

THE NATIONAL ENVIRONMENTAL POLICY ACT OF 1969 AND ITS IMPLICATIONS FOR NAFTA: *PUBLIC CITIZEN V. UNITED STATES TRADE REPRESENTATIVE*, 822 F. SUPP. 21 (D.D.C.), *REV'D*, 5 F.3D 549 (D.C. CIR. 1993).

I. FACTUAL BACKGROUND

The Berlin Wall of American economic development¹ may be coming down, thanks to the North American Free Trade Agreement (NAFTA).² NAFTA proposes to create the world's largest free trade market, by gradually phasing out tariffs between the United States, Canada, and Mexico over a period of fifteen years.³ Negotiations on the agreement, which were conducted on behalf of the United States by the Office of the United States Trade Representative (OTR),⁴ formally began in 1991.⁵ The negotiations

¹ Richard Kiy, a spokesperson for a U.S. government group reviewing a proposal for an airport straddling the U.S.-Mexico border, called NAFTA "the New World's equivalent of the Berlin Wall falling." Bill Mason, *New Airport May Be First Sign of NAFTA*, CALGARY HERALD, Jan. 23, 1993, at F12.

² North American Free Trade Agreement Between the Government of the United States of America, the Government of Canada, and the Government of the United Mexican States,—U.S.T.—, abridged version reprinted in 32 I.L.M. 296 (1993) [hereinafter NAFTA]. For an excellent discussion of NAFTA, see Thomas J. Schoenbaum, *The North American Free Trade Agreement (NAFTA): Good for Jobs, for the Environment, and for America*, 23 GA. J. INT'L & COMP. L. 461 (1993).

³ Mexico has already lowered its tariffs from peaks in the early 1980s of 100% to the current level of 50%, pursuant to the General Agreement on Tariffs and Trade (GATT). ASIL/CCIL Joint Panel, *North American Trade: Barriers in Free Trade Arising From Differences in National Law*, 86 AM. SOC'Y INT'L L. PROC. 141 (1992) [hereinafter ASIL/CCIL Joint Panel]. GATT is similar to NAFTA in that its purpose is the lowering of tariff barriers, but NAFTA will virtually eliminate tariffs across North America. *Id.* NAFTA would eliminate tariffs altogether, thus liberalizing investment and giving all three countries an advantage in international competition. *Id.*; Christopher Marquis, *New Version of Trade Pact Is Not a Deal: Democratic Leaders Declare Clinton's Changes Fall Short*, DET. FREE PRESS, Aug. 14, 1993, at A1; Craig Stock, *Free Trade Ready for Vote in Congress; Here's the Deal*, In Brief, TIMES-PIRAYUNE, Aug. 17, 1993, at D2.

⁴ Former United States Trade Representative (USTR) Carla A. Hills headed the NAFTA negotiations team during the Bush Administration; Mickey Kantor stepped into that position when President Clinton took office. Paul Magnusson, *Clinton's Trade Team Is No Dream Team*, BUS. WK., Jan. 11, 1993, at 31.

culminated in a final agreement signed by U.S. President Bush, Mexican President Salinas, and Canadian Prime Minister Mulroney on December 17, 1992.⁶ The agreement was placed on an expedited schedule for ratification by Congress⁷ under "fast-track" procedures⁸ that allow it to take effect January 1, 1994.⁹ The magnitude of NAFTA cannot be understated, as it impacts 360 million consumers across the continent and creates a multi-national market generating over \$6 trillion in output.¹⁰ Moreover, experts estimate that NAFTA will create 170,000¹¹ to 200,000¹² jobs in the United States alone.¹³

A. *Environmental Effects of NAFTA*

Despite the positive economic effects of NAFTA, implementation could multiply the effects of existing pollution problems, especially along the

⁵ William H. Carlile, *NAFTA Promises New Era of Trading Opportunity; 3-Nation Pact Would Create a Single Market of 360 Million People and a Unified Annual Economy of \$6.5 Trillion*, ARIZ. REPUBLIC, Oct. 3, 1993, at E1; Davis S. Hilzenrath, *The Perots and Cons of NAFTA; Trade Pact Foe's Family Venture Forecasts Benefits from Accord*, WASH. POST, Oct. 1, 1993, at G14.

⁶ Mary Tiemann, *Environmental Issues*, 3 MEX. TRADE & L. REP. 2 (Feb. 1, 1993).

⁷ The Clinton administration submitted NAFTA's implementing legislation to Congress in early November, 1993. *Foley Seeks NAFTA Vote By Thanksgiving; Clinton Makes Pitch to House Members*, Int'l Trade Daily (BNA) (Oct. 4, 1993) [hereinafter *Foley Seeks NAFTA Vote*].

⁸ The fast-track process is authorized by the Trade Act of 1974, 19 U.S.C. §§ 2191-2194, 2902-2903 (1988). See *infra* notes 75-78 and accompanying text.

⁹ The countries have identified January 1, 1994 as the target date for implementation. Chwee Huay Ow-Taylor, *Facing the Challenge from NAFTA*, BUS. TIMES, July 28, 1993, at 23.

¹⁰ These figures reflect the total population of North America and the value of a continental trade market. ASIL/CCIL Joint Panel, *supra* note 3; Marquis, *supra* note 3, at A1; Stock, *supra* note 3, at D2; Carlile, *supra* note 5, at E1.

¹¹ *Suit Over EIS Requirement Would Be Moot if Congress Passes NAFTA, Attorney Says*, Banking Daily (BNA) (July 28, 1993) [hereinafter *Suit Over EIS Requirement*] (according to the amicus curiae brief filed by the National Association of Manufacturers).

¹² This figure is an estimate of the Clinton administration. See *Unions See Good Chance to Defeat NAFTA*, REUTER BUS. REP., Aug. 31, 1993 [hereinafter *Unions See Good Chance*]; *New Version of Trade Pact*, *supra* note 3, at A1.

¹³ These estimates are net figures which presume that the United States will lose a certain number of jobs through NAFTA. *Unions See Good Chance*, *supra* note 12; Marquis, *supra* note 3, at A1; *Suit Over EIS Requirement*, *supra* note 11.

Mexican border, as well as create new environmental hazards. Mexico's relatively lax environmental regulations and its cavalier attitude toward enforcement¹⁴ have already allowed the border region to become, in the words of the American Medical Association, a "virtual cesspool."¹⁵

A major contributor to the pollution problem is Mexico's infamous maquiladora program.¹⁶ Under this program, American companies employ Mexican workers to assemble American-made component parts, which are then shipped back to the United States.¹⁷ Besides reaping the benefits of cheap Mexican labor and diminished environmental standards, the companies pay tariffs only on the labor value added during the assembly of the product.¹⁸ One result of this practice is rampant pollution, and the program is widely blamed for the high incidence of birth defects in the border area.¹⁹

¹⁴ Mexican law ostensibly requires that hazardous waste produced by foreign companies be returned to their home countries for disposal. Casey Bukro, *On the Free Trade Frontier: Environmental Problems Multiply on Border*, CHI. TRIB., Aug. 22, 1993, at C1. However, it is estimated that 70% of such waste is dumped illegally. *Id.* According to the National Ecology Institute, Mexico's sole toxic waste dump stores approximately 5000 metric tons of hazardous waste per month—less than .001 percent of Mexico's annual yearly production. Chris Aspin, *Mexico's Ability to Meet Environmental Rules in Doubt*, REUTER ASIA-PACIFIC BUS. REP., Aug. 27, 1993.

¹⁵ Burko, *supra* note 14. Until recently, Mexico lacked guidelines governing sewage treatment, allowing raw sewage to flow untreated through many border cities. Chris Wood & Augusta Dwyer, *Borderline: Mexico's Vast Industrial Corridor Takes a Heavy Toll on Health and the Environment*, MACLEAN'S, July 19, 1993, at 25.

¹⁶ The term "maquiladora" derives from the Spanish word "maquila," referring to the amount of corn retained by a miller in exchange for grinding a farmer's corn. Frances Lee Ansley, *North American Free Trade Agreement: The Public Debate*, 22 GA. J. INT'L & COMP. L. 329, 339 n.30 (1992). For a review of the history of the Maquiladora program, see generally Angela C. Montez, *The Run Past the Border: Consequences of Treating the Environment Under NAFTA as a Border Issue*, 5 GEO. INT'L ENVTL. L. REV. 417, 418 (1993).

¹⁷ ASIL/CCIL Joint Panel, *supra* note 3.

¹⁸ Because the parts are assembled but not manufactured in Mexico, tariffs are charged only on the value of assembly, which is determined by the price paid for Mexican labor. *Id.*

¹⁹ Nineteen families in Brownsville, Texas, have filed a lawsuit alleging that chemicals used by U.S.-owned border factories have caused severe spinal and brain defects (including amencephaly, or brainlessness) in their children. Juanita Darling, *A River of Doubt: The Rio Grande's Pollution Is Part of the Debate Over NAFTA*, L.A. TIMES, Aug. 31, 1993, at 2. Women in Juarez, Mexico, have given birth to 163 amencephalytic babies in the last four years, an astonishing number. Linda Robinson, *A Tale of Two Troubled Cities*, U.S. NEWS & WORLD REP., Mar. 1, 1993, at 46.

These and other substantial risks²⁰ would affect consumers across the continent, and particularly within the border region.

B. NAFTA Side Agreements

In response to these concerns, President Clinton vowed not to submit NAFTA to Congress for approval until an environmental side agreement could be negotiated.²¹ The OTR completed negotiations on the side pact, which must be submitted concurrently with NAFTA,²² on August 13, 1993.²³

According to the text recently released by the OTR,²⁴ the agreement would create a tri-national Commission for Environmental Cooperation composed of a council, a secretariat, and a public advisory committee.²⁵ The Council, composed of the three countries' environmental ministers, would govern a relatively complex and time-consuming dispute resolution process.²⁶ The U.S., Mexican, and Canadian governments would present

²⁰ Mexico permits the use of 58 pesticides, including DDT, that are banned in the United States. Use of these pesticides by Mexican farmers can contaminate produce shipped to the United States. *Judge Richey's Ruling Creates a New NAFTA Setback: Much Ado About Nothing . . . Hopefully*, BUS. MEXICO, Aug. 1993 [hereinafter *Judge Richey's Ruling*]; Andrew Wood & Ian Young, *GATT May Be in Home Stretch, But NAFTA Hits an Eco Hurdle*, CHEMICAL WK., July 21, 1993, at 8.

²¹ Tiemann, *supra* note 6, at 2.

²² *NAFTA Will Create More High-Wage Jobs in U.S. and Mexico*, USTR Official Says, Int'l Trade Rep. (BNA) (Nov. 11, 1992) [hereinafter *More High-Wage Jobs*].

²³ *Perot Says Side Agreements Do Not Fix "Flawed" NAFTA*, Int'l Trade Daily (BNA) (Aug. 17, 1993).

²⁴ North American Agreement on Environmental Cooperation Between the Government of Canada, the Government of the United Mexican States and the Government of the United States of America, text released Sept. 14, 1993 [hereinafter *Environmental Agreement*]. For a detailed review of the environmental agreement, see *Sanctions Allowed Against U.S., Mexico, Fines for Canada Under Environment Pact*, Int'l Env't Daily (BNA) (Aug. 17, 1993) [hereinafter *Sanctions*].

²⁵ *Environmental Agreement*, *supra* note 24, art. 8.

²⁶ The opposing nations would first take part in a consultation without the presence of the Council. *Id.* at art. 22. If the parties could not resolve the issue within 60 days, the Council would compile and discuss a record on factual allegations and make a recommendation. *Id.* at art. 23. If the Council members were unable to settle the dispute within 60 days, the Council could by a two-thirds vote convene an arbitral panel, composed of experts selected from a pool previously chosen by the Council. *Id.* at art. 24. The Panel would be required to issue an initial report within 180 days, after which the disputing parties could submit

their complaints directly to the Council.²⁷ The Secretariat or bureaucracy would screen complaints made by individuals or non-governmental organizations, including environmental groups and trade associations.²⁸ An arbitral panel convened by the Council would ultimately be responsible for implementation of an action plan.²⁹ A signatory nation's persistent failure to enforce its domestic environmental regulations would eventually lead to trade sanctions or fines against the United States or Mexico, or to fines against Canada.³⁰

Environmental groups have sharply criticized the environmental accord.³¹ First, they complain that the dispute resolution process is inaccessible as a practical matter, because it proposes no timeline for the Council's decision and requires the support of two countries even to initiate proceedings.³² Second, American environmental laws and environmental treaties that conflict with NAFTA could still be subject to attack as impediments to free

written comments. *Id.* at art. 31. A final report would follow within 60 days of the initial report. *Id.* at art. 32. If the Panel found a "persistent pattern of failure" to enforce environmental laws, the countries would have 60 days to agree on a plan of enforcement. *Id.* at arts. 33-34. If no action is taken after 60 days, the Panel would reconvene to evaluate a plan proposed by the complaining country. *Id.* at art. 34. Fines could be assessed at this point in the process. *Id.* The Panel could also reconvene to evaluate the violating country's compliance with the plan. *Id.* Continual violations or failure to pay fines could result in trade sanctions against the United States or Mexico. *Id.* at art. 36. Trade sanctions against Canada would not be allowed, but fines could be collected in the Canadian Court. *Id.* at annex 36A.

²⁷ Environmental Agreement, *supra* note 24, at art. 23.

²⁸ *Id.* at art. 14. The Secretariat will consider the following criteria in determining the validity of complaints:

- 1) whether the complaining party has been harmed;
- 2) whether pursuing the complaint would further the goals of the side agreement;
- 3) whether the party has pursued private remedies; and
- 4) whether the complaint is supported by media reports.

Id.

²⁹ *Id.* at art. 34.

³⁰ *Id.* at arts. 34, 36, annex 36A. Fines could be assessed at up to \$20 million for the first year of implementation, with a ceiling in subsequent years of .007 percent of total trade between the disputing parties.

³¹ Public Citizen, the Sierra Club, and the Center for International Environmental Law are among the groups objecting to the side agreement. *Sanctions, supra* note 24.

³² This would be problematic, for example, if one nation complains of a hazard to which both remaining nations are contributing. *Id.*

trade.³³ Finally, the groups expressed concern that the side pact deals only with border issues and does not address other environmental concerns, such as toxic waste, air pollution, and protection of wildlife.³⁴

C. Procedural History of *Public Citizen v. USTR*

Although NAFTA, especially in conjunction with the environmental side agreement, is the "greenest" trade pact ever negotiated,³⁵ its environmental provisions remain inadequate in the eyes of environmental groups. Three environmental organizations—Public Citizen, the Sierra Club, and Friends of the Earth—instituted a cause of action in *Public Citizen v. United States Trade Representative*,³⁶ seeking to require the OTR to prepare an environmental impact statement (EIS) before the President submitted NAFTA to Congress for ratification.³⁷ The plaintiffs base their claim on the National Environmental Policy Act of 1969 (NEPA),³⁸ which requires the preparation

³³ A recent GATT dispute is illustrative: a GATT dispute resolution panel ruled that an American ban under the Marine Mammals Protection Act, 16 U.S.C. § 1371 (1988), on importation of tuna caught with purse seine nets, which trap and then kill dolphins, violated GATT as a restriction on Mexican trade. *United States - Restrictions on Imports of Tuna: Report of the Panel, GATT Doc. DS 21/R* (Sept. 3, 1991); see also ASIL/CCIL Joint Panel, *supra* note 3. Environmental organizations are also concerned that NAFTA could override environmental treaties that allow trade sanctions as punishment for violations. *Sanctions, supra* note 23.

³⁴ *Sanctions, supra* note 24.

³⁵ Gary S. Becker & Michael L. Abramson, *NAFTA: The Pollution Issue Is Just a Smokescreen*, *BUS. WK.*, Aug. 9, 1993, at 16. NAFTA contains several provisions regarding the environment, although they may not suffice to provide genuine environmental protection. According to the text, (1) NAFTA will not diminish a nation's right to act under international environmental agreements, subject to the condition that inconsistency with NAFTA is minimized, NAFTA, art. 104; (2) each country may maintain the level of environmental protection it desires, *Id.* at art. 712; and (3) the NAFTA nations will work together to preserve the environment, *Id.* at preamble.

³⁶ 822 F. Supp. 21 (D.D.C.), *rev'd*, 5 F.3d 549 (D.C. Cir. 1993) [hereinafter *Public Citizen II*].

³⁷ The same plaintiffs filed a nearly identical claim while the agreement was still being negotiated, but the suit was dismissed by the District Court for the District of Columbia on the grounds that the agreement was not final. *Public Citizen v. United States Trade Repr.*, 782 F. Supp. 139 (D.D.C.), *aff'd on other grounds*, 970 F.2d 916 (D.C. Cir. 1992) [hereinafter *Public Citizen I*]. In affirming the dismissal, the D.C. Court of Appeals stated that "a specific proposal for legislation or other action" was required. *Id.* at 918.

³⁸ 42 U.S.C. § 4321 (1988).

of an EIS if certain prerequisites are met.³⁹ NEPA does not authorize a private cause of action, but a claim may be premised on triggering language contained in the Administrative Procedure Act (APA).⁴⁰ The APA provides for judicial review of a "final agency action"⁴¹ on behalf of an adversely affected plaintiff.⁴² The District Court for the District of Columbia, in a controversial opinion that may have helped the President gain leverage in negotiating the side agreements,⁴³ found that the final version of NAFTA was a final agency action.⁴⁴ After analyzing NEPA's requirements, the court ordered the OTR to prepare an EIS.⁴⁵

The District of Columbia Circuit Court of Appeals quickly reversed, however, responding to the President's request for an expedited appeal.⁴⁶ The court held that there was no final agency action because the ultimate responsibility for presenting NAFTA to Congress lies exclusively with the President; thus, NEPA does not apply.⁴⁷ Although NAFTA's implementing legislation was submitted to Congress on November 3, 1993,⁴⁸ Public Citizen and the Sierra Club are pursuing an appeal to the Supreme Court.⁴⁹

³⁹ See *infra* notes 81-92 and accompanying text.

⁴⁰ 5 U.S.C. § 701 (1988). See *infra* note 53 and accompanying text.

⁴¹ 5 U.S.C. § 704 (1988). See *infra* notes 53-65 and accompanying text.

⁴² See *infra* notes 66-71 and accompanying text.

⁴³ The decision made the environmental side agreement a more urgent issue because Congress has the power to pass legislation exempting NAFTA from the EIS requirement, a more likely action if Congress felt environmental issues were adequately addressed in the supplemental accord. *Impact Statement Ruling Seen Giving U.S. Increased Clout in Side Agreement Talks*, Int'l Trade Daily (BNA) (July 2, 1993).

⁴⁴ *Public Citizen II*, 822 F. Supp. at 23-25.

⁴⁵ *Id.* at 29-30.

⁴⁶ 5 F.3d 549 (D.C. Cir. 1993); see also *Suit Over EIS Requirement*, *supra* note 11; *Suit Over Impact Statement Will Not Stall Trade Pact*, *Public Interest Groups Argue*, Int'l Trade Daily (BNA) (July 8, 1993).

⁴⁷ *Public Citizen II*, 5 F.3d at 551-52.

⁴⁸ The vote in the House, where support may be inadequate to pass NAFTA, was scheduled for November 17, 1993. Bob Deans, *Free Trade Treaty Goes to Congress; Job Cut Fears Cloud Outlook*, ATLANTA CONST., Nov. 4, 1993, at A7. NAFTA was heavily favored in the Senate. *Id.* House Minority Whip Newt Gingrich believed NAFTA would pass by a narrow margin, assuming President Clinton was able to rally the support of Congressional Democrats. *Gingrich Predicts Passage for NAFTA*, Int'l Trade Daily (BNA) (Oct. 5, 1993).

⁴⁹ *Public Citizen Announces Filing of Cert Petition in NAFTA EIS Case*, Int'l Trade Daily (BNA) (Oct. 14, 1993); *NAFTA Decision Appealed*, WASH. TIMES, Oct. 9, 1993. This appeal will likely be fruitless, because either NAFTA's passage or its rejection will render the

II. LEGAL BACKGROUND

Often characterized as an "environmental bill of rights,"⁵⁰ NEPA was enacted in 1969 in response to growing concerns about the world environment.⁵¹ NEPA mandates that "to the fullest extent possible," all federal agencies must prepare an EIS for "every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment."⁵²

A. Jurisdiction

Since NEPA does not authorize a private cause of action, courts must assert jurisdiction under Section 704 of the APA, which provides for judicial review of "final agency action."⁵³ Much of the controversy in *Public Citizen* centers on the dual components of the jurisdiction issue: the finality requirement and the meaning of "federal agency."

1. The Requirement of "Final" Action

A court cannot exercise jurisdiction under the APA unless the administrative agency has completed a final action.⁵⁴ In *Franklin v. Massachu-*

decision moot, except as a procedural precedent.

⁵⁰ Comment, *NEPA's Role in Protecting the World Environment*, 131 U. PA. L. REV. 353, 354 (1982) (citing Frank P. Grad, 2 TREATISE ON ENVIRONMENTAL LAW 9-6 (1980) (quoting Eva P. 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, 269 (1970))).

⁵¹ NEPA states as its purpose:

To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a council on environmental quality.

42 U.S.C. § 4321 (1988).

⁵² *Id.* § 4332.

⁵³ The APA provides, "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review." 5 U.S.C. § 704 (1988).

⁵⁴ *Id.* § 704.

setts,⁵⁵ the Supreme Court held that the Secretary of Commerce had not completed a final agency action when it provided the President with the census report.⁵⁶ The Commerce Department issued a recommendation to the President, but the President could still amend the census information before submitting it to Congress.⁵⁷ After *Franklin*, an agency's action probably cannot be considered final if it can be construed as only a recommendation.

2. *The Meaning of "Federal Agency"*

The language requiring the action of a federal agency is found in NEPA, but will be interpreted under Section 704 of the APA.⁵⁸ The Council on Environmental Quality (CEQ), pursuant to its authority to issue regulations governing NEPA's application,⁵⁹ has issued definitions of the general terms contained in the statute.⁶⁰ The definition most relevant in *Public Citizen* is that of "federal agency," which CEQ has defined as "all agencies of the Federal Government."⁶¹ The definition expressly excludes "Congress, the Judiciary, or the President, including the performance of staff functions for the President in his Executive Office."⁶² A key decision involving the interpretation of the term "federal agency" is *Soucie v. David*.⁶³ In that case, the court held that the Office of Science and Technology (OST), by virtue of the independent nature of its duties, qualified as a federal agency despite its location within the President's Executive Office.⁶⁴ While the court based its ruling on the APA definition of "federal agency" rather than CEQ's definition interpreting NEPA, the case is relevant in defining the

⁵⁵ 112 S. Ct. 2767 (1992).

⁵⁶ *Id.* at 2774. The census report was to be used to compute the number of Representatives allowed from each Congressional district. *Id.* at 2771.

⁵⁷ *Id.* at 2774.

⁵⁸ See *supra* note 53 and accompanying text.

⁵⁹ Exec. Order No. 11,991, 3 C.F.R. 123 (1978).

⁶⁰ CEQ has defined "federal agency," 40 C.F.R. § 1508.12 (1992), "human environment," § 1508.14, "legislation," § 1508.17, "major federal action," § 1508.18, "proposal," § 1508.23, and "significantly," § 1508.27.

⁶¹ *Id.* § 1508.12.

⁶² *Id.*

⁶³ 448 F.2d 1067 (D.C. Cir. 1971). Two citizens sought to compel the government to release a document regarding development of a supersonic transport aircraft. *Id.* at 1070.

⁶⁴ *Id.* at 1075.

term's meaning.

In *Public Citizen*, the agency at issue is the OTR. The OTR was established "within the Executive Office of the President,"⁶⁵ but performs many duties outside the President's immediate control and supervision. In addition to advising the President on international trade, the OTR coordinates the country's international trade policy, represents the United States in trade negotiations, and reports to the President and Congress regarding trade agreements.⁶⁶

B. Standing

Because NEPA does not provide for a private cause of action, the Plaintiffs must achieve standing under the APA, which governs judicial review of administrative agencies in general. The APA provides, "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."⁶⁷ Nevertheless, vague allegations of harm are not sufficient to achieve standing. The Supreme Court in *Lujan v. Defenders of Wildlife*⁶⁸ denied standing to environmental groups challenging a regulation that permitted agencies to fund activities abroad that could harm endangered species.⁶⁹ The Court denied standing because the alleged environmental impact would occur only in foreign countries, and the plaintiffs' member representatives could assert only a vague intent to revisit affected areas through which they had previously traveled.⁷⁰ Thus, a

⁶⁵ 19 U.S.C. § 2171(a) (1988).

⁶⁶ *Id.* § 2171(c)(A)-(C),(F). The Department of Commerce also plays a part in trade negotiations, helping to govern export controls and assess compliance with trade agreements. Reorganization Plan No. 3 of 1979, § 2(a), 44 Fed. Reg. 69,273, 69,274 (1979). At least one commentator believes NEPA could apply to a trade agreement based on the input of the Commerce Department. See M. Diane Barber, *Bridging the Environmental Gap: Application of NEPA to a Mexico-United States Bilateral Trade Agreement*, 5 TUL. ENVTL. L.J., 429, 446-47 (1992).

⁶⁷ 5 U.S.C. § 702 (1988).

⁶⁸ 112 S. Ct. 2130 (1992).

⁶⁹ *Id.*

⁷⁰ *Id.* at 2138.

specific allegation of imminent harm is necessary to achieve standing.⁷¹

C. Separation of Powers

NEPA would not apply to a trade agreement if the EIS requirement violated the Constitutional separation of powers doctrine by usurping the President's power over foreign affairs. In *Greenpeace USA v. Stone*,⁷² the U.S. District Court in Hawaii found that requiring an impact statement for transportation of chemical weapons across Germany for eventual destruction near the Hawaiian Islands would substantially interfere with the authority of both the President and the foreign sovereign.⁷³ Therefore, the EIS mandate will not be construed so broadly as to infringe upon Executive authority to conduct foreign policy.

D. The Environmental Impact Statement Requirement

1. The Fast-Track Process

The Trade Act of 1974⁷⁴ outlines "fast-track" procedures that would permit NAFTA's implementation by January 1, 1994, consistent with President Clinton's timetable.⁷⁵ The fast-track process ensures that Congress will vote on NAFTA, after limited debate, within 60 days

⁷¹ The plaintiff's standing was also denied because its injury was not redressable. The Court rejected the plaintiff's "ecosystem nexus" theory, which would grant standing to any individual who could show that an activity adversely affected the "contiguous ecosystem", regardless of the origin of the harm. The Court rejected similar theories, including the "animal nexus" and "vocational nexus." *Id.* at 2137-38.

⁷² 748 F. Supp. 749 (D.C. Haw. 1990).

⁷³ *Id.* at 761. The United States army had stored obsolete nerve gas weapons in Germany since 1968. The leaders of both countries entered into an agreement to remove the munitions pursuant to the Department of Defense Authorization Act of 1986, which mandated the destruction of the U.S. stockpile by 1997. *Id.* at 752.

⁷⁴ 19 U.S.C. §§ 2191-194, 2902-03 (1988). Section 1103(B) of the Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, 102 Stat. 1107 (1988) (codified at 29 U.S.C. § 2901 (1988)), makes the fast-track procedures of the Trade Act of 1974 applicable to NAFTA.

⁷⁵ Chwee Huay Ow-Taylor, *supra* note 9.

following its submission.⁷⁶ Congress cannot amend the agreement, and the President drafts the implementing legislation.⁷⁷ NAFTA is on the fast track to encourage quick implementation; however, if preparation of an EIS is required, the possibility of delay exists. A full-scale EIS generally takes eighteen months to prepare,⁷⁸ but given the extensive research already completed, a lengthy delay could probably be avoided.⁷⁹ Even if preparation of an impact statement were required before NAFTA's submission to Congress, the OTR may have time to complete an EIS in keeping with the President's timetable.

2. NEPA's Extraterritorial Applicability

The debate surrounding NEPA's extraterritorial application can be aptly illustrated by the long-standing disagreement between CEQ and the State Department. CEQ steadfastly sought to expand the scope of NEPA's application, proclaiming its conviction that the EIS requirement included "all significant effects of proposed federal actions on the quality of the human environment,"⁸⁰ whether or not those effects may occur in a foreign jurisdiction.⁸¹ The State Department advocated a more narrow scope which excluded extraterritorial impacts, citing foreign policy concerns regarding the infringement of foreign sovereignty rights.⁸² Responding to this disagree-

⁷⁶ 19 U.S.C. § 2191(e)(1). The U.S. House of Representatives adopted legislation to put the agreement into effect by a vote of 234-200. *Clinton Grabs Stunning Win with NAFTA; Help from GOP Carries House; Senate 'is a lock,'* ATLANTA CONST., Nov. 18, 1993, at A1.

⁷⁷ *Id.* § 2191(d).

⁷⁸ *Judge Richey's Ruling*, *supra* note 20.

⁷⁹ The Plaintiffs maintain an EIS could be completed in six to nine months. *Id.* Other estimates predict an even shorter period. The Natural Resources Defense Council, for example, estimates completion time at "a few months." *NDRC Urges Federal Appeals Court to Uphold District Court's Decision on NAFTA Environmental Impact Statement*, U.S. NEWSWIRE, Aug. 4, 1993. A legislative EIS, which may take only 45 days, could be sent to Congress up to 30 days after the submission of NAFTA. *Judge Richey's Ruling*, *supra* note 20. An "environmental assessment" could be completed in approximately 30 days. *Id.*

⁸⁰ *Memorandum on the Application of the EIS Requirement to Environmental Impacts Abroad of Major Federal Actions*, 42 FED. REG. 61,068, 61,069 (1977).

⁸¹ *Id.*

⁸² Office of General Counsel, Dep't of Defense, *The Application of the National Environmental Policy Act to Major Federal Actions with Environmental Impacts outside the United States*, reprinted in 124 CONG. REC. S19,361 (daily ed. Oct. 14, 1978).

ment, President Carter issued Executive Order No. 12,114 in 1979.⁸³ The Order, which is based on "independent authority"⁸⁴ but still "furthers the purpose of the National Environmental Policy Act,"⁸⁵ sets out four categories of federal actions that require assessment of environmental effects.⁸⁶ The Order exempts from its mandate "actions taken by the President" and "actions taken by or pursuant to the direction of the President or Cabinet officer when the national security or interest is involved."⁸⁷

The Order did not clarify the extent of NEPA's extraterritorial application when some, but not all, environmental effects occur within the United States. Case law has not settled the issue, but instead has avoided squarely addressing the issue. In *National Organization for the Reform of Marijuana Laws (NORML) v. United States Dep't of State*,⁸⁸ the District Court for the District of Columbia assumed, without deciding, that NEPA was applicable in a challenge to the State Department's failure to prepare an EIS based on its participation in a Mexican marijuana eradication project.⁸⁹ The court did not rule on NEPA's applicability because the State Department had already agreed to prepare an EIS on the project.⁹⁰

Courts have concluded, however, that NEPA does not apply to environmental effects occurring wholly outside the United States. In *Natural*

⁸³ Exec. Order No. 12,114, 3 C.F.R. 356 (1980), reprinted in 42 U.S.C. § 4321 (1982).

⁸⁴ *Id.* § 1-1. "Independent authority" presumably refers to the President's power as Chief Executive. The Order did not cite NEPA as its authority because it was attempting to limit NEPA's scope in a way that NEPA would not have permitted. See Sanford E. Gaines, "Environmental Effects Abroad of Major Federal Actions": An Executive Order Ordains a National Policy, 3 HARV. ENVTL. L. REV. 136, 145-46 (1979).

⁸⁵ Exec. Order No. 12,114, *supra* note 83, at § 1-1.

⁸⁶ Environmental assessment is required for:

- 1) actions affecting the global commons;
- 2) actions affecting a non-participating foreign nation;
- 3) actions affecting a foreign country, if the United States is providing a product or a physical project that causes pollution or emits radioactive waste; and
- 4) actions outside the United States that affect global resources.

Id. § 2-3.

⁸⁷ *Id.* § 2-5.

⁸⁸ 452 F. Supp. 1226 (D.D.C. 1978).

⁸⁹ The project involved the aerial herbicide spraying of marijuana farms. The plants were still marketable if harvested shortly after spraying, but the herbicide used left behind toxic residue that could endanger the health of marijuana users. *Id.* at 1228-29.

⁹⁰ *Id.* at 1233.

Resources Defense Council v. Nuclear Regulatory Commission,⁹¹ the D.C. Circuit Court of Appeals held that approval of the export of a nuclear reactor and materials was appropriate where any environmental effects would impact only the recipient nation.⁹² NEPA's application, then, may turn on the likelihood that environmental effects would reach the United States.

III. ANALYSIS*

The Court of Appeals for the District of Columbia declined to impose NEPA's environmental impact statement requirement on NAFTA, on the grounds that the OTR's action was not final, as is required for jurisdiction under the APA.⁹³ Although the Court's opinion addressed only the finality issue, other issues that were decided in the District Court opinion will be discussed here, as they may become relevant on appeal to the Supreme Court.

A. *Determination of APA Jurisdiction*

Under the APA, the court may review a final agency action using the relevant statute, here NEPA, as the basis for its interpretation.⁹⁴ The Court of Appeals used sound reasoning in reversing the District Court and concluding that APA jurisdiction is inappropriate, because NAFTA does not represent final action by the OTR. Since it ruled that NAFTA is not a final action by the OTR, the appeals court did not need to address whether the OTR is a federal agency within the meaning of the statute. However, the District Court's affirmative ruling may not withstand close scrutiny if the Supreme Court chooses to review the issue.

⁹¹ 647 F.2d 1345 (D.C. Cir. 1981).

⁹² The court declined to apply NEPA because any environmental effects would be wholly extraterritorial. *Id.* at 1345.

* Author's Note: The same analysis should apply to the side agreements, as they were submitted to Congress concurrently with NAFTA and are essentially two components of the same overall agreement. *See More High-Wage Jobs, supra* note 22.

⁹³ *Franklin*, 112 S. Ct. at 2774. *See supra* notes 53-57 and accompanying text.

⁹⁴ 5 U.S.C. § 702 (1988).

1. *Is NAFTA a Final Action?*

The Court of Appeals correctly ruled that the OTR's negotiation of the signed agreement did not constitute a final action. In making that determination, the Court rejected three theories proffered by the Plaintiffs: first, that NAFTA was a final action because it would not be altered before submission to Congress; second, that the EIS requirement was an independent statutory obligation; and third, that a contradictory ruling would void NEPA's mandate.⁹⁵

Following the Supreme Court's decision in *Franklin v. Massachusetts*,⁹⁶ the Court was left with little room for interpretation. The *Franklin* Court identified the central issue as "whether the agency has completed its decision-making process, and whether the result of that process is one that will directly affect the parties."⁹⁷ Even though the decision-making process of the Secretary of Commerce was complete, there was not a final action because the parties were directly affected only by the President's action.⁹⁸

Based on the holding in *Franklin*, the Plaintiffs' argument that NAFTA is a final action because the fast-track process precludes amendment is likely to be rejected. Although the Plaintiffs correctly assert that neither the President nor Congress can amend the agreement pursuant to the fast-track process, the President was in no way bound to submit NAFTA to Congress.⁹⁹ In addition, the process required the President present the implementing legislation for the agreement.¹⁰⁰ Therefore, irrespective of the OTR's role in the actual negotiations, the President retains the power to make the ultimate decision on the agreement.¹⁰¹

The environmental groups also argue that preparation of an impact

⁹⁵ *Public Citizen II*, 5 F.3d, at 551-52.

⁹⁶ 112 S. Ct. 2767 (1992).

⁹⁷ *Id.* at 2773. There, the Secretary of Commerce's census report was not a final action because the President retained the authority to finalize the calculations and present the report to Congress. This was true even though the President did not actually alter the report. *Id.*

⁹⁸ *Id.*

⁹⁹ 19 U.S.C. § 2191 (1988).

¹⁰⁰ *Id.*

¹⁰¹ The District Court found for the Plaintiffs on this issue. However, its statement that "NAFTA is a complete, and more importantly, a final product that will not be changed before submission to Congress," undercuts the holding in *Franklin*. *Public Citizen*, 822 F. Supp. at 26. While the actual document may have been finalized, the President still has the power to make the ultimate decision.

statement is an independent duty under NEPA.¹⁰² The court notes that an independent statutory obligation is irrelevant unless the agency's action alone would directly impact the Plaintiffs.¹⁰³ The court was not persuaded by Public Citizen's contention that the OTR's refusal to prepare an EIS directly affects its lobbying power, stating that the agency's action was not sufficiently substantive.¹⁰⁴

Finally, the court counters Plaintiffs' argument that its decision would nullify NEPA's EIS requirement by attempting to limit *Franklin's* application. The court acknowledges that an agency action often requires "some other step"¹⁰⁵ before it is finalized.¹⁰⁶ It asserts, however, that "[w]hen the President's role is not essential to the integrity of the process, APA review of otherwise final agency actions may well be available."¹⁰⁷ By limiting *Franklin's* application to situations where the President has final authority, the court aptly eludes an application of the APA that would effectively void NEPA's impact statement requirement on legislative proposals.

2. *Is the OTR a Federal Agency?*

The District Court opinion extensively discussed the amount of agency involvement required by NEPA, but gave only cursory treatment to the issue of the OTR's qualification as a federal agency.¹⁰⁸ The court concluded that although the OTR did not exercise exclusive control over NAFTA's preparation, case law suggests that an EIS may be required even where the

¹⁰² *Id.* at 23.

¹⁰³ *Id.* The Secretary's report on the census in *Franklin* was also an independent statutory obligation, but since the Secretary's action did not directly affect the plaintiffs, it did not meet the criteria for a final action. *Franklin*, 112 S.Ct. at 2767.

¹⁰⁴ *Public Citizen II*, 5 F.3d at 552. This "direct effects" inquiry is similar to the standing issue. See *infra* notes 123-129 and accompanying text. See *Foundation on Economic Trends v. Lyng*, 943 F.2d 79 (D.C. Cir. 1991) (plaintiff's interest in the dissemination of information to the public not sufficient to attain standing).

¹⁰⁵ *Public Citizen II*, 5 F.3d at 552 (quoting Plaintiffs' brief). Judge Randolph's concurring opinion addresses the same issue, but indicates that a proposal for legislation may never qualify as a final action. *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ The court mentioned this point only in a footnote. *Public Citizen II*, 822 F. Supp. at 25 n.4.

proposal is not wholly prepared by a federal agency.¹⁰⁹ Citing the CEQ regulations, the court noted that a legislative proposal that is “predominantly that of the agency rather than another source”¹¹⁰ falls within the CEQ’s definition of “legislation.”¹¹¹

The flaw in this argument becomes apparent when one considers whether the OTR is indeed a federal agency. The organic legislation creating the OTR marks its origin “within the Executive Office of the President.”¹¹² The District Court, which acknowledged the deference due the CEQ regulations in its discussion of legislation,¹¹³ neglected to mention that the CEQ definition of “federal agency” specifically exempts “the performance of staff functions for the President in his Executive Office.”¹¹⁴ Executive Order 12,114 adopts this position as well, exempting “actions taken by the President”¹¹⁵ and “actions taken by or pursuant to the direction of the President or Cabinet officer when the national security *or interest* is involved.”¹¹⁶ In addition, legal scholars have voiced the opinion that the OTR is essentially an executive function.¹¹⁷ Therefore, although the OTR performs duties apart from presidential advisement, both the CEQ regulations and Executive Order 12,114 require that the OTR be exempted from NEPA.

The District Court refers to *Soucie v. David*,¹¹⁸ a District of Columbia Circuit decision holding that the Office of Science and Technology (OST), which was also created within the Executive Office of the President, was an agency under the APA and the Freedom of Information Act.¹¹⁹ There, the court emphasized the independent nature of the OST’s duties, in light of the

¹⁰⁹ *Id.* at 25 (citing *Colorado River Indian Tribes v. Marsh*, 605 F. Supp. 1425 (C.D. Cal. 1985)); *Sierra Club v. Marsh*, 769 F.2d 868 (1st Cir. 1985).

¹¹⁰ 40 C.F.R. § 1508.17 (1992).

¹¹¹ *Public Citizen II*, 822 F. Supp. at 25. “Legislation” is defined in part as “a bill or legislative proposal to Congress developed by or with the significant cooperation and support of a Federal agency The test for significant cooperation is whether the proposal is in fact predominantly that of the agency rather than another source.” 40 C.F.R. § 1508.17 (1992).

¹¹² Trade Act of 1974, 19 U.S.C. § 2171(a).

¹¹³ *Public Citizen II*, 822 F. Supp. at 25.

¹¹⁴ 40 C.F.R. § 1508.12 (1992).

¹¹⁵ Exec. Order No. 12,114, § 2-5(a)(ii).

¹¹⁶ *Id.* § 2-5(a)(iii) (emphasis added).

¹¹⁷ *Court Ruling Fuels Discussion on NEPA Applicability to Trade Deal*, Int’l Env’t Daily (BNA) (July 23, 1993) (citing Professor Laurence H. Tribe of Harvard Law School).

¹¹⁸ 448 F.2d 1067 (D.C. Cir. 1970).

¹¹⁹ *Id.* at 1071.

APA definition of "agency," which includes "authority of the Government of the United States, whether or not it is within or subject to review by another agency."¹²⁰ The court's analysis in *Public Citizen*, however, is not limited to the statutory definition imposed by the APA. Taking into account the exemptions contained in interpretations of NEPA, such as the CEQ regulations and Executive Order 12,114, the OTR should not be considered a federal agency under NEPA.

B. Standing

The Court of Appeals did not address the issue of standing. The District Court, however, ruled that the Plaintiffs were entitled to judicial review by virtue of their allegations of sufficiently imminent harm to members of their organizations.¹²¹ In *Lujan v. Defenders of Wildlife*,¹²² Justice Scalia outlined a stringent standard, stating, "a plaintiff claiming injury from environmental damage must use the area affected by the challenged activity and not an area roughly 'in the vicinity' of it."¹²³ In contrast to *Lujan*, where the plaintiffs were denied standing, NAFTA would directly affect members of Plaintiffs' organizations by lowering environmental standards where they live. The maquiladora program, which has produced environmental effects on both sides of the border, stands as an example of the harm caused by even a limited region of free trade.¹²⁴ Similar consequences could result from NAFTA-mandated pre-emption of state environmental standards, especially in California, where strict environmental regulations traditionally surpass federal requirements.¹²⁵ NAFTA is therefore likely to affect existing environmental safeguards in a deleterious manner.

In addition, courts have more willingly embraced plaintiffs' standing where the alleged injury takes place in the United States. In *NORML v. United States*,¹²⁶ the court granted standing where the plaintiff showed that the health of its members would be endangered by herbicide spraying of

¹²⁰ *Id.* at 1073 (citing 5 U.S.C. § 551(1) (Supp. V. 1990)).

¹²¹ *Public Citizen II*, 822 F. Supp. at 28.

¹²² 112 S. Ct. 2130 (1992).

¹²³ *Id.* at 2139 (quoting *Lujan v. National Wildlife Federation*, 497 U.S. 871, 887-89 (1990)).

¹²⁴ See *supra* notes 16-19 and accompanying text.

¹²⁵ ASIL/CCIL Joint Panel, *supra* note 3; *Judge Richey's Ruling*, *supra* note 20.

¹²⁶ 452 F. Supp. 1226 (D.C. 1978).

marijuana in Mexico.¹²⁷ Likewise, actions on the Mexican side of the U.S.-Mexican border would at a minimum harm members of the Plaintiff organizations who live near the border. Such allegations of harm are sufficient to attain standing.

C. Separation of Powers

The District Court correctly dismissed the Government's argument that requiring the preparation of an EIS would infringe upon the President's authority in the foreign policy arena.¹²⁸ The court stated that the OTR "conveniently ignores the fact that the power to regulate commerce with foreign nations is given to Congress under the Constitution."¹²⁹ Requiring the preparation of an EIS would not significantly infringe upon the President's power to conduct foreign policy. As the court notes, this is merely a domestic issue once negotiations for a trade agreement are completed.¹³⁰

If an international issue were at stake, however, the EIS requirement could violate the separation of powers doctrine. For example, the District Court in *Greenpeace USA v. Stone*¹³¹ ruled that applying NEPA to a prospective agreement regarding the transportation of chemical weapons across Germany would infringe upon the President's authority to conduct foreign policy. Here no such infringement would occur, because the agreement has already been negotiated and finalized. Thus, the separation of powers argument is invalid.

D. NEPA's Application to Extraterritorial Environmental Impacts

Finally, the District Court determined that "the plain language of the NEPA makes it a foregone conclusion that the OTR must prepare an EIS on the NAFTA."¹³² While this statement oversimplifies NEPA and the case

¹²⁷ Standing was permitted despite the illegality of marijuana use in the United States. *Id.* at 1226.

¹²⁸ *Public Citizen II*, 822 F. Supp. at 26.

¹²⁹ *Id.* The Commerce Clause of the United States Constitution provides: "The Congress shall have Power . . . To regulate Commerce with foreign Nations." U.S. CONST. art. I, § 8, cl. 3.

¹³⁰ *Public Citizen II*, 822 F. Supp. at 27.

¹³¹ 748 F. Supp. 749 (Haw. 1990).

¹³² *Public Citizen II*, 822 F. Supp. at 29.

law interpreting its extraterritorial application, NEPA would almost surely apply if the case were not invalidated on procedural grounds.

The initial inquiry under NEPA is whether NAFTA is a "recommendation or report on proposals for legislation and other major federal action significantly affecting the quality of the human environment,"¹³³ which would activate the EIS requirement. NAFTA easily constitutes either a recommendation on a proposal for legislation or a major federal action,¹³⁴ and would affect the quality of the environment significantly.¹³⁵

NEPA does not, however, expressly require preparation of an impact statement for actions taking place in another country that have effects within the United States. Even so, the case law tends to follow this line of reasoning without expressly adopting it.¹³⁶ Both *NRDC v. NRC* and *Greenpeace USA* stand for the proposition that NEPA does not apply to environmental effects occurring exclusively in foreign jurisdictions. The *Greenpeace USA* court, however, tempered its decision with the statement, "[i]n other circumstances, NEPA may require a federal agency to prepare an EIS for action taken abroad, especially where the United States agency's

¹³³ 42 U.S.C. § 4332(2)(c) (1988).

¹³⁴ NAFTA could be construed as a major federal action by virtue of its unprecedented effect on free trade across North America. The CEQ definition of "major Federal action" encompasses "actions with effects that may be major and which are potentially subject to Federal control and responsibility," including "treaties and international conventions and agreements." 40 C.F.R. § 1508.18 (1992). Since Congress must vote on NAFTA to permit implementation, it could also be considered a report on a proposal for legislation. CEQ has defined "proposal" as "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 goal and the effects can be meaningfully evaluated." *Id.* § 1508.23. "Legislation" is defined as "a bill or legislative proposal developed by or with the significant cooperation and support of a Federal agency." *Id.* § 1508.17. Although federal agencies have generally ignored the "proposal for legislation" provision of NEPA, refusal to comply in the context of a free trade agreement would contradict NEPA's mandate. Barber, *supra* note 65, at 452 (citing Ian M. Kirschner, Note, *NEPA's Forgotten Clause: Impact Statements for Legislative Proposals*, 58 B.U. L. REV. 560 (1978)).

¹³⁵ The meaning of "significantly" would probably be interpreted according to two factors: the increase in environmental harm resulting from the agreement; and the accumulated total harm, including existing environmental problems. *Hanly v. Kleindienst*, 471 F.2d 823 (2d Cir. 1972), *cert. denied*, 412 U.S. 908 (1973). CEQ has also defined "significantly," 40 C.F.R. § 1508.27 (1992), and "human environment," *id.* § 1508.14. For a review of NAFTA's probable effects, see *supra* notes 14-20 and accompanying text.

¹³⁶ The *NORML* court assumed, without deciding, that NEPA applied because the State Department had already agreed to prepare an EIS on the project. 452 F. Supp. at 1233.

action abroad has direct environmental impacts within this country.”¹³⁷ The foreign sovereignty argument that overcame the impact statement requirement in *Greenpeace USA* and *NRDC v. NRC* carries little weight where environmental effects would be felt within the United States. Here, where NAFTA would impact the United States so profoundly, particularly near the border, the court would most likely require preparation of an EIS.

IV. CONCLUSION

The Court of Appeals correctly held that the President’s responsibility to submit NAFTA to Congress precludes a finding that final action was taken by the OTR. Since the court then lacks jurisdiction, NEPA cannot apply.

Although the issues raised by *Public Citizen* may be moot if Congress ratifies NAFTA, the case has called attention to the serious problems of environmental degradation resulting from rapid industrialization. These concerns provided the impetus for the side agreements on the environment. Although *Public Citizen*, the Sierra Club, and Friends of the Earth have probably lost this environmental battle, they have taken large steps toward heightening public and Congressional awareness of environmental problems.

Kristin R. Loecke

¹³⁷ 748 F. Supp. at 761 (emphasis in original).

