December 30, 1992

POLICY ISSUE

(Notation Vote)

SECY-92-435

For: The Commissioners

From: James M. Taylor
Executive Director for Operations

Subject: IMPLEMENTATION OF THE CONVENTION ON ENVIRONMENTAL IMPACT ASSESSMENT IN A TRANSBOUNDARY CONTEXT

Purpose: To obtain Commission approval to send the letter at Enclosure 1 regarding the Implementation of the Convention on Environmental Impact Assessment in a Transboundary Context.

Background: As part of our National Environmental Policy Act (NEPA) Liaison responsibilities, the Nuclear Regulatory Commission (NRC) was asked by the Council on Environmental Quality (CEQ) to comment on the Guidelines for Implementation of the Convention on Environmental Impact Assessment in a Transboundary Context, hereafter "the Convention" (Enclosure 2). On October 13, 1992, NRC transmitted verbal comments to CEQ. These were followed on October 30, 1992 with a letter (Enclosure 3). The CEQ reply (Enclosure 4) dated November 24, 1992, reiterates that the Convention's negotiations ". . . dealt with the procedural requirements, not specific types of activities to which those requirements would apply." It also appears, from our files and from the information we have gleaned from other agencies, that the NRC's views regarding authority and negotiating instructions were not requested.

Contact:
Maria Lopez-Otin
Federal Liaison, OSP
504-2598

NOTE: TO BE MADE PUBLICLY AVAILABLE WHEN THE FINAL SRM IS MADE AVAILABLE.

19:119

DF02

The Convention, signed on February 25, 1991, was developed through the auspices of the Economic Commission for Europe (ECE). The United States, Canada and the Russian Federation are members of the ECE, thus the Convention is applicable to the United States. The United Mexican States is not an ECE member.

The Convention requires establishment of procedures for assessing environmental impacts for covered activities listed in Appendix I of the Convention that could cause significant adverse transboundary impacts. The specific activities covered for which NRC has oversight include nuclear power stations (Item 2), enrichment, reprocessing, and radioactive waste processing facilties (Item 3), and waste disposal facilities (Item 10). These procedures must provide for public participation. The CEQ has stated that the Convention should not alter an agency's implementation of their environmental impact assessment process, under either NEPA or Executive Order 12114 (Environmental Effects of Major Federal Actions Abroad.) According to CEQ, the Convention simply requires a systematic way of including the other country's agencies and members of the public in the current U.S. practice.

Discussion: Our conclusion is that the only definite effect of the Convention on NRC's normal environmental review process is to add the Department of State to the distribution requirements of 10 CFR Part 51. As noted in the implementing Guidelines, the Department of State will transmit the relevant notices to the Canadian Government. It is up to the Canadian Government to determine and notify affected parties.

However, the Convention appears to provide for additional avenues for the Governments (Parties) involved to resolve certain issues in dispute:

- Article 3, para.7, provides that when a Party considers that it could be affected by a significant transboundary impact and when no notification has taken place (Party of origin has not considered the proposed activity to be likely to cause a significant impact or fails to notify for another reason), the concerned Parties shall consult (at the request of the affected Party) and if

the consultation does not resolve the question, any concerned Party may submit the question to a 3 member inquiry commission; two of whom are appointed by the respective concerned parties and the third is appointed by those two.

- Article 15 provides that if a dispute arises between two Parties about the interpretation or application of the Convention, they shall seek a solution by negotiation or any other method acceptable to the Parties. It also provides for arbitration of disputes in certain cases.

- Article 5 provides that after completion of the environmental assessment the Party of origin will consult with the affected Party concerning transboundary impacts and measures to reduce the impact. The Guidelines provide at the request of either Party such consultations will be coordinated through the State Department.

- The Guidelines provide that if either Party concludes that there is a significant adverse environmental impact resulting from the final decision of the Authority of the Party of origin, that Party will initiate consultations on possible post-project analysis activities.

Although there is nothing in the Convention or Guidelines that would require the NRC licensing or rulemaking process to stop in the event of a dispute and although we have received verbal assurances that this understanding is correct, we are nonetheless seeking a clear statement to that effect in the Guidelines.

It is our intent, at this time, to issue an amendment, under my authority, to modify the pertinent sections of 10 CFR Part 51. We will do this after the subject implementation Guidelines are finalized by the CEQ.

Coordination: The Office of the General Counsel has no legal objection.

Recommendation: That the Commission approve sending the attached letter to CEQ.

James M. Taylor
Executive Director
for Operations

Enclosures:
1. Letter to Ms. Dinah Bear
   Council on Environmental Quality
2. Convention on Environmental Impact
   Assessment in a Transboundary Context
3. Letter dtd Oct. 13, 1992 to D. Bear from
   M. Lopez-Otin
4. Letter dtd Nov. 24, 1992 to M. Lopez-Otin
   from D. Bear

Commissioners' comments or consent should be provided directly to the Office of the Secretary by COB Friday, January 15, 1993.

Commission staff office comments, if any, should be submitted to the Commissioners NLT January 8, 1993, with an information copy to the Office of the Secretary. If the paper is of such a nature that it requires additional review and comment, the Commissioners and the Secretariat should be apprised of when comments may be expected.

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DRAFT ENCLOSURE 1

Ms. Dinah Bear
Council on Environmental Quality
722 Jackson Place, N.W.
Washington, D.C. 20503

Dear Ms. Bear:

Regarding your October 2, 1992 memorandum on the "Implementation of the Convention on Environmental Impact Assessment in a Transboundary Context," this confirms the comments that I related to you on October 13, 1992. As we discussed, it is our view that the only direct effect the Convention will have on NRC's licensing procedures will be to add to the distribution requirements in 10 CFR Part 51, "Environmental Protection Regulations for Domestic Licensing and Related Regulatory Functions."

Although "normal" NRC procedures will be followed, the Convention appears to provide for additional avenues for Governments involved to resolve certain issues in dispute:

- Article 3, para.7, provides that when a Party considers that it could be affected by a significant transboundary impact and when no notification has taken place (Party of origin has not considered the proposed activity to be likely to cause a significant impact or fails to notify for another reason), the concerned Parties shall consult (at the request of the affected Party) and if the consultation does not resolve the question, any concerned Party may submit the question to a 3 member inquiry commission; two of whom are appointed by the respective concerned parties and the third is appointed by those two.

- Article 15 provides that if a dispute arises between two Parties about the interpretation or application of the Convention, they shall seek a solution by negotiation or any other method acceptable to the Parties. It also provides for arbitration of disputes in certain cases.

- Article 5 provides that after completion of the environmental assessment the origin Party will consult with the affected Party concerning transboundary impacts and measures to reduce the impact. The Guidelines provide at the request of either Party such consultations will be coordinated through the State Department.

- The Guidelines provide that if either Party concludes that there is a significant adverse environmental impact resulting from the final decision of the Authority of the Party of origin, that Party will initiate consultations on possible post-project analysis activities.

However, there is nothing in the Convention or Guidelines that would require the NRC licensing process or rulemaking to stop in the event of a dispute. We understand from our discussions with you that this understanding of the Convention and Guidelines is correct. Nevertheless, we believe that it would be appropriate and desirable for the Guidelines to contain a clear statement to this effect (see enclosure).

In like vein, we would like to suggest that the general approach of 40 CFR 1508.27 to identifying significant impacts be established. Determination of "significance" is fundamental since, under Article 2, consultation and coordination is not necessary except for activities that will likely cause significant adverse transboundary impacts.

Lastly, as you indicated in our conversation, the NRC would transmit the documentation/information to the Department of State, which would, in turn, transfer it to the Canadian Government. We have no objection to this approach but request a point of contact for this activity.

Sincerely,

Maria E. Lopez-Otin
Federal Liaison
Office of State Programs

Enclosure:
As stated

ENCLOSURE

Following is the language the NRC would like included in the Guidelines to the Convention. It should be included as an introductory paragraph in the Guidelines section. This broad statement sufficiently addresses the NRC's concerns with regard to duplicative procedures.

SCOPE OF GUIDELINES

The following Guidelines are not intended to affect existing substantive provisions in the United States Code of Federal Regulations.

EXECUTIVE OFFICE OF THE PRESIDENT
COUNCIL ON ENVIRONMENTAL QUALITY
WASHINGTON, D.C. 20503

TO: NEPA Liaisons for
Soil Conservation Service
Animal and Plant Health Inspection Service
U.S. Forest Service
Rural Electrification Administration
Bonneville Power Administration
National Oceanic and Atmospheric Administration
Economic Development Administration
Department of Defense
Department of the Air Force
Department of the Army
U.S. Army Corps of Engineers
Department of the Navy
Department of Energy
Department of Health and Human Services
Department of the Interior
Department of Justice
Department of State
Department of Transportation
Environmental Protection Agency
Federal Energy Regulatory Commission
General Services Administration
Interstate Commerce Commission
Nuclear Regulatory Commission
U.S. Postal Services

FROM: Dinah Bear
General Counsel

DATE: October 2, 1992

RE: **Implementation of Convention on Environmental Impact Assessment in a Transboundary Context**

In February of 1991, the United States signed the Convention on Environmental Impact Assessment in a Transboundary Context (hereinafter, the Convention). Developed through the auspices of the Economic Commission for Europe (the "ECE"), the Convention is expected to be in force within the next few months. To be prepared for implementation of the Convention, a copy of which is enclosed, CEQ has been working with the Department of State and the Environmental Protection Agency to develop appropriate procedures.

The Convention applies only to ECE members. The United States' ECE neighbors are Canada and Russia[1]. At least in the

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[1]. If any of your agencies anticipate situations involving the Russian Republic in the near future, please include that fact in your comments.

ENCLOSURE 2

immediate future, we expect that the vast majority of situations which will trigger the Convention will involve the U.S. and Canada.

I would appreciate your comments on the attached draft guidelines. In reviewing the guidelines, please keep the following points in mind:

o o o The Convention should not alter an agency's implementation of the environmental impact assessment process, under either the National Environmental Policy Act (NEPA) or Executive Order 12114 (Environmental Effects of Major Federal Actions Abroad). Rather, the Convention simply requires a systematic way of including the other country's agencies and members of the public in the current U.S. practice. Similarly, U.S. agencies and members of the American public will have opportunities to be involved in the Canadian environmental impact assessment process.

o o o We are trying to keep the additional paperwork requirements to a minimum, while still fulfilling the goals and objectives of the Convention.

o o o The burden of notifying agencies and the public once the formal notification has been transmitted to the other country would, in this draft, rest on the receiving country. In other words, a U.S. agency would not have the burden of notifying all interested members of the Canadian public. Rather, that responsibility would rest on the Canadian government.

o o o The process for developing these procedures will be as follows: We would appreciate receiving your comments, either in writing or by phone, by October 14th. CEQ will also be meeting with representatives of environmental NGO groups, at their request. Later this month, I and my Canadian counterpart will discuss the Convention at a meeting of the International Joint Commission. At that time, there will also be an opportunity for informal discussion with the Canadians about their thinking regarding implementation of the Convention. After that meeting, we will revise the guidelines as appropriate and send them out to all relevant agency NEPA liaisons for additional comment before finalizing the guidelines.

o o o At some point in this process, CEQ will also be informing the northern border states of the Convention and the proposed process. Canada's provinces will be implementing the Convention; however, the United States took a reservation on the Convention indicating that it could only bind the federal government. However, we will make information regarding the Convention available to the state governments and encourage them to implement it on a voluntary basis.

I appreciate any suggestions and comments you or your agency colleagues care to offer. Please feel free to write, or to call me at (202) 395-5754. Thank you.

CONVENTION ON ENVIRONMENTAL IMPACT ASSESSMENT IN A TRANSBOUNDARY CONTEXT

done at Espoo (Finland), on 25 February 1991

UNITED NATIONS
1991

CONVENTION ON ENVIRONMENTAL IMPACT ASSESSMENT IN A TRANSBOUNDARY CONTEXT

The Parties to this Convention,

Aware of the interrelationship between economic activities and their environmental consequences,

Affirming the need to ensure environmentally sound and sustainable development,

Determined to enhance international co-operation in assessing environmental impact in particular in a transboundary context,

Mindful of the need and importance to develop anticipatory policies and of preventing, mitigating and monitoring significant adverse environmental impact in general and more specifically in a transboundary context,

Recalling the relevant provisions of the Charter of the United Nations, the Declaration of the Stockholm Conference on the Human Environment, the Final Act of the Conference on Security and Co-operation in Europe (CSCE) and the Concluding Documents of the Madrid and Vienna Meetings of Representatives of the Participating States of the CSCE,

Commending the ongoing activities of States to ensure that, through their national legal and administrative provisions and their national policies, environmental impact assessment is carried out,

Conscious of the need to give explicit consideration to environmental factors at an early stage in the decision-making process by applying environmental impact assessment, at all appropriate administrative levels, as a necessary tool to improve the quality of information presented to decision makers so that environmentally sound decisions can be made paying careful attention to minimizing significant adverse impact, particularly in a transboundary context,

Mindful of the efforts of international organizations to promote the use of environmental impact assessment both at the national and international levels, and taking into account work on environmental impact assessment carried out under the auspices of the United Nations Economic Commission for Europe, in particular results achieved by the Seminar on Environmental Impact Assessment (September 1987, Warsaw, Poland) as well as noting the Goals and Principles on environmental impact assessment adopted by the Governing Council of the United Nations Environment Programme, and the Ministerial Declaration on Sustainable Development (May 1990, Bergen, Norway),

Have agreed as follows:

Article 1

DEFINITIONS

For the purposes of this Convention,

(i) "Parties" means, unless the text otherwise indicates, the Contracting Parties to this Convention;

(ii) "Party of origin" means the Contracting Party or Parties to this Convention under whose jurisdiction a proposed activity is envisaged to take place;

(iii) "Affected Party" means the Contracting Party or Parties to this Convention likely to be affected by the transboundary impact of a proposed activity;

(iv) "Concerned Parties" means the Party of origin and the affected Party of an environmental impact assessment pursuant to this Convention;

(v) "Proposed activity" means any activity or any major change to an activity subject to a decision of a competent authority in accordance with an applicable national procedure;

(vi) "Environmental impact assessment" means a national procedure for evaluating the likely impact of a proposed activity on the environment;

(vii) "Impact" means any effect caused by a proposed activity on the environment including human health and safety, flora; fauna, soil, air, water, climate, landscape and historical monuments or other physical structures or the interaction among these factors; it also includes effects on cultural heritage or socio-economic conditions resulting from alterations to those factors;

(viii) "Transboundary impact" means any impact, not exclusively of a global nature, within an area under the jurisdiction of a Party caused by a proposed activity the physical origin of which is situated wholly or in part within the area under the jurisdiction of another Party;

(ix) "Competent authority" means the national authority or authorities designated by a Party as responsible for performing the tasks covered by this Convention and/or the authority or authorities entrusted by a Party with decision-making powers regarding a proposed activity;

(x) "The Public" means one or more natural or legal persons.

Article 2

GENERAL PROVISIONS

1. The Parties shall, either individually or jointly, take all appropriate and effective measures to prevent, reduce and control significant adverse transboundary environmental impact from proposed activities.

2. Each Party shall take the necessary legal, administrative or other measures to implement the provisions of this Convention, including, with respect to proposed activities listed in Appendix I that are likely to cause significant adverse transboundary impact, the establishment of an environmental impact assessment procedure that permits public participation and preparation of the environmental impact assessment documentation described in Appendix II.

3. The Party of origin shall ensure that in accordance with the provisions of this Convention an environmental impact assessment is undertaken prior to a decision to authorize or undertake a proposed activity listed in Appendix I that is likely to cause a significant adverse transboundary impact.

4. The Party of origin shall, consistent with the provisions of this Convention, ensure that affected Parties are notified of a proposed activity listed in Appendix I that is likely to cause a significant adverse transboundary impact.

5. Concerned Parties shall, at the initiative of any such Party, enter into discussions on whether one or more proposed activities not listed in Appendix I is or are likely to cause a significant adverse transboundary impact and thus should be treated as if it or they were so listed. Where those Parties so agree, the activity or activities shall be thus treated. General guidance for identifying criteria to determine significant adverse impact is set forth in Appendix III.

6. The Party of origin shall provide, in accordance with the provisions of this Convention, an opportunity to the public in the areas likely to be affected to participate in relevant environmental impact assessment procedures regarding proposed activities and shall ensure that the opportunity provided to the public of the affected Party is equivalent to that provided to the public of the Party of origin.

7. Environmental impact assessments as required by this Convention shall, as a minimum requirement, be undertaken at the project level of the proposed activity. To the extent appropriate, the Parties shall endeavour to apply the principles of environmental impact assessment to policies, plans and programmes.

8. The provisions of this Convention shall not affect the right of Parties to implement national laws, regulations, administrative provisions or accepted legal practices protecting information the supply of which would be prejudicial to industrial and commercial secrecy or national security.

9. The provisions of this Convention shall not affect the right of particular Parties to implement, by bilateral or multilateral agreement where appropriate, more stringent measures than those of this Convention.

10. The provisions of this Convention shall not prejudice any obligations of the Parties under international law with regard to activities having or likely to have a transboundary impact.

Article 3

NOTIFICATION

1. For a proposed activity listed in Appendix I that is likely to cause a significant adverse transboundary impact, the Party of origin shall, for the purposes of ensuring adequate and effective consultations under Article 5, notify any Party which it considers may be an affected Party as early as possible and no later than when informing its own public about that proposed activity.

2. This notification shall contain, *inter alia*:

(a) Information on the proposed activity, including any available information on its possible transboundary impact;

(b) The nature of the possible decision; and

(c) An indication of a reasonable time within which a response under paragraph 3 of this Article is required, taking into account the nature of the proposed activity;

and may include the information set out in paragraph 5 of this Article.

3. The affected Party shall respond to the Party of origin within the time specified in the notification, acknowledging receipt of the notification, and shall indicate whether it intends to participate in the environmental impact assessment procedure.

4. If the affected Party indicates that it does not intend to participate in the environmental impact assessment procedure, or if it does not respond within the time specified in the notification, the provisions in paragraphs 5, 6, 7 and 8 of this Article and in Articles 4 to 7 will not apply. In such circumstances the right of a Party of origin to determine whether to carry out an environmental impact assessment on the basis of its national law and practice is not prejudiced.

5. Upon receipt of a response from the affected Party indicating its desire to participate in the environmental impact assessment procedure, the Party of origin shall, if it has not already done so, provide to the affected Party:

(a) Relevant information regarding the environmental impact assessment procedure, including an indication of the time schedule for transmittal of comments; and

(b) Relevant information on the proposed activity and its possible significant adverse transboundary impact.

6. An affected Party shall, at the request of the Party of origin, provide the latter with reasonably obtainable information relating to the potentially affected environment under the jurisdiction of the affected Party, where such information is necessary for the preparation of the environmental impact assessment documentation. The information shall be furnished promptly and, as appropriate, through a joint body where one exists.

7. When a Party considers that it would be affected by a significant adverse transboundary impact of a proposed activity listed in Appendix I, and when no notification has taken place in accordance with paragraph 1 of this Article, the concerned Parties shall, at the request of the affected Party, exchange sufficient information for the purposes of holding discussions on whether there is likely to be a significant adverse transboundary impact. If those Parties agree that there is likely to be a significant adverse transboundary impact, the provisions of this Convention shall apply accordingly. If those Parties cannot agree whether there is likely to be a significant adverse transboundary impact, any such Party may submit that question to an inquiry commission in accordance with the provisions of Appendix IV to advise on the likelihood of significant adverse transboundary impact, unless they agree on another method of settling this question.

8. The concerned Parties shall ensure that the public of the affected Party in the areas likely to be affected be informed of, and be provided with possibilities for making comments or objections on, the proposed activity, and for the transmittal of these comments or objections to the competent authority of the Party of origin, either directly to this authority or, where appropriate, through the Party of origin.

Article 4

PREPARATION OF THE ENVIRONMENTAL IMPACT ASSESSMENT DOCUMENTATION

1. The environmental impact assessment documentation to be submitted to the competent authority of the Party of origin shall contain, as a minimum, the information described in Appendix II.

2. The Party of origin shall furnish the affected Party, as appropriate through a joint body where one exists, with the environmental impact assessment documentation. The concerned Parties shall arrange for distribution of the documentation to the authorities and the public of the affected Party in the areas likely to be affected and for the submission of comments to the competent authority of the Party of origin, either directly to this authority or, where appropriate, through the Party of origin within a reasonable time before the final decision is taken on the proposed activity.

Article 5

CONSULTATIONS ON THE BASIS OF THE ENVIRONMENTAL IMPACT ASSESSMENT DOCUMENTATION

The Party of origin shall, after completion of the environmental impact assessment documentation, without undue delay enter into consultations with the affected Party concerning, inter alia, the potential transboundary impact of the proposed activity and measures to reduce or eliminate its impact. Consultations may relate to:

(a) Possible alternatives to the proposed activity, including the no-action alternative and possible measures to mitigate significant adverse transboundary impact and to monitor the effects of such measures at the expense of the Party of origin;

(b) Other forms of possible mutual assistance in reducing any significant adverse transboundary impact of the proposed activity; and

(c) Any other appropriate matters relating to the proposed activity.

The Parties shall agree, at the commencement of such consultations, on a reasonable time-frame for the duration of the consultation period. Any such consultations may be conducted through an appropriate joint body, where one exists.

Article 6

FINAL DECISION

1. The Parties shall ensure that, in the final decision on the proposed activity, due account is taken of the outcome of the environmental impact assessment, including the environmental impact assessment documentation, as well as the comments thereon received pursuant to Article 3, paragraph 8 and Article 4, paragraph 2, and the outcome of the consultations as referred to in Article 5.

2. The Party of origin shall provide to the affected Party the final decision on the proposed activity along with the reasons and considerations on which it was based.

3. If additional information on the significant transboundary impact of a proposed activity, which was not available at the time a decision was made with respect to that activity and which could have materially affected the decision, becomes available to a concerned Party before work on that activity commences, that Party shall immediately inform the other concerned Party or Parties. If one of the concerned Parties so requests, consultations shall be held as to whether the decision needs to be revised.

Article 7

POST-PROJECT ANALYSIS

1. The concerned Parties, at the request of any such Party, shall determine whether, and if so to what extent, a post-project analysis shall be carried out, taking into account the likely significant adverse transboundary impact of the activity for which an environmental impact assessment has been undertaken pursuant to this Convention. Any post-project analysis undertaken shall include, in particular, the surveillance of the activity and the determination of any adverse transboundary impact. Such surveillance and determination may be undertaken with a view to achieving the objectives listed in Appendix V.

2. When, as a result of post-project analysis, the Party of origin or the affected Party has reasonable grounds for concluding that there is a significant adverse transboundary impact or factors have been discovered which may result in such an impact, it shall immediately inform the other Party. The concerned Parties shall then consult on necessary measures to reduce or eliminate the impact.

Article 8

BILATERAL AND MULTILATERAL CO-OPERATION

The Parties may continue existing or enter into new bilateral or multilateral agreements or other arrangements in order to implement their obligations under this Convention. Such agreements or other arrangements may be based on the elements listed in Appendix VI.

Article 9

RESEARCH PROGRAMMES

The Parties shall give special consideration to the setting up, or intensification of, specific research programmes aimed at:

(a) Improving existing qualitative and quantitative methods for assessing the impacts of proposed activities;

(b) Achieving a better understanding of cause-effect relationships and their role in integrated environmental management;

(c) Analysing and monitoring the efficient implementation of decisions on proposed activities with the intention of minimizing or preventing impacts;

(d) Developing methods to stimulate creative approaches in the search for environmentally sound alternatives to proposed activities, production and consumption patterns;

(e) Developing methodologies for the application of the principles of environmental impact assessment at the macro-economic level.

The results of the programmes listed above shall be exchanged by the Parties.

Article 10

STATUS OF THE APPENDICES

The Appendices attached to this Convention form an integral part of the Convention.

Article 11

MEETING OF PARTIES

1. The Parties shall meet, so far as possible, in connection with the annual sessions of the Senior Advisers to ECE Governments on Environmental and Water Problems. The first meeting of the Parties shall be convened not later than one year after the date of the entry into force of this Convention. Thereafter, meetings of the Parties shall be held at such other times as may be deemed necessary by a meeting of the Parties, or at the written request of any Party, provided that, within six months of the request being communicated to them by the secretariat, it is supported by at least one third of the Parties.

2. The Parties shall keep under continuous review the implementation of this Convention, and, with this purpose in mind, shall:

(a) Review the policies and methodological approaches to environmental impact assessment by the Parties with a view to further improving environmental impact assessment procedures in a transboundary context;

(b) Exchange information regarding experience gained in concluding and implementing bilateral and multilateral agreements or other arrangements regarding the use of environmental impact assessment in a transboundary context to which one or more of the Parties are party;

(c) Seek, where appropriate, the services of competent international bodies and scientific committees in methodological and technical aspects pertinent to the achievement of the purposes of this Convention;

(d) At their first meeting, consider and by consensus adopt rules of procedure for their meetings;

(e) Consider and, where necessary, adopt proposals for amendments to this Convention;

(f) Consider and undertake any additional action that may be required for the achievement of the purposes of this Convention.

Article 12

RIGHT TO VOTE

1. Each Party to this Convention shall have one vote.

2. Except as provided for in paragraph 1 of this Article, regional economic integration organizations, in matters within their competence, shall exercise their right to vote with a number of votes equal to the number of their member States which are Parties to this Convention. Such organizations shall not exercise their right to vote if their member States exercise theirs, and vice versa.

Article 13

SECRETARIAT

The Executive Secretary of the Economic Commission for Europe shall carry out the following secretariat functions:

(a) The convening and preparing of meetings of the Parties;

(b) The transmission of reports and other information received in accordance with the provisions of this Convention to the Parties; and

(c) The performance of other functions as may be provided for in this Convention or as may be determined by the Parties.

Article 14

AMENDMENTS TO THE CONVENTION

1. Any Party may propose amendments to this Convention.

2. Proposed amendments shall be submitted in writing to the secretariat, which shall communicate them to all Parties. The proposed amendments shall be discussed at the next meeting of the Parties, provided these proposals have been circulated by the secretariat to the Parties at least ninety days in advance.

3. The Parties shall make every effort to reach agreement on any proposed amendment to this Convention by consensus. If all efforts at consensus have been exhausted, and no agreement reached, the amendment shall as a last resort be adopted by a three-fourths majority vote of the Parties present and voting at the meeting.

4. Amendments to this Convention adopted in accordance with paragraph 3 of this Article shall be submitted by the Depositary to all Parties for ratification, approval or acceptance. They shall enter into force for Parties having ratified, approved or accepted them on the ninetieth day after the receipt by the Depositary of notification of their ratification, approval or acceptance by at least three fourths of these Parties. Thereafter they shall enter into force for any other Party on the ninetieth day after that Party deposits its instrument of ratification, approval or acceptance of the amendments.

5. For the purpose of this Article, "Parties present and voting" means Parties present and casting an affirmative or negative vote.

6. The voting procedure set forth in paragraph 3 of this Article is not intended to constitute a precedent for future agreements negotiated within the Economic Commission for Europe.

Article 15

SETTLEMENT OF DISPUTES

1. If a dispute arises between two or more Parties about the interpretation or application of this Convention, they shall seek a solution by negotiation or by any other method of dispute settlement acceptable to the parties to the dispute.

2. When signing, ratifying, accepting, approving or acceding to this Convention, or at any time thereafter, a Party may declare in writing to the Depositary that for a dispute not resolved in accordance with paragraph 1 of this Article, it accepts one or both of the following means of dispute settlement as compulsory in relation to any Party accepting the same obligation:

(a) Submission of the dispute to the International Court of Justice;

(b) Arbitration in accordance with the procedure set out in Appendix VII.

3. If the parties to the dispute have accepted both means of dispute settlement referred to in paragraph 2 of this Article, the dispute may be submitted only to the International Court of Justice, unless the parties agree otherwise.

Article 16

SIGNATURE

This Convention shall be open for signature at Espoo (Finland) from 25 February to 1 March 1991 and thereafter at United Nations Headquarters in New York until 2 September 1991 by States members of the Economic Commission for Europe as well as States having consultative status with the Economic Commission for Europe pursuant to paragraph 8 of the Economic and Social Council resolution 36 (IV) of 28 March 1947, and by regional economic integration organizations constituted by sovereign States members of the Economic Commission for Europe to which their member States have transferred competence in respect of matters governed by this Convention, including the competence to enter into treaties in respect of these matters.

Article 17

RATIFICATION, ACCEPTANCE, APPROVAL AND ACCESSION

1. This Convention shall be subject to ratification, acceptance or approval by signatory States and regional economic integration organizations.

2. This Convention shall be open for accession as from 3 September 1991 by the States and organizations referred to in Article 16.

3. The instruments of ratification, acceptance, approval or accession shall be deposited with the Secretary-General of the United Nations, who shall perform the functions of Depositary.

4. Any organization referred to in Article 16 which becomes a Party to this Convention without any of its member States being a Party shall be bound by all the obligations under this Convention. In the case of such organizations, one or more of whose member States is a Party to this Convention, the organization and its member States shall decide on their respective responsibilities for the performance of their obligations under this Convention. In such cases, the organization and the member States shall not be entitled to exercise rights under this Convention concurrently.

5. In their instruments of ratification, acceptance, approval or accession, the regional economic integration organizations referred to in Article 16 shall declare the extent of their competence with respect to the matters governed by this Convention. These organizations shall also inform the Depositary of any relevant modification to the extent of their competence.

Article 18

ENTRY INTO FORCE

1. This Convention shall enter into force on the ninetieth day after the date of deposit of the sixteenth instrument of ratification, acceptance, approval or accession.

2. For the purposes of paragraph 1 of this Article, any instrument deposited by a regional economic integration organization shall not be counted as additional to those deposited by States members of such an organization.

3. For each State or organization referred to in Article 16 which ratifies, accepts or approves this Convention or accedes thereto after the deposit of the sixteenth instrument of ratification, acceptance, approval or accession, this Convention shall enter into force on the ninetieth day after the date of deposit by such State or organization of its instrument of ratification, acceptance, approval or accession.

Article 19

WITHDRAWAL

At any time after four years from the date on which this Convention has come into force with respect to a Party, that Party may withdraw from this Convention by giving written notification to the Depositary. Any such withdrawal shall take effect on the ninetieth day after the date of its receipt by the Depositary. Any such withdrawal shall not affect the application of Articles 3 to 6 of this Convention to a proposed activity in respect of which a notification has been made pursuant to Article 3, paragraph 1, or a request has been made pursuant to Article 3, paragraph 7, before such withdrawal took effect.

Article 20

AUTHENTIC TEXTS

The original of this Convention, of which the English, French and Russian texts are equally authentic, shall be deposited with the Secretary-General of the United Nations.

IN WITNESS WHEREOF the undersigned, being duly authorized thereto, have signed this Convention.

DONE at Espoo (Finland), this twenty-fifth day of February one thousand nine hundred and ninety-one.

APPENDIX I

LIST OF ACTIVITIES

1. Crude oil refineries (excluding undertakings manufacturing only lubricants from crude oil) and installations for the gasification and liquefaction of 500 tonnes or more of coal or bituminous shale per day.

2. Thermal power stations and other combustion installations with a heat output of 300 megawatts or more and nuclear power stations and other nuclear reactors (except research installations for the production and conversion of fissionable and fertile materials, whose maximum power does not exceed 1 kilowatt continuous thermal load).

3. Installations solely designed for the production or enrichment of nuclear fuels, for the reprocessing of irradiated nuclear fuels or for the storage, disposal and processing of radioactive waste.

4. Major installations for the initial smelting of cast-iron and steel and for the production of non-ferrous metals.

5. Installations for the extraction of asbestos and for the processing and transformation of asbestos and products containing asbestos: for asbestos-cement products, with an annual production of more than 20,000 tonnes finished product; for friction material, with an annual production of more than 50 tonnes finished product; and for other asbestos utilization of more than 200 tonnes per year.

6. Integrated chemical installations.

7. Construction of motorways, express roads */ and lines for long-distance railway traffic and of airports with a basic runway length of 2,100 metres or more.

8. Large-diameter oil and gas pipelines.

9. Trading ports and also inland waterways and ports for inland-waterway traffic which permit the passage of vessels of over 1,350 tonnes.

10. Waste-disposal installations for the incineration, chemical treatment or landfill of toxic and dangerous wastes.

11. Large dams and reservoirs.

12. Groundwater abstraction activities in cases where the annual volume of water to be abstracted amounts to 10 million cubic metres or more.

13. Pulp and paper manufacturing of 200 air-dried metric tonnes or more per day.

14. Major mining, on-site extraction and processing of metal ores or coal.

15. Offshore hydrocarbon production.

16. Major storage facilities for petroleum, petrochemical and chemical products.

17. Deforestation of large areas.

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*/ For the purposes of this Convention:

- "Motorway" means a road specially designed and built for motor traffic, which does not serve properties bordering on it, and which:

(a) Is provided, except at special points or temporarily, with separate carriageways for the two directions of traffic, separated from each other by a dividing strip not intended for traffic or, exceptionally, by other means;

(b) Does not cross at level with any road, railway or tramway track, or footpath; and

(c) Is specially sign-posted as a motorway.

- "Express road" means a road reserved for motor traffic accessible only from interchanges or controlled junctions and on which, in particular, stopping and parking are prohibited on the running carriageway(s).

APPENDIX II

CONTENT OF THE ENVIRONMENTAL IMPACT ASSESSMENT DOCUMENTATION

Information to be included in the environmental impact assessment documentation shall, as a minimum, contain, in accordance with Article 4:

(a) A description of the proposed activity and its purpose;

(b) A description, where appropriate, of reasonable alternatives (for example, locational or technological) to the proposed activity and also the no-action alternative;

(c) A description of the environment likely to be significantly affected by the proposed activity and its alternatives;

(d) A description of the potential environmental impact of the proposed activity and its alternatives and an estimation of its significance;

(e) A description of mitigation measures to keep adverse environmental impact to a minimum;

(f) An explicit indication of predictive methods and underlying assumptions as well as the relevant environmental data used;

(g) An identification of gaps in knowledge and uncertainties encountered in compiling the required information;

(h) Where appropriate, an outline for monitoring and management programmes and any plans for post-project analysis; and

(i) A non-technical summary including a visual presentation as appropriate (maps, graphs, etc.).

APPENDIX III

GENERAL CRITERIA TO ASSIST IN THE DETERMINATION OF THE ENVIRONMENTAL SIGNIFICANCE OF ACTIVITIES NOT LISTED IN APPENDIX I

1. In considering proposed activities to which Article 2, paragraph 5, applies, the concerned Parties may consider whether the activity is likely to have a significant adverse transboundary impact in particular by virtue of one or more of the following criteria:

(a) Size: proposed activities which are large for the type of the activity;

(b) Location: proposed activities which are located in or close to an area of special environmental sensitivity or importance (such as wetlands designated under the Ramsar Convention, national parks, nature reserves, sites of special scientific interest, or sites of archaeological, cultural or historical importance); also, proposed activities in locations where the characteristics of proposed development would be likely to have significant effects on the population;

(c) Effects: proposed activities with particularly complex and potentially adverse effects, including those giving rise to serious effects on humans or on valued species or organisms, those which threaten the existing or potential use of an affected area and those causing additional loading which cannot be sustained by the carrying capacity of the environment.

2. The concerned Parties shall consider for this purpose proposed activities which are located close to an international frontier as well as more remote proposed activities which could give rise to significant transboundary effects far removed from the site of development.

APPENDIX IV

INQUIRY PROCEDURE

1. The requesting Party or Parties shall notify the secretariat that it or they submit(s) the question of whether a proposed activity listed in Appendix I is likely to have a significant adverse transboundary impact to an inquiry commission established in accordance with the provisions of this Appendix. This notification shall state the subject-matter of the inquiry. The secretariat shall notify immediately all Parties to this Convention of this submission.

2. The inquiry commission shall consist of three members. Both the requesting party and the other party to the inquiry procedure shall appoint a scientific or technical expert, and the two experts so appointed shall designate by common agreement the third expert, who shall be the president of the inquiry commission. The latter shall not be a national of one of the parties to the inquiry procedure, nor have his or her usual place of residence in the territory of one of these parties, nor be employed by any of them, nor have dealt with the matter in any other capacity.

3. If the president of the inquiry commission has not been designated within two months of the appointment of the second expert, the Executive Secretary of the Economic Commission for Europe shall, at the request of either party, designate the president within a further two-month period.

4. If one of the parties to the inquiry procedure does not appoint an expert within one month of its receipt of the notification by the secretariat, the other party may inform the Executive Secretary of the Economic Commission for Europe, who shall designate the president of the inquiry commission within a further two-month period. Upon designation, the president of the inquiry commission shall request the party which has not appointed an expert to do so within one month. After such a period, the president shall inform the Executive Secretary of the Economic Commission for Europe, who shall make this appointment within a further two-month period.

5. The inquiry commission shall adopt its own rules of procedure.

6. The inquiry commission may take all appropriate measures in order to carry out its functions.

7. The parties to the inquiry procedure shall facilitate the work of the inquiry commission and, in particular, using all means at their disposal, shall:

(a) Provide it with all relevant documents, facilities and information; and

(b) Enable it, where necessary, to call witnesses or experts and receive their evidence.

8. The parties and the experts shall protect the confidentiality of any information they receive in confidence during the work of the inquiry commission.

9. If one of the parties to the inquiry procedure does not appear before the inquiry commission or fails to present its case, the other party may request the inquiry commission to continue the proceedings and to complete its work. Absence of a party or failure of a party to present its case shall not constitute a bar to the continuation and completion of the work of the inquiry commission.

10. Unless the inquiry commission determines otherwise because of the particular circumstances of the matter, the expenses of the inquiry commission, including the remuneration of its members, shall be borne by the parties to the inquiry procedure in equal shares. The inquiry commission shall keep a record of all its expenses, and shall furnish a final statement thereof to the parties.

11. Any Party having an interest of a factual nature in the subject-matter of the inquiry procedure, and which may be affected by an opinion in the matter, may intervene in the proceedings with the consent of the inquiry commission.

12. The decisions of the inquiry commission on matters of procedure shall be taken by majority vote of its members. The final opinion of the inquiry commission shall reflect the view of the majority of its members and shall include any dissenting view.

13. The inquiry commission shall present its final opinion within two months of the date on which it was established unless it finds it necessary to extend this time limit for a period which should not exceed two months.

14. The final opinion of the inquiry commission shall be based on accepted scientific principles. The final opinion shall be transmitted by the inquiry commission to the parties to the inquiry procedure and to the secretariat.

APPENDIX V

POST-PROJECT ANALYSIS

Objectives include:

(a) Monitoring compliance with the conditions as set out in the authorization or approval of the activity and the effectiveness of mitigation measures;

(b) Review of an impact for proper management and in order to cope with uncertainties;

(c) Verification of past predictions in order to transfer experience to future activities of the same type.

APPENDIX VI

ELEMENTS FOR BILATERAL AND MULTILATERAL CO-OPERATION

1. Concerned Parties may set up, where appropriate, institutional arrangements or enlarge the mandate of existing institutional arrangements within the framework of bilateral and multilateral agreements in order to give full effect to this Convention.

2. Bilateral and multilateral agreements or other arrangements may include:

(a) Any additional requirements for the implementation of this Convention, taking into account the specific conditions of the subregion concerned;

(b) Institutional, administrative and other arrangements, to be made on a reciprocal and equivalent basis;

(c) Harmonization of their policies and measures for the protection of the environment in order to attain the greatest possible similarity in standards and methods related to the implementation of environmental impact assessment;

(d) Developing, improving, and/or harmonizing methods for the identification, measurement, prediction and assessment of impacts, and for post-project analysis;

(e) Developing and/or improving methods and programmes for the collection, analysis, storage and timely dissemination of comparable data regarding environmental quality in order to provide input into environmental impact assessment;

(f) The establishment of threshold levels and more specified criteria for defining the significance of transboundary impacts related to the location, nature or size of proposed activities, for which environmental impact assessment in accordance with the provisions of this Convention shall be applied; and the establishment of critical loads of transboundary pollution;

(g) Undertaking, where appropriate, joint environmental impact assessment, development of joint monitoring programmes, intercalibration of monitoring devices and harmonization of methodologies with a view to rendering the data and information obtained compatible.

APPENDIX VII

ARBITRATION

1. The claimant Party or Parties shall notify the secretariat that the Parties have agreed to submit the dispute to arbitration pursuant to Article 15, paragraph 2, of this Convention. The notification shall state the subject-matter of arbitration and include, in particular, the Articles of this Convention, the interpretation or application of which are at issue. The secretariat shall forward the information received to all Parties to this Convention.

2. The arbitral tribunal shall consist of three members. Both the claimant Party or Parties and the other Party or Parties to the dispute shall appoint an arbitrator, and the two arbitrators so appointed shall designate by common agreement the third arbitrator, who shall be the president of the arbitral tribunal. The latter shall not be a national of one of the parties to the dispute, nor have his or her usual place of residence in the territory of one of these parties, nor be employed by any of them, nor have dealt with the case in any other capacity.

3. If the president of the arbitral tribunal has not been designated within two months of the appointment of the second arbitrator, the Executive Secretary of the Economic Commission for Europe shall, at the request of either party to the dispute, designate the president within a further two-month period.

4. If one of the parties to the dispute does not appoint an arbitrator within two months of the receipt of the request, the other party may inform the Executive Secretary of the Economic Commission for Europe, who shall designate the president of the arbitral tribunal within a further two-month period. Upon designation, the president of the arbitral tribunal shall request the party which has not appointed an arbitrator to do so within two months. After such a period, the president shall inform the Executive Secretary of the Economic Commission for Europe, who shall make this appointment within a further two-month period.

5. The arbitral tribunal shall render its decision in accordance with international law and in accordance with the provisions of this Convention.

6. Any arbitral tribunal constituted under the provisions set out herein shall draw up its own rules of procedure.

7. The decisions of the arbitral tribunal, both on procedure and on substance, shall be taken by majority vote of its members.

8. The tribunal may take all appropriate measures in order to establish the facts.

9. The parties to the dispute shall facilitate the work of the arbitral tribunal and, in particular, using all means at their disposal, shall:

(a) Provide it with all relevant documents, facilities and information; and

(b) Enable it, where necessary, to call witnesses or experts and receive their evidence.

10. The parties and the arbitrators shall protect the confidentiality of any information they receive in confidence during the proceedings of the arbitral tribunal.

11. The arbitral tribunal may, at the request of one of the parties, recommend interim measures of protection.

12. If one of the parties to the dispute does not appear before the arbitral tribunal or fails to defend its case, the other party may request the tribunal to continue the proceedings and to render its final decision. Absence of a party or failure of a party to defend its case shall not constitute a bar to the proceedings. Before rendering its final decision, the arbitral tribunal must satisfy itself that the claim is well founded in fact and law.

13. The arbitral tribunal may hear and determine counter-claims arising directly out of the subject-matter of the dispute.

14. Unless the arbitral tribunal determines otherwise because of the particular circumstances of the case, the expenses of the tribunal, including the remuneration of its members, shall be borne by the parties to the dispute in equal shares. The tribunal shall keep a record of all its expenses, and shall furnish a final statement thereof to the parties.

15. Any Party to this Convention having an interest of a legal nature in the subject-matter of the dispute, and which may be affected by a decision in the case, may intervene in the proceedings with the consent of the tribunal.

16. The arbitral tribunal shall render its award within five months of the date on which it is established unless it finds it necessary to extend the time limit for a period which should not exceed five months.

17. The award of the arbitral tribunal shall be accompanied by a statement of reasons. It shall be final and binding upon all parties to the dispute. The award will be transmitted by the arbitral tribunal to the parties to the dispute and to the secretariat. The secretariat will forward the information received to all Parties to this Convention.

18. Any dispute which may arise between the parties concerning the interpretation or execution of the award may be submitted by either party to the arbitral tribunal which made the award or, if the latter cannot be seized thereof, to another tribunal constituted for this purpose in the same manner as the first.

UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D.C. 20555

October 30, 1992

Ms. Dinah Bear
Council on Environmental Quality, CEQ
722 Jackson Place, N.W.
Washington, D.C. 20503

Dear Ms. Bear:

As we discussed recently, the Nuclear Regulatory Commission (NRC) has a number of concerns about potential misinterpretations of the "Convention on Environmental Impact Assessment in a Transboundary Context," (thereafter, the Convention), that could negatively affect our nuclear licensing process. Although we find that the only definite effect of the Convention to our licensing process will be to add to the distribution requirements of 10 CFR Part 51, the issues requiring clarification are of sufficient magnitude that additional time is needed for NRC to provide you with comments. I am therefore, requesting such an extension, to allow our comments to be considered and incorporated into the final CEQ guidelines on implementation of the Convention.

I also would like to thank you for transmitting a copy of a letter from Ms. Janet G. Mullins, Legislative Assistant Secretary to Chairman John D. Dingell, addressing his concerns about the Convention. It would be helpful to have a signed and dated copy of the letter. Additionally, I would appreciate memoranda dealing with the nuclear issues the Convention covers, including clearances CEQ received, or any other document that could provide further background on the Convention.

If you have any questions, please call me at (301) 504-2598.

Sincerely,

Maria E. Lopez-Otin
Federal Liaison
Office of State Programs

ENCLOSURE 3

EXECUTIVE OFFICE OF THE PRESIDENT
COUNCIL ON ENVIRONMENTAL QUALITY
WASHINGTON, D.C. 20503

November 24, 1992

Ms. Maria Lopez-Otin
Federal Liaison
Nuclear Regulatory Commission
Mail Stop 3D23
Washington, D.C. 20555

Dear Ms. Lopez-Otin:

I am writing in response to your letter of October 30, 1992, asking for additional information about the Convention on Environmental Impact Assessment in a Transboundary Context, which the United States signed in February, 1991, in Espoo, Finland.

No memoranda exist dealing with the relationship between the Convention and nuclear issues. The U.S. representatives at the negotiating sessions could not recall any verbal discussion, let alone written memoranda, on the subject. In fact, all of the documents I have ever seen and the negotiations which I attended dealt with the procedural requirements, not specific types of activities to which those requirements would apply.

The State Department does not keep written signed and dated copies of its correspondence. It does have a system of filing documents on microfiche. There is no doubt in anyone's mind that the letter from Janet Mullins to Congressman Dingell was in fact sent, and that it is dated June 6, 1991. If you wish to pursue this further, it was suggested that you talk to Scott Styles in the Department of State at 647-8732.

I am enclosing a background memo and the 175 circular for authorizing negotiations and for signing the Convention. Again, as you will see, the documents do not address specific types of activities. I might also mention that during my recent discussions with the Canadians about implementation of the Convention, the subject of nuclear power plants was not raised. Perhaps more significantly, our Canadian counterparts expressed precisely the same viewpoint as ourselves regarding implementation of the Convention - that is, that is extended, but did not change, the normal environmental impact assessment process.

Finally, I am enclosing an updated draft of the guidelines, based on agency comments to date. As you will see, the guidelines are written generically to cover situations with

ENCLOSURE 4

Russia and Caribbean territories owned by ECE member countries, and the terminology of the Convention is used.

I hope some of this material is helpful to you, and that we will receive your agency's comments on the proposed guidelines in the near future.

Sincerely,

Dinah Bear

Dinah Bear
General Counsel

Enclosures

GUIDELINES FOR IMPLEMENTING THE ECE CONVENTION ON ENVIRONMENTAL IMPACT ASSESSMENT IN A TRANSBOUNDARY CONTEXT

11/27/92

A. OUTGOING (United States as Party of Origin)

1. A federal agency with a proposed activity triggering the Convention (that is, the Competent Authority) sends a copy of the Notice of Intent (NOI) for preparation of an environmental impact statement (EIS) to the [POC[1]], at the same time that the NOI is ready for publication in the Federal Register. The NOI should contain: (a) a description of the proposed action and possible alternatives, including available information on possible transboundary impacts; and (b) an indication of a reasonable time within which a response regarding the affected country's willingness to participate in the EIA process is required.

   a. A number of activities carried out by the U.S. Environmental Protection Agency (EPA) are statutorily exempt from the National Environmental Policy Act (NEPA) or utilize procedures which are functionally equivalent to NEPA. For its activities covered under the Convention, EPA will provide appropriate documentation for review by the Affected Party's authorities and the public, under terms of specific guidelines to be developed.

2. The Competent Authority will forward a copy of the NOI to CEQ and other relevant agencies.

3. The [POC] will forward the NOI to the Affected Party's Point of Contact.

4. The Affected Party's Point of Contact will respond to the [POC] regarding that country's willingness to participate in the EIS process. The [POC] will forward the response to the Competent Authority, with copies to the Council on Environmental Quality (CEQ) and other relevant agencies.

5. The Competent Authority will perform its EIS process in conformance with its normal procedures under NEPA and Executive Order 12114, giving due consideration to information and comments submitted by the public as well as federal, provincial, tribal and local agencies in the Affected Party. The Competent Authority will be responsible for ensuring adequate opportunity for public participation in the appropriate localities of the Affected Party.

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[1]. For purposes of this draft, the U.S. Point of Contact is being left unstated. It is most likely to be either the office of the Assistant Secretary for Oceans, International Environmental and Scientific Affairs, Department of State, or the Director, Office of Federal Activities, Environmental Protection Agency.

6. The Competent Authority will send a copy of the draft and final EIS and the Record of Decision (as required by 40 C.F.R. §1505.2) at the time such documents are issued to the [POC] for transmittal to the Affected Party's Point of Contact. Each copy shall be accompanied by a list of the consultations with the Affected Party's entities that have occurred.

7. Consultations between the Competent authority and the Affected Party will generally occur directly. However, at the request of the Competent Authority or the Affected Party's Ministry of Foreign Affairs, consultations under Article 5 will be coordinated by the Department of State, in consultation with CEQ and other relevant U.S. agencies.

8. The Affected Party's federal, provincial and local agencies, tribes, organizations and individuals choosing to participate in the process should submit technical information and comments directly to the Competent Authority.

9. Disputes and discussions between the Concerned Parties under Article 7 Paragraph 2 will be communicated and negotiated through the Department of State, in consultation with CEQ and other relevant agencies.

10. The Competent Authority will take into account the comments received from the Affected Party and its citizens and the results of any consultations between the Concerned Party in its final decision, as reflected in the Competent Authority's Record of Decision. The Competent Authority will forward the Record of Decision to the Affected Party's Point of Contact.

11. If either of the Concerned Parties conclude that there is a significant adverse environmental impact resulting from the Competent Authority's final decision, that Party will initiate consultations with the Competent Authority on possible post-project analysis activity to be undertaken.

11/27/92
INCOMING (United States as affected party)

1. The Party of Origin's Point of Contact will notify the U.S. [POC] of a proposed activity it believes is covered by the Convention that could have a significant adverse environmental impact in the United States.

2. The U.S. [POC] will respond in the affirmative, that the U.S. would like to participate in the environmental impact assessment (EIA) process. The positive response will indicate that the Party of Origin's Competent Authority should work directly with relevant U.S. federal, state, tribal and local entities and the public, who will respond directly to the Competent Authority.

3. [The Department of State will forward the notification to the Environmental Protection Agency's (EPA) Office of Federal Activities (OFA).] Will be deleted if OFA is the POC.

4. The Office of Federal Activities will publish a short notice describing the project, its location and Party of Origin's contact in the weekly (Friday) Notice of Availability in the Federal Register, with a copy to the Council on Environmental Quality (CEQ).

5. The Office of Federal Activities will send a separate notice to the relevant Governor's Office in the state(s) likely to be impacted.

6. Concerned federal, state, and local agencies, tribes, organizations, and members of the public will participate directly in the Party of Origin's process. The Competent Authority will be responsible for ensuring adequate opportunity for public participation in the appropriate localities of the Affected Party.

7. U.S. Federal agencies that participate in the scoping and/or commenting processes will transmit technical information/comments directly to the Party of Origin's Competent Authority.

8. Consultations between the Competent Authority and federal agencies will generally occur directly. However, at the request of the Affected Party or the Party of Origin's Ministry of Foreign Affairs, consultations under Article 5 will be coordinated by the Department of State, in consultation with CEQ and other relevant U.S. agencies.

9. Disputes and requests for consultation under Article 7 Paragraph 2 will be communicated and negotiated through the Department of State, in consultation with CEQ and other relevant U.S. agencies.

10. The Competent Authority will take into account the comments received from the Affected Party and its citizens and the results of any consultations between the Concerned Party's, and will forward a document explaining the decision to the Affected Party.

11. If either of the Concerned Parties conclude that there is a significant adverse environmental impact resulting from the Competent Authority's final decision, that Party will initiate consultations with the Competent Authority on possible post-project analysis activity to be undertaken.

United States Department of State

Washington, D. C. 20520

ACTION MEMORANDUM
S/S

TO: E - Ambassador McCormack

FROM: OES - Frederick M. Bernthal

SUBJECT: Circular 175 Request for Authority to Negotiate an ECE Agreement on Enviromental Impact Assessment in a Transboundary Context

ISSUE FOR DECISION

Whether to authorize the U.S. to enter into negotiations on an Economic Commission for Europe (ECE) Agreement on Environmental Impact Assessment in a Transboundary Context. A draft text of the agreement is at Tab A.

ESSENTIAL FACTORS

At a 1987 Seminar on Environmental Impact Assessment held under the auspices of the ECE (which includes the U.S., Canada, Eastern and Western Europe), the United States supported a recommendation to the Senior Advisers to ECE Governments on Environmental and Water Problems that called for the development of a Framework Agreement on Environmental Impact Assessment in a Transboundary Context. At their March 1988 meeting, the Senior Advisers accepted the recommendation and created an Ad Hoc Working Group to elaborate elements of such an agreement.

The Working Group has met three times and is expected to meet at least twice more before the text is ready for adoption and signature. We are seeking policy-level approval of positions we propose taking at the meeting scheduled for February 12-16, 1990.

The agreement, as it is emerging, would obligate a party to take certain steps if an activity within its territory were likely to have significant environmental impacts in the territory of another party. An activity would be covered by the agreement only if it were: 1) listed in the annex to the agreement (or two or more parties had separately agreed to treat it as if it were in the annex); 2) likely to cause significant transboundary impacts; and 3) subject to federal decision-making. For the U.S., the agreement would have significance with respect to such activities near the U.S.-Canadian border.

If a proposed activity met the above criteria, a party would be obligated to: conduct an environmental impact assessment (EIA), including an examination of transboundary impacts; notify a potentially affected party; invite the other party and its relevant public to participate in the EIA process; provide its own public in the potentially affected area with an opportunity to participate in relevant legal and administrative procedures and ensure that the relevant public of the other party was provided with an equivalent opportunity; consult with the other party concerning potential transboundary impacts; duly take into account the outcome of the EIA process, including the consultation, when making its final decision on the proposed activity; and transmit the final decision and reasons underlying it to the other party. The agreement would not require a party to transmit confidential, proprietary, or national defense information. The agreement would permit, but not require, parties to conclude bilateral or multilateral implementing agreements.

In terms of implementing the agreement's obligations, U.S. agencies report that, as a matter of practice, they currently take the steps outlined above with respect to activities along the U.S.-Canada border that could have significant environmental impacts in Canada. As is discussed in the Memorandum of Law at Tab C, it would be necessary to codify this practice (through regulations or Executive Order amendments) in order to implement the agreement.

At Tab B are the proposed delegation instructions on the latest draft text of the agreement. (The draft text contains brackets around language that either remains controversial or has not yet been discussed.) Essentially, the instructions call for the delegation to seek to make the text as close as possible to existing U.S. practice with respect to the procedural aspects of EIA. Also, the delegation is to seek to make the text "decision-neutral". Specifically, apart from a statement reflecting customary international law that states should take appropriate preventive measures to avoid causing significant adverse transboundary environmental impacts, the agreement should not link the EIA procedure with any particular decisional result.

RECOMMENDATION

That you authorize the U.S. to enter into negotiations on an ECE Agreement on Environmental Impact Assessment in a Transboundary Context, based on the delegation instructions at Tab B.

Approve_____ Disapprove_____

Attachments:

Tab A - Text of Draft ECE Agreement
Tab B - Proposed Delegation Instructions
Tab C - Memorandum of Law

← only "Tab C" is attached
11/2/92
EV

Drafted:L/OES:SBiniaz
Cleared:OES/E:PJSmith
OES/ENV:ADSensi
S/P:CDawson
OES/EHC:ESavage
L:AJKreczko
EPA:NKete
EPA:AMiller
EPA/GC:TMarshall
CEQ/GC:DBear
DOE:EWilliams(substance)
OSTP:JHoughton
OMB:EWatts
Commerce:JRSpradley(substance)
Justice:W.M.Cohen
DOT:CMittelholtz
FERC:MAllday
USDA/APHIS:TMedley
USDA/USFS:DKetcham
DOD/EP:CRamsey
DOI/EPR:JDeason

MEMORANDUM OF LAW

Subject: Circular 175 Request for Authority to Negotiate an ECE Agreement on Environmental Impact Assessment in a Transboundary Context

The accompanying Circular 175 memorandum from OES requests authority to negotiate an agreement within the Economic Commission for Europe (ECE) on Environmental Impact Assessment in a Transboundary Context.

The legal authority to enter into the proposed negotiations is generally derived from the President's Article II constitutional powers to conduct foreign relations, as exercised by the Secretary of State on day-to-day basis, 22 U.S.C. 2656. Statutory authority for the negotiation of international environmental agreements in particular is contained in the National Environmental Policy Act of 1969, 42 U.S.C. 4321, et seq., which directs all agencies of the federal government to recognize the worldwide character of environmental problems and support initiatives, resolutions, and programs designed to maximize international cooperation on environmental issues, 42 U.S.C. 4332(F). Specific Congressional support for U.S. involvement in the negotiation of this particular kind of agreement is reflected in a Senate resolution expressing its sense that the U.S. government "should seek the agreement of other governments to a proposed treaty requiring the preparation of an International Environmental Assessment for any major project, action, or continuing activity which may be reasonably expected to have a significant adverse effect on the physical environment or environmental interests of another national or a global commons area" (see S.Res.49 of July 21, 1978).

As explained in the accompanying memorandum, the draft agreement, as it is emerging, would obligate a party to take certain steps if an activity within its territory were likely to have significant environmental impacts in the territory of another party. An activity would be covered by the agreement only if it were: 1) listed in the annex to the agreement (or two or more parties had separately agreed to treat it as if it were in the annex); 2) likely to cause significant transboundary impacts; and 3) subject to federal decision-making. For the U.S., the agreement would have significance with respect to such activities near the U.S.-Canadian border.

If a proposed activity met the above criteria, a party would be obligated to: conduct an environmental impact assessment (EIA), including an examination of transboundary impacts; notify a potentially affected party; invite the other party and its relevant public to participate in the EIA process; provide its own

public in the potentially affected area with an opportunity to participate in relevant legal and administrative procedures and ensure that the relevant public of the other party was provided with an equivalent opportunity; consult with the other party concerning potential transboundary impacts; duly take into account the outcome of the EIA process, including the consultation, when making its final decision on the proposed activity; and transmit the final decision and reasons underlying it to the other party. The agreement would not require a party to transmit confidential, proprietary, or national defense information. The agreement would permit, but not require, parties to conclude bilateral or multilateral implementing agreements.

If the United States were to become a party to the EIA agreement currently under negotiation, we would have to take further legal steps to implement U.S. obligations thereunder. It is unclear at this point what legal form such implementation would take, e.g., regulations, executive order.

It is unclear whether the obligations contemplated in the EIA draft agreement are already imposed under current U.S. law, namely the National Environmental Policy Act ("NEPA"), cited above. It is clear that NEPA does require federal agencies to examine the environmental impacts within the United States of major federal actions. However, it has been unsettled since NEPA was enacted in 1969 as to whether it was intended to require examination of environmental impacts outside U.S. jurisdiction.

The courts have not provided a clear answer. They have reached different results with respect to NEPA's applicability to major federal actions with impacts wholly outside the United States; further, no court has examined the specific question whether, in the case where a major federal action is likely to have both domestic and transboundary environmental impacts (and NEPA therefore applies at least to the domestic impacts), NEPA's requirements also extend to examination of the transboundary impacts. Within the U.S. Government, agencies have also been divided since NEPA's enactment in terms of its applicability to impacts outside U.S. jurisdiction.

In an effort to set aside the interagency disagreement over NEPA's applicability to impacts abroad, in 1979 President Carter issued E.O. 12114 ("Environmental Effects Abroad of Major Federal Actions") requiring federal agencies to consider the environmental impacts abroad of certain federal actions. By its terms, E.O. 12114 represents the U.S. government's "exclusive and complete determination of the procedural and other actions to be taken by Federal agencies to further the purpose of [NEPA], with respect to the environment outside the United States...." The scope of the Executive Order, as currently drafted, would not be adequate to implement U.S. obligations under the EIA agreement.

One means of implementing the EIA agreement would be through amendment of E.O. 12114. Another option would be to issue a new executive order. A third option would be to amend the regulations implementing NEPA (40 CFR Parts 1500-1508); however, such an approach would likely counter resistance from those agencies that do not believe that NEPA applies to examination of impacts abroad.

It should also be noted that legislative proposals are currently pending in Congress that would have a bearing on the implementation of U.S. obligations under the EIA agreement being negotiated. More than one proposal would explicitly expand NEPA's coverage to extend to consideration of environmental impacts outside U.S. jurisdiction (see, e.g., H.R. 1113; S. 1089).

Therefore, the exact means of implementing U.S. obligations will be analyzed in the Memorandum of Law that will accompanying the Circular 175 seeking authority to sign the agreement.

In light of the above, there is no legal objection to entering into negotiations along the lines described in the accompanying Circular 175 memorandum and in the negotiating instructions, based on the understanding that additional Circular 175 authorization will be sought for conclusion of the agreement.

Acting Assistant Legal Adviser
for Oceans, International
Environmental and Scientific
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Drafted:L/OES:SBiniaz
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SB fm

TO: The Secretary

THROUGH: E/C - Mr. Zoellick

FROM: OES - Curtis Bohlen

SUBJECT: Request for Circular 175 Authority to Sign an Agreement Within the United Nations Economic Commission for Europe Concerning Transboundary Effects of Industrial Accidents

ISSUE FOR DECISION

Whether to authorize and issue a full power (Tab 1) to sign a Convention on the Transboundary Effects of Industrial Accidents, in the United Nations Economic Commission for Europe (ECE).

ESSENTIAL FACTORS

The 1989 Conference on Security and Cooperation in Europe (CSCE) called upon the ECE to "elaborate an international convention, code of practice or other appropriate legal instrument addressing the transboundary effects of industrial accidents." The United States played a leading role in crafting the CSCE's recommendation and has actively participated in the ensuing negotiations within the ECE. The proposed Convention on the Transboundary Effects of Industrial Accidents will be open for signature on March 18, 1992, in Helsinki. (The Convention's text is attached at Tab 2.)

Parties to the Convention must take appropriate steps to identify "hazardous activities" that might have transboundary effects; consult with potentially affected parties; seek to prevent accidents; prepare emergency response measures; and respond to accidents. The Convention defines hazardous activities as activities using specified chemicals in amounts exceeding quantities set forth in Annex I. EPA estimates that fewer than 100 facilities near the Canadian border may fall within the scope of the Convention. (Mexico is not a member of the ECE and is not permitted to become party to this Convention. The United States and Mexico have established a joint contingency plan for accidental releases of hazardous substances along the border.)

As the accompanying legal memorandum explains (Tab 3), the obligations assumed under the Convention are consistent with existing legal authorities. The Convention is also consistent with current U.S. international legal obligations. A legally-binding Decision of the Council of the Organization for Economic Cooperation and Development (OECD), which the United States endorsed in 1988, contains substantially the same obligations as does the proposed Convention. (The ECE Convention brings more substances within those obligations and describes the procedures for consulting potentially effected parties in greater detail than does the OECD Decision.)

The Convention furthers U.S. objectives in the area of industrial safety. It sets benchmarks for domestic legislation in countries with economies in transition, which should result in substantial benefits to the public and the environment in those countries. The United States has been a leading advocate of industrial safety in those countries and has provided extensive technical assistance to their industrial safety programs.

Furthermore, the Convention requires public involvement in consultations with potentially affected states and obligates states to provide the public with information concerning accidents. In these aspects, the Convention draws heavily upon the U.S. experience under the Emergency Planning and Community Right-to-Know Act of 1986. The United States has strongly advocated public involvement in environmental policymaking, in particular with regard to hazardous substances, in a variety of international fora.

The Convention is not expected to cover the same facilities as will a ECE Convention on Environmental Impact Assessment in the Transboundary Context (EIA), which the United States has signed and intends to become party to once implementing regulations are completed. To the extent that an activity is covered under the EIA Convention, however, the draft Convention defers to "final decisions" taken under Article 6 of the EIA Convention. Accidents involving maritime activities are excluded from the coverage of this Convention, because they are the subject of separate agreements.

The Convention does not enter into force upon signature but instead requires the deposit of an instrument of ratification, accession, or approval. It provides that it will enter into force after the sixteenth such instrument is deposited. When it deposits its instrument, the United States will include any necessary statements of interpretation or reservation.

FUNDING

The Department of State commits no funds or resources to activities under the Convention.

ENVIRONMENTAL CONSIDERATIONS

The proposed Convention will not require changes in U.S. practice that might affect the environment. Furthermore, activities required by the Convention will not be subject to environmental review under Executive Order 12114, which governs effects of federal actions on the environment outside the United States. The Executive Order does not require environmental documentation with regard to the environmental effects of activities in which affected states participate, as Canada will under this Convention.

CONGRESSIONAL CONSULTATIONS

Interested members of Congress were consulted during negotiations. No further consultations are necessary.

RECOMMENDATION

That you authorize Robert A. Reinstein, Deputy Assistant Secretary of State, to sign the Convention on the Transboundary Effects of Industrial Accidents, by signing the attached full power (Tab 1).

Approve _____ Disapprove _____

Date _____

Tabs:

Tab 1 - Full Power
Tab 2 - Text of Convention
Tab 3 - Memorandum of Law

Drafted: L/OES - SMurphy/JO'Brien:647-2282:#2519

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CEQ/GC - DBear
USCG/LMI - MYost
FMP/MP - AFairchild
FMP/BP - ABassett
OMB - NHartness
H - SStyles

Memorandum of Law

The accompanying action memorandum from OES requests a full power to sign the Convention on the Transboundary Effects of Industrial Accidents in the United Nations Economic Commission for Europe (UNECE).

LEGAL AUTHORITY TO SIGN THE CONVENTION

Legal authority to sign the proposed Convention derives from the President's Article II constitutional powers to conduct foreign relations, as exercised by the Secretary of State on a day-to-day basis. See 22 U.S.C. § 2656. Section 102(2)(F) of the National Environmental Policy Act (NEPA) supplements this authority by providing that all agencies shall "lend appropriate support" to international initiatives "designed to maximize international cooperation" concerning environmental issues, when such support is consistent with U.S. foreign policy. See 42 U.S.C. § 4332(2)(F).

The Convention will be concluded as an executive agreement. This is consistent with U.S. practice in the ECE, where three previous international agreements have been signed and, in three cases ratified, as executive agreements. The Convention will be transmitted to the Congress pursuant to the Case-Zablocki Act, 1 U.S.C. § 112b, following its entry into force.

The accompanying action memorandum requests only authority to sign the Convention. The Convention provides that it will enter into force ninety days after the sixteenth instrument of ratification, accession, etc., is deposited. The Convention will become binding on the U.S. only after it has deposited its instrument, and the Convention has entered into force. Based on discussions with other ECE member states, OES and EPA estimate that it will be at least several years before the Convention will enter into force. This is typical of international agreements within the ECE.

The meeting of the ECE, at which the Convention is to be opened for signature, may adopt a non-binding resolution calling upon each signatory to implement the Convention to the extent it can before the Convention enters into force. A non-binding resolution along the lines now being considered would create a political commitment, not a legal obligation. The resolution should be limited to calling for compliance to the extent possible and acting to bring the Convention into

force expeditiously. The U.S. endorsed a similar resolution concerning the ECE Convention on Environmental Impact Assessment in a Transboundary Context.

DOMESTIC AUTHORITY TO IMPLEMENT THE CONVENTION

The Convention imposes five central obligations with regard to hazardous activities: identification, consultation, prevention, preparedness, and response. It can be implemented within current statutory authority, primarily the Emergency Planning and Community Right to Know Act of 1986, which is Title III of the Superfund Amendment and Reauthorization Act (SARA III), 42 U.S.C. §§ 11001 et seq, and section 122(r) of the Clean Air Act, 42 U.S.C. § 7412(r). The Occupational Health and Safety Act (OSHA), 29 U.S.C. §§ 654 et seq., provides additional authority, particularly for prevention and response.

(1) Identification of Hazardous Activities

Article 4(1) requires that each Party "take measures, as appropriate, to identify hazardous activities within its jurisdiction." Under the terms of the Convention, a hazardous activity is one that (i) uses the hazardous substances specified in Annex I in the quantities also specified in that Annex and (ii) is "capable of causing" transboundary effects. See Article 1(b).

(a) Hazardous Substances and Quantities.

Annex I lists thirteen hazardous substances; hazardous substances may also fall within Annex I if they are within any of eight categories. Sections 302 and 313 of SARA III provide sufficient authority to identify most hazardous activities. The Clean Air Act and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. § 96001 et seq., provide authority to identify remaining activities, in particular, those involving unlisted substances falling into the various categories. The statutes overlap, thereby providing redundant authority for most substances.

Section 302: Under section 302 of SARA III, any activity using substances on an EPA-administered list of "extremely hazardous substances" must identify itself to State Emergency Response Commissions (SERCs), which are to pass this information to the Administrator upon his request. See 42 U.S.C. § 11002. (EPA has not made such requests but will issue technical guidelines to that end before the U.S. ratifies the Convention.) Through section 302, the U.S. can identify all

activities using ten of the thirteen listed substances, many activities involving an eleventh (methyl isocyanate), and many activities using substances in the categories, particularly toxics and very toxics. The thresholds triggering reports under section 302 are below those required in Annex I (except methyl isocyanate, which is discussed below).

Section 313: Under section 313, the Administrator must maintain a national data base containing reports on all releases of "toxic" substances during normal operations. See id. at § 11023. The list of "toxic" chemicals promulgated pursuant to this section includes ammonium nitrate and lead alkyls (the two listed substances not covered by section 302), as well as substances in the Annex I categories "very toxic" and "toxic." (Section 313 applies to ammonium nitrate solution, but EPA has determined that this is over-inclusive will cover all ammonium nitrate. Lead alkyls fall within the section 313 category of lead compounds, which will also prove to be over-inclusive.) Any covered release of a listed substance must be reported under section 313, provided that the activity involves a manufacturer with ten or more employees at the facility, which must use 10,000 pounds of a substance annually, id. at § 11023(f)(1)(A), or manufacture 25,000 pounds annually. id. at § 11023(f)(1)(B)(iii). These thresholds, which base reporting requirements on total amounts used in a year, are in effect far below those in the Convention, which applies only to facilities using comparable amounts at any one time.

Clean Air Act Amendments: Section 112(r) of the CAA requires reports to the Administrator of activities involving a list, promulgated pursuant to the CAAA, of substances that "in the case of an accidental release, are known to cause or may reasonably be anticipated to cause death, injury, or serious adverse effects to human health or the environment." See 42 U.S.C. § 112r(1)&(3). The draft list includes all substances falling into the categories of flammable gases, liquids, and explosives; all remaining substances will be subsets of the "extremely hazardous substances" list (except oxidizers). With the exception of methyl isocyanate (discussed below), the quantities listed in the proposed rule are less than those in the Convention.

The CAA also imposes upon facilities a "general duty" that mirrors the general duty clause of OSHA, 29 U.S.C. § 654. Under this authority, EPA will issue guidelines clarifying that the general duty clause reaches all substances covered by the Convention and includes obligations necessary for U.S. implementation of the Convention, especially reporting (so that the U.S. can identify hazardous acitivities not otherwise identified). Only the category of "oxidizers" will be reported solely under the general duty clause.

The regulations promulgated pursuant to the CAAA are in rulemaking. The CAA Amendments of 1990 require that they be final by November 1992. Because the regulations were expressly required by Congress and have been approved by the Executive Branch, they should be in effect before the United States decides whether to ratify the Convention. Nevertheless, the CAA's authorities should be reviewed when the United States decides whether to ratify the Convention.

Supplemental Authorities: Sections 311-312 of SARA III require that chemical hazard and inventory information be made available to state and local authorities, as well as the public, concerning many hazardous activities covered by the Convention. Sections 311-312, however, do not require that information be provided to EPA, which will be primarily responsible for implementation of the Convention. Consequently, to the extent that these sections are relied upon to implement the Convention, EPA should promulgate appropriate regulations or guidance to state and local authorities.

Section 103(c) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) requires a facility that treats or disposes of hazardous substances (except those operating under federal permits or interim status) and that is not eligible to receive a permit under the Resource Conservation and Recovery Act (RCRA) to identify itself to EPA. See 42 U.S.C. § 9603(c). This captures many facilities. For activities that require major federal actions, NEPA, which governs review of effects on the U.S. environment, and Executive Order 12114, which applies to review of effects on the environment outside the United States, will enable EPA to determine whether an activity is capable of causing transboundary effects, if such activities require permits or other major federal actions triggering the application of NEPA or E.O. 12114. See 42 U.S.C. 4331 et seq. (NEPA); 44 Fed. Reg. 1957 (January 4, 1979) (E.O. 12114). The Toxic Substances Control Act (TSCA) requires reporting to the Administrator of releases into the environment of all chemicals. See 42 U.S.C. § 8(e).

Activities using methyl isocyanate may pose a special problem. Under domestic law, the thresholds for reporting methyl isocyanate (which is covered by SARA section 302, 313, and the Clean Air Act) are higher than those of Annex I (which range from 330 to 500). The United States faced the same situation in 1988, when we decided to endorse the OECD Council Act on the Exchange of Information Concerning Accidents Capable of Causing Transfrontier Damage, which is binding on the United States as a matter of international law. (The ECE Convention

repeats the OECD Council Act's threshold for methyl isocyanate.) As in 1988, EPA has determined that the United States can identify all methyl isocyanate-using hazardous activities falling under the Convention.

First, 500 pounds is the minimum commercial quantity of methyl isocyanate. It is therefore extraordinarily unlikely that there are hazardous activities where more than 330 pounds but less than 500 pounds is "or may be present." Second, if there are any such activities, they can be identified two ways: under the CAA, 42 U.S.C. § 7412(b), any release of more than one pound of methyl isocyanate must be reported to the NRC pursuant to CERCLA. The NRC will coordinate identification of hazardous activities under the Convention. Given the likelihood of releases during normal business operations, EPA has determined, remaining hazardous activities will be identified. In addition, the NRC will learn about methyl isocyanate concentrations of less than 500 pounds through the facilities' response plans, which are required of facilities using methyl isocyanate under the general duty clause of CAA section 112(r). 42 U.S.C. § 7412(r).

(b) "Capable of Causing" Transboundary Effects.

Activities falling within Annex I are covered by the Convention only if they are "capable of causing" transboundary effects. This standard is drawn from the 1988 OECD Decision, which requires consultation with any country "capable of" being affected by an industrial accident. See C(88)84(Final) Appendix II(h). The possible effects of industrial accidents are extremely localized and could only under rare situations extend beyond one mile from a facility. The "Technical Guidelines on Hazard Analysis," prepared by the EPA, Department of Transportation, and Federal Emergency Management Agency (FEMA), have set ten miles from a facility as the maximum distance for a worse-case scenario. The standard was discussed extensively during negotiations, and no delegation indicated any expectation that activities more than a very few miles from a boundary would fall under the Convention. The United States should consider making a statement to this effect as part of its signing statement. (By contrast, activities covered by the ECE Agreement on Environmental Impact Assessment in a Transboundary Context (EIA Convention) could have effects extending great distances; that Convention adopted a standard of "likely to cause" transboundary impacts.)

(2) Consultation.

Article 4 requires that potentially affected Parties be notified of and consulted concerning hazardous activities. See Articles 4(1) & 4(3) and Annex III. These obligations can be implemented through existing law. Section 301 of SARA III requires the

establishment of State emergency response commissions (SERCs), sub-state emergency planning districts, and local emergency planning committees (LEPCs). See 42 U.S.C. § 11001(a)-(c). In preparing emergency response plans, these bodies consult with the public; information in their possession is available to all members of the public, including interested Canadian citizens. See id. at § 11003, § 11005, and 11021.

Annex III, which sets forth the procedures for notification and consultation, requires the Party of origin to provide notice to potentially affected Parties "at appropriate levels." See Annex III(2). EPA has surveyed facilities likely to fall within the Convention. It has determined that, for most activities under the Convention, a variety of local and state entities, including many LEPCs and SERCs, have already consulted with their Canadian counterparts with regard to existing institutions and have, in some cases, undertaken to continue cooperation with regard to new activities. The Convention requires that notifications include information on preventive measures taken with regard to the hazardous activity and on an "analysis and evaluation" of risks posed by the activity. See Article 6 (referring to Annexes IV & V). Pursuant to SARA III, SERCs and LEPCs base their emergency planning on this information, which is accordingly made available to their Canadian counterparts. See 42 U.S.C. § 11003 (creation of emergency response plans); id. at § 11005 (emergency training); id. at § 11021-22 (availability of information to public).

Once Parties have agreed to consultations, Annex III(10) requires consultations "without undue delay" with affected Parties and does not provide for consultations "at appropriate levels." It is consistent with the object and purpose of the Convention, as well as the intention of the negotiators, that consultations take place at the state and local level, however. Notification can be given to state and local officials; those officials should be permitted to continue consultations. Moreover, many of the decisions that will be taken after consultation procedures are completed are within the authority of state and local officials, e.g., zoning decisions, emergency planning measures, and response measures (such as fire trucks). Both U.S. and Canadian negotiators stressed that they intended for local and state-provincial contacts to be the primary locus for consultations under the Convention. It may be appropriate for the United States to state an understanding to this effect when it deposits its instrument of ratification, acceptance, or accession. An exchange of letters with the Government of Canada should also be considered.

EPA plans to distribute a guidance document under section 303(g) of SARA III, 42 U.S.C. § 11003(g), informing each SERC and LEPC of activities within its jurisdiction covered by the Convention. Although these documents are not binding, they will promote compliance through well-established relationships with other entities at the state and local level. Because EPA will identify those activities under the Convention, it will notify and consult Canada when SERCs and LEPCs do not.

(3) Prevention.

Article 6 requires Parties to "take appropriate measures" for the prevention of industrial accidents. Section 305 of SARA III requires review of emergency systems for minotoring, detecting, and preventing releases of extremely hazardous substances. See 42 U.S.C. § 11005. The CAA's "general duty" clause requires operators of facilities using substances listed under section 112r(3) "to design and maintain a safe facility taking such steps as are necessary to prevent releases." The Administrator is authorized to promulgate regulations, including to require risk management plans for facilities. Under the CAA, these plans must include a hazard assessment, an estimate of a potential release's size, and other information called for by Annex IV, which is in any event illustrative and not prescriptive. Finally, OSHA requires that employers provide a place of employment free from recognized hazards. Its general duty clause, 29 U.S.C. § 654, contains all the measures described in Annex IV.

(4) Preparedness.

Article 8 requires appropriate measures for emergency measures to respond to accidents. Section 301 of SARA III, described above, provides for such planning and preparedness. Furthermore, the CAAA require facility plans that must include "all necessary steps ... to minimize the consequences of accidental releases that occur." See § 112r(1).

Article 9 requires the provision of information to the public, as well as its participation. Section 305 of SARA III requires public involvement. See 42 U.S.C. § 11005. Article 9(3) states that the Parties shall, in accordance with their legal systems and on a reciprocal basis, allow persons in the territory of a potentially affected Party to have "equivalent access" to administrative and judicial proceedings as persons in the source state's territory. The United States has accepted similar language in Article 3(8) of the UNECE EIA Convention; under the U.S. legal system, such access may turn on the standing of these persons in U.S. proceedings..

(5) Response.

Article 10(1) requires that Parties "provide for" industrial accident notification systems "at appropriate levels." The Party of origin is to notify potentially affected Parties "without delay" when an accident occurs, and the Parties concerned shall initiate the emergency plans to the extent appropriate under the circumstances. Article 11 requires Parties to take adequate response measures in the event of an accident. It does not require any Party to take steps within the territory of another Party. Article 12 provides for voluntary mutual assistance.

Most U.S. states and localities on the border already have arrangements with their Canadian counterparts. Furthermore, the National Response Team (NRT), which is notified in the event of any release involving hazardous substances, will be in a position to notify Canadian authorities. The NRT will be designated the U.S. competent authority, as required under Article 17. The U.S. and Canada have concluded an Agreement on Cooperation in Comprehensive Civil Emergency Planning and Management, which entered into force April 28, 1986. Under this Agreement, the Federal Emergency Management Agency is authorized to organize and provide emergency assistance necessary along the border.

(6) Other Obligations

Article 7 creates an obligation concerning land use policies, so that Parties may, for example, discourage concentrations of people near hazardous activities, even when the people and activities will be on opposite sides of a border. For each Party, the obligation is limited to "seeking" such policies "within the framework of its legal system"; this reflects the negotiators' recognition that federal states do not control zoning and other decisions that are necessary to siting controls. The negotiators did not intend to impose an obligation beyond a Party's legal or constitutional authority.

Although the U.S. Government's authority to affect siting decisions is limited, it can exercise some controls. Under NEPA, it may consider the possible effects of an activity on nearby populations. (NEPA applies only if there is a major federal action involved.) Under the Clean Air Act, EPA is to establish a permit program for stationary sources, a category including most facilities under this Convention, which will circumscribe site choices. See 42 U.S.C. § 7661a-b. Furthermore, state implementation plans under the Clean Air Act may limit plant locations; these are reviewed by EPA. See 42 U.S.C. § 112. Permitting of direct discharges under the

Clean Water Act may limit locations. See 33 U.S.C. § 1342. Finally, under RCRA, EPA must permit TSD facilities, some of which may fall under the Convention; these permits can affect site choices. See 42 U.S.C. § 6926.

CONCLUSION

In the light of the above, there is no legal objection to the signature of the attached Convention.

Susan Biniaz
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1 of 3

DRAFT

FRAMEWORK AGREEMENT FOR ENVIRONMENTAL IMPACT ASSESSMENT
IN A TRANSBOUNDARY CONTEXT

Purpose

To set forward the basic assumptions and parameters for a framework agreement on environmental impact assessment in a transboundary context to be negotiated among the member governments of the United Nations Economic Commission for Europe (UNECE).

Background

The US has supported the development of an international agreement (of some sort) on environmental impact assessment for some time, with the support of Senator Pell of the Senate Foreign Relations Committee (and the endorsement of the Senate?). At a Seminar on Environmental Impact Assessment held in 1987 under the auspices of the United Nations Economic Commission for Europe (UNECE), the US delegation supported a recommendation to the Senior Advisers to UNECE Governments on Environmental and Water Problems that called for the developme t of a Framework Agreement on Environmental Impact Assessment in a Transboundary Context. At their March 1988 meeting, the Senior Advisers accepted the recommendation and created an Ad Hoc Working Group to elaborate a draft framework agreement.

Two meetings have been held to initiate the development of the agreement. Representatives from the following countries have attended at least one of the meetings: Austria; Belgium; Canada; Czechoslovakia; Denmark; Finland; France; German Democratic Republic; Germany, Federal Republic of; Greece; Ireland; Italy; Netherlands; Norway; Poland; Portugal; Spain; Sweden; Turkey; Union of Soviet Socialist Republics; United Kingdom; United States of America; and Yugoslavia.

A third meeting will be held November 28-December 1, 1989. The US delegation would like to move forward at this meeting with a position that can be expected to represent the eventual official US position on the agreement.

Assumptions

A general assumption is that the framework agreement would not result in additional requirements in the US. NEPA is generally as broad or broader than the EIA systems that have been developed in the other UNECE countries. In addition, although not required under NEPA, the US has routinely included Canada in discussions where US proposals being reviewed under NEPA may impact Canadian lands or populations.

1. The agreement would apply to activities that would occur within the jurisdiction of the country of origin, i.e., domestic activities, that would be subject to an EIA process within that

2 of 3

country, where it is reasonable to foresee that adverse impacts could occur across a contiguous border with the affected country. For the US, it would cover activities within the political jurisdiction of the US that would normally be subject to a review under the National Environmental Policy Act (NEPA) and which might result in adverse environmental impacts in Canada. It would not apply to US activities on foreign soil, nor would it apply to exports. Query: Would activities that are reviewed under Executive Order 12114 be included?

The actual list of projects would be determined within the context of a more specific bilateral or multilateral agreement between or among the parties of concern. For the US, a bilateral agreement would be negotiated with Canada that would more specifically define the projects/activities covered. One issue will be whether activities under the jurisdiction of the US Environmental Protection Agency that are considered exempt from the procedural requirements of NEPA should be included. These projects are generally subject to a review that is deemed functionally equivalent to a NEPA review. The issue will arise since this would include Superfund clean-ups; permits for hazardous waste treatment, storage, and disposal; and permits for underground injection control, among others.

2. The process would not be retroactive; again, it would be limited to projects being reviewed under the normal EIA process in the country of origin. It would extend participation in the process to the potentially affected government.

3. The agreement would not require the development of identical methods, standards, or "critical loads" to be used by the countries involved. It would be expected, however, that the countries would need to establish mutually acceptable standards, either during the development of country-specific agreements or on a case-by-case basis.

4. While the potentially affected country would be assured a role in the EIA process, the framework agreement would not bind the countries to any particular form of mitigation or to any claim for compensation beyond whatever current avenues exist. It would be expected, however, that any effective EIA process would require that mitigation be discussed where adverse impacts are identified. Again, for the US it would be expected that no obligations beyond those that currently exist under NEPA would pertain.

3