

BRIDGING THE ENVIRONMENTAL GAP: THE APPLICATION OF NEPA TO THE MEXICO-UNITED STATES BILATERAL TRADE AGREEMENT

M. DIANE BARBER*

I. INTRODUCTION	430
II. APPLICATION OF NEPA	432
A. <i>Legislative History of NEPA</i>	432
1. General Purpose of the Statute	432
2. Purpose of the Environmental Impact Statement	434
3. Role of the Public	436
B. <i>Scope of the Statute</i>	437
1. Framework	437
2. Judicial Review of the International Applicability of NEPA	439
a. <i>Legislative Intent</i>	439
b. <i>Statutory Language</i>	439
c. <i>Balance and Separation of Powers</i>	440
d. <i>Balancing Foreign Policy against U.S. Border and Health Issues</i>	442
C. <i>Consideration of General Statutory Applicability</i>	444
1. Threshold Issues	444
a. <i>Duties of the Office of the USTR</i>	445
b. <i>Role of the Department of Commerce</i> ...	446
2. "Federal Agency"	447
3. "Major Federal Action"	451
4. Report on Proposals for Legislation	452
5. "Significantly Affecting the Human Environment"	454
6. Timeliness	454
7. NEPA Exemptions	455
a. <i>Section 104</i>	455

* LL.M. Candidate, Energy, Environment, and Natural Resources, University of Houston Law Center; J.D. 1972, Albany Law School; B.A. 1969, State University of New York at Buffalo.

b. <i>Direct Statutory Conflict</i>	456
c. <i>"To the Fullest Extent Possible"</i>	458
d. <i>National Security</i>	458
III. APPLICABILITY OF EXECUTIVE ORDER NUMBER	
12,114	460
A. <i>History</i>	460
1. <i>Initial Position</i>	460
2. <i>Issuance of Executive Order</i>	460
B. <i>Applicability of Order to Trade Agreement</i>	462
1. <i>Provisions of the Order</i>	462
2. <i>Exemptions</i>	463
C. <i>Judicial Review of the Order</i>	464
D. <i>The Order and the FTA</i>	465
IV. EQUITY AND THE FTA	466
V. CONCLUSION	468

I. INTRODUCTION

"Linkage" has been defined as "the deliberate conditioning, by diplomats, of progress on one issue in return for progress on another . . . issue."¹ Under the Mexico-United States Free Trade Agreement (FTA),² there is no mechanism in place nor any for linkage of trade and environmental issues. While Mexican and U.S. negotiators hope to conclude an accord within the next eighteen months, they repeatedly assert that environmental concerns should be addressed separately.³ Those in Congress

1. John E. Carroll & Newell B. Mack, *On Living Together in North America: Canada, the United States and International Environmental Relations*, 12 DENV. J. INT'L L. & POL'Y 35, 41 n.26 (1982).

2. In 1985, Mexico and the United States signed a Statement of Intent to Negotiate a Framework of Principle and Procedures Regarding the Trade and Investment Relations Between the United Mexican States and the United States of America (Apr. 23, 1985). In 1987, a trade and investment agreement between the United States and Mexico was signed. *Understanding Between the Government of the United States of America and the Government of the United Mexican States Concerning a Framework of Principles and Procedures for Consultations Regarding Trade and Investment Relations*, Nov. 6, 1987, 27 I.L.M. 439 [hereinafter *Trade and Investment Framework*]. On June 11, 1990, President Bush and President Salinas de Gortari of Mexico announced their intent to commence negotiations on trade. See generally Guy C. Smith, *The United States-Mexico Framework Agreement: Implications For Bilateral Trade*, 20 LAW & POL'Y INT'L BUS. 655 (1989) for an exhaustive treatment of the *Trade and Investment Framework*.

3. Roberto Suro, *In Search of a Trade Pact With the Environment in Mind*, N.Y. TIMES, Apr. 14, 1991, at E4; Jennifer Dixon, *Lawmakers Press Issues for Free Trade Negotiations*, HOUS. CHRON., Mar. 9, 1991, at 2D; Ricardo Ampudia, *Clear the Air on Commerce, Environment*, HOUS. CHRON., Apr. 7, 1991, at 1E; Robert Suro, *Border Boom's Dirty Residue Imperils U.S.-Mexico Trade*, N.Y. TIMES, Mar. 31, 1991, at A1, A16.

who would like to attach environmental issues to international agreements are thwarted by the fast-track proviso under the Omnibus Trade and Competitiveness Act of 1988.⁴ Under this proviso, no amendments may be added to a negotiated agreement; Congress may vote only for or against it.⁵ Although the issue was heatedly debated in June,⁶ U.S. Trade Representative (USTR) Carla A. Hills received the extension of the fast-track authorization she avidly sought.⁷ In short, the official government position is as follows: Tucking environmental issues directly into the trade agreement appears to result in a Procrustean bed. The issue, then, is how to best approach the task of incorporating a comprehensive, integrated, yet appropriately restricted, consideration of environmental impacts into the negotiated agreement.

To articulate a starting mark, it behooves one to turn to the cornerstone of American environmental law, the National Environmental Policy Act of 1969 (NEPA or the Act).⁸ The informational function of NEPA springs from its clearly outlined legislative history, which has been judicially recognized in a wide range of federal actions.⁹ The Act offers a comprehensive mechanism through which the federal government and the public may address the environmental issues that will result from eased trade barriers between the United States and Mexico.¹⁰

4. Pub. L. No. 100-418, 102 Stat. 1107 (1988) (codified at 29 U.S.C. § 2901 (1988)).

5. Section 1103(B) of this Act makes the fast-track procedures of the Trade Act of 1974, 19 U.S.C. §§ 2101-2495 (1988), applicable to the FTA.

6. For a review of fast-track procedures and the role of Congress, see Stewart A. Baker & Jeffrey P. Bialos, *U.S.-Mexico Trade Talks: A Preview*, 20 INT'L L. NEWS 1, 6-7 (1991).

7. President Bush said in a letter to Congress that "[m]aintaining fast-track is essential to our leadership in the global trading system." Peter Truell, *Bush Asks Congress for Special Authority to Negotiate Liberalized Trade Rules*, WALL ST. J., Mar. 4, 1991, at A2; see generally Carla A. Hills, *Testimony of Ambassador Carla A. Hills, United States Trade Representative, Before the Subcommittee on Trade, Committee on Ways and Means, U.S. House of Representatives, June 14, 1990*, 22 ST. MARY'S L.J. 583 (1991) (discussing U.S.-Mexican trade relations).

8. 42 U.S.C. §§ 4321-70a (1988).

9. See, e.g., *infra* text accompanying note 20.

10. See generally Barbara B. Aldave, *Toward Free Trade and More Commerce Between the United States and Mexico*, 22 ST. MARY'S L.J. 579 (1991) (discussing the development of free trade between the U.S. and Mexico); MARY E. KELLY ET AL., *MEXICO-U.S. FREE TRADE NEGOTIATIONS AND THE ENVIRONMENT: EXPLORING THE ISSUES* (1991); STEWART HUDSON & PAUL SPECK, *ENVIRONMENT AND THE NORTH AMERICAN FREE TRADE AGREEMENT* (1991); Center for Growth Studies, 1989 Woodlands Conference, *U.S.-Mexico Industrial Integration: Today and Tomorrow* (1989) (unpublished report on file with the *Tulane Environmental Law Journal*).

This article examines NEPA's application to the FTA and concludes that it is a natural and necessary extension of the Act. Because the consideration of environmental impacts on Mexico is not mandated by the statute, applying NEPA to the FTA avoids the troublesome specter of foreign policy and sovereignty issues. What is unquestionably mandated by NEPA, however, is a consideration of the environmental impacts of federal actions in the United States. This article also examines Executive Order Number 12,114 which purports to provide for the extraterritorial application of NEPA. The article concludes that the Order, although an admirable presidential policy instituted to force federal agencies to consider the environmental effects of their actions (particularly in the global commons area of ensuring extraterritorial application of NEPA to all federal agency action), does not appear to provide the means by which to apply NEPA or the standards of NEPA.

II. APPLICATION OF NEPA

A. *Legislative History of NEPA*

1. General Purpose of the Statute

An examination of the legislative history of NEPA indicates that the very concept that was instrumental in its creation is at the forefront of the current dispute between trade negotiators and environmentalists: the fundamental need to comprehensively address environmental concerns, despite the prevailing fear that such action will create an administrative morass.¹¹ As various commentators have remarked, the environmental issues involved in the FTA are myriad and complex.¹² However, these

11. Pursuant to a joint communique issued by Presidents Bush and Salinas that "emphasized the need for ongoing cooperation in the area of environmental protection," Joint Communique on the Border Environmental Plan, Nov. 27, 1990, the U.S. Environmental Protection Agency (EPA) and the environmental agency of Mexico (the Secretaria de Desarrollo Urbano y Ecologica (SEDUE)) prepared a working draft entitled "Integrated Environmental Plan for the Mexico-U.S. Border Area (First Stage, 1992-1994)". Released on August 1, 1991, hearings on the plan are being held in affected border states. The plan briefly summarizes the existing environmental border problems, including water quality, drinking water supplies, wastewater treatment, transboundary movement of hazardous wastes, hazardous/municipal solid waste disposal, abandoned hazardous waste dump sites, air quality, and pesticide use. EPA & SEDUE, INTEGRATED ENVIRONMENTAL PLAN FOR THE MEXICO-U.S. BORDER AREA (FIRST STAGE, 1992-1994) § III, at 1-41, § V, at 1-4 (1991) [hereinafter *BORDER PLAN*]. It does not purport to examine the impact of increased border trade and, in fact, repeatedly asserts the need for more data to appropriately assess the current situation. *Id.*

12. See generally HUDSON & SPECK, *supra* note 10; KELLY *et al.*, *supra* note 10. On

characteristics only support the comprehensive study and analytic review intended by NEPA legislation.¹³

Participants in the drafting of NEPA noted that the "challenge was to approach environmental management in a comprehensive way. The new values of environmental policy had to intrude somehow into the most remote recesses of the federal administrative machinery and begin to influence the multitude of

the maquiladora problem, see Daniel I.B. Gonzalez & Elaine F. Rodriguez, *Environmental Aspects of Maquiladora Operations: A Note of Caution for U.S. Parent Corporations*, 22 ST. MARY'S L.J. 659, 662-81 (1991); Zack V. Chayet & Eduardo A. Bustamante, *The Mexican Maquiladora Industry: Legal Framework of the 1990's*, 20 CAL. W. INT'L L.J. 263, 271-73 (1990); Abelardo L. Valdez, *A Proposal for Establishing a United States-Mexico Co-Production Zone*, 20 LAW & POL'Y INT'L BUS. 619, 651-54 (1989); Matilde K. Stephenson, *Mexico's Maquiladora Program: Challenges and Prospects*, 22 ST. MARY'S L.J. 589, 590-601 (1991). For a report on the more than 200,000 residents of Texas and New Mexico who live in unincorporated subdivisions with substandard housing (colonias), see BORDER PLAN, *supra* note 11, § III, at 37-38.

On U.S.-Mexican trade issues, see Smith, *supra* note 2, at 655; see also James F. Smith, *United States-Mexico Agricultural Trade*, 23 U.C. DAVIS L. REV. 431, 431-60 (1990); Albert E. Utton, *An Assessment of the Management of U.S.-Mexican Water Resources: Anticipating the Year 2000*, 22 NAT. RESOURCES J. 1093, 1093-117 (1982).

For general background, see C. Richard Bath, *U.S.-Mexico Experience in Managing Transboundary Air Resources: Problems, Prospects, and Recommendations for the Future*, 22 NAT. RESOURCES J. 1147 (1982) (analyzing causes for pollution in El Paso and Ciudad Juarez); Edwin H. Carpenter & Larry G. Blackwood, *The Potential for Population Growth in U.S. Counties That Border Mexico: El Paso to San Diego*, 17 NAT. RESOURCES J. 545 (1977) (discussing potential for population growth in ten border counties); Harry W. Ayer & Paul G. Hoyt, *Industrial Growth in the U.S. Border Communities and Associated Water and Air Problems: An Economic Perspective*, 17 NAT. RESOURCES J. 585 (1977) (discussing air problems and possible solutions in U.S. border cities); Niles Hansen, *Economic Growth Patterns in the Texas Borderlands*, 22 NAT. RESOURCES J. 805 (1982) (describing recent evolution of the border economy); Albert E. Utton, *Overview*, 22 NAT. RESOURCES J. 735 (1982) (discussing management of water resources in U.S.-Mexican border area); Mark A. Sinclair, Note, *The Environmental Cooperation Agreement Between Mexico and the U.S.: A Response to Pollution Problems of the Borderlands*, 19 CORNELL INT'L L.J. 87 (1986) (assessing significance of Environmental Cooperation Agreement as a potential solution to U.S.-Mexican border pollution problems); Stephen P. Mumme, *The U.S.-Mexican Conflict Over Transboundary Groundwaters: Some Institutional and Political Considerations*, 12 CASE W. RES. J. INT'L L. 505 (1980) (analyzing the complex interdependence of the border region); H. Jeffrey Leonard, *Confronting Industrial Pollution in Rapidly Industrializing Countries: Myths, Pitfalls, and Opportunities*, 12 ECOLOGY L.Q. 779 (1985) (discussing public policy decisions facing rapidly industrializing nations); William S. Ferguson, Note, *International Trade Implications of Pollution Control*, 58 CORNELL L. REV. 368 (1972) (discussing U.S. policy of promoting pollution control).

13. In a review of the theory of NEPA, Dan Tarlock observed, "The recognition of environmental values is also difficult because the arguments against present development made in most environmental controversies are often unprovable assertions that there is a possible risk of long-term damage to an ecosystem or that future generations will assign higher values to non-development than do present generations." A. Dan Tarlock, *Balancing Environmental Considerations and Energy Demands: A Comment on Calvert Cliffs' Coordinating Committee, Inc. v. AEC*, 47 IND. L.J. 645, 658 (1972).

decisions being made by thousands of officials."¹⁴ Dan Tarlock, a noted NEPA scholar, further explains the need for the legislation:

Federal legislation was necessary because the creation of program, mission-oriented agencies has insured that these environmental considerations have been systematically under-represented in most short- and long-range decision making. Existing agencies were established to supervise the development of our natural resources consistent with the ethic which has prevailed throughout this country's history and, thus, *they tended to overstress the benefits of development and to explore insufficiently the less environmentally detrimental alternatives to current methods of meeting their programmed objectives.*¹⁵

In a decisionmaking process in which an agency's vision was often narrowed by the mandate of its mission, an action-forcing approach was seen as essential by NEPA's proponents.¹⁶

2. Purpose of the Environmental Impact Statement

As enacted, NEPA demands the filing of an environmental impact statement (EIS) by all federal agencies on "proposals for legislation and other major Federal actions significantly affecting the quality of the human environment."¹⁷ This "action-forcing

14. Daniel A. Dreyfus & Helen M. Ingram, *The National Environmental Policy Act: A View of Intent and Practice*, 16 NAT. RESOURCES J. 243, 246 (1976) (emphasis added). For a review of NEPA legislative history, see *id.* at 251-56 (one author is a staff member of the Senate Committee on Interior and Insular Affairs, the other was a key aide to Sen. Jackson during the drafting of NEPA legislation).

15. Tarlock, *supra* note 13, at 658 (emphasis added) (footnote omitted).

16. "Emphasis — perhaps over-emphasis — upon environmental concerns was considered a necessary means of instilling the new policy into an uncongenial decision-making process in which the *support of the administration was uncertain* and federal agencies were wedded to their own missions and to economic efficiency." Dreyfus & Ingram, *supra* note 14, at 254 (emphasis added).

17. 42 U.S.C. § 4332 provides:

(2) All agencies of the Federal Government shall —

(c) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on —

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

provision" was designed to "require the Federal agencies, in submitting proposals, to contain within the proposals an evaluation of the effect of these proposals upon the state of the environment."¹⁸

Senator Henry Jackson (D-Washington), in a floor speech advocating the Senate version of the section of NEPA that established the impact statement procedure, declared:

There are about 80 major Federal agencies with programs underway which affect the quality of the human environment. If environmental policy is to become more than rhetoric, and if the studies and advice of any high-level, advisory group are to be translated into action, each of these agencies must be enabled and directed to participate in active and objective-oriented environmental management. *Concern for environmental quality must be made part of every Federal action.*¹⁹

In *Robertson v. Methow Valley Citizens Council*,²⁰ the Supreme Court took notice of Senator Jackson's remarks:

[A]n environmental impact statement serves NEPA's "action-forcing" purpose in two important respects. It ensures that the agency, in reaching its decision, will have available, and will carefully consider detailed information concerning significant environmental impacts; it also guarantees that the relevant information will be made available to the larger audience that may also play a role in both the decisionmaking process and the implementation of that decision.²¹

Under the statute, the enforcement of such environmental man-

18. *National Environmental Policy: Hearings on S. 1075, S. 237, S. 1752 before the Senate Comm. on Interior and Insular Affairs*, 91st Cong., 1st Sess. 71-73 (1969) (testimony of Dr. Lynton Caldwell, a professor of political science at Indiana University, who is generally regarded as having designed NEPA along with Sen. Jackson); see also Tarlock, *supra* note 13, at 660-67 (critiquing NEPA and discussing its legislative history, with emphasis on Sen. Jackson's comments).

19. Dreyfus & Ingram, *supra* note 14, at 246 (emphasis added). The authors note Sen. Jackson's purpose was to "[i]mpose a *comprehensive* policy within the organizational arrangement." *Id.* (emphasis added). The Court of Appeals for the District of Columbia later recognized Sen. Jackson's goal: "the greatest importance of NEPA is to require the Atomic Energy Commission to consider environmental issues just as they consider other matters within their mandates . . . 'no agency will be able to maintain that it has no mandate or no requirement to consider the environmental consequences of its actions.'" *Calvert Cliffs' Coord. Comm., Inc. v. United States Atomic Energy Comm'n*, 449 F.2d 1109, 1112-13 (D.C. Cir. 1971) (quoting Sen. Jackson, 115 CONG. REC. 40,416 (1969)).

20. 490 U.S. 332 (1989).

21. *Id.* at 349 (citations omitted). See generally Melanie Fisher, Comment, *The CEQ Regulations: New Stage in the Evolution of NEPA*, 3 HARV. ENVTL. L. REV. 347 (1979) (discussing CEQ's reforms in the decisionmaking process, its instigation of a balancing mechanism for such decisionmaking, and its ability to set agency procedures).

agement is left to the impact statement's reader. There is no extra-agency enforcement mechanism, underscoring the importance of public reaction.

3. Role of the Public

NEPA provides for the dissemination of information to the public under the Freedom of Information Act (FOIA).²² This informational function of NEPA has been consistently recognized as integral to knowledgeable decisionmaking by Congress, other branches of the government, and the public. As Justice Stevens noted in *Robertson v. Methow Valley Citizens Council*, "Publication of an EIS . . . serves a larger informational role. It gives the public the assurance that the agency 'has indeed considered environmental concerns in its decisionmaking process,' and perhaps more significantly, provides a springboard for public comment."²³ William Ruckelshaus, the former chairman of the Environmental Protection Agency (EPA), has remarked, "Unquestionably, the public must not only be allowed to participate in environmental decision making; it should be encouraged to do so. Often the sheer weight of public opinion is sufficient to force corrections."²⁴

The final version of NEPA did not specifically provide for standing by private citizens to challenge federal government actions that cause harm to their "healthful environment."²⁵ However, it is clear that Senator Jackson, as sponsor of the legislation, saw the public in the role of an insistent sentry.²⁶ In a powerful floor argument, the Senator declared:

What is involved is a congressional declaration that we do not intend, as a government or as a people, to initiate actions

22. 5 U.S.C. § 552 (1988). See generally *The Freedom of Information Act and the Federal Trade Commission, A Study in Malfeasance*, 4 HARV. C.R.-C.L. REV. 345 (1969) (a review of the Freedom of Information Act).

23. *Robertson*, 490 U.S. at 349 (citation omitted); see also *Andrus v. Sierra Club*, 442 U.S. 347, 350 (1979); *Kleppe v. Sierra Club*, 427 U.S. 390, 409 (1976); *Trout Unlimited v. Morton*, 509 F.2d 1276, 1282 (9th Cir. 1974); *Sierra Club v. Morton*, 510 F.2d 813, 820 (5th Cir. 1975).

24. William D. Ruckelshaus, *The Citizen and the Environmental Regulatory Process*, 47 IND. L.J. 636, 636 (1972).

25. 42 U.S.C. § 4331(c). The Senate version of § 101(e) stated that every person had a right to a healthful environment, but the statement was deleted by the Conference Committee, despite Sen. Jackson's objections. See Tarlock, *supra* note 13, at 663.

26. For a discussion of the role of private citizens in NEPA, see Eva H. Hanks & John L. Hanks, *An Environmental Bill of Rights: The Citizen Suit and the National Environmental Policy Act of 1969*, 24 RUTGERS L. REV. 230, 230-69 (1970).

which endanger the continued existence or the health of mankind: That we will not intentionally initiate actions which will do irreparable damage to the air, land and water which support life on earth.

... If there are to be departures from this standard of excellence, they should be exceptions to the rule and the policy. And as exceptions they will have to be justified in the light of public scrutiny as required by Section 102.²⁷

B. Scope of the Statute

1. Framework

The EIS required under section 102(2)(C) of NEPA has been held applicable to a broad range of federal actions.²⁸ Yet, the extraterritorial application of NEPA has been debated for more than twenty years. A careful examination of the legislative history reveals little support for a clear intent by Congress to apply NEPA to government actions occurring entirely outside the jurisdiction of the United States.²⁹ Although agencies have taken various positions concerning the applicability of NEPA abroad,³⁰ section 102(2)(C), drafted in the general terms of the

27. 115 CONG. REC. 40,415, 40,416 (daily ed. Dec. 20, 1969) (statement of Sen. Jackson) (emphasis added).

28. CEQ regulations define "federal actions." 40 C.F.R. § 1508.18 (1991). Projects funded by the federal government and carried out by both state and local governments may also be deemed federal. See generally DANIEL R. MANDELKER, NEPA LAW & LITIGATION: THE NATIONAL ENVIRONMENTAL POLICY ACT §§ 8:15-8:28 (1984).

29. For a review of legislative history pertaining to this issue, see Sanford E. Gaines, *Environmental Effects Abroad of Major Federal Actions: An Executive Order Ordains a National Policy*, 3 HARV. ENVTL. L. REV. 136, 137-39 (1979); Jeremy Galton, Note, *The Scope of the National Environmental Policy Act: Should the 102(2)(C) Impact Statement Provision Be Applicable to a Federal Agency's Activities Having Environmental Consequences Within Another Sovereign's Jurisdiction?*, 5 SYRACUSE J. INT'L L. & COM. 317, 328-32 (1978).

30. See Gaines, *supra* note 29, at 139; see also Glenn Pincus, Comment, *The "NEPA-Abroad" Controversy: Unresolved by an Executive Order*, 30 BUFF. L. REV. 611, 611-62 (1981) (discussing several options to resolve the controversy); Theresa M. Welsh, Note, *Agency Responses to Executive Order 12,114: A Comparison and Implications*, 14 CORNELL INT'L L.J. 481, 491-506 (1981).

CEQ issued guidelines to heads of agencies requiring application of NEPA to extraterritorial impacts in 1973 and again in 1977. Council on Environmental Quality, 38 Fed. Reg. 20,550 (1973) (codified at 40 C.F.R. § 1500); Memorandum on the Application of the EIS Requirement to Environmental Impacts Abroad of Major Federal Actions, 42 Fed. Reg. 61,068 (1977). It must be noted that these memoranda were issued prior to Exec. Order 11,991, which gave the guidelines the force of regulations. See 3 C.F.R. 123 (1977). Following issuance of that Exec. Order, CEQ drafted regulations repeating the assertion of extraterritorial application of NEPA. 43 Fed. Reg. 25,230; see 8 Env't Rep. (BNA) 1495 (Jan. 27, 1978). The circulation of this memo led to intense interagency debates which

"human environment," does not specifically mandate such application. Additionally, section 102(2)(F), which requires federal agencies to "recognize worldwide environmental problems," only mildly encourages international cooperation — and even that limited support must be consistent with the foreign policy of the United States.³¹ The Court of Appeals for the District of Columbia has held this statutory provision to be a mere "prescription . . . toward cooperation."³²

Indeed, it has been suggested that a joint reading of the two provisions may create a presumption against any extraterritorial application of NEPA.³³ It is not necessary, however, to pursue the question of whether NEPA applies to government actions occurring entirely outside the jurisdiction of the United States.³⁴ Rather, it is necessary to carefully address whether NEPA applies to a federal trade agreement with a bordering country which, in promoting increased industrial growth, will environmentally impact our nation's air, water, and land resources. The issue then becomes why should NEPA be inapplicable to a federal trade agreement that would result in such intraterritorial impacts.

The argument may be made that the very nature of the FTA, a negotiated agreement between the United States and a

resulted in the issuance of Exec. Order 12,114, 3 C.F.R. 356 (1980), *reprinted in* 42 U.S.C. § 4321 (1982). For a thorough review of the debate, see Gaines, *supra* note 29, at 142-45.

31. Section 102(2)(F) requires 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 in anticipating and preventing a decline in the quality of mankind's world environment." 42 U.S.C. § 4332(F).

32. *Natural Resources Defense Council v. Nuclear Regulatory Comm'n*, 647 F.2d 1345, 1366 (D.C. Cir. 1981).

33. Gaines, *supra* note 29, at 138-39 n.15.

34. For intensive discussions on that issue, see generally Nicholas A. Robinson, *Extraterritorial Environmental Protection Obligations of Foreign Affairs Agencies: The Unfulfilled Mandate of NEPA*, 7 N.Y.U. J. INT'L L. & POL. 257 (1974) (focusing on the Dept. of State's position); Harry H. Almond, *The Extraterritorial Reach of United States Regulatory Authority Over the Environmental Impacts of its Activities*, 44 ALB. L. REV. 739 (1980) (inquiring into restraints upon the jurisdiction of nation states seeking to extend and enforce their legislation over activities affecting the environment abroad); Galton, *supra* note 29 (analyzing the scope of the statute's 102(2)(C) provisions to determine its applicability to federal agencies' actions abroad); J.D. Head, Comment, *Federal Agency Responsibility to Assess Extraterritorial Environmental Impacts*, 14 TEX. INT'L L.J. 425 (1979) (discussing the judiciary's role regarding the foreign application of NEPA); Comment, *NEPA's Role in Protecting the World Environment*, 131 U. PA. L. REV. 353 (1982) (concluding that the primary objection to NEPA's application abroad, the potential infringement on foreign sovereignty, is not valid in many cases).

foreign nation, invokes the protective cloak of foreign policy prerogative of the President, a power granted to the Executive by the Constitution.³⁵ It is thus essential to examine the approach U.S. courts have taken where the application of NEPA has raised foreign policy concerns.³⁶ Such examination lends substantial support to the argument that, where federal action will result in extraterritorial environmental impacts which affect neighboring American states, foreign policy concerns may be legitimately set aside.

2. Judicial Review of the International Applicability of NEPA

a. *Legislative Intent*

It is well-recognized by the courts that "absent evidence of Congressional intent to the contrary, a federal statute should be construed as applying *only* within the territorial jurisdiction of the United States."³⁷ The legislative history of NEPA was examined in *Natural Resources Defense Council v. Nuclear Regulatory Commission*,³⁸ and the Court of Appeals for the District of Columbia found that Congress

focused on international cooperation and left open the issue of extraterritorial application of NEPA. The intention of the NEPA Congress, however, is obscure. All we can know for sure is that the earlier Congress also recognized the merits of *cooperation* and *foreign policy* temperance. . . . I must conclude that NEPA's legislative history illuminates nothing in regard to extraterritorial application.³⁹

b. *Statutory Language*

In the more recent decision of *Greenpeace USA v. Stone*,⁴⁰ the District Court of Hawaii went beyond earlier cases that had consistently maintained the extraterritoriality of NEPA as "an

35. This issue is addressed *infra* at notes 116-19 and accompanying text.

36. Those cases have involved federal action occurring entirely outside the United States.

37. *Greenpeace USA v. Stone*, 748 F. Supp. 749, 758 (D. Haw. 1990) (emphasis added) (citing *Foley Bros. v. Filardo*, 336 U.S. 281, 285 (1949); *McKeel v. Islamic Republic of Iran*, 722 F.2d 582 (9th Cir. 1983); *Meredith v. United States*, 330 F.2d 9, 11 (9th Cir. 1964); *Commodity Futures Trading Comm'n v. Nahas*, 738 F.2d 487, 493 (D.C. Cir. 1984)).

38. 647 F.2d 1345, 1366-67 (D.C. Cir. 1981).

39. *Id.* at 1367 (footnote omitted).

40. 748 F. Supp. 749 (D. Haw. 1990).

open question."⁴¹ In *Greenpeace*, the court, looking to the language of NEPA, determined that its purpose was "[t]o declare a national policy which will encourage productive and enjoyable harmony between man and his environment."⁴² Additionally, the court looked to NEPA's requirements that an environmental impact statement be prepared by all federal agencies on all major federal actions "affecting the quality of the human environment,"⁴³ and the requirement that federal agencies "recognize the worldwide and long-range character of environmental problems."⁴⁴ After this examination, the court was "convinced that Congress intended to *encourage* federal agencies to consider the global impact of domestic actions and *may* have intended under certain circumstances for NEPA to apply extraterritorially."⁴⁵

c. *Balance and Separation of Powers*

Thus far, the courts have approached the concept of the extraterritorial application of NEPA "tentatively" at best.⁴⁶ Indeed, some courts have simply assumed that NEPA is applicable in certain situations rather than directly addressing the issue.⁴⁷ This reluctance stems not only from the paucity of legislative history to the contrary, but also from the resulting need to consider the separation of powers issue. The reluctance of the judicial branch to interfere in foreign policy matters is long standing. For example, in the 1973 case of *People of Enewetak v. Laird*,⁴⁸ a case involving the application of NEPA to American trust territories, the court easily reached the conclusion that

41. See, e.g., *National Org. for Reform of Marijuana Laws (NORML) v. United States*, Dep't of State, 452 F. Supp. 1226, 1232 (D.D.C. 1978).

42. *Greenpeace*, 748 F. Supp. at 759 (quoting 42 U.S.C. § 4321).

43. *Id.* (quoting 42 U.S.C. § 4332(2)(c)).

44. *Id.* (quoting 42 U.S.C. § 4332(2)(f)).

45. *Id.* (emphasis added).

46. See *Natural Resources Defense Council v. Nuclear Regulatory Comm'n*, 647 F.2d 1345, 1355 (D.C. Cir. 1981) ("Construing the equivocal reach of NEPA abroad, however, is a judicial endeavor oft-encountered, but not yet fully realized by any court. We, too, will face this issue tentatively.").

47. See *National Org. for Reform of Marijuana Laws (NORML) v. United States*, Dep't of State, wherein the court avoided the issue of the application of NEPA in a foreign jurisdiction by "assum[ing] without deciding, that NEPA is fully applicable to the Mexican herbicide spraying program." 452 F. Supp. 1226, 1233 (D.D.C. 1978); see also *Sierra Club v. Adams*, 578 F.2d 389, 392 n.14 (D.C. Cir. 1978) ("[W]e need only assume, without deciding, that NEPA is fully applicable to construction in Panama. We leave resolution of this important issue to another day.").

48. 353 F. Supp. 811 (D. Haw. 1973).

trust territories fall under the obligatory jurisdiction of NEPA, but noted that, in this instance, there was "little, if any, need for concern about conflicts with United States foreign policy or the balance of world power."⁴⁹

Likewise, Judge Tamm, concurring in *Wilderness Society v. Morton*,⁵⁰ found "no problem with regard to separation of powers or interference with the conduct of foreign relations in the narrow questions presented"⁵¹ In that case, the court permitted a nonresident Canadian citizen to intervene in litigation involving NEPA application where the Canadian's interests would have been directly affected by the outcome of the litigation.⁵² Moreover, in *Natural Resources Defense Council v. Nuclear Regulatory Commission*,⁵³ the court called section 102(2)(F) a "prescription . . . toward cooperation," and even further qualified that gentle description by declaring that such prescription must be "in a manner consistent with our foreign policy."⁵⁴

Greenpeace USA v. Stone involved the movements of obsolete chemical weapons through Germany to the Johnston Atoll pursuant to a presidential agreement.⁵⁵ The court declined to find NEPA applicable because applying NEPA to actions on foreign soil "would result in grave foreign policy implications and would substantively interfere with a decision of the President and a foreign sovereign in a manner not intended or anticipated by Congress."⁵⁶ Significantly, however, the court hastened to add:

[T]his decision is limited to the specific and unique facts which are presented here. In other circumstances, NEPA may require a federal agency to prepare an EIS for action taken abroad, especially where [a] United States agency's action abroad has direct environmental impacts within this country, or where there has clearly been a total lack of environmental

49. *Id.* at 818. But see *People of Saipan v. United States Dep't of Interior*, 356 F. Supp. 645 (D. Haw. 1973), *aff'd as modified*, 502 F.2d 90 (9th Cir. 1974), *cert. denied*, 420 U.S. 1003 (1975) (holding NEPA inapplicable to federal agencies operating in the trust territory of the Pacific Islands, but not reaching balance of powers issues).

50. *Wilderness Society v. Morton*, 463 F.2d 1261 (D.C. Cir. 1972) (involving NEPA application to the Trans-Alaska pipeline).

51. *Id.* at 1263.

52. *Id.*

53. 647 F.2d 1345 (D.C. Cir. 1981).

54. *Id.* at 1366.

55. 748 F. Supp. 749 (D. Haw. 1990).

56. *Id.* at 752.

assessment by the federal agency or foreign country involved.⁵⁷

d. *Balancing Foreign Policy against U.S. Border and Health Issues*

Despite the judicial reluctance to openly find the extraterritorial application of NEPA per se, there has been no hesitation to bypass that issue when the health of American citizens was at stake. In *National Organization for the Reform of Marijuana Laws (NORML) v. United States*, the court reviewed a federal marijuana spraying program in Mexico that could potentially harm U.S. citizens who use marijuana.⁵⁸ The court, discussing neither foreign policy nor sovereignty issues, chose to assume NEPA extraterritorially.⁵⁹ One may assume that the court, although disinclined to explicitly state its rationale, was persuaded by the plaintiff's allegations of harm to U.S. citizens on both sides of the border.⁶⁰

Health issues also figured prominently in *Sierra Club v. Adams*,⁶¹ a case considering the adequacy of an EIS taken totally outside of the United States. Because the government prepared an extensive EIS, which included an assessment of impacts on native Americans living in Panama and Columbia, the applica-

57. *Id.* (second and third emphasis added).

58. 452 F. Supp. 1226 (D.D.C. 1978).

59. *Id.* at 1228-29. The court recited, without comment, the allegations of the plaintiff:

[M]any NORML members smoke marijuana, or ingest it in food or drink, and . . . Mexican grown marijuana consumed in this country has been found to contain significant levels of the herbicide paraquat which presents a serious health hazard to the marijuana user. It also claims that NORML members visit Mexico for recreational and professional purposes, and have an interest in insuring that the food and drink they consume in Mexico are free from potentially harmful herbicides; that NORML members have an interest in insuring that agricultural imports, including fruits, vegetables, and beef, are free from potentially harmful herbicides; and that NORML members who travel in Mexico have a recreational and aesthetic interest in insuring that areas of scenic beauty there are not harmed by herbicide usage.

Id.

In this unusual case, the plaintiff NORML acknowledged the criminal status of marijuana usage. *Id.* at 1229. Nonetheless, the court found a sufficient "informational interest" under NEPA for standing. *Id.* at 1230. Having established standing on one ground, the "plaintiff is entitled to a 'public interest' standing on other grounds." *Id.* This convoluted approach seems to indicate some underlying yet unspoken concern for the plaintiff's allegation of a "serious health hazard for a broad segment of the nation's citizenry." *Id.* at 1229.

60. *Id.* at 1228-29; see also *Greenpeace USA v. Stone*, 21 Env'tl. L. Rep. (Env'tl. L. Inst.) 20, 378 (D. Haw. Aug. 9, 1990) ("Defendants apparently conceded that NEPA applied insofar as the highway would have environmental impacts within the U.S.").

61. 578 F.2d 389 (D.C. Cir. 1978).

bility of NEPA was assumed.⁶² The court took notice of the fact that the construction of the Darien Gap highway, although entirely within Panama and Columbia, might cause the spread of aftosa, hoof and mouth disease commonly found in livestock, into the United States.⁶³ The court did state that

[T]he Darien Gap has served as an effective natural land barrier to the spread of the disease. . . . [A] cooperative agreement on aftosa control has been entered into by the United States and Panama, and numerous preventive measures have been taken, including the establishment of a forty-mile wide quarantine zone at the border.⁶⁴

However, alarmed by the potential spread of livestock disease into the United States, the court in its substantive review of the EIS, ignored foreign policy considerations, despite the intergovernmental agreement.⁶⁵ Moreover, the intrusive nature of the adequacy of a federally prepared EIS for a foreign country raised judicial concern for sovereignty issues.⁶⁶

The courts have taken judicial notice of the environmental impact's proximity to the United States.⁶⁷ In *National Resources Defense Council v. Nuclear Regulatory Comm'n*, the court expressed an interest in the physical location of the other country involved vis-à-vis the United States: "[t]he direction of the foreign antagonism runs against the petitioners themselves, who from non-adjacent America presume they can represent the Philippine environment."⁶⁸ And the importance of the geographic location of a country was implicit in the *Greenpeace USA v. Stone* decision that an EIS may apply where there would

62. *Id.* at 391, 392 n.14.

63. *Id.* at 395. See generally A. Dan Tarlock, *The Application of the National Environmental Policy Act of 1969 to the Darien Gap Highway Project*, 7 N.Y.U. J. INT'L L. & POL. 459 (1974) (extensive predecision review of the facts, case law and policy considerations of the project).

64. *Sierra Club*, 578 F.2d at 394-95 (emphasis added) (footnotes omitted).

65. *Id.*

66. *Id.* at 391 n.14 (the effect of highway construction on local Indians brings into question the applicability of NEPA to U.S. foreign country projects that produce local environmental impacts).

67. See *Wilderness Society v. Morton*, 463 F.2d 1261, 1262 (D.C. Cir. 1972) (per curiam).

68. *Natural Resources Defense Council v. Nuclear Regulatory Comm'n*, 647 F.2d 1345, 1367 (D.C. Cir. 1981) (emphasis added); see also R. David Kitchen, Comment, *NEPA's Overseas Myopia: Real or Imagined?*, 71 GEO. L.J. 1201 (1983) ("NEPA, case law, principles of domestic and international law, and foreign policy considerations support a far broader reading of NEPA than the NRDC court's narrow interpretation allows.").

be "direct environmental impacts within this country."⁶⁹ Thus, it appears that when federal action on foreign soil environmentally affects the United States, the EIS requirement may well be deemed applicable, barring exceptional foreign policy complications.⁷⁰

C. Consideration of General Statutory Applicability

1. Threshold Issues

In determining the applicability of NEPA to the FTA, the threshold question under the statute is whether the agreement is a "recommendation or report on proposals for legislation and other major Federal action significantly affecting the quality of the human environment, . . . which must be complied with by all federal agencies."⁷¹ The Council on Environmental Quality (CEQ) is charged with promulgating regulations to implement NEPA under Executive Order 11,991.⁷² CEQ has defined "federal agency,"⁷³ "legislation,"⁷⁴ "major Federal action,"⁷⁵ and "proposal."⁷⁶ The courts have acknowledged that "CEQ's interpretation of NEPA is entitled to substantial deference."⁷⁷

The FTA, after two years of negotiations, was agreed upon in principle on June 11, 1990. Three months later, President

69. *Greenpeace*, 748 F. Supp. 749, 761 (D. Haw. 1990). In an earlier opinion denying injunctive relief, the District Court looked to the location of the impacts and relied heavily on the *Natural Resources Defense Council* reasoning: "This court is persuaded by [the *NRDC* court's] deference to the careful decision made by the Congress and the Executive which would essentially be usurped by an application of NEPA extraterritorially to environmental impacts which fall primarily within the borders of a foreign country." *Greenpeace USA v. Stone*, 21 Env'tl. L. Rptr. (Env'tl. L. Inst.) 20,378, 20,380 (D. Haw. Aug. 9, 1990) (emphasis added).

70. Scholars have also noted judicial recognition of effects within the United States in the early cases. See *Gaines*, *supra* note 29, at 140 n.22.

71. 42 U.S.C. § 4332(2)(c).

72. Exec. Order No. 11,991 § 1(h), 3 C.F.R. 123, 124 (1977), reprinted in 42 U.S.C. § 4321 (1988).

73. 40 C.F.R. § 1508.12 (1991).

74. *Id.* § 1508.17.

75. *Id.* § 1508.18.

76. *Id.* § 1508.23.

77. *Andrus v. Sierra Club*, 442 U.S. 347, 358 (1979). See generally Note, *NEPA after Andrus v. Sierra Club: the Doctrine of Substantial Deference to the Regulations of the Council on Environmental Quality*, 66 VA. L. REV. 843, 876 (1980) (some of CEQ's interpretations of NEPA should not be accorded substantial deference, particularly if CEQ exceeded NEPA mandate); Melanie Fisher, *The CEQ Regulations: New Stage in the Evolution of NEPA*, 3 HARV. ENVTL. L. REV. 347 (1978) (discussing means by which CEQ pursues goal of furthering the national policy to protect and enhance the quality of the human environment).

Bush officially informed the Senate Finance Committee and the House Ways and Means Committee of his interest in negotiating an FTA with Mexico. He requested an up-or-down congressional vote within sixty days of the proposed agreement, pursuant to the fast-track proviso in section 1103(B) of the Omnibus Trade Act of 1988 (the Trade Act).⁷⁸ Though some commentators have argued that this process results in "more congressional involvement and consultation during negotiations,"⁷⁹ the very nature of this provision may lead to complications in the application of NEPA.⁸⁰

a. Duties of the Office of the USTR

By statute, the Office of the United States Trade Representative (Office of the USTR) is "established within the Executive Office of the President."⁸¹ The Office of the USTR has "primary responsibility for developing, and for coordinating the implementation of, United States international trade policy . . ."⁸² In addition, the Office of the USTR serves as the "principal advisor to the President on international trade policy"⁸³ and has "the lead responsibility for the conduct of, and shall be the chief representative of the United States for, international trade negotia-

78. 29 U.S.C. § 2903 (1988).

79. "Indeed, the fast-track statute requires the Administration to consult with every House and Senate committee and joint committee that has jurisdiction over legislation involving any of the subject matters that would be affected by the FTA. Given the potentially vast scope of a U.S.-Mexican agreement, this requirement gives a great proportion of Congressional committees a role in the shaping of the FTA." Stewart A. Baker & Jeffrey P. Bialos, *U.S.-Mexico Trade Talks: A Preview*, 20 INT'L L. NEWS 1, 6 (1991).

As Senator Baucus noted for the record:

The fast track is an arrangement under which the Congress agrees to vote up or down on a trade agreement negotiated by the administration without offering amendments within 90 days after the agreement is formally submitted to Congress. In return for the guarantee of a vote, the administration agrees to consult closely with the Congress on objectives and strategy in the negotiations. The administration also agrees to allow the congressional committees of jurisdiction to draft the implementing legislation for the agreement.

The fast track is a necessity under our Constitution because power on trade matters is divided between the President and the Congress. The arrangement is a thoughtfully crafted balance that allows the administration to negotiate trade agreements while preserving the rights of Congress.

137 CONG. REC. S2585 (daily ed. Mar. 5, 1991).

80. See *infra* notes 109-17 and accompanying text.

81. 19 U.S.C. § 2171(a) (1988).

82. *Id.* § 2171(c)(1)(A) (listing duties of the trade representative).

83. *Id.* § 2171(c)(1)(B).

tions."⁸⁴ The Office of the USTR is also required to "issue and coordinate policy guidance to departments and agencies on broad issues of policy"⁸⁵ and is "responsible for making reports to Congress" with respect to international trade negotiations.⁸⁶ The Office of the USTR has a statutory requirement to keep congressional representatives "currently informed" on trade negotiations⁸⁷ and to consult with congressional committees on "trade policy."⁸⁸ Clearly, the statutory role of the Office of the USTR may prove to be of vital importance in determining the general applicability of NEPA.

b. Role of the Department of Commerce

The statutory and actual role of the Commerce Department may also be legally important in finding NEPA applicable. Reorganization Plan Number 3 of 1979,⁸⁹ prepared by President Carter pursuant to the Trade Act of 1974,⁹⁰ declares that the Secretary of Commerce "shall have . . . *assigned by law* . . . general operational responsibility for major nonagricultural trade functions of the United States including export development . . . export controls . . . and monitoring compliance with international trade agreements to which the United States is a party."⁹¹ The President's message places responsibility for coordination and negotiation with the Executive Office, while placing operations and implementation responsibilities with the Department of Commerce.⁹² Executive Order Number 12,188, delineating International Trade Functions,⁹³ continued the Trade Policy Committee,⁹⁴ a committee with the function of issuing policy guidance to departments and agencies on, among other things, bilateral trade.⁹⁵ The Secretary of Commerce is vice-chair to the

84. *Id.* § 2171(c)(1)(C).

85. *Id.* § 2171(c)(1)(D).

86. *Id.* § 2171(c)(1)(C), (F), (H).

87. *Id.* § 2211(b)(1).

88. *Id.* § 2211(c).

89. Reorganization Plan No. 3 of 1979, 44 Fed. Reg. 69,273 (1979).

90. 19 U.S.C. §§ 2101-2495.

91. 44 Fed. Reg. 69,273, 69,274 § 2(a) (emphasis added). This plan centralized international trade policy development, coordination and negotiation functions in the Office of the Executive, simultaneously renaming the Special Trade Representative the USTR.

92. *Id.*

93. Exec. Order No. 12,188, 3 C.F.R. 131 (1981).

94. *Id.* § 1-102.

95. Reorganization Plan No. 3, 44 Fed. Reg. 69,273 § 1(b)(3).

Office of the USTR on this Committee.⁹⁶

The Trade Act further provides that "[b]efore any trade agreement is entered into under Section 2133 . . . or Section 2902 . . . the President shall seek information and advice" on the agreement from certain enumerated federal agencies, including the Department of Commerce and the Office of the USTR.⁹⁷ The fundamental role of the Department of Commerce as a federal agency in trade matters is also emphasized by another Executive Order. Citing the authority of the Trade Act, President Reagan issued Executive Order Number 12,661, Implementing the Omnibus Trade and Competitiveness Act of 1988 and Related International Trade Matters.⁹⁸ This Order created an Interagency Group on Countertrade, chaired by the Secretary of Commerce.⁹⁹ Thus, although the Office of the USTR has been statutorily designated as having the lead role in trade negotiations, the Commerce Department has an integral part as well.

2. "Federal Agency"

For NEPA to apply to a given case, a federal agency must be involved in the action.¹⁰⁰ "Federal Agency" is defined under CEQ regulations as "all agencies of the Federal government."¹⁰¹ The definition specifically excludes "Congress, the Judiciary, [and] the President, including the performance of staff functions for the President in his Executive Office."¹⁰²

By statute, the Office of the USTR is explicitly placed "within the Executive Office of the President."¹⁰³ The question arising, then, is whether the phrase "all agencies of the federal government" under section 102(2) of NEPA includes agencies of the Executive Office. The legislative history of NEPA strongly

96. The Committee also is composed of the Secretaries of State, Treasury, Defense, Interior, Agriculture, Labor, Transportation, and Energy; the Attorney General; the Director of the Office of Management and Budget; the Chairman of the Council of Economic Advisors; the Assistant to the President for National Security Affairs; and the Director of the U.S. International Development Cooperation Agency. *Id.* § 1-102(b)(3)-(15).

97. 19 U.S.C. § 2152. The Departments of Agriculture, Commerce, Defense, Interior, Labor, State, and the Treasury are included.

98. Exec. Order No. 12,661, 3 C.F.R. 618 (1989), *as amended* Exec. Order No. 12,697, 3 C.F.R. 243 (1990).

99. Exec. Order No. 12,661 § 2-101(1), 3 C.F.R. 618 (1989).

100. 40 C.F.R. § 1500.1 (1991).

101. *Id.* § 1508.12.

102. *Id.*

103. 19 U.S.C. § 2171(a).

supports a broad interpretation of the term "all agencies."¹⁰⁴

Although the issue of NEPA applicability to a federal executive agency has not been litigated, the Court of Appeals for the District of Columbia has addressed the issue of what is a federal agency within the Executive Branch in *Soucie v. David*.¹⁰⁵ In *Soucie*, the court looked to the role of the Office of Science and Technology (OST) to determine if it had an "independent function," noting that "if the . . . sole function [of OST] were to advise and assist the President," such a function might be an 'indication' that OST is part of the President's staff and not a separate agency."¹⁰⁶ The court found "by virtue of its independent function of evaluating federal programs, the OST must be regarded as an agency subject to the APA [Administrative Procedure Act] and the Freedom of Information Act."¹⁰⁷ Similarly, in reviewing the Office of the USTR, a court would look to the functions delineated by the statute, including such independent responsibilities as reporting directly to Congress and consulting with congressional committees.¹⁰⁸ Thus, the court's finding that OST had independent agency status may also argue for a finding of independent agency status for the Office of the USTR, creating federal agency status sufficient for NEPA application.

However tempered it may be by the position of legislators in the consultative process, the Office of the USTR maintains a leading role in negotiating and shaping trade policy. Thus, the argument that congressional influence during trade negotiations dilutes a finding of federal agency action would seem to fail. Given the substantial statutory authority for the Office of the USTR to coordinate and direct other agency actions, as well as to perform a number of other significant duties, it would seem that the Office of the USTR may be found to have functions independent of advising the President. Therefore, a finding of "federal agency" status under the NEPA statute is at least plausible. Moreover, such a finding would be consistent with the established congressional intent under NEPA to reach all federal decisionmaking.¹⁰⁹ Senator Jackson's repeated statements regarding the purpose of NEPA, discussed previously, clearly

104. See *supra* notes 11-21 and accompanying text.

105. 448 F.2d 1067 (D.C. Cir. 1971).

106. *Id.* at 1075.

107. *Id.*

108. For evidence of this need for coordination and development within the Executive Office, see *supra* notes 81-87 and accompanying text.

109. See Dreyfus & Ingram, *supra* note 14, at 246.

demonstrate that the word "agency" in the statute was meant to include all federal action.¹¹⁰

It is the CEQ regulations that might arguably block a finding of agency status.¹¹¹ Such regulations are given due deference by the courts. However, a court's first duty is to arrive at the congressional intent under the statute of "agencies of the federal government." A court, broadly interpreting "agency" under *Soucie v. David*,¹¹² could find sufficient independent action for NEPA to attach. In making that determination, a court may consider the purpose of the CEQ regulations.

The implicit concern of CEQ that a court would have to face would be the constitutional right of the executive branch to conduct its duties in an unhampered fashion. This issue becomes more complex in the area of foreign policy. Would a finding of agency status with respect to the Office of the USTR impose an unwarranted intrusion upon the constitutional responsibilities of the executive branch?¹¹³

Given CEQ's historical attempts to expand rather than contract the reach of NEPA, the irony of such a result would be overwhelming. In fact, a review of the arguments put forth by congressional advocates of fast-track negotiation supports the contention that recognition of the application of NEPA through a recognition of agency status for the Office of the USTR would not create any interference with the ability of the Office of the USTR to negotiate a trade agreement such that a separation of powers issue would arise. As Senator Max Baucus (D-Montana) has noted, the fast-track method is designed to create greater discussion such that the final product proposed for the up-or-down congressional vote is a result of consultation and compromise.¹¹⁴ That very process provides an appropriate forum for consideration of an EIS and a mechanism for timely adjustment of the FTA as a result of a review of environmental issues. This, in essence, is the purpose of NEPA.

Furthermore, in any consideration of foreign policy and NEPA, a court must look for judicial guidance to the applica-

110. See *supra* notes 17-21 and accompanying text.

111. 40 C.F.R. § 1508.12.

112. *Soucie*, 448 F.2d at 1067.

113. The court may object to a finding of federal agency status for the Office of the USTR on national security grounds. Carla Hills, the current USTR, recently invoked the use of national security interests to limit the trade information made available to Congress.

114. 137 CONG. REC. S2585 (daily ed. Mar. 5, 1991) (statement of Sen. Baucus).

tion of NEPA in extraterritorial cases. The decisive weight given to the health of American citizens, particularly when the harm was geographically nearby, rather crisply checks reliance on foreign policy concerns.¹¹⁵ Such precedents are particularly valid when the court may additionally point to the recent history of United States-Mexican agreements that endorse cooperative action on joint environmental concerns.¹¹⁶ Indeed, such agreements further negate the notion that EIS preparation would create a disturbing impact on foreign policy. Thus, an EIS prepared in the fast-track context fails to raise substantial claims of foreign policy intrusion which would block a finding of agency for the Office of the USTR on explicit or implicit separation of powers grounds.

Should the Office of the USTR fail to meet the NEPA federal agency standard, the role of the Commerce Department would have to be closely reviewed. The Commerce Department has publicly participated in FTA discussions, if not in negotiations. A study of the statutes further discloses the active role of the Commerce Department anticipated by Congress in trade

115. See *supra* notes 58-60 and accompanying text.

116. See, e.g., Agreement between the United States of America and the United Mexican States on Cooperation for the Protection and Improvement of the Environment in the Border Area, Aug. 14, 1983, U.S.-Mex., T.I.A.S. No. 10,827, 10,827 (effective Feb. 16, 1984). For a discussion thereof, see Gonzalez & Rodriguez, *supra* note 12, at 663-64, n.15. The 1983 Border Environmental Agreement spawned five Annexes relating to wastewater treatment facilities, joint response to accidental release of hazardous waste, transboundary shipment of hazardous wastes, smelter emissions, and urban air pollution. Additionally, three cooperative agreements have been signed protecting natural resources in the border: Agreement between the Directorate General of Natural Resources of SEDUE and the U.S. Fish and Wildlife Service for Cooperation in the Conservation of Wildlife (1984); Memorandum of Understanding between SEDUE and the U.S. National Park Service on Cooperation in Management and Protection of National Parks and Other Protected Natural and Cultural Heritage Sites (1988); and Memorandum of Understanding among the Directorate General of Natural Resources of SEDUE and the U.S. Fish and Wildlife Service and the Canadian Wildlife Service of the Department of the Environment of Canada to Evaluate the Possibilities of Developing Strategies for Conservation of Migratory Birds and their Habitats (1988).

The Treaty Relating to the Utilization of Waters of the Colorado and Tijuana Rivers and of the Rio Grande, Feb. 3, 1944, 59 Stat. 1219, 3 U.N.T.S. 313, and subsequent International Boundary and Water Commission Minutes thereto showcase bilateral cooperation in water issues. More importantly, the Integrated Environmental Plan for the Mexico-U.S. Border Area issued by EPA and SEDUE (Working Draft, Aug. 1, 1991) highlights the cooperative nature of the relationship between the two countries on environmental issues. For a detailed review of Mexican-U.S. environmental laws and agreements, see Sinclair, *supra* note 12, at 104-11, 125-27.

The affected U.S. states are Texas, New Mexico, Arizona, and California. The Mexican states include Tamaulipas, Nuevo Leon, Coahuila, Chihuahua, Sonora, and Baja California. For a review of the major transboundary pollution problems, see *id.*

matters.¹¹⁷ Therefore, the active role of the Commerce Department in the FTA may well provide ample basis for the court to find the requisite "federal agency" action sufficient to invoke NEPA.

3. "Major Federal Action"

The thrust of the regulations in the "Major Federal action" section of CEQ is to encompass the policy-making function of the government as intended by NEPA legislators.¹¹⁸ In defining "Major Federal action," CEQ specifically included "treaties and international conventions or agreements."¹¹⁹ Therefore, one could argue that the FTA, as a final agreement presented to Congress, falls within the parameters of the Act as interpreted by CEQ. It is questionable, however, whether the sixty-day consideration period allotted to Congress would allow for the preparation of an EIS.¹²⁰

Assuming *arguendo* that the fast-track nature of the agreement process creates a practical hurdle to EIS preparation at the final stage, the legal status of the negotiations per se would appear to be pivotal in finding federal agency action. That murky issue may be placed aside, however, when NEPA is reexamined. Notwithstanding the fact that NEPA mandates an EIS for "every recommendation or report on proposals for legislation and other major Federal actions," government agencies and the courts have heretofore approached NEPA application with emphasis upon "major federal action."¹²¹ Nevertheless, the ongoing reports by the Office of the USTR to Congress on the intended FTA appear to be appropriate and sufficient for NEPA application to attach.

117. See *supra* notes 89-99 and accompanying text. The Secretary of Commerce, Robert Mosbacher, has played an active role in encouraging the FTA, meeting with President Carlos Salinas de Gortari and other Mexican officials. Mark Smith, *Mosbacher Launches Free Trade Campaign in Mexico*, Hous. Chron., Apr. 18, 1991, at 2B.

118. See 40 C.F.R. § 1508.18.

119. 40 C.F.R. § 1508.18(b)(1). The Department of State has complied with NEPA on international treaties, e.g., the U.S.-Panama Canal Treaties, the renegotiation of the International Convention for the High Seas Fisheries of the North Pacific Ocean, and the Interim Convention on Conservation of North Pacific Fur Seals.

120. For a discussion of direct statutory conflict, see *infra* notes 146-59 and accompanying text.

121. 42 U.S.C. § 4332(2)(c); see *infra* note 17.

4. Report on Proposals for Legislation

In an attempt to avoid opening a Pandora's box, the statutory provision of CEQ regulations requiring an EIS for reports on proposals for legislation has been ignored by federal agencies.¹²² Nonetheless, in the instant situation, such hesitation to apply the statutory language would appear to thwart the purposes of NEPA.

The Trade Act obligates the Office of the USTR "to report to Congress" on trade negotiations.¹²³ These ongoing reports to Congress arguably constitute a "report on a proposal for legislation" such that a court could find NEPA to be applicable.¹²⁴ This conclusion is supported by the fact that the final trade agreement is unquestionably grounds for NEPA application under the CEQ interpretation of major federal action. To deny NEPA application to the Office of the USTR reports to Congress in the fast-track trade agreement process would be to deliberately exclude the consideration of environmental impacts "on the supra-agency level at which policy formulation in fact occurs."¹²⁵

The CEQ definition of "proposal" lends further support to NEPA application. The definition states that a proposal exists "at that stage in the development of an action when an agency subject to the Act has a goal and is actively preparing to make a decision on one or more alternative means of accomplishing that

122. 42 U.S.C. § 4332(2)(c). See generally Ian M. Kirschner, Note, *NEPA's Forgotten Clause: Impact Statements for Legislative Proposals*, 58 B.U. L. REV. 560 (1978) (citing lack of judicial enforcement of the legislative proposal clause of NEPA as the cause for lack of compliance by federal agencies).

123. 19 U.S.C. § 2171(c)(1)(C), (F), (H); see also *id.* § 2211(b)(1) (requiring the Office of the USTR to keep Congress informed); *id.* § 2211(c) (requiring reports to appropriate congressional committees on trade policy issues).

124. The instant application (to the FTA) is clearly not an "appropriation request." The distinction is important because the Supreme Court has ruled that "appropriation requests constitute neither 'proposals for legislation' nor 'proposals for . . . major Federal actions . . .'" *Andrus v. Sierra Club*, 442 U.S. 347, 364-65 (1979). The *Andrus* Court noted that "[s]ection 102(2)(C) is thus best interpreted as applying to those recommendations or reports that actually propose programmatic actions . . ." *Id.* at 362. The argument that the FTA's reports to Congress are recommendations or reports, which actually propose programmatic actions sufficient to apply NEPA's EIS requirements must be advanced. This article will not further review the programmatic EIS which may well be appropriate for the facts herein.

125. Comment, *NEPA and Federal Policy-Making: NRDC v. Morton, Legislative Impact Statements, and Better NEPA Procedures*, [1972] 2 *Envtl. L. Rep.* (Envtl. L. Inst.) 10,038, 10,042 (April 1972).

goal and the effects can be meaningfully evaluated."¹²⁶ The Office of the USTR has stated its goal and is actively preparing to make decisions in the negotiating process to accomplish that goal. The reports would thereby appear to meet the language of the statute. Again, should the Office of the USTR not be found to be a federal agency for the purpose of NEPA application, the degree of participation by the Commerce Department in preparing such reports must be closely examined.

The regulations define "legislation" as "a bill or legislative proposal to Congress developed by or with the significant cooperation and support of a Federal agency."¹²⁷ The test for "significant cooperation" is whether the proposal is "in fact predominantly that of the agency rather than another source."¹²⁸ Assuming *arguendo* that the Office of the USTR is not judicially accorded "agency" status, the FTA proposal would thereby be that of "another source," namely that of the Trade Representative who is serving in a staff function for the President. Under such an interpretation, the FTA would be excluded under this proviso of the CEQ unless the participation of the Commerce Department was deemed sufficient. A determination by the courts regarding the degree of participation required by a federal agency to meet the requirements of the regulations may be necessary.¹²⁹ Moreover, in making that determination a court may well conclude that, although the regulations should be given significant deference, they are not to be interpreted in a way that would prevent application of the statute as intended by Congress.¹³⁰ Senator Jackson's testimony on the floor demanding that "every Federal action" consider environmental concerns¹³¹ could weigh heavily toward a finding of Commerce Department participation sufficient to meet a significant cooperation test. In addition, the CEQ definition of legislation includes "requests for ratification of treaties."¹³² Although the FTA may not be a treaty, the broad scope of the regulation argues for an interpreta-

126. 40 C.F.R. § 1508.23.

127. *Id.* § 1508.17.

128. *Id.*

129. The regulations provide little guidance on this point, declaring only that "[d]rafting does not by itself constitute significant cooperation." *Id.*

130. See generally Note, *NEPA after Andrus v. Sierra Club: The Doctrine of Substantial Deference to the Regulations of the Council on Environmental Quality*, 66 VA. L. REV. 843 (1980).

131. *Dreyfus & Ingram*, *supra* note 14, at 246 (quoting Sen. Jackson).

132. 40 C.F.R. § 1508.17.

tion of pending legislation that is consistent with the CEQ definition of major action, which includes "treaties and international conventions and agreements."¹³³

5. "Significantly Affecting the Human Environment"

The CEQ regulations define both "significantly"¹³⁴ and "affecting the human environment."¹³⁵ Although courts have frequently presided over disputes involving the interpretation of the term "significantly," the environmental impacts within the United States resulting from the Mexico-United States Free Trade Agreement would most likely meet the two-part test set out in *Hanly v. Kleindienst*.¹³⁶ In that case, the Court of Appeals for the Second Circuit stated:

[I]n deciding whether a major federal action will 'significantly' affect the quality of the human environment, the agency in charge, although vested with broad discretion, should normally be required to review the proposed action in the light of at least two relevant factors: (1) the extent to which the action will cause adverse environmental effects in excess of those created by existing uses in the area affected by it, and (2) the absolute quantitative adverse environmental effects of the action itself, including the cumulative harm that results from its contribution to existing adverse conditions or uses in the affected area.¹³⁷

Commentators, observing that the FTA surely will contribute to increased environmental impacts, have widely reported on the current environmental border conditions.¹³⁸

6. Timeliness

The next hurdle relates to timeliness. Courts have looked to the timeliness of an action with an eye to ripeness, while recognizing that filing an EIS late in the agency decisionmaking

133. *Id.* § 1508.18(b)(1).

134. *Id.* § 1508.27.

135. *Id.* § 1508.14.

136. 471 F.2d 823 (2d Cir. 1972), *cert. denied*, 412 U.S. 908 (1973).

137. *Id.* at 830-31.

138. See Dianna Solis, *Mexico Cracks Down on Pollution, Spurred in Part by Trade Politics*, WALL ST. J., Feb. 10, 1992, at A12; Edward Cody, *Expanding Waste Line Along Mexico's Border*, WASH. POST., Feb. 17, 1992, at A1; Lori Rodriguez, *Bush Denies Mexican Trade Pact Will Cost American Jobs*, HOUS. CHRON., Apr. 9, 1991, at 1A, 4A; John Gravois, *Bush Talks Tough on Pollution*, HOUS. POST., Jan. 24, 1992, at A1, A14; Bentsen Seeks Funding, HOUS. POST., Jan. 16, 1992, at A8; see generally BORDER PLAN, *supra* note 11.

process would defeat the purpose of NEPA.¹³⁹ Thus, courts have defined federal action as taking place "whenever an agency makes a decision which permits action by other parties which will affect the quality of the environment."¹⁴⁰

On the issue of when an EIS is required, the Supreme Court has repeatedly turned to the statutory language of section 102(2)(C) to assert that a "proposal," not the mere study or contemplation of a project, is required.¹⁴¹ The oft-stated intention of both President Bush and USTR Carla Hills to conclude the FTA as rapidly as possible would underscore the concrete nature of FTA reports to Congress, thereby triggering statutory application.

7. NEPA Exemptions

a. Section 104

The sole basis for statutory exemption from NEPA is contained in section 104, which provides that NEPA shall not interfere with "specific statutory obligations of any Federal agency."¹⁴² In the seminal case of *Calvert Cliffs' Coordinating Committee, Inc. v. United States Atomic Energy Commission*,¹⁴³ the Court of Appeals for the District of Columbia determined that section 104 "relieve[d] an agency of its NEPA duties only if other 'specific statutory obligations' clearly preclude performance of those duties."¹⁴⁴ It must be noted, however, that Con-

139. See *Kleppe v. Sierra Club*, 427 U.S. 390, 401, 405 (1976). See generally Richard A. Johnston, *Kleppe v. Sierra Club: An Environmental Planning Catch-22?*, 1 HARV. ENVTL. L. REV. 182 (1976) (discussing the balancing of environmental and other national policy considerations).

140. *Scientists' Inst. for Pub. Info., Inc. v. Atomic Energy Comm'n*, 481 F.2d 1079, 1088 (D.C. Cir. 1973).

141. See *Kleppe*, 427 U.S. at 401-02 n.n.12-13, 406; see also *Aberdeen & Rockfish R.R. v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 422 U.S. 289, 320 (1975).

142. 42 U.S.C. § 4334 provides:

Nothing in Sections 4332 or 4333 of this title shall in any way affect the specific statutory obligations of any Federal agency (1) to comply with criteria or standards of environmental quality, (2) to coordinate or consult with any other Federal or State agency, or (3) to act, or refrain from acting contingent upon the recommendations or certification of any other Federal or State agency.

143. 449 F.2d 1109 (D.C. Cir. 1971).

144. *Id.* at 1125. The court's review of the legislative history of § 104 indicates the section's "overriding purpose was to prevent NEPA from eclipsing obedience to more specific standards under WQIA [Water Quality Improvement Act of 1972]"; it was thus designed to eliminate a lack of NEPA deference to more specific environmental controls imposed by other statutes. *Id.* at 1125.

gress has also passed legislation specifically exempting an agency project from NEPA compliance.¹⁴⁵

b. Direct Statutory Conflict

Exemption from NEPA has also been asserted where a federal agency has cited direct statutory conflict with its enabling legislation. This potential challenge is troublesome. The Supreme Court in *Flint Ridge Development Co. v. Scenic Rivers Ass'n of Oklahoma*,¹⁴⁶ looked to the requirement of the Interstate Land Sales Full Disclosure Act¹⁴⁷ (the Disclosure Act) that developers file a statement of record with the Department of Housing and Urban Development which would automatically become effective thirty days after filing unless incomplete or materially inaccurate.¹⁴⁸ The Court reviewed CEQ reports and found it "inconceivable" that an EIS "could, in thirty days, be drafted, circulated, commented upon, and then reviewed and revised in light of the comments."¹⁴⁹ The Court considered the "to the fullest extent possible" language of NEPA section 102¹⁵⁰ and framed the question as "whether, assuming an environmental impact statement would otherwise be required in this case, requiring the Secretary to prepare such a statement would create an irreconcilable and fundamental conflict with the Secretary's duties under the Disclosure Act."¹⁵¹

Noting that the thirty day time limit of the Disclosure Act was "designed to protect developers from costly delays" and that requiring an EIS filing generally would result in such delays, the Court held NEPA's impact statement requirement to be inapplicable where "there would be a clear and fundamental conflict of statutory duty."¹⁵² The Court reviewed the legislative

145. See, e.g., 15 U.S.C. § 793(d) (1988) (transmission facilities at specified site); 45 U.S.C. § 791(c) (1988) (action before final date of railroad system plan); 15 U.S.C. § 719h(c) (judicial review of adequacy of impact statements on Alaska pipeline precluded); see also *Earth Resources Co. of Alaska v. Federal Energy Regulatory Comm'n*, 617 F.2d 775, 779-80 (1980) (upholding congressional exemption); *Wilderness Soc'y v. Morton*, 479 F.2d 842, 884 (D.C. Cir. 1973), cert. denied, 411 U.S. 917 (precluding judicial review of adequacy of an EIS).

146. 426 U.S. 776 (1976).

147. 15 U.S.C. §§ 1701-1720.

148. *Flint Ridge*, 426 U.S. at 780-81 (quoting 15 U.S.C. § 1706(b)).

149. *Id.* at 788-89.

150. Section 102 provides all agencies shall comply "to the fullest extent possible."
42 U.S.C. § 4332.

151. *Flint Ridge*, 426 U.S. at 788.

152. *Id.* at 791.

history of section 102 and declared that the section recognizes that where "a clear and unavoidable conflict in statutory authority exists, NEPA must give way."¹⁵³ Indeed, as noted in *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*,¹⁵⁴ "NEPA was not intended to repeal by implication any other statute."¹⁵⁵ Accordingly, in its conclusion the Supreme Court referred to the requirements of the Disclosure Act on environmental aspects of a subdivision. Thus, it is arguable that the Court was convinced adequate environmental safeguards already existed. Believing that costly delay would defeat the economic purpose of the Disclosure Act, the Court, in a hostile reading of the legislative history, found the grounds for a limiting interpretation of section 102.¹⁵⁶

In the FTA situation, with the fast-track authorization extended for another two years, a thoughtful litigator may well raise serious questions under *Flint Ridge Development Co. v. Scenic Rivers Ass'n* if federal action is found to apply only to the final agreement. The enabling legislation for the fast-track actions of the Office of the USTR, by its very nature, compels an overwhelming consideration regarding timeliness in the filing of an EIS on the FTA.¹⁵⁷ If the filing were to impede the fast-track process there arguably would be "a clear and fundamental conflict of statutory duty."¹⁵⁸ Moreover, there is the issue that the enabling legislation further underscores the notion that the

153. *Id.* at 788.

154. 412 U.S. 669 (1973).

155. *Id.* at 694. The Court reasoned that "[t]o allow judicial suspension for noncompliance with NEPA, would disturb this careful balance of interests. . . . [And g]ranting an injunction . . . based on noncompliance with NEPA . . . would deprive the railroad of vitally needed revenues and result in an unjustified windfall to shippers." *Id.* at 697. Thus, the economic effect on the railroad was pivotal.

156. But see *Jones v. Gordon*, 792 F.2d 821 (9th Cir. 1986), in which an action was brought challenging issuance of a permit by the Secretary of Commerce authorizing Sea World to capture killer whales for purposes of scientific research and public display without preparation of an EIS. The published regulations require issuance or denial of a permit within 90 days of publication. In a de novo review of whether *Flint Ridge* applied 16 U.S.C. § 1374(d)(6) to support the contention that the mandatory time limits of the Marine Mammal Protection Act, 16 U.S.C. § 1374(d)(6)(1988), conflict irreconcilably with NEPA, the court referred to the legislative history cited in *Flint Ridge*. *Id.* at 825-82. Yet the *Jones* court held that "it appears to be the congressional desire that we make as liberal an interpretation as we can to accommodate the application of NEPA." *Id.* at 826. The court ruled that *Flint Ridge* "applies only when a conflict is 'clear and unavoidable' and 'irreconcilable and fundamental.'" *Id.* In this fact situation, the agency could reconcile the conflict by not publishing the permit application until the EIS was completed. *Id.*

157. *Flint Ridge*, 426 U.S. at 791.

158. *Id.*

agreement is a function of the Executive Office of the President and thereby exempted from NEPA application.¹⁵⁹

c. *"To the Fullest Extent Possible"*

Nonetheless, citing precisely the same passage, the argument could be advanced that the legislative history also permits emphasis to be given to the stated congressional intent that "all agencies of the Federal Government shall comply . . . 'to the fullest extent possible' . . . and that no agency shall utilize an *excessively narrow construction of its existing statutory authorizations* to avoid compliance."¹⁶⁰ Further, it could be argued that the phrase "to the fullest extent possible" should be read plainly to demand an EIS of whatever scope possible within the time parameters of the federal action.

The adequacy of such an EIS under existing case law may be challenged,¹⁶¹ but the response would be that by mention of "the fullest extent possible" in section 102, Congress provided for a tailoring of the EIS to meet the federal action at hand and that such flexibility was deliberate and consistent with the purpose of the statute. Conversely, to preclude NEPA application on presupposed adequacy grounds would be tantamount to bold-faced obstruction under the guise of fairness. A complete assessment of future EIS adequacy issues, however, is beyond the scope of this article.¹⁶²

d. *National Security*

The federal government has unsuccessfully attempted to establish a "national defense" exemption from NEPA.¹⁶³

159. But recall the proposed two-pronged counter argument that the Department of Commerce has played an active role and that the regulations explicitly include "treaties and agreements." See *supra* notes 89-98 and accompanying text.

160. *Flint Ridge Dev. Co. v. Scenic Rivers Ass'n of Oklahoma*, 426 U.S. 776, 788 (1976); see also *Jones v. Gordon*, 792 F.2d 821, 826 (9th Cir. 1986) (using the same passage).

161. See *Strycker's Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223, 225 (1980); *Robertson v. Methow Valley Citizen's Council*, 490 U.S. 332, 345-48 (1989); *Sierra Club v. Morton*, 510 F.2d 813, 819 (5th Cir. 1975).

162. On adequacy concerns, see generally Harold Leventhal, *Environmental Decisionmaking and the Role of the Courts*, 122 U. PA. L. REV. 509 (1974) (substantive review); Deborah L. Williams, *Benefit-Cost Analysis in Natural Resources, Decisionmaking: An Economic and Legal Overview*, 11 NAT. RESOURCES LAW. 761 (1979) (cost-benefit); Eugene Bardach & Lucian Pulglares, *The Environmental Impact Statement vs. the Real World*, 49 PUB. INTEREST 22 (1977) (inhibitive effect of regulation and the defensive response).

163. *Concerned About Trident v. Rumsfeld*, 555 F.2d 817, 823 (D.C. Cir. 1977)

Indeed, the courts have specifically ruled that there is no "national defense" exemption from NEPA.¹⁶⁴ The Supreme Court has, however, recognized the applicability of the Freedom of Information Act¹⁶⁵ exemption to the public disclosure requirement of the EIS under NEPA,¹⁶⁶ in *Weinburger v. Catholic Action of Hawaii*.¹⁶⁷ In *Weinburger*, the Court ruled that the Navy need not disclose classified matters relating to the storage of nuclear weapons.¹⁶⁸ The Court noted that FOIA was "intended by Congress to balance the public's need for access to official information with the Government's need for confidentiality."¹⁶⁹ What is unclear in the majority opinion, as Justice Blackmun points out in his concurrence is whether the Navy must prepare an EIS if it proposes to engage in activity which would significantly impact the environment even if that EIS need not be published under FOIA.¹⁷⁰ Blackmun declares such an EIS is required under NEPA, noting that the majority opinion is "rather oblique."¹⁷¹ He further states, "No exception is made for a confidential or classified proposal."¹⁷²

Under FOIA, three statutory exemptions may well apply to an EIS prepared by the Office of the USTR.¹⁷³ However, it appears that application of these exemptions should not remove the statutory obligation of the Office of the USTR to prepare an EIS assuming other threshold issues are met.¹⁷⁴

(finding no support in NEPA for a "national defense" exemption); *No GWEN Alliance of Lane County, Inc. v. Aldridge*, 855 F.2d 1380, 1384 (9th Cir. 1988) (holding there is no "national defense" except to NEPA).

164. *Concerned About Trident*, 555 F.2d at 823.

165. 5 U.S.C. § 522(b).

166. 42 U.S.C. § 4332(2)(c).

167. 454 U.S. 139, 144-45 (1981).

168. *Id.*

169. *Id.* at 144.

170. *Id.* at 147.

171. *Id.*

172. *Id.* at 148. On the issue of political question, the courts have ruled that a consideration of NEPA application to matters touching upon national defense is a justiciable question. *Romer v. Carlucci*, 847 F.2d 445, 463 (8th Cir. 1988); *No GWEN Alliance of Lane County, Inc. v. Aldridge*, 855 F.2d 1380, 1384 (9th Cir. 1988); see generally Douglas E. Baker, *Anticipating Lamm v. Weinberger II* (*Romer v. Carlucci*) *The Political Question Doctrine, MX Missiles, and NEPA's Environmental Impact Statement*, 21 CREIGHTON L. REV. 1245 (1987-88) (discussing of the application of the political question doctrine to NEPA).

173. *Weinburger v. Catholic Action of Hawaii*, 454 U.S. 139, 148 (1981).

174. 5 U.S.C. § 552(b) does not apply to matters that are

(1)(A) specifically authorized under criteria established by an Executive Order to

III. APPLICABILITY OF EXECUTIVE ORDER NUMBER 12,114

A. *History*

1. Initial Position

CEQ has long asserted that NEPA applies to international actions by federal agencies.¹⁷⁵ In a memorandum, however, CEQ stated that "national security or essential foreign policy considerations"¹⁷⁶ may necessitate "controlled circulation of environmental statements."¹⁷⁷ Although the memorandum acknowledged the existence of substantial interplay between foreign policy and environmental questions, it dismissed the issue, asserting that "NEPA provides sufficient procedural flexibility"¹⁷⁸

2. Issuance of Executive Order

Amidst agency furor over the CEQ guidelines,¹⁷⁹ President Carter, in an attempt to resolve conflicting views of foreign policy concerns sharply voiced by the State Department and environmental concerns strongly asserted by CEQ, issued Executive Order Number 12,114, "Environmental Effects Abroad of Major

be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive Order;

. . . .

(3) specifically exempted from disclosure by statute . . . provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishing particular criteria for withholding a reference to particular types of matters to be withheld;

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential.

19 U.S.C. § 2155(b) provides for protection of trade secrets and confidential information by the USTR.

175. In the 1973 guidelines, which at that time lacked the force of regulations, CEQ declared that NEPA applied to environmental impacts outside the United States. 40 C.F.R. § 1500.8(a)(3)(i) (1990); *see also* Memorandum to Heads of Agencies on Applying the EIS Requirement to Environmental Impacts Abroad, 42 Fed. Reg. 61,068 (1977) (recommending that agencies whose actions have environmental impacts abroad consult with CEQ regarding particular programs, procedures or proposals that might be influenced). For a review of CEQ action, *see* Christopher G. Lehmann, Note, *The International Application of the National Environmental Policy Act of 1969: A New Strategy*, 1979 WASH. U. L.Q. 1063, 1075-79.

176. Memorandum on the Application of the EIS Requirement to Environmental Impacts Abroad of Major Federal Actions, 42 Fed. Reg. 61,068, 61,069 (1977).

177. *Id.*

178. *Id.*

179. For an extensive review of the role of the State Department/CEQ controversy, *see* Robinson, *supra* note 34, at 258-69.

Federal Actions."¹⁸⁰ The required citation of authority clause¹⁸¹ declares that the Order was issued "by virtue of the authority vested in [the President] by the Constitution and the laws of the United States," thus deliberately avoiding naming the specific source of such authority.¹⁸² In the "Purpose and Scope" section, however, the Order stated:

[B]ased on independent authority, this order 'is to enable responsible officials of Federal Agencies . . . to be informed of pertinent environmental considerations and to take such considerations into account, with other pertinent considerations of national policy, in making decisions' [This] Order furthers the purpose of the National Environmental Policy Act¹⁸³

The Order further states that it is the government's "exclusive and complete determination" of procedures to be followed by federal agencies.¹⁸⁴ Additionally, the Order prohibits consideration of "social, economic and other environments" in assessing environmental impact.¹⁸⁵ Courts have recognized that such elements must be reviewed where there are domestic physical impacts.¹⁸⁶ Thus, it is acceptable to adhere to a more restricted review standard than that of the domestic application of NEPA.

NEPA's claim to legitimate extraterritorial application appears frustrated by the dilemmas inherent in the nebulous sta-

180. Exec. Order No. 12,114, 3 C.F.R. 356 (1979), reprinted in 42 U.S.C. § 4321 (1982). For a thorough analysis of the compromise nature of the Exec. Order, see Gaines, *supra* note 29, at 146.

181. All executive orders must cite statutory or constitutional source of authority. Exec. Order No. 11,030 § 1(b), 3 C.F.R. 610 (1959-1963), reprinted in 44 U.S.C. § 1505 (1976). For a discussion of the basis of executive order authority, see Pincus, *supra* note 30, at 642-45 (of particular significance is n.201, which contains judicial analysis of the President's authority for Exec. Order No. 12,114).

182. In *Indep. Meat Packers Ass'n v. Butz*, 526 F.2d 228 (8th Cir. 1975), cert. denied, 424 U.S. 966 (1976), the court noted that Presidential proclamations may have the force and effect of laws when issued pursuant to a statutory mandate or delegation of authority from Congress. *Id.* at 234. The court found that the Exec. Order "cites no specific source of authority other than the 'Constitution and laws of the United States.'" *Id.* at 235. Therefore, the court held the Order was simply "a managerial tool for implementing the President's personal economic policies and not . . . a legal framework enforceable by private civil action." *Id.* at 236. The court's language is strikingly similar to the enabling language chosen by President Carter in Exec. Order 12,114. Thus, there is an unavoidable fundamental issue as to the enforceability of the Exec. Order.

183. Exec. Order No. 12,114 § 1-1, 3 C.F.R. 356, 357 (1979).

184. *Id.*

185. *Id.* § 3-4.

186. When associated with a primary physical aspect, such impacts must be considered. See *City of Rochester v. United States Postal Serv.*, 541 F.2d 967, 973 (2d Cir. 1976).

tus conveyed upon it by the form of President Carter's order. While NEPA as domestic policy is acknowledged, the awkwardness concomitant with full-fledged support and recognition of NEPA as statutory authority for extraterritorial action is apparent. Despite pleas for a "higher order" approach to environmental concerns,¹⁸⁷ in a world dominated by traditional thought processes in the area of foreign policy, nations continue historical preoccupation with mapped boundary lines. Accepting that structural context as a given, the Order provides a less than forceful approach to potential ecological damage.

B. Applicability of Order to Trade Agreement

1. Provisions of the Order

Executive Order Number 12,114 requires environmental assessment for four types of federal actions having extraterritorial effects: section (a) deals with actions affecting the environment of the global commons, section (b) deals with effects on a non-participatory foreign nation, section (c) deals with toxic products and projects that produce or discharge toxins and "physical projects" that would be prohibited or subject to strict regulation in the United States, and section (d) deals with federal actions outside the United States that affect natural or ecological resources of global importance (including radioactive substances) which may be protected by international agreements by the President.¹⁸⁸ The question then becomes whether a trade

187. See, e.g., Harry H. Almond, *The Extraterritorial Effect of United States Regulatory Authority Over the Environmental Impacts of its Activities*, 44 ADMIN. L. REV. 739 (1980); Richard A. Falk, *Environmental Policy as a World Order Problem*, 12 NAT. RESOURCES J. 161 (1972); see also Gaines, *supra* note 29 at 136, which states:

In the ecological light that suffuses NEPA, political boundaries become irrelevant; evaluating environmental impacts occurring outside the United States has as much importance as evaluating impacts on the "national" environment. In the political light by which nations view each other, the boundaries of each nation's territory compose the structural elements of the world order.

188. Exec. Order No. 12,114 § 2-3, 3 C.F.R. 356, 357 (1979). Section 2-3 provides:

(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 produce, or physical project producing a principal product or an emission or effluent, which is prohibited or strictly regulated by Federal law in the United

agreement negotiated by a government agency that may indirectly encourage plants producing of toxic wastes, which would be subject to strict to regulations in the United States, creates a need for compliance with the Executive Order.

As it would seem too far a reach for the Order, the answer appears to be no.¹⁸⁹ It is significant, however, that when two nations are participating under the Order, the toxic threat alone commands environmental assessment. Thus, even if the Order were found to apply to a bilateral trade agreement, it would be limited to those situations where the agreement directly produced toxic products or projects, and, presumably, the EIS also would be limited to such consideration.¹⁹⁰

2. Exemptions

The Executive Order provides a specific exemption for "actions taken by the President."¹⁹¹ Should any clamor arise regarding the necessity or propriety of formally recognizing the environmental impacts of the FTA under the Order, the President could rely on this exception. Given the argument that the

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

189. Government-funded banks which fund such plants fall under § 2(d) of the Exec. Order. For example, under the Order the Eximbank would be required to perform an environmental analysis if it provided funds for certain industrial uses, such as nuclear power plants, steel mills, or a polyvinyl chloride plant. See Gaines, *supra* note 29, at 150 n.95.

190. Exec. Order No. 12,114 § 2-4, 3 C.F.R. 356, 357-58 (1979). The Order provides: Applicable Procedures. (a) There are the following types of documents to be used in connection with actions described in Section 2-3:

(i) environmental impact statements (including generic, program and specific statements);

(ii) bilateral or multilateral environmental studies, relevant or related to the proposed action, by the United States and one or more foreign nations, or by an international body or organization in which the United States is a member or participant; or

(iii) concise reviews of the environmental issues involved, including environmental assessments, summary environmental analyses or other appropriate documents.

191. *Id.* § 2(5)(a)(ii), 3 C.F.R. 356, 358.

Office of the USTR could be considered as an extension of the executive branch rather than as a separate agency,¹⁹² the cord between the two positions would be difficult to sever.

C. *Judicial Review of the Order*

In the first decision to squarely face the applicability of the Order to federal action abroad, *Greenpeace USA v. Stone*, the court refused to accept the contention of the defendants that "Executive Order 12,114 preempts application of NEPA to *all* federal agency actions taken outside the United States."¹⁹³ Even though the court was awkwardly positioned for such a review of the Order by the fact that the Army had *already* complied with the Order by preparing an assessment of crossing the North Sea to the Atoll, the court was reluctant to concede complete applicability, declaring such an application of an Executive Order to be neither "appropriate" nor "supported by law."¹⁹⁴ The "specific facts"¹⁹⁵ of the case persuaded the court that the Army's compliance with the Order was to be given weight in determining whether NEPA required an EIS for action taking place wholly in Germany.¹⁹⁶ It is important to note that the court otherwise abandoned the Executive Order in both its holding and in dicta. The court relied entirely on NEPA itself.

As the Order fails to directly cite NEPA as authority and possesses a limited proclamation of purpose, the Order leaves the courts with no framework upon which to rely. To look at NEPA case law is to look into the neighbor's backyard. Indeed, when plaintiffs argued that "NEPA standards . . . require a 'convincing statement of reasons' where an EIS . . . [was] not prepared,"¹⁹⁷ the court found that "[t]his court has no standards to apply to Executive Order 12114. Plaintiffs insist on applying NEPA standards to Executive Order 12114, . . . however, there is no authority for applying that standard to an environmental

192. See *supra* note 81 and accompanying text.

193. *Greenpeace USA v. Stone*, 748 F. Supp. 749, 762 (D. Haw. 1990).

194. *Id.* at 762. The court cited *Independent Meat Packers Ass'n v. Butz* on this point, thus quietly raising the potentially stormy issue of the legal weight of an Exec. Order, which heretofore the courts had been loathe to reach. *Id.* Such a challenge to Exec. Orders generally would be especially difficult to quantify where complicated by foreign policy overtones. *Id.*

195. *Id.* at 762.

196. *Id.*

197. See, e.g., *id.* at 762-63 n.15. Although the court addressed this issue, it did so only briefly by way of a footnote.

assessment prepared pursuant to Executive Order 12114."¹⁹⁸

The *Greenpeace* court was primarily concerned with foreign policy issues.¹⁹⁹ Seeking guidance from the only circuit court case on point, the court declared: "Other than the D.C. Circuit decision of *NRDC v. NRC*, . . . the court has found no other case which accentuates as sharply the necessity of balancing the environmental goals of NEPA against the particular foreign policy concerns which federal action abroad necessarily entails."²⁰⁰ The intrinsic intrusion on sovereignty and foreign policy concurrent with the extraterritorial application of NEPA rendered the court, like its predecessors, unwilling to apply NEPA. This judicial unwillingness to apply the federal statute must extend as well to an Executive Order purporting to require application of the policy of that same statute. The court, in sum, gives the Order short shrift.

D. *The Order and the FTA.*

Even assuming enforceability, it would nonetheless appear that the FTA does not fall within the carefully delineated categories of the Order. Indeed, the limited provisions of the Order reflect the foreign policy considerations championed effectively by the Department of State.²⁰¹ The Order will not extend to a bilateral agreement with the United States without a direct nexus between the federal action and toxic production.

The Order, moreover, as indicated by the court in *Greenpeace USA v. Stone*, lacks a comprehensive legal framework, resulting in a lack of standards for the courts to apply. Thus, President Carter's admirable attempt to initiate a new national environmental policy recognizing the world as an ecosystem, has

198. *Id.* at 763.

199. *Id.* at 752.

200. *Id.* at 760 (citation omitted).

201. Dreyfus & Ingram, *supra* note 14. It is significant to note that Congress is apparently aware of the shortcomings of the Order. The pending appropriation bills for CEQ require consideration of global commons issues, while a third proposal requires major federal action to include international activities. H.R. REP. NO. 113, 101st Cong., 1st Sess., 135 CONG. REC. H6836 (daily ed. Oct. 10, 1989) (statement of Rep. Studds); S. 1089, 101st Cong., 1st Sess. (1989), 135 CONG. REC. S5990 (daily ed. June 1, 1989); H.R. REP. NO. 3332, 101st Cong., 1st Sess., 135 CONG. REC. H5898 (daily ed. Sept. 25, 1989) (statement of Rep. Jones). Moreover, the recently enacted Antarctic Protection Act requires CEQ to issue regulations for applying NEPA to agency action in Antarctica. Antarctic Protection Act of 1990, Pub. L. No. 101-594, 104 Stat. 2975 (1990). For a review of the bills, see Joan R. Goldfart, Comment, *Extraterritorial Compliance with NEPA Amid the Current Wave of Environmental Alarm*, 18 B.C. ENVTL. AFF. L. REV., 543, 570-75 (1991).

failed by virtue of its manner of conception. Issued without statutory basis, the Order today is, unfortunately, of questionable application in all situations and wholly inapplicable to the Mexico-United States FTA.

IV. EQUITY AND THE FTA

A pressing, underlying issue exists regarding the availability of prospective injunctive relief under NEPA.²⁰² A future court may be asked to enjoin the FTA. This action assumes a finding of statutory applicability and the subsequent preparation of an EIS, by the Office of the USTR or the Commerce Department, during the two-year period authorized by Congress for fast-track negotiations. Such an EIS would most probably be attacked on adequacy grounds and an injunction of the FTA would be sought. Courts have long recognized the fundamental principle that "an injunction is an equitable remedy . . . [that does not] issue as of course."²⁰³ Yet, courts have found no clear indication in NEPA or its legislative history that Congress intended to deny federal courts their equitable discretion."²⁰⁴

In considering the FTA, a court would observe that four criteria must be satisfied to obtain a preliminary injunction.²⁰⁵ The court must find: (1) A likelihood of irreparable environmental injury, (2) a balancing of the harms which favors the plaintiff, (3) that the decision is in the public interest, and (4) a likelihood of success on the merits.²⁰⁶ Although the courts enforcing NEPA have in most cases granted injunctive relief to plaintiffs,²⁰⁷ a showing of "more than environmental change" has been required.²⁰⁸ Likewise, in viewing the balance of harms, courts have held that even a likely NEPA violation does not "automatically call[] for an injunction [where] the balance of harms may point the other way."²⁰⁹ The third test of public

202. 5 U.S.C. §§ 701-706 (1988), applies to NEPA.

203. See, e.g., *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 311 (1982).

204. *Id.* at 316.

205. *Planned Parenthood v. Bellotti*, 641 F.2d 1006, 1009 (1st Cir. 1981).

206. *Id.*

207. The Supreme Court has noted: "Environmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, *i.e.*, irreparable. If such injury is sufficiently likely, therefore, the balance of harms will usually favor the issuance of an injunction to protect the environment." *Amoco Prod. Co. v. Gambell*, 480 U.S. 531, 545 (1987).

208. *Id.* at 544-45.

209. *Massachusetts v. Watt*, 716 F.2d 946, 952 (1st Cir. 1983).

interest, obviously connected to the "balance of harms" question, may cause the court to withhold injunctive relief "though the postponement may be burdensome to the plaintiff."²¹⁰ The "range of public interests"²¹¹ in exercise of equitable discretion plays an "important role" in NEPA cases.²¹²

In considering such equitable relief for a plaintiff, the court would surely give substantial weight to the public interest in allowing the trade agreement to be signed, as well as the potential harm to the foreign policy prerogative of the President. Additionally, after considering earlier cases, it would seem that an argument related to severe economic harm would be persuasive to the court.²¹³ Despite the court's concern with environmental issues, it appears that in the light of previous cases where a foreign policy question is involved, the court may resort to equity to preserve the underlying separation of powers issue which is at the heart of NEPA application. The *Wisconsin v. Weinberger* opinion lends support to this notion:

NEPA cannot be construed to elevate automatically its procedural requirements above all other national considerations. Although there is no national defense exception to NEPA, and the Navy does not claim one, the national well-being and security as determined by the Congress and the President demand consideration before an injunction should issue for a NEPA violation.²¹⁴

Accordingly, courts have undertaken an evaluation of competing public interests in molding permanent injunctive relief for NEPA violators. "[A] court should tailor its relief to fit each particular case, balancing the environmental concerns of NEPA against the larger interests of society that might be adversely

210. *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312-13 (1982) (quoting *Yakus v. United States*, 321 U.S. 414, 440 (1944)).

211. *Id.* at 320.

212. *Amoco Prod. Co.*, 480 U.S. 531, 545 (1987).

213. See the argument relating economic harm and statutory conflict, *supra* notes 146-59 and accompanying text.

214. *Wisconsin v. Weinberger*, 745 F.2d 412 (7th Cir. 1984). The Seventh Circuit found this case analogous to the well-known snail darter case, *Tennessee Valley Auth. v. Hill*, 437 U.S. 153 (1978). In that case, the Supreme Court held that the Endangered Species Act required injunctive relief where the construction of a dam would have eliminated an endangered species. *Tennessee Valley*, 437 U.S. at 194. The Act contained a ban on destruction of artificial habitats for endangered species. *Id.* at 173, 194. In its later jurisprudence, the Court noted that "Congress . . . had chosen the small darter over the dam. The purpose and language of the statute limited the remedies available to the District Court; only an injunction could vindicate the objectives of the Act." *Wisconsin*, 745 F.2d at 426 (quoting *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 314 (1982)).

affected by an overly broad injunction."²¹⁵

Thus, even in subsequently finding a NEPA violation, the court, applying traditional principles of injunctive relief, may refuse an injunction. Indeed, in *Wisconsin v. Weinberger*, the court emphasized that even with a finding of NEPA violations, it must "balance the weight of the alleged NEPA violation against the harm the injunction would cause the Navy and to this country's defense."²¹⁶ Given the preoccupation of the courts in all extraterritorial NEPA cases with foreign policy considerations, it appears likely that even the finding of a NEPA violation would not necessarily persuade the court to grant injunctive relief. The Office of the USTR, who has repeatedly asserted her need for fast-track authorization to be an effective negotiator, would allege irreparable harm from an injunction. It seems implausible that a court would not view the harms from such interference as outweighing a NEPA violation, particularly since NEPA is, after all, predominantly a procedural statute rather than a substantive one.²¹⁷

V. CONCLUSION

The FTA will most likely be concluded without linkage between trade and environmental issues. The present "shotgun" approach to meeting the mounting attack on the integrity of water, air, and land resources along the United States-Mexican border will surely falter under the environmental fusillade of increased industrialization. The United States must initiate a comprehensive and intensive program to rescue the imperiled border cities. The National Environmental Policy Act of 1969 provides the means to immediately generate centralized information through an EIS, which would form the basis upon which to devise a defensive plan.

In searching the legislative history of the Act, a court would most likely be persuaded by the unequivocal intent of Congress to force the consideration of environmental concerns in all federal decisionmaking. The court must then acknowledge the inherently controversial nature of such issues but should take

215. *Environmental Defense Fund v. Marsh*, 651 F.2d 983, 1006 (5th Cir. 1981); see also *Wisconsin*, 745 F.2d at 426.

216. *Wisconsin*, 745 F.2d at 427.

217. *Strycker's Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223, 227 (1980) (citing favorably *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519, 588 (1978)).

note that the framers of the statute, while recognizing the balancing of issues necessary for appropriate resolution, left the statute without remedial effect. "If the adverse environmental effects of the proposed action are adequately identified and evaluated, the agency is not constrained, by NEPA, from deciding that other values outweigh the environmental costs."²¹⁸ The statute was deliberately designed to permit such flexibility by decisionmakers, provided such action could withstand the harsh "light of public scrutiny."²¹⁹

Historical perspective supports the initial contention of this article, namely, that the purpose of NEPA would be well served by application of the FTA. Consideration of potential environmental impacts along the border will reassure United States citizens that the government has not narrowed its vision to the mandate of its trade mission. The FTA and the Commerce Department must not be allowed to escape the demands of NEPA in apparent contradiction to the intent of the Act.

Nonetheless, NEPA application to the FTA confronts formidable barriers. First, the question arises whether the Office of the USTR is a federal agency under the statute or whether the role of the Commerce Department suffices to reach agency action. It is clearly within the spirit of the Act to find the Office of the USTR an agency for the purposes of NEPA and there is adequate judicial precedent to so hold. The second hurdle to be cleared is whether NEPA applies to the Office of the USTR reports on a proposed agreement, given that it would apparently apply to the final agreement. Depending upon the answer to this question, a third potential barrier would be whether time constraints would prevent EIS preparation such that claims of direct statutory conflict between the Trade Act (and accompanying fast-track legislation) and NEPA would arise. The shape of any EIS, regardless of time constraints, would probably give rise to legal concerns by some. Finally, the threat of an issuance of an injunction in the midst of fast-track, or in the final stages of fast-track, would cause an uproar from many quarters, particularly from the White House. But the court is, first and foremost, the defender of the Constitution.

As vigorous supporters of the separation of powers doctrine, courts would be concerned that NEPA application may

218. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989).

219. See *supra* note 27 and accompanying text.

interrupt the efficient and timely workings of a federal agency consistent with its statutorily ordained mission. Such application may also be an unlawful interference with the Executive Branch's ability to carry out its constitutional duty to conduct foreign policy. This article does not seek to sidestep such concerns; rather, it acknowledges their viability while suggesting that a close review of the statute itself will alleviate these concerns.

NEPA, although substantive in some respects, is primarily a procedural statute. It generates information. After airing of information on environmental issues, the government is unfettered in making a decision, assuming, of course, it has fulfilled the appropriate procedural requirements. Moreover, the statute contains language, "to the fullest extent possible," — that allows the best EIS possible and practicable within the fast-track time restrictions. This statutory language also provides for judicial elasticity in dealing with adequacy issues should Mexico, despite current indications to the contrary, refuse to cooperate in the preparation of an EIS. There is clear judicial precedent for such interpretation.²²⁰ As to the latent fears of injunction suits or findings of NEPA violations such that permanent injunctions may be sought which would obstruct the FTA, the court need not retreat into the woods of separation of powers to preserve the trade agreement. Overwhelming public interest in signing the agreement, coupled with the threat of economic harm to the nation for failing to do so, may persuade the court to invoke equity principles and refuse injunctive relief. National security concerns have invoked such principles in past cases. Surely, foreign policy concerns, coupled with public interest issues, could provoke similar judicial reaction.

Executive Order Number 12,114 does not appear to provide the means by which to apply NEPA or the standards of NEPA. Moreover, the Order, by its terms, does not apply to the FTA. Should the application of NEPA to the FTA be proposed, there would be an outcry over such nontraditional interference with trade negotiations. But it is precisely this nontraditional intersection of environmental issues into trade negotiation matters through the consultative fast-track process that must be pursued. Not only does it allow, by its nature, consideration of the

220. See *Stryker's Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223, 227 (1980).

environmental information NEPA would provide in an EIS, but also it permits Congress and the Office of the USTR to adjust the final form of the trade agreement as they deem appropriate to reflect such consideration. To declare such input to be obstructive is to beg the proposed value of fast-track, namely, that Congress will have more direct access to a consideration of all the issues decided in the FTA. Indeed, a preparation of an EIS by the Office of the USTR and the Commerce Department would help to ensure realization of the congressional mandate under fast-track: to vote yes if the agreement is "in the national interests."²²¹ Such a result would be particularly true if legislators were confident that the EIS considered would, under separate agreement, be used to comprehensively address the current and future environmental threats to American citizens along the thousand-mile border.

President Bush, in a shrinking global economy, visualizes a new world order. This new order takes into account the end of the Cold War, which has diminished the military threat to national security.²²² The United States approaches the twenty-first century as part of an ecologically damaged planet. Perhaps it is time to redefine national security. Is not the air Americans breathe, the water they drink, and the land on which they dwell to be aggressively protected from more than military threats? Is there not an argument to be made that protecting the air, water,

221. 19 U.S.C. § 1113. See generally Matt Moffet, *Salinas Goes on Tour to Push Free Trade*, WALL ST. J., Apr. 15, 1991, at A10; Robert Reinhold, *Mexico Says It Won't Harbor U.S. Companies Fouling Air*, N.Y. TIMES, Apr. 17, 1991, at A1.

It is also noteworthy that the only EPA attaché to a U.S. Embassy is Anne Alonzo in Mexico City. She recently "called on border businesses to participate in creating a comprehensive integrated border plan that will list environmental accomplishments and suggest solutions to environmental problems that have not been resolved." 14 Int'l. Env'tl. Rep. (Env'tl. L. Inst.) at 143 (Mar. 13, 1991).

222. See generally Michael Mandelbaum, *The Bush Foreign Policy*, 70 FOREIGN AFF. 5 (1991) (greatest geopolitical windfall in the history of America); Charles Kruthammer, *The Unipolar Movement*, 70 FOREIGN AFF. 23 (1991) (most striking feature of the post-Cold War world is its unipolarity); William Pfaff, *Redefining World Power*, 70 FOREIGN AFF. 34 (1991) (U.S. role in world without superpowers); C. Michael Aho & Bruce Stokes, *The Year The World Economy Turned*, 70 FOREIGN AFF. 160 (1991) (waning of Cold War changed environment for U.S. policymaking). Former Secretary of Defense and former President of the World Bank, Robert S. McNamara recently observed: "[T]he opportunity for the Western democracies at present is to establish a new world order. . . . The residual role for the military is to deal with conflicts that can't be deterred. . . . We've got all kinds of common enemies and challenges, such as the sustainability of development in the broadest sense around the world. Population stability and environmental stability are going to be increasingly serious problems." Felicity Barrigan, *After the Thaw: The Residual Role for the Military*, N.Y. TIMES, Feb. 6, 1992, at A6.

and land of the United States will be the real issue of national security in the twenty-first century?

The application of NEPA to the FTA is the next logical stage in the evolution of NEPA. Despite separation of powers arguments, courts consistently have held health interests of American citizens to be paramount, especially in border situations. In sum, one need not fear that finding NEPA applicable to the FTA would place the government in the seat of Damocles, the legendary Greek courier who was made to sit at a banquet under a sword suspended by a single hair. The United States government should sit comfortably at the negotiation table with the knowledge that the fiber of the statute is, after all, merely informational.