

**GAO**

Report to the Chairman, Subcommittee  
on Toxic Substances, Research and  
Development, Committee on  
Environment and Public Works,  
U.S. Senate

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February 1994

# INTERNATIONAL ENVIRONMENT

## Improved Procedures Needed for Environmental Assessments of U.S. Actions Abroad



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United States  
General Accounting Office  
Washington, D.C. 20548

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Resources, Community, and  
Economic Development Division

B-255395

February 11, 1994

The Honorable Harry M. Reid  
Chairman, Subcommittee on Toxic Substances,  
Research and Development  
Committee on Environment and Public Works  
United States Senate

Dear Mr. Chairman:

This report responds to your request that we review federal agencies' use of environmental impact assessments in conducting, regulating, and supporting activities that may affect the environment of other nations. For example, U.S. agencies apply pesticides in other countries to control agricultural pests, store hazardous waste on overseas military bases, issue permits for ocean dumping, and negotiate international trade agreements that may have environmental consequences. The extent to which U.S. agencies are required under U.S. law to assess the environmental impact of such actions is unclear. The National Environmental Policy Act (NEPA), signed into law on January 1, 1970, requires federal agencies to assess the environmental impact of their actions, but the courts have not determined definitively whether this requirement extends to these agencies' actions abroad. Executive Order 12114, issued in 1979, specifically requires federal agencies to assess the environmental impact of certain "major" actions abroad; however, it exempts other actions from this requirement. Although policymakers have for years debated the question of NEPA's applicability to U.S. agencies' actions abroad, recent federal court decisions have again focused attention on this issue.

Concerned about whether federal agencies are adequately assessing the environmental consequences of their actions abroad, you asked us to (1) compare the requirements for environmental impact assessments<sup>1</sup> under NEPA and Executive Order 12114, (2) review federal agencies' implementation of Executive Order 12114, and (3) analyze the advantages and disadvantages of applying NEPA's procedures to, or strengthening environmental impact assessment procedures for, federal agencies' actions outside the jurisdiction of the United States.

<sup>1</sup>We apply the broad term "environmental impact assessment" to any of the following performed under Executive Order 12114: environmental assessments, environmental impact statements, bilateral or multilateral environmental studies, concise environmental reviews, or summary environmental analyses. We also apply the term to environmental assessments or environmental impact statements performed under NEPA.

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## Results in Brief

Compared to NEPA's requirements for environmental impact assessments, Executive Order 12114's requirements are both more ambiguous and more limited in the range of actions covered and in the analyses and participation required. Unlike NEPA and its implementing regulations, the order does not fully describe the types of documents or the kinds of analyses to be used in the assessment process. Furthermore, the order does not call for external review of the assessment process. External review includes interagency oversight, public participation, and judicial review.

Numerous federal agencies have procedures to implement Executive Order 12114, and many have conducted environmental impact assessments under the order for their actions abroad. However, according to many federal officials, ambiguities in the order have resulted in its inconsistent application. In particular, many officials told us that additional guidance is needed because the order does not adequately specify which major actions are included and does not indicate how comprehensive the environmental impact assessments must be.

Since the executive order's issuance in 1979, federal agency officials and legal commentators have debated the merits of applying NEPA's procedures or strengthened environmental impact assessment procedures to extraterritorial actions. Some have noted certain difficulties that might arise in applying NEPA's requirements abroad, such as infringement upon the sovereignty of host countries, increases in the number of lawsuits, and encroachment upon the President's flexibility in conducting foreign affairs. Others, however, believe that the extension of NEPA's procedural requirements could improve agencies' decision-making and would be consistent with recent U.S. initiatives to strengthen the environmental impact assessment procedures of foreign assistance agencies and multilateral development banks. Deciding whether and how to strengthen U.S. environmental review requirements abroad is ultimately a policy decision that requires weighing diplomatic and environmental considerations. However, we believe that at a minimum, certain modifications to the order are needed in the current process to clarify (1) which actions require analysis and (2) how comprehensive these analyses must be.

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## Background

NEPA, signed into law on January 1, 1970, directed federal agencies to evaluate the environmental consequences of their actions. The Council on Environmental Quality, created in title II of NEPA, was given responsibility

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in two executive orders to issue guidance to federal agencies in their preparation of this evaluation, known as the environmental impact assessment process. NEPA has been used to assess the environmental impact of federal actions ranging from the construction of domestic dams, bridges, and highways to the negotiation of international agreements, such as the New Panama Canal Treaty.

Although the language of NEPA indicates that the Congress was concerned in 1969 about the global environment, NEPA did not specifically require the assessment of federal actions outside the jurisdiction of the United States. Some federal agencies, such as the Department of State, the Department of Defense, and the Export-Import Bank, objected to applying NEPA abroad because its time-consuming procedures could complicate foreign policy actions and hobble the federal government's efforts to promote American exports. The Council on Environmental Quality argued at the time, however, that federal actions abroad could harm the environment in other countries or the global commons<sup>2</sup> and that NEPA should apply to all major federal actions, regardless of location.

After years of interagency debate over the applicability of NEPA outside the United States and no definitive judicial decision on this issue, on January 4, 1979, President Carter signed Executive Order 12114, "Environmental Effects Abroad of Major Federal Actions." The intent of Executive Order 12114 was to strike a balance among competing agency concerns. While the order extended environmental impact assessments to major federal actions abroad, it took into account concerns about possible intrusion into foreign affairs, national security, and export promotion activities, and it exempted many major federal actions abroad from assessment.

Executive Order 12114 has not prevented litigants from attempting to obtain court rulings on the applicability of NEPA to major federal actions abroad. In January 1993, a federal court determined that NEPA applied to the National Science Foundation's actions to incinerate food wastes in Antarctica.<sup>3</sup> The National Science Foundation had prepared environmental documentation for this action under Executive Order 12114. According to a National Security Council official, following that decision, many federal agencies called for clarification of NEPA's applicability outside the United States. In April 1993, the National Security Council began a review, under

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<sup>2</sup>The term "global commons" refers to those portions of the planet—such as the oceans, the upper atmosphere, and Antarctica—in which all nations have a common but nonproprietary interest.

<sup>3</sup>*Environmental Defense Fund, Inc. v. Massey*, 986 F.2d 528 (D.C. Cir. 1993).

Presidential Review Directive 23, to determine whether changes were needed to the current policy governing the assessment of the environmental impact of actions abroad. This effort was preceded by a 1990 Council on Environmental Quality task force and by congressional hearings in 1988, 1989, and 1991 on this issue.

## Executive Order 12114 Differs From NEPA in Several Important Respects

While one stated goal of Executive Order 12114 is to “further the purpose” of NEPA, the order differs from NEPA in several important respects. Table 1 summarizes these differences, which include the scope of the federal actions covered, the applicable procedures and documents, and the extent of the external review of the assessments by the public, other federal agencies, and the courts.

**Table 1: Key Differences Between NEPA and Executive Order 12114**

NEPA	Executive Order 12114
Broad in scope	Limited in scope
Assessment process detailed in Council on Environmental Quality regulations	No Council on Environmental Quality regulations
Evaluation of alternatives required	Evaluation of alternatives not required
Public involvement required	Public involvement not required
Interagency review required	Interagency review not required
Judicial review available	No judicial review

## National Environmental Policy Act

NEPA is broad in scope in that it does not specifically exempt any major federal action from its assessment process. The NEPA assessment process begins when an agency proposes an action. Generally, if the agency’s own NEPA regulations<sup>4</sup> do not categorically exclude the action, the agency performs an environmental assessment of the proposed action. The environmental assessment may either generate a finding of no significant impact or yield sufficient evidence to require a more detailed environmental impact statement.

Under NEPA and its implementing regulations, federal officials must weigh alternatives to an agency’s proposed action and seek comment from the

<sup>4</sup>While NEPA did not require the Council on Environmental Quality to issue regulations to federal agencies for implementing NEPA, subsequent executive orders—Executive Order 11514 of 1970 and Executive Order 11991 of 1977—directed the Council to issue guidance and regulations to federal agencies to make the NEPA process more uniform and efficient. The Council’s regulations do not address the applicability of the various procedural requirements to specific agency actions. Instead, the Council requires each federal department and agency to prepare its own procedures to ensure its compliance in performing its particular mission. The Council reviews and approves all agencies’ procedures and amendments to those procedures.

public and other federal agencies on that action. Such an informative and open process was intended to ensure the systematic consideration of environmental values in federal decision-making. Under NEPA, both environmental assessment and environmental impact statement documents are required to assess the environmental impacts not only of the proposed action but also of possible alternatives to the proposed action.

To enhance the openness of the assessment process, NEPA, as interpreted in case law, provides for external review by other government agencies, the public, and the courts (through judicial review). Under section 309 of the Clean Air Act, the Environmental Protection Agency is responsible for reviewing and commenting on environmental impact statements prepared by other federal agencies under NEPA.<sup>5</sup> In addition, the public is allowed to participate during both the "scoping" process—when the range of actions, alternatives, and impacts to be considered in environmental documents are determined—and after draft environmental documents have been prepared. Finally, the courts have permitted citizens to challenge agencies' procedural decisions under NEPA, such as decisions about whether to prepare an environmental impact statement. In 1991, 94 cases involving a NEPA claim were filed against federal agencies.

Many believe that external review is critical to the quality of the environmental impact assessment process. The Council on Environmental Quality has concluded that among nations that have established environmental impact assessment systems, those that have set up external review procedures have been more effective than those that have not.<sup>6</sup>

## Executive Order 12114

Executive Order 12114 differs significantly from NEPA in both the range of actions it covers and in the analyses and participation it requires for its environmental impact assessments. Executive Order 12114 applies to major federal actions that significantly affect (1) the environment of the global commons, (2) a nation not participating with the United States in the actions, (3) a nation to which the United States exports a product or a physical project that produces an emission or effluent that is prohibited or strictly regulated in the United States because it poses a toxic or

<sup>5</sup>This section directs the Environmental Protection Agency to refer to the Council on Environmental Quality "any such legislation, action, or regulation" found to be "unsatisfactory from the standpoint of public health or welfare or environmental quality. . . ." Under section 102(2)(C) of NEPA and its implementing regulations, other federal agencies can undertake similar reviews and referrals.

<sup>6</sup>Environmental Quality: Twentieth Annual Report, Council on Environmental Quality (Washington, D.C., 1990).

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radioactive threat, or (4) a designated natural or ecological resource of global importance.

Executive Order 12114 also lists categories of major federal actions that are exempt from the order. These include actions by the President, actions taken by or pursuant to the direction of the President or a Cabinet officer involving national security or occurring during the course of an armed conflict, intelligence activities and arms transfers, the granting of export licenses or permits or export approvals, certain actions relating to nuclear activities, votes and other actions in international conferences and organizations, and disaster and emergency relief actions. The text of Executive Order 12114 appears in appendix I.

While Executive Order 12114 calls for the preparation of an environmental impact statement in certain circumstances, this document is less comprehensive than the environmental impact statement required under NEPA. Under the order, such a statement is required only when an action will significantly affect the global commons or when an action threatens a globally important natural resource designated as such by the President or the Secretary of State. When an environmental impact statement is to be prepared because an action may threaten both the global commons and a foreign nation, the order explicitly provides that the statement need not describe the action's effects within the foreign nation. In addition, an evaluation of the alternatives to the proposed action is not called for under the order, as it is under NEPA. Other assessment documents called for under the order include "bilateral or multilateral environmental studies" and "concise environmental reviews, including environmental assessments, summary environmental analyses or other appropriate documents." However, these documents are not defined in the order. The order did not require the Council on Environmental Quality to issue regulations to describe these documents or to explain when they should be prepared.

External review of the assessment process is not required under Executive Order 12114, as it is under NEPA. No requirement exists under the order for the Environmental Protection Agency or other government agencies to review and comment on the environmental impact statements prepared under the order. Also, the order does not mention the need for public comment during the assessment process. Finally, the order specifically exempts agencies' actions under the order from judicial review.



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## Ambiguities in the Executive Order Are of Concern to Some Agencies

Executive Order 12114 directs every federal agency taking major federal actions defined in the order to develop procedures to implement the order. Twenty-one federal departments and agencies have such procedures, and many have applied their procedures to projects abroad. Appendix II details the number and type of assessments that have been completed under the order by the departments and agencies we contacted.

Generally, agencies have varied widely in interpreting and implementing the order, particularly in deciding (1) which major federal actions require environmental impact assessments and (2) how comprehensively these assessments need to be performed. We found that ambiguities in the order contributed to this variation and that additional guidance is needed to resolve the problem.

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## Agencies Vary as to Which Actions Require Assessment

Section 2-4 of the order requires the preparation of either (1) a bilateral or multilateral environmental study or (2) a concise environmental review for actions covered by section 2-3(b). Under section 2-3(b), such actions include "major federal actions significantly affecting the environment of a foreign nation not participating with the United States and not otherwise involved in the action." According to a 1979 White House fact sheet, this provision was intended to address situations involving a third-party or innocent bystander: For example, when the construction in one country of a dam financed by the United States could cut off water for another country, an environmental assessment would be required because the nation whose water supply would be affected would not be participating with the United States or otherwise involved in the project.

A section 2-4 document is also required for actions covered by section 2-3(c)(1) and 2-3(c)(2). Such actions provide a product or project producing an emission or effluent that is prohibited or strictly regulated in the United States, or a project that is prohibited or strictly regulated in the United States to protect the environment against radioactive substances. Projects covered under these sections included a rocket launch from Brazil sponsored by the National Aeronautics and Space Administration and the construction of hazardous waste storage facilities on overseas military bases by the Defense Logistics Agency.

As the Council on Environmental Quality's task force reported in July 1990,<sup>7</sup> agencies' implementation of Executive Order 12114's

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<sup>7</sup>Interagency Task Force on Environmental Impacts Abroad, Council on Environmental Quality (Washington, D.C.: July 23, 1990).

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requirements has varied widely and agencies disagree as to which actions require environmental assessment. According to the report, several participants in the task force argued that some agencies have failed to develop guidelines for implementing the order because they believe that their actions abroad are excluded by virtue of a foreign nation's participation. Conversely, several participants said that "under the terms of the [order], a nation's participation with the agency is not sufficient to exempt an action from environmental review unless the foreign nation is also 'involved in the action.'" The report concluded that "Experience with . . . Executive Order 12114 varies considerably within the federal government" and noted that many federal agencies have made extensive use of environmental impact assessments while "other agencies have had little experience" with them.

We found similar variation among federal agencies today: Some agencies interpret the applicability of the order to their actions narrowly, while others assume a broader interpretation. This variation was particularly evident in agencies' interpretation of the order's "participation" clause. The U.S. Section of the International Boundary and Water Commission, for example, reported that it had not developed procedures to implement the order because all of its actions in Mexico are taken with the cooperation of that country. Similarly, the National Science Foundation, which had developed implementation procedures, did not conduct an environmental assessment for the construction of a laboratory in Chile, since that country's government was participating in the project.

Other agencies, however, have conducted an assessment for a major federal action even though the agencies could have claimed that another nation was participating in or had consented to the action. The Air Force European Command's environmental impact assessment procedures, for example, go beyond the order to require environmental reviews of actions that the Command believes would be exempt under either the order or the Air Force's implementing regulations. In addition, the Air Force has conducted environmental reviews for base closures and troop withdrawals under its executive order procedures even though it could have argued that these activities were undertaken with the participation of the host country. Similarly, the Federal Aviation Administration plans to conduct an environmental impact assessment for an action in another country that is involved in the action, even though such an assessment is not explicitly required by the order.

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### Agencies Also Vary as to How Comprehensive Assessments Must Be

Our interviews suggest that agencies also vary as to how thorough their assessments must be for certain classes of actions covered by Executive Order 12114. Much of this variation is attributable to the fact that, unlike NEPA and its associated regulations, the order does not specify whether agencies' environmental documents should consider alternatives to the proposed action and/or measures to mitigate adverse environmental impacts.

Accordingly, some agencies' executive order procedures encourage the consideration of alternatives and mitigation strategies where feasible, while other agencies' procedures do not. For example, many agencies' procedures require the consideration of alternatives only for actions in the global commons, but several agencies' procedures require no consideration of alternatives. Few agencies' procedures go beyond the guidance provided in the order in specifying how comprehensively to prepare a concise environmental review or environmental study.

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### Agencies Seek Additional Guidance on Assessments

While some of the variation in agencies' requirements and procedures for environmental impact assessments can be attributed to the flexibility built into Executive Order 12114, some of the variation reflects agencies' confusion over ambiguities in the order. As the Council on Environmental Quality noted in 1990, many participants on its interagency task force "stated that the Executive Order lacked clarity and guidance and that their agencies have had difficulty in implementation because of these factors." The report added that some participants noted a lack of definitions for the terms "involved in," "participating in" and "global commons." A Department of Defense participant maintained that the order was "troublesome," in part, because it lacked clear guidance on what activities are to be analyzed and on how an environmental impact assessment is to be processed.

Similar sentiments were expressed during the course of our review. In particular, officials from several agencies expressed uncertainty over how the executive order applies to actions they conduct with other countries. For example, the Air Force European Command's Chief of Environmental Law noted in an April 16, 1993, letter to Air Force headquarters about assessing environmental impacts overseas that

there are significant shortcomings in the [executive order] . . . that have hindered the development and effective utilization of the environmental impact analysis process. If the

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shortcomings could be corrected, a substantial improvement in the effectiveness of the program would be realized. . . .

He noted, among other specific problems, that (1) the order does not define participation by another nation and therefore almost any official involvement by host nation officials qualifies as participation and (2) the issues that must be discussed in an environmental review have never been identified.

Other officials echoed the views expressed by participants in the Council on Environmental Quality's task force, stating that additional guidance should be developed to clarify when an environmental impact assessment needs to be undertaken and how comprehensive that assessment needs to be. Some noted more specifically that the guidance should clarify what constitutes the involvement of other countries in the action; how detailed the documentation needs to be; and what is required of the agency if host nations have comparable environmental impact assessment laws.<sup>8</sup>

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### Ambiguities in NEPA Have Raised Questions About Its Applicability to Trade Agreements

Just as ambiguities in Executive Order 12114 have created uncertainty over the applicability of the order's requirements for environmental review abroad, so ambiguities in NEPA have raised questions about the applicability of the act's procedures to certain federal actions, particularly to trade agreements.

NEPA requires that an environmental impact statement be prepared for every "recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment." On the basis of this provision, environmental impact statements have been prepared for several international agreements, ranging from the Montreal Protocol for the Protection of the Stratospheric Ozone Layer to the New Panama Canal Treaty. However, according to the Council on Environmental Quality, no environmental impact statements have been prepared for trade agreements. No environmental impact statement was prepared for the North American Free Trade Agreement (NAFTA), although the Office of the U.S. Trade Representative independently completed an environmental assessment of NAFTA and transmitted it to the Congress in September 1992.

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<sup>8</sup>As the 1990 task force showed, the Council on Environmental Quality has conducted a limited exchange of information about Executive Order 12114. If the Congress abolished the Council—as it considered doing in the last session—it would probably transfer the Council's functions, such as oversight for NEPA, to the Environmental Protection Agency, which would then likely oversee and provide guidance on international environmental impact assessment.

In June 1993, in a suit brought by three public interest groups contending that NAFTA constituted a proposal for legislation significantly affecting the environment, a U.S. district court ruled that NEPA did in fact apply to NAFTA and ordered the Office of the U.S. Trade Representative to prepare an environmental impact statement.<sup>9</sup> In September 1993, however, a U.S. court of appeals reversed that decision on jurisdictional grounds.<sup>10</sup>

The prospect that the United States will negotiate more regional trade agreements like NAFTA, as well as engage in further rounds of the General Agreement on Tariffs and Trade, suggests a need for clear guidance on when NEPA applies to trade agreements.

## Problems and Benefits of Extending NEPA's Procedures to Actions Abroad

While the need to clarify the ambiguities of Executive Order 12114 seems apparent, a more controversial issue is whether to strengthen its environmental review provisions to more closely parallel those of NEPA or to amend NEPA to apply explicitly to U.S. agencies' actions abroad. For example, officials we interviewed expressed a wide variety of opinions on a number of issues concerning U.S. actions abroad, such as whether to allow other U.S. agencies to comment on environmental documents, provide copies of these documents to officials of other governments, or hold public hearings in other countries.

Many federal officials have cited difficulties they would face if they were required to apply NEPA's procedures abroad, noting in particular that doing so could infringe on the sovereignty of other nations by imposing U.S. law on foreign soil. In 1990 and 1993, U.S. district courts echoed this concern by rejecting claims that the Department of Defense needed to prepare environmental impact statements under NEPA for major federal actions in the Federal Republic of Germany and in Japan. The court in 1990 stated that the imposition of NEPA's requirements would encroach on the authority of the Federal Republic of Germany to implement its own decision on the matter.<sup>11</sup> In 1993, citing the 1990 case, the court noted that even if NEPA did apply in the case involving Japan, no environmental

<sup>9</sup>Public Citizen v. United States Trade Representative, 1993 U.S. Dist. LEXIS 8682 (D.D.C. June 30, 1993).

<sup>10</sup>Public Citizen v. United States Trade Representative, 1993 U.S. App. LEXIS 24660 (D.C. Cir. Sept. 24, 1993). The U.S. Supreme Court recently declined to review the appellate court's decision.

<sup>11</sup>Greenpeace USA v. Stone, 748 F.Supp. 749 (D. Haw. 1990).

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impact statements would be required because U.S. foreign policy interests outweighed the benefits of preparing the statements.<sup>12</sup>

In the absence of safeguards limiting judicial review, some federal officials fear that extending NEPA's procedures abroad could increase the number of lawsuits using NEPA as a vehicle to litigate over foreign relations and national defense policies. Such litigation, as well as implementing NEPA's procedural requirements, could disrupt U.S. relations with other countries and limit the President's ability to act with the kind of flexibility and dispatch often critical in the conduct of foreign affairs. The litigation might also raise difficult constitutional questions of encroachment on the powers of the President.

Another problem raised has been the potentially prohibitive cost of conducting environmental impact assessments in other countries. In addition, NEPA's public participation requirements, some argue, would be politically and culturally difficult to accomplish if agencies had to translate documents or hold public hearings in foreign countries.

In contrast, some believe that strengthening environmental assessment procedures abroad, possibly by amending NEPA, could lead to better decisions by requiring rigorous analysis of potential environmental impacts before projects are undertaken. Under NEPA, federal officials must weigh alternatives to proposed agency actions and seek comment from the public and other federal agencies on the actions. In enacting NEPA, the Congress believed that such an informative and open decision-making process would help ensure the systematic consideration of environmental values. Many believe that allowing the people directly affected by the projects to participate in the process improves decision-making. Assessing the environmental impacts of federal actions abroad could prevent the kind of environmental problems that have recently been discovered on overseas military bases. For example, we have reported on the problems of managing hazardous waste at Department of Defense overseas installations.<sup>13</sup> The United States may now have to settle claims brought by host countries to clean up hazardous waste and other sources of significant pollution.

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<sup>12</sup>NEPA Coalition of Japan v. Aspin, No. 91-1522, 1993 U.S. Dist. LEXIS 17090 (D.D.C. Nov. 30, 1993).

<sup>13</sup>Hazardous Waste: Management Problems Continue at Overseas Military Bases (GAO/NSIAD-91-231, Aug. 28, 1991).

## The United States Is Supporting Stronger Assessment Requirements Internationally

Some have argued that strengthening environmental impact assessment requirements for U.S. actions abroad would be consistent with other recent U.S. actions. The United States has strengthened the environmental impact assessment requirements for U.S. foreign aid agencies beyond the requirements of Executive Order 12114 and has promoted other countries' use of NEPA procedures through international agreement. Interviews with experts on NEPA and our own analysis show that, compared to these initiatives, Executive Order 12114 appears dated.

For example, 1981 amendments to the Foreign Assistance Act require the Agency for International Development to follow procedures similar to those required by NEPA regulations. The agency's procedures provide for a host country's government and citizens to participate during the assessment process and allow the agency's bureau environmental coordinators to stop projects they believe will have significant adverse environmental impacts. The Overseas Private Investment Corporation Amendments Act of 1985 requires the Corporation to apply to its projects procedures similar to those used by the Agency for International Development. The act also requires the Corporation to decline to assist projects that pose an unreasonable threat to the environment or to protected areas. In addition, the Export Enhancement Act of 1992 amended the Export-Import Bank Act of 1945 to permit the Export-Import Bank's board to withhold financing from a project for environmental reasons.

In 1989, the Congress enacted the "Pelosi Amendment" to title XIII of the International Financial Institutions Act. This amendment requires the Secretary of the Treasury to instruct the U.S. executive directors of the multilateral development banks to vote against any action proposed to be taken by a particular bank that would have a significant effect on the environment unless the proposed action is accompanied by an environmental assessment or comprehensive environmental summary received at least 120 days before the board votes on the proposal. The Treasury Department reported to the Congress that the restrictions placed on U.S. support for multilateral development bank projects by the Pelosi Amendment have unquestionably been a factor in motivating the banks to develop environmental assessment requirements for their projects.

Finally, the United States has increasingly supported the use of NEPA procedures by other countries, and NEPA has been copied by foreign governments. About 50 other countries have adopted an environmental impact assessment system in some form. In February 1992, the United

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States signed the Convention on Environmental Impact Assessment in a Transboundary Context (Espoo Convention). The Espoo Convention, limited to significant transboundary actions among countries belonging to the Economic Commission for Europe, establishes environmental impact assessment procedures, such as public participation and analysis of alternatives, for these actions.

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## Conclusions

We recognize that Executive Order 12114 represented an attempt to strike a balance between safeguarding the environment abroad and providing flexibility in foreign policy and national security pursuits. Federal officials and other experts on NEPA have long debated the adequacy of the order, as well as the problems and benefits of strengthening the environmental impact assessment procedures used abroad. Recent U.S. actions to strengthen the environmental assessment procedures of foreign aid agencies, coupled with U.S. initiatives to strengthen the environmental impact assessment procedures of multilateral development banks and other countries, could argue for strengthening the environmental impact assessment procedures of other federal agencies as well. Ultimately, however, any decision to strengthen U.S. environmental review requirements abroad is a policy decision for the Congress and the administration to make, taking into account both diplomatic and environmental considerations.

At a minimum, however, the variation we have found in agencies' implementation of Executive Order 12114 suggests a need to clarify (1) when environmental impact assessments are required and (2) how comprehensively they should be prepared. As part of its review of environmental impact assessment procedures abroad under Presidential Review Directive 23, the National Security Council will have an opportunity to recommend changes to resolve the ambiguities in the executive order.

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## Recommendations

We recommend that the Assistant to the President for National Security Affairs take the following steps:

- Clarify which actions abroad require environmental assessments under Executive Order 12114. In particular, the Assistant to the President for National Security Affairs should clarify if, and under what circumstances, participation with another country exempts actions from assessment.



- Clarify how comprehensive the assessments must be, including whether and how agencies must consider alternatives, seek external review, and include public participation.

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## Matters for Congressional Consideration

The completion of Presidential Review Directive 23 on environmental impact assessment procedures abroad will give the Congress an opportunity to consider whether these procedures should be strengthened. Should the Congress wish to strengthen these procedures, it could require the Council on Environmental Quality, or a successor agency if the Council is abolished, to write separate regulations under NEPA for major federal actions abroad that would explicitly require the consideration of alternatives, some degree of public participation, and interagency review and oversight by the Council or a successor agency.

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## Agency Comments

We discussed the contents of this report with the Acting Director, Council on Environmental Quality, who generally agreed with the information presented. We incorporated his comments where appropriate. We also verified certain factual information with officials from other agencies and incorporated their comments as appropriate. However, as agreed with your office, we did not obtain written comments on a draft of this report.

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## Scope and Methodology

To determine the differences between Executive Order 12114 and NEPA, we reviewed the texts of each, as well as related regulations, case law, and articles in legal periodicals. We also discussed the differences with agency officials responsible for implementing the order and NEPA.

To determine how agencies have implemented the order, we interviewed representatives from 13 Cabinet departments and 16 independent federal agencies or commissions to determine (1) whether they had international activities, (2) whether they had procedures for assessing the environmental impacts of these activities, and (3) what kinds of activities they had applied the procedures to. We also asked officials in these agencies for their opinions on the problems and benefits of applying NEPA's procedures to their actions abroad.

Because not every agency kept complete records of its extraterritorial activities and because significant changes in agency staff occurred since 1979, some agencies could not provide complete information over a 15-year period. In such cases, we relied on agency officials' best estimates.

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Also, to determine the problems and benefits of extending NEPA's procedures to major actions abroad, we reviewed congressional hearings and other literature on this issue and discussed options with agency officials, representatives of nongovernmental organizations, and experts in the field of environmental impact assessment law.

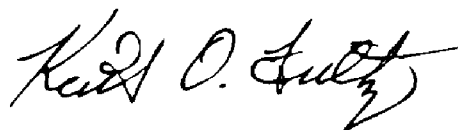
We conducted our review in Washington, D.C., from February 1993 to December 1993 in accordance with generally accepted government auditing standards.

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As arranged with your office, unless you publicly announce its contents earlier, we plan no further distribution of this report until 30 days from the date of this letter. At that time, we will send copies to the appropriate congressional committees; the Acting Chairman, Council on Environmental Quality; the Assistant to the President for National Security Affairs; the heads of the other agencies we contacted during our review; and the Director, Office of Management and Budget.

This work was performed under the direction of Peter F. Guerrero, Director, Environmental Protection Issues, who can be reached on (202) 512-6111 if you or your staff have any questions. Major contributors to this report are listed in appendix III.

Sincerely yours,



Keith O. Fultz  
Assistant Comptroller General



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## Abbreviations

NAFTA	North American Free Trade Agreement
NEPA	National Environmental Policy Act

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## Executive Order 12114

THE PRESIDENT

1957

[3195-01-M]  
Title 3  
The President

Executive Order 12114 of January 4, 1979

**Environmental Effects Abroad of Major Federal Actions**

By virtue of the authority vested in me by the Constitution and the laws of the United States, and as President of the United States, in order to further environmental objectives consistent with the foreign policy and national security policy of the United States, it is ordered as follows:

**Section 1.**

1-1. *Purpose and Scope.* The purpose of this Executive Order is to enable responsible officials of Federal agencies having ultimate responsibility for authorizing and approving actions encompassed by this Order to be informed of pertinent environmental considerations and to take such considerations into account, with other pertinent considerations of national policy, in making decisions regarding such actions. While based on independent authority, this Order furthers the purpose of the National Environmental Policy Act and the Marine Protection Research and Sanctuaries Act and the Deepwater Port Act consistent with the foreign policy and national security policy of the United States, and represents the United States government's exclusive and complete determination of the procedural and other actions to be taken by Federal agencies to further the purpose of the National Environmental Policy Act, with respect to the environment outside the United States, its territories and possessions.

**Sec. 2.**

2-1. *Agency Procedures.* Every Federal agency taking major Federal actions encompassed hereby and not exempted herefrom having significant effects on the environment outside the geographical borders of the United States and its territories and possessions shall within eight months after the effective date of this Order have in effect procedures to implement this Order. Agencies shall consult with the Department of State and the Council on Environmental Quality concerning such procedures prior to placing them in effect.

2-2. *Information Exchange.* To assist in effectuating the foregoing purpose, the Department of State and the Council on Environmental Quality in collaboration with other interested Federal agencies and other nations shall conduct a program for exchange on a continuing basis of information concerning the environment. The objectives of this program shall be to provide information for use by decisionmakers, to heighten awareness of and interest in environmental concerns and, as appropriate, to facilitate environmental cooperation with foreign nations.

2-3. *Actions Included.* Agencies in their procedures under Section 2-1 shall establish procedures by which their officers having ultimate responsibility for authorizing and approving actions in one of the following categories encompassed by this Order, take into consideration in making decisions concerning such actions, a document described in Section 2-4(a):

- (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:

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(1) a product, or physical project producing a principal product or an emission or effluent, which is prohibited or strictly regulated by Federal law in the United States because its toxic effects on the environment create a serious public health risk; or

(2) a physical project which in the United States is prohibited or strictly regulated by Federal law to protect the environment against radioactive substances.

(d) major Federal actions outside the United States, its territories and possessions which significantly affect natural or ecological resources of global importance designated for protection under this subsection by the President, or, in the case of such a resource protected by international agreement binding on the United States, by the Secretary of State. Recommendations to the President under this subsection shall be accompanied by the views of the Council on Environmental Quality and the Secretary of State.

2-4. *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 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.

(b) Agencies shall in their procedures provide for preparation of documents described in Section 2-4(a), with respect to actions described in Section 2-3, as follows:

(i) for effects described in Section 2-3(a), an environmental impact statement described in Section 2-4(a)(i);

(ii) for effects described in Section 2-3(b), a document described in Section 2-4(a)(ii) or (iii), as determined by the agency;

(iii) for effects described in Section 2-3(c), a document described in Section 2-4(a)(ii) or (iii), as determined by the agency;

(iv) for effects described in Section 2-3(d), a document described in Section 2-4(a)(i), (ii) or (iii), as determined by the agency.

Such procedures may provide that an agency need not prepare a new document when a document described in Section 2-4(a) already exists.

(c) Nothing in this Order shall serve to invalidate any existing regulations of any agency which have been adopted pursuant to court order or pursuant to judicial settlement of any case or to prevent any agency from providing in its procedures for measures in addition to those provided for herein to further the purpose of the National Environmental Policy Act and other environmental laws, including the Marine Protection Research and Sanctuaries Act and the Deepwater Port Act, consistent with the foreign and national security policies of the United States.

(d) Except as provided in Section 2-5(b), agencies taking action encompassed by this Order shall, as soon as feasible, inform other Federal agencies with

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relevant expertise of the availability of environmental documents prepared under this Order.

Agencies in their procedures under Section 2-1 shall make appropriate provision for determining when an affected nation shall be informed in accordance with Section 3-2 of this Order of the availability of environmental documents prepared pursuant to those procedures.

In order to avoid duplication of resources, agencies in their procedures shall provide for appropriate utilization of the resources of other Federal agencies with relevant environmental jurisdiction or expertise.

2-5: *Exemptions and Considerations.* (a) Notwithstanding Section 2-3, the following actions are exempt from this Order:

(i) actions not having a significant effect on the environment outside the United States as determined by the agency;

(ii) actions taken by the President;

(iii) actions taken by or pursuant to the direction of the President or Cabinet officer when the national security or interest is involved or when the action occurs in the course of an armed conflict;

(iv) intelligence activities and arms transfers;

(v) export licenses or permits or export approvals, and actions relating to nuclear activities except actions providing to a foreign nation a nuclear production or utilization facility as defined in the Atomic Energy Act of 1954, as amended, or a nuclear waste management facility;

(vi) votes and other actions in international conferences and organizations;

(vii) disaster and emergency relief action.

(b) Agency procedures under Section 2-1 implementing Section 2-4 may provide for appropriate modifications in the contents, timing and availability of documents to other affected Federal agencies and affected nations, where necessary to:

(i) enable the agency to decide and act promptly as and when required;

(ii) avoid adverse impacts on foreign relations or infringement in fact or appearance of other nations' sovereign responsibilities, or

(iii) ensure appropriate reflection of:

(1) diplomatic factors;

(2) international commercial, competitive and export promotion factors;

(3) needs for governmental or commercial confidentiality;

(4) national security considerations;

(5) difficulties of obtaining information and agency ability to analyze meaningfully environmental effects of a proposed action; and

(6) the degree to which the agency is involved in or able to affect a decision to be made.

(c) Agency procedure under Section 2-1 may provide for categorical exclusions and for such exemptions in addition to those specified in subsection (a) of this Section as may be necessary to meet emergency circumstances, situations involving exceptional foreign policy and national security sensitivities and other such special circumstances. In utilizing such additional exemp-



Appendix I  
Executive Order 12114

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tions agencies shall, as soon as feasible, consult with the Department of State and the Council on Environmental Quality.

(d) The provisions of Section 2-5 do not apply to actions described in Section 2-3(a) unless permitted by law.

Sec. 3.

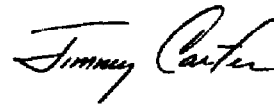
3-1. *Rights of Action.* This Order is solely for the purpose of establishing internal procedures for Federal agencies to consider the significant effects of their actions on the environment outside the United States, its territories and possessions, and nothing in this Order shall be construed to create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

3-2. *Foreign Relations.* The Department of State shall coordinate all communications by agencies with foreign governments concerning environmental agreements and other arrangements in implementation of this Order.

3-3. *Multi-Agency Actions.* Where more than one Federal agency is involved in an action or program, a lead agency, as determined by the agencies involved, shall have responsibility for implementation of this Order.

3-4. *Certain Terms.* For purposes of this Order, "environment" means the natural and physical environment and excludes social, economic and other environments; and an action significantly affects the environment if it does significant harm to the environment even though on balance the agency believes the action to be beneficial to the environment. The term "export approvals" in Section 2-5(a)(v) does not mean or include direct loans to finance exports.

3-5. *Multiple Impacts.* If a major Federal action having effects on the environment of the United States or the global commons requires preparation of an environmental impact statement, and if the action also has effects on the environment of a foreign nation, an environmental impact statement need not be prepared with respect to the effects on the environment of the foreign nation.



The White House,  
January 4, 1979.

[FR Doc. 79-869  
Filed 1-5-79; 3:38 pm]

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# Federal Agencies' Implementation of Executive Order 12114

Five Cabinet departments—Defense, Energy, State,<sup>1</sup> Transportation, and the Treasury—have procedures to implement Executive Order 12114. Eleven agencies within three of these departments have separate implementing procedures. The Food and Drug Administration in the Department of Health and Human Services and the National Oceanic and Atmospheric Administration in the Department of Commerce have their own procedures, although their departments do not. Of the 13 independent agencies and commissions we surveyed, 3 had such procedures.<sup>2</sup>

As table I.1 shows, 15 out of 21 agencies that have Executive Order 12114 procedures have performed environmental impact assessments under either these procedures or another authority, such as the National Environmental Policy Act.<sup>3</sup> While the total number of assessments performed by these agencies for actions abroad is not known, we estimate, on the basis of interviews with agency officials, that over 500 assessments have been conducted since 1979. This estimate includes approximately 200 assessments submitted by applicants for the Environmental Protection Agency's permits for major new sources in Prevention of Significant Deterioration areas established under the Clean Air Act of 1977. Many of the remaining actions were Department of Defense construction projects on overseas military installations.

Both the Animal and Plant Health Inspection Service of the Department of Agriculture and the United States Information Agency have assessed the environmental impact of actions they have planned to take outside the United States even though they have no procedures for doing so under the executive order or another authority.

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<sup>1</sup>In November 1979, the State Department also issued separate procedures under Executive Order 12114 specifying environmental assessment procedures for nuclear export activities of federal agencies.

<sup>2</sup>This number excludes three agencies that have environmental assessment procedures under both the executive order and other authorities—the Agency for International Development, the Export-Import Bank, and the Overseas Private Investment Corporation (see this report's letter and table II.2).

<sup>3</sup>We use the broad term "environmental impact assessment" to include any of the following performed under Executive Order 12114: environmental assessments, environmental impact statements, bilateral or multilateral environmental studies, concise environmental reviews, or summary environmental analyses.

**Appendix II  
Federal Agencies' Implementation of  
Executive Order 12114**

**Table II.1: Federal Agencies That Have Procedures to Implement Executive Order 12114**

<b>Department/Agency</b>	<b>Estimated number of environmental impact assessments performed for actions abroad since 1979 (under any authority)</b>	<b>Type of environmental impact assessments typically performed <sup>a</sup></b>	<b>Examples of activities for which environmental impact assessments have been performed</b>
Environmental Protection Agency	Over 200	Concise environmental reviews, environmental impact statements	Permits for ocean dumping and for Prevention of Significant Deterioration
Army	Over 100	Environmental reviews	Conventional Armed Forces in Europe Treaty; road construction; chemical weapons transport from Germany to U.S. territory in Pacific
National Science Foundation	Over 100	Programmatic environmental impact statements	Ocean drilling; sea water desalination system, Antarctica
Department of State	25	Environmental impact statements, environmental reviews	Montreal Protocol on Substances That Deplete the Ozone Layer; use of herbicides to eradicate illicit coca overseas
Air Force	Over 20	Environmental reviews	Base closures; force structure realignments; power plant construction; housing construction
Food and Drug Administration (Department of Health and Human Services)	Over 20	Environmental assessments	Drug and food additive manufacturing by U.S. companies overseas
Defense Logistics Agency	20	Environmental reviews	Fuel storage tank construction; hazardous materials and waste storage facility construction
National Oceanic and Atmospheric Administration (Department of Commerce)	11-20	Environmental assessments, environmental impact statements	Fishery management projects in Atlantic and Pacific oceans
Department of Energy	11-20	Environmental reviews, environmental assessments	Nuclear power plant export to Philippines; shipment of plutonium from foreign research reactors
National Aeronautics and Space Administration	4-6	Environmental assessments, environmental reviews	Space launches on foreign soil
U. S. Coast Guard	3	Environmental impact statements	Construction of offshore ports; vessel traffic system and radar

(continued)

**Appendix II  
Federal Agencies' Implementation of  
Executive Order 12114**

<b>Department/Agency</b>	<b>Estimated number of environmental impact assessments performed for actions abroad since 1979 (under any authority)</b>	<b>Type of environmental impact assessments typically performed <sup>a</sup></b>	<b>Examples of activities for which environmental impact assessments have been performed</b>
Navy	3-5	Environmental assessments	Underwater explosive testing; Arctic field exercises
Army Corps of Engineers	2 <sup>b</sup>	Environmental assessments, environmental impact statements	Flood control project for North Dakota and Canada
Defense Nuclear Agency	1	Environmental assessment	Groundwave nuclear command and control system
Federal Aviation Administration	Unknown—at least 1 under way	Environmental assessment	Radar tower on Bimini, Caribbean
Joint Chiefs of Staff	None		
Federal Highway Administration	None		
Maritime Administration	None		
Department of Defense	All assessments performed by individual agencies		
Department of Transportation	All assessments performed by individual agencies		
Department of the Treasury	None		

Note: Some agencies stated that they have not developed environmental assessment procedures under the Executive Order because they do not engage in major federal actions outside the United States. Other agencies stated that their only international actions include providing technical assistance or training to other countries or participating in international forums. These agencies have not developed procedures because they do not consider these activities major federal actions as described in the order. Still other agencies that have not developed procedures stated that any activities they might undertake outside the United States would have little or no environmental impact.

<sup>a</sup>Executive Order 12114 specifies that the following types of documents be used when considering the environmental effects of actions abroad: (1) environmental impact statements for actions affecting the environment of the global commons; (2) bilateral or multilateral environmental studies for actions affecting the environment of a foreign nation not participating with the United States and not otherwise involved in the action; (3) concise reviews of the environmental issues involved—including environmental assessments, summary environmental analyses, or other appropriate documents—for actions described in (2), for actions providing a product or physical project producing a toxic substance prohibited or regulated in the United States, or for a physical project producing a radioactive substance prohibited or regulated in the United States. Any one of the above documents may be prepared for an action affecting a natural or ecological resource of global importance.

<sup>b</sup>The Army Corps of Engineers has also performed environmental impact assessments for projects financed by other agencies.

**Appendix II  
Federal Agencies' Implementation of  
Executive Order 12114**

As table II.2 shows, three U.S. foreign aid agencies assess the environmental impact of their actions abroad under separate procedures. These procedures are more stringent than those required under Executive Order 12114.

**Table II.2: U.S. Foreign Aid Agencies That Conduct Environmental Impact Assessments for Actions Abroad Under Separate Procedures**

<b>Agency</b>	<b>Authority to conduct environmental impact assessment</b>	<b>Estimated number of environmental impact assessments performed abroad since 1979</b>	<b>Examples of activities for which environmental impact assessments have been performed</b>
Overseas Private Investment Corporation	Overseas Private Investment Corporation Amendments Act of 1985	Over 100 annually	Large-scale industrial projects, such as mining, oil field development, and chemical manufacturing
Agency for International Development	Foreign Assistance Act of 1961, as amended	75-100 annually	Pesticide application; road improvements; AIDS surveillance and education project
Export-Import Bank	Section 17 of the Export-Import Bank Act of 1945, as amended	25	Funding for chemical plants, copper mine, pharmaceutical plant

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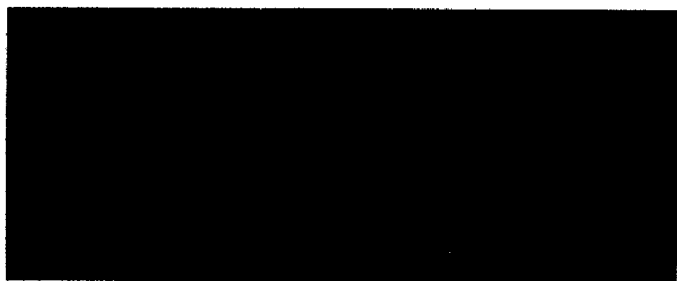
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