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Applying Procedural Requirements of U.S. Environmental Laws to Foreign Ventures: A Growing Challenge to Business

Worldwide concern over the state of the environment has resulted in a major effort in Europe to develop expanded mechanisms for environmental regulation. These efforts are being monitored closely by American businesses contemplating ventures in Europe and elsewhere. Dissatisfied with both the pace and substantive content of these regulatory efforts, some environmental groups have attempted to extend judicially the application of U.S. environmental standards to ventures in other countries. In so doing, the debate over the nature and extent of environmental regulation in Europe and elsewhere may shift to American agencies and courts. More importantly, the imposition of the U.S. environmental regulatory regime abroad undoubtedly will have a dramatic impact on the cost of doing business overseas and could expose U.S. firms to liability for environmental contamination in other countries.

This article discusses two recent U.S. judicial decisions that define the extent to which certain procedural requirements of U.S. environmental laws may be applied to activities abroad. Also discussed is proposed legislation seeking to apply substantive U.S. standards for waste handling to foreign countries that receive U.S. waste exports.

I. Extending Procedural Requirements to Cover United States Government Involvement in Foreign Activities

In *Defenders of Wildlife v. Lujan*[1] the United States Court of Appeals for the Eighth Circuit held that a requirement for interagency consultation imposed by the Endangered Species Act of 1973[2] (ESA) is applicable to foreign projects

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1. 911 F.2d 117 (8th Cir. 1990).
2. 16 U.S.C. §§ 1531-1544 (1988).

funded in whole or in part by U.S. government agencies. ESA directs each federal agency to consult with the Interior Department to ensure that "any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species" or adversely affect the habitat of such species.[3] The statute imposes the consultation duty without addressing the distinction between domestic and foreign projects in which the United States participates.

Prior to 1986 the Interior Department had considered the consultation duty to be applicable to overseas federal projects and published regulations to that effect.[4] In 1986, however, the agency reversed itself and issued a new rule that limited the consultation obligation to agency participation in activities or projects taking place "in the United States or upon the high seas."[5] In the preamble to the 1986 rule the agency attributed this policy shift to "the apparent domestic orientation of the consultation and exemption processes" following the 1978 amendments to ESA and "the potential for interference with the sovereignty of foreign nations."[6]

Several environmental organizations, led by Defenders of Wildlife, immediately brought suit to challenge the Interior Department's new interpretation of ESA's consultation requirement. In 1989 the U.S. District Court for Minnesota ruled in favor of Defenders of Wildlife. The court ordered the Interior Department to revoke its 1986 rule regarding consultations and to issue new rules reinstating the applicability of the consultation duty to foreign projects.[7]

The Interior Department appealed the decision to the Eighth Circuit. The agency argued that the application of the consultation requirement to foreign projects would intrude improperly upon the sovereign right of foreign nations to strike their own balance between resource development and protection of endangered species. The appellate court rejected the agency's contentions, however, concluding instead that Congress had evinced a clear intent to require interagency consultations regarding the impact on endangered species of all projects and activities, be they foreign or domestic, in which the federal government participated. In the court's view the plain language of ESA imposed the consultation duty upon "*any* action authorized, funded, or carried out by" a federal agency, and did not distinguish between foreign and domestic projects.[8]

The court found substantial evidence within ESA of congressional concern over the protection of endangered species worldwide. Specifically, ESA declares

3. *Id.* § 1536(a)(2).

4. *See* 43 Fed. Reg. 870 (1978).

5. 50 C.F.R. § 402.02 (1990).

6. 51 Fed. Reg. 19,929 (codified with some differences in language at 50 C.F.R. § 402.01 (1990)).

7. Defenders of the Wildlife v. Hodel, 707 F. Supp. 1082 (D. Minn. 1989), *aff'd*, 911 F.2d 117 (8th Cir. 1990).

8. 16 U.S.C. § 1536(a)(2) (emphasis added).

that "the United States has pledged itself as a sovereign state in the international community to conserve to the extent practicable the various species of fish or wildlife and plants facing extinction" and that one of the goals of ESA is to take appropriate steps to achieve the purposes of the various international treaties and conventions adopted by the United States that seek to protect endangered species.[9] In addition, ESA directs the Interior Department to promulgate a list of species found to be endangered after giving actual notice to, and inviting comment from, foreign countries in which such species proposed for listing are found.[10] The listing process does not distinguish between domestic and foreign species. The court thus concluded that ESA, viewed as a whole, "clearly demonstrates congressional commitment to worldwide conservation efforts. To limit the consultation duty in a manner which protects only domestic endangered species runs contrary to such a commitment."[11]

Finally, the court pointed to the Interior Department's 1978 rule which, as noted above, extended the consultation duty to overseas federal projects. Following the issuance of this rule, Congress amended ESA's consultation provision to reflect its current form. While the amendments did not touch upon the applicability of the consultation duty to foreign projects, their congressional authors expressed an intent to retain the existing law and the implementing regulations, since they were "familiar to most Federal agencies and have received substantial judicial interpretation."[12] The *Defenders* court found that, because the "existing law" in 1978 included the regulation requiring consultation on foreign projects, Congress tacitly had approved the prior regulatory interpretation of the consultation provision.[13]

II. A More Restrictive View of Extraterritorial Application

In contrast to the Eighth Circuit decision, a U.S. district judge in Hawaii, in a case shortly following *Defenders*, weighed similar factors and concluded that the procedural requirements imposed by another environmental statute, the National Environmental Policy Act of 1969 (NEPA),[14] could be applied extraterritorially only in limited circumstances.[15]

NEPA requires the preparation of an environmental impact statement (EIS) in connection with "major federal actions significantly affecting the quality of the

9. *Id.* § 1531(a)-(b).
10. *Id.* § 1533(b)(5)(B).
11. Defenders of the Wildlife v. Lujan, 911 F.2d 177, 123 (8th Cir. 1990).
12. H.R. REP. NO. 1804, 95th Cong., 2d Sess. 18 (1978), *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 9451, 9486.
13. *Defenders*, 911 F.2d at 124.
14. 42 U.S.C. §§ 4321-4347 (1988).
15. Greenpeace USA v. Stone, 748 F. Supp. 749, 758-61 (D. Haw. 1990), *appeal dismissed*, 924 F.2d 175 (9th Cir. 1991).

human environment."[16] A "major federal action" is not limited to government initiatives; it includes any private venture or undertaking that is potentially subject to federal financing, assistance, regulation, or approval.[17] The EIS must address the environmental impact of the proposed action, any unavoidable adverse environmental impact should the proposal be implemented, and alternatives to the proposed action.[18] Like the Endangered Species Act discussed above, NEPA does not distinguish between domestic and foreign projects.

The *Greenpeace* case concerned the U.S. Army's role in the removal and destruction of certain unitary and now obsolete chemical weapons (the European stockpile or the stockpile) that had been deployed in West Germany in 1968. In 1986 the United States and West German Governments agreed to remove the stockpile from German soil by December 1992. Congress subsequently required that the entire U.S. stockpile of unitary chemical weapons be destroyed no later than April 1997.[19]

In March 1989 the United States and West Germany agreed to step up the April 1992 deadline for removal of the stockpile to December 1990. The two countries worked out a joint plan to transport the stockpile from its current storage site in Clausen, Germany, to Johnston Atoll, an unincorporated U.S. territory located in the central Pacific Ocean, for ultimate incineration in the Johnston Atoll Chemical Agent Disposal System (JACADS). JACADS currently is the United States' only operational site for the destruction of such chemical munitions. Under the agreement the stockpile would be loaded into secondary containers and transported by truck and rail from Clausen to Germany's port of Nordenham on the North Sea. Next, the munitions would be shipped through international waters to Johnston Atoll, where they would be stored and ultimately incinerated in JACADS.

The Army, for purposes of complying with NEPA's EIS requirements, divided the project into three separate components: (1) the movement of the stockpile within Germany from Clausen to Nordenham; (2) the transport of the stockpile from Nordenham through international waters to Johnston Atoll; and (3) the disembarkation of the weapons at Johnston Atoll, and their storage and ultimate incineration at JACADS. The Army never contested NEPA's applicability to Segment 3 of the project and published three EISs regarding JACADS. The Army's 1983 EIS addressed the construction and operation of JACADS. The second EIS, issued in 1988, covered the disposal of solid and liquid wastes that JACADS itself would produce. Finally, the Army published a second supplemental EIS in 1990, which specifically addressed the unloading, storage, and disposal of the European stockpile at Johnston Atoll.

16. 42 U.S.C. § 4332(2)(C).
17. 40 C.F.R. § 1508.18(a) (1990).
18. 42 U.S.C. § 4332(2)(C).
19. 50 U.S.C. § 1521(a)-(b) (1988).

The Army also prepared a Global Commons Environmental Assessment (GCEA), which addressed Segment 2 of the project, the shipment of the munitions through international waters from the North Sea to Johnston Atoll. The GCEA concluded that the shipments would cause only "the same environmental impacts as from the passage of any modern commercial ship."[20]

The Army declined to issue any environmental impact assessment, however, with regard to Segment 1 of the project, the transport of the stockpile within Germany, which the Army maintained was beyond the scope of NEPA. This phase of the project was reviewed by a German court, which examined the proposed transport plan and safety measures and found them to be in accordance with German law.[21]

In August 1990 a number of environmental organizations, led by Greenpeace, filed suit against the Army, seeking to block the proposed transport of the European stockpile from Germany to Johnston Atoll.[22] Greenpeace claimed that the U.S. Army's involvement in the project made NEPA fully applicable to all aspects of the proposed transportation and disposal of the European stockpile. Greenpeace therefore asserted that the Army violated NEPA by failing to issue a comprehensive EIS covering the transportation of the stockpile within Germany and, subsequently, through international waters.

The Army countered that the scope of NEPA does not reach the transport of the stockpile within Germany and, therefore, no EIS was required. The Army maintained that NEPA did not purport to apply to federal actions taken outside the United States. It urged the court to adhere to the traditional principle of statutory interpretation restricting federal statutes to domestic applications, absent clear evidence of congressional intent to the contrary. Further, the Army argued that the application of NEPA to the intra-Germany transport of the European stockpile would improperly infringe upon Germany's sovereignty and also would invade the President's discretion to determine the foreign policy of the United States.

The court agreed with the Army and found NEPA applicable to the movement of the European stockpile within Germany. The court expressly limited its find-

20. 749 F. Supp. at 754. The Army's GCEA, which is less comprehensive than an EIS, was prepared pursuant to Exec. Order No. 12,114, 44 Fed. Reg. 1957 (1979), which requires federal agencies to evaluate the environmental impact of their actions taken outside the territorial United States and to issue "environmental impact statements" pertaining to such actions. *Id.* § 2-4(a)(i), 44 Fed. Reg. at 1958. The order was inapplicable to the movement of the European stockpile within Germany because it only requires an environmental evaluation of the impact upon "a foreign nation not participating with the United States and not otherwise involved in the action." *Id.* § 2-3(b), 44 Fed. Reg. at 1957. In this instance, the West German Government was participating actively in the federal project. *Greenpeace*, 748 F. Supp. at 754.

21. *Greenpeace*, 748 F. Supp. at 754 (citing Translation of the Decision of the Administrative Court of Cologne, Eric Neumayer v. Fed. Rep. Germany (July 20, 1990)).

22. Greenpeace also raised issues regarding the destruction of the stockpile at Johnston Atoll. These claims were not addressed by the trial court's opinion, however, which dealt only with the environmentalists' request for a preliminary injunction against the transportation of the stockpile.

ings, however, to the particular facts incident to this dispute and noted that NEPA's EIS requirements could in some circumstances reach federal projects taking place exclusively within foreign jurisdictions. The court found that the potential conflict between NEPA and the United States' foreign policies that U.S. action overseas necessarily entails "caused Congress to leave open the question of whether NEPA applies to the environmental impacts of federal action abroad."[23] Accordingly, the court held that NEPA's extraterritorial application could only be determined on a case-specific basis.

The court, in concluding that the transport of the European stockpile within Germany did not warrant NEPA's extraterritorial application, focused on a number of factors particular to this case. First, the removal of the European stockpile from Germany was an action undertaken by the United States Government with the encouragement, cooperation, and approval of the West German Government. The stockpile had been situated in Germany at the sufferance of the host country, and the United States had committed itself to remove the weapons by the end of 1990 based upon foreign policy considerations that the court considered to be beyond the purview of its scrutiny.[24] The court also held that the extraterritorial application of NEPA to the transport of the European stockpile within Germany would infringe the sovereignty and authority of the German Government over actions taken within its borders. The German Government had already considered the environmental risks incident to the internal transport of the stockpile and had found such risks acceptable in light of the benefits to be derived from expeditiously ridding the country of unitary chemical weapons.[25]

Thus, the court found that the extraterritorial application of NEPA to the movement of the stockpile within Germany would interfere with the President's foreign policy, and with a specific agreement between the United States and a foreign sovereign, in a manner not intended or anticipated by Congress.[26] The court reiterated, however, that its decision was limited to the facts presented in this case and that, in other circumstances, NEPA's requirements could reach overseas activities in which the federal government participated, "especially where [the] United States agency's action abroad has direct environmental impacts within this country, or where there has been a total lack of environmental assessment by the federal agency or foreign country involved."[27]

23. *Greenpeace*, 748 F. Supp. at 761.

24. *Id.* at 760.

25. *Id.*

26. *Id.* at 761. For these same reasons, the court found that the Army's preparation of the less-comprehensive GCEA in connection with the transoceanic shipment of the stockpile through the Global Commons satisfied the requirements of NEPA.

27. *Id.* The court also disposed of Greenpeace's claims that were unrelated to the extraterritorial application of NEPA. Specifically, Greenpeace had alleged that the Army failed to consider certain additional information in preparing its second supplemental EIS; that the Army had failed to evaluate a full range of alternatives to disposal of the weapons at JACADS; that the proposal violated certain congressional directives regarding the certification of JACADS; and that the proposal violated two

Greenpeace subsequently appealed the trial court's decision to permit the transfer of the European stockpile to Johnston Atoll. However, by the time the appeal reached the Ninth Circuit Court of Appeals the transfer had been completed and the appellate court therefore dismissed the appeal as moot.[28]

III. Extending NEPA's Reach

Although the *Greenpeace* case severely limited the extraterritorial application of NEPA, the statute ultimately may be broadened through legislative action to reach foreign projects. In 1989, the Senate considered legislation to extend NEPA's coverage to include "extraterritorial actions (other than those taken to protect the national security of the United States, actions taken in the course of an armed conflict, strategic intelligence actions, armament transfers, or judicial or administrative civil or criminal enforcement actions)."[29] The proposal, which ultimately was not adopted, also would have required "full consideration of the environmental impacts of proposed major Federal agency actions on geographic, oceanographic, and atmospheric areas within as well as beyond the jurisdiction of the United States and its territories and possessions."[30] Although this proposal was unsuccessful, its sponsors are likely to pursue the issue further in the 102d Congress.

The development of NEPA's extraterritorial application merits close attention by anyone contemplating a foreign venture that in any way requires United States Government approval or participation. While NEPA is a procedural statute and does not purport to apply substantive U.S. environmental standards to agency decision making, NEPA's EIS process does require federal agencies to initiate lengthy environmental reviews of a proposed action, often at considerable expense to the private applicant who is seeking government approval of, or participation in, certain aspects of the project. In these circumstances the applicant must develop and present information to the agency concerning the environmental impact of the proposed project, as well as alternatives to the project. This administrative process, which leads to the preparation of the EIS, is subject to public participation and judicial review. Consequently, the application of NEPA to foreign actions involving United States Government participation would bring

international treaties concerning the transport and disposal of hazardous substances, the Basel Convention on the international movement of hazardous wastes and the London Convention on ocean dumping. In rejecting these contentions, the court found that: (1) the Army acted within its discretion in declining to amend the second supplemental EIS to include certain new data produced by Greenpeace; (2) the Army had properly considered a full range of alternatives to the proposed disposal at JACADS; (3) Greenpeace did not have standing to challenge the Army's compliance with the certification requirements regarding JACADS or with the Basel Convention; and (4) the London Convention was inapplicable to the on-land disposal of substances at JACADS. *Id.* at 764-67.

28. Greenpeace USA v. Stone, 924 F.2d 175 (9th Cir. 1991).

29. *See* S. 1089, 101st Cong., 1st Sess. (1989), *reprinted in* S. REP. NO. 352, 101st Cong., 2d Sess. 20 (1990).

30. *Id.* at 23.

many aspects of those projects (including their environmental impacts, the capacity of foreign governmental agencies to manage these impacts, and alternatives to the proposed actions) under the scrutiny of U.S. agencies and courts, which, in reviewing the proposals, would be guided by U.S. law.

IV. Extending Substantive U.S. Environmental Standards to Foreign Countries Through the Regulation of Hazardous Waste Exports

The proposed application of substantive U.S. environmental standards to foreign countries that receive U.S. exports of hazardous wastes raises even greater concerns for the international community. The United States currently regulates the export of hazardous waste through section 3017 of the Resource Conservation and Recovery Act (RCRA).[31] RCRA prohibits the export of hazardous waste from the United States unless the shipment conforms to an international agreement between the United States and the receiving country's government that addresses hazardous waste exports. If no international agreement is in force, RCRA prohibits hazardous waste exports unless the exporter notifies EPA of the types and quantities of waste exported, and the receiving country consents to accept the shipment.[32]

A. Proposals for a Waste Export Control Act

In 1989 Representative Thomas Luken (D.-Ohio) introduced H.R. 3736, the Waste Export Control Act, which would have broadened RCRA's application to cover the export of solid wastes and to increase the scope of regulation over waste treatment and disposal facilities in foreign countries.[33] Luken's proposal ultimately expired with the 101st Congress, but is expected to be reintroduced as part of, or in conjunction with, legislation to amend or reauthorize RCRA.

Luken's proposal would ban the export of certain categories of wastes to countries whose environmental standards are less strict than those of the United States. The proposal is premised on the implementation of the multilateral 1989 Basel Convention, which prohibits the export of hazardous waste, incinerator ash, and municipal waste unless a bilateral or multilateral agreement provides that the receiving nation will manage the waste in an "environmentally sound manner."[34]

31. 42 U.S.C. § 6938 (1988).

32. The EPA's regulation concerning hazardous waste exports is codified at 40 C.F.R. § 262.50-.58 (1990).

33. H.R. 3736, 101st Cong., 1st Sess. (1989).

34. Final Act of the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, *opened for signature* Mar. 22, 1989, art. 4(8), 28 I.L.M. 657, 663 (1989).

Luken's proposal would ban the export of solid and hazardous wastes from the United States unless the United States and the country receiving such waste were parties to an agreement enabling the United States to ensure that the transportation, treatment, storage, and disposal of exported solid and hazardous waste would be conducted in a manner that, if conducted in the United States, would satisfy the requirements of RCRA. At a minimum, such agreements would have to include a right of access by the United States to the foreign facilities used to manage exported solid and hazardous waste. In addition, all solid and hazardous waste export agreements currently in force would ultimately have to include mechanisms that enabled the United States to determine that a foreign country managed waste in a manner no less stringent than mandated by RCRA requirements. This "no less stringent than RCRA" standard would bring into question any foreign waste management system, however sophisticated.

Moreover, the proposal would establish a permit program for exporters of solid or hazardous waste that would require disclosure of extensive and potentially sensitive information by exporters. Each permit applicant would have to provide EPA with the type, quantities, and concentrations of waste exported; a demonstration that the exported waste would be transported, treated, stored, and disposed of in a manner at least as stringent as that required under RCRA; evidence that the foreign facility operator has adequate financial resources to pay cleanup and liability costs that may be imposed under U.S. law or the laws of the receiving country; the names of all persons holding more than 5 percent of the equity in the exporter's business; and any other information EPA might require relating to the "competency, reliability or good character of the applicant."[35] In addition, EPA's National Enforcement Investigations Center would have to prepare an investigative report on the exporter before EPA issued a waste export permit.

To ensure compliance with the waste export regulatory program, EPA would be authorized to inspect the facilities of a permit holder and any foreign facilities receiving solid or hazardous waste exported from the United States. Finally, the proposal would authorize foreign governments to bring actions for response costs or natural resource damages in U.S. courts under section 107 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1986[36] if hazardous waste caused the foreign government to incur such costs or damages.

V. Conclusion

Efforts to extend the protections of U.S. environmental laws beyond the nation's borders reflect both altruistic and self-serving motivations. On the one hand, many in the United States seek to protect environmental conditions in other

35. H.R. 3736, *supra* note 33, § 2(b)(16).
36. 42 U.S.C. § 9611 (1988).

countries, many of which lack the legal mechanisms and enforcement resources necessary to safeguard their environment from harmful wastes and environmentally unsound practices. On the other hand, environmental degradation is rarely confined to specific geographic areas and can prove costly to all nations, be it in the form of ocean dumping, deforestation, greenhouse gases, or ozone depletion. Traditionally, the global community has relied on multilateral negotiations and agreements such as the Basel Convention to address such international problems. Such agreements, however, take years to complete and often contain only vague and indefinite standards with ineffective enforcement mechanisms. These shortcomings are precisely those that have led to unilateral efforts to protect the global environment. While U.S. laws may provide convenient, familiar standards by which to promote international environmental protection, the unilateral application of such laws to other countries denies those countries' governments the opportunity to adopt modern standards to fit their particular needs. Such application also rekindles the long-standing debate over the extent to which prosperous, industrialized nations should attempt to impose their own views of the proper balance of economic development and environmental protection upon the rest of the global community.

At all events, companies conducting business abroad have good reason to monitor these developments closely. While such companies may comply fully with the environmental responsibilities imposed by the countries in which they do business, they may ultimately find themselves saddled with new and potentially burdensome obligations imposed by the United States. Such companies, therefore, should take action now to limit future environmental liabilities by reviewing and modifying their compliance procedures in light of these emerging extraterritorial standards.