of motorways, express roads<sup>1</sup> and lines for long-distance railway traffic and of airports<sup>2</sup> with a basic runway length of 2100 m or more.
8. Trading ports and also inland waterways and ports for inland-waterway traffic which permit the passage of vessels of over 1350 tonnes.

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<sup>1</sup>For the purposes of the Directive, 'express road' means a road which complies with the definition in the European Agreement on main international traffic arteries of 15 November 1975.

<sup>2</sup>For the purposes of this Directive, 'airport' means airports which comply with the definition in the 1944 Chicago Convention setting up the International Civil Aviation Organization (Annex 14).

9. Waste-disposal installations for the incineration, chemical treatment or land fill of toxic and dangerous wastes.

## **ANNEX II**

### **PROJECTS SUBJECT TO ARTICLE 4.1**

#### **1. Agriculture**

- (a) Projects for the restructuring of rural land holdings.
- (b) Projects for the use of uncultivated land or semi-natural areas for intensive agricultural purposes.
- (c) Water-management projects for agriculture.
- (d) Initial afforestation where this may lead to adverse ecological changes and land reclamation for the purposes of conversion to another type of land use.
- (e) Poultry-rearing installations.
- (f) Pig-rearing installations.
- (g) Salmon breeding.
- (h) Reclamation of land from the sea.

#### **2. Extractive industry**

- (a) Extraction of peat.
- (b) Deep drillings with the exception of drillings for investigating the stability of the soil and in particular:
  - geothermal drilling,
  - drilling for the storage of nuclear waste material,
  - drilling for water supplies.
- (c) Extraction of minerals other than metalliferous and energy-producing minerals, such as marble, sand, gravel, shale, salt, phosphates and potash.
- (d) Extraction of coal and lignite by underground mining.
- (e) Extraction of coal and lignite by open-cast mining.
- (f) Extraction of petroleum.

- (g) Extraction of natural gas.
- (h) Extraction of ores.
- (i) Extraction of bituminous shale.
- (j) Extraction of minerals other than metalliferous and energy-producing minerals by open-cast mining.
- (k) Surface industrial installations for the extraction of coal, petroleum, natural gas and ores, as well as bituminous shale.
- (l) Coke ovens (dry coal distillation).
- (m) Installations for the manufacture of cement.

### **3. Energy industry**

- (a) Industrial installations for the production of electricity, steam and hot water (unless included in Annex I).
- (b) Industrial installations for carrying gas, steam and hot water; transmission of electrical energy by overhead cables.
- (c) Surface storage of natural gas.
- (d) Underground storage of combustible gases.
- (e) Surface storage of fossil fuels.
- (f) Industrial briquetting of coal and lignite.
- (g) Installations for the production or enrichment of nuclear fuels.
- (h) Installations for the reprocessing of irradiated nuclear fuels.
- (i) Installations for the collection and processing of radioactive waste (unless included in Annex I).
- (j) Installations for hydroelectric energy production.

### **4. Processing of metals**

- (a) Iron and steelworks, including foundries, forges, drawing plants and rolling mills (unless included in Annex I).
- (b) Installations for the production, including



smelting, refining, drawing and rolling, of nonferrous metals, excluding precious metals.

- (c) Pressing, drawing and stamping of large castings.
- (d) Surface treatment and coating of metals.
- (e) Boilermaking, manufacture of reservoirs, tanks and other sheet-metal containers.
- (f) Manufacture and assembly of motor vehicles and manufacture of motor-vehicle engines.
- (g) Shipyards.
- (h) Installations for the construction and repair of aircraft.
- (i) Manufacture of railway equipment.
- (j) Swaging by explosives.
- (k) Installations for the roasting and sintering of metallic ores.

**5. Manufacture of glass**

**6. Chemical industry**

- (a) Treatment of intermediate products and production of chemicals (unless included in Annex I).
- (b) Production of pesticides and pharmaceutical products, paint and varnishes, elastomers and peroxides.
- (c) Storage facilities for petroleum, petrochemical and chemical products.

**7. Food industry**

- (a) Manufacture of vegetable and animal oils and fats.
- (b) Packing and canning of animal and vegetable products.
- (c) Manufacture of dairy products.
- (d) Brewing and malting.
- (e) Confectionery and syrup manufacture.
- (f) Installations for the slaughter of animals.

- (g) Industrial starch manufacturing installations.
- (h) Fish-meal and fish-oil factories.
- (i) Sugar factories.
- 8. **Textile, leather, wood and paper industries**
  - (a) Wool scouring, degreasing and bleaching factories.
  - (b) Manufacture of fibre board, particle board and plywood.
  - (c) Manufacture of pulp, paper and board.
  - (d) Fibre-dyeing factories.
  - (e) Cellulose-processing and production installations.
  - (f) Tannery and leather-dressing factories.
- 9. **Rubber industry Manufacture and treatment of elastomer-based products.**
- 10. **Infrastructure projects**
  - (a) Industrial-estate development projects.
  - (b) Urban-development projects.
  - (c) Ski-lifts and cable-cars.
  - (d) Construction of roads, harbours, including fishing harbours, and airfields (projects not listed in Annex I).
  - (e) Canalization and flood-relief works.
  - (f) Dams and other installations designed to hold water or store it on a long-term basis.
  - (g) Tramways, elevated and underground railways, suspended lines or similar lines of a particular type, used exclusively or mainly for passenger transport.
  - (h) Oil and gas pipeline installations.
  - (i) Installation of long-distance aqueducts.
  - (j) Yacht marinas.

**11. Other projects**

- (a) Holiday villages, hotel complexes.
- (b) Permanent racing and test tracks for cars and motor cycles.
- (c) Installations for the disposal of industrial and domestic waste (unless included in Annex I).
- (d) Waste water treatment plants.
- (e) Sludge-deposition sites.
- (f) Storage of scrap iron.
- (g) Test benches for engines, turbines or reactors.
- (h) Manufacture of artificial mineral fibres.
- (i) Manufacture, packing, loading or placing in cartridges of gunpowder and explosives.
- (j) Knackers' yards.

**12. Modifications to development projects included in Annex I and projects in Annex I undertaken exclusively or mainly for the development and testing of new methods or products and not used for more than one year.**

## ABSTRACT

Title.....The European Community Directive - An  
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This thesis addresses a question of direct concern to the United States Air Forces in Europe. An environmental impact assessment is required for major Department of Defense actions abroad having significant environmental effects. For about two decades legal scholars have debated the precise procedure federal agencies should follow in analyzing major federal actions having significant environmental impacts overseas. The thesis evaluates whether the European environmental impact procedure might present a viable alternative to the National Environmental Policy Act (NEPA) process following the decision in the case of *Environmental Defense Fund v. Massey*. The case left open the question as to whether NEPA should apply overseas.

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