CHAPTER VII

ENVIRONMENTAL LAW

Environmental Litigation: Rights and Remedies

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INTRODUCTION

The purpose of this paper is to provide a current review and analysis of environmental case law as it affects the federal highway program. It is intended to inform the reader about pertinent decisions by the federal courts. Although analysis of these decisions is one objective of the paper, it also is directed to the practicing attorney, and consequently, its thrust is to provide practical legal information rather than the author's philosophy or point of view.

As any attorney practicing in the area of highway law during the past few years is aware, environmental law has become a major ingredient of the discipline. The proliferation of environmental cases concerning highways has been staggering to say the least. At this point, though some may argue to the contrary, our judicial system is far from having mastered the efficient, expeditious, and just disposition of environmental cases. Discretion and honesty permit only the prediction that environmental problems, and, thus, environmental law, are permanent fixtures in highway law. No serious practitioner can ignore it, or fail to master its still ill-defined precepts.

Although environmental law as a discipline is still in its infancy, there are literally hundreds of environmental cases that affect the federal highway program. An effort has been made to reduce this material to manageable proportions; however, there remains a massive amount of case law to be dealt with. Accordingly, this paper is neither brief nor easy reading. Hopefully, it will provide an orderly and thorough discussion of the law at the time of this writing.

Federal Statutes

For all practical purposes, environmental law is a creature of statute.[1] In the case of the Federal–State highway program this is particularly true. The major federal statutes affecting highway construction are: the Federal-Aid Highway Act,[2] the Department of Transportation Act,[3] and the National Environmental Policy Act (NEPA).[4] To a much lesser extent at present,[5] the highway program also is affected by the Clean Air Act[6] and the National Historical Preservation Act.[7]

With few exceptions, the case law that is the focus of this paper involves interpretation by the federal courts of one or more of these statutes. Further, at least at this point, nearly all the case law involves application of only two of these statutes—the Federal-Aid Highway Act and the National Environmental Policy Act[8]—to the highway program.

A number of the significant cases under NEPA are not highway cases; however, they do establish rules of law of importance to the highway program and therefore are discussed as a part of this paper.

National Environmental Policy Act

NEPA is by far the most important federal environmental statute, both in terms of its broad statement of federal environmental policy and the practical effect of its procedural requirements on the activities and programs of the federal bureaucracy. This is borne out, if by nothing else, by the simple fact that in the years of its existence, the Act has generated over 600 lawsuits against the various federal agencies. For the purposes of this paper, it is worth noting that the Federal-Aid Highway Program has figured in a rather large percentage of these

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[1] This statement is generally true for what might be termed modern environmental law. It is not intended to indicate that common law rights do not protect environmental interests. In fact, there is a rather large body of common law on environmental rights. However, with the advent of federal environmental legislation, the importance of common law rights as a part of environmental litigation has been significantly diminished. For those interested in a thorough review of the common law environmental rights, an excellent treatment is to be found in *Environmental Rights and Remedies,* Victor J. Yannacone, Jr., and Bernard S. Cohen, (The Lawyers Coop. Pub. Co. and Bancroft-Whitney Co., 1972). See pp. 1–142.

[2] 23 U.S.C. § 101, *et seq.* (1970, as amended Supp. V 1975).

[3] 49 U.S.C. § 1651, *et seq.* (1970, as amended Supp. V 1975).

[4] 42 U.S.C. § 4321, *et seq.* (1970, as amended Supp. V 1975).

[5] It is necessary to qualify the phrase "at present," because the author believes that the Clean Air Act will play a significant role in highway litigation in the future.

[6] 42 U.S.C. § 1857, *et seq.* (1970, as amended Supp. V 1975).

[7] 16 U.S.C. § 470–470n (1970, as amended Supp. V 1975).

[8] The vast majority of plaintiffs in highway litigation involving the Federal–State highway program combine allegations of violation of the National Environmental Policy Act and the various provisions of Title 23.

suits.[9] Because of the massive scope of the highway program and the unalterable fact that the program does, and will continue to, involve in almost every project "a major federal action significantly affecting the quality of human environment," [10] NEPA applies to virtually all highway projects in which the Federal Government is involved. Thus, it is essential to understand the purpose of the statute and the importance of its major provisions.[11] What follows is a section-by-section review of the pertinent sections of NEPA. This is an unfortunate necessity, and perhaps there are some so well versed in the Act that this section can be omitted. For most, however, it is an important prelude to the discussion of case materials appearing later in the paper. NEPA as much as any other statute is a stepchild of the judiciary. The rather simple language of the Act has been markedly expanded by judicial interpretation. If for no other reason, it is essential from time to time to review the genesis of all this law to fully understand how much has been added to the statute by judicial interpretation.

NEPA became law on January 1, 1970.[12] It is difficult to recall another act of Congress that has so significantly altered the workings of the federal bureaucracy or engendered such controversy. At the extremes, it has been described as a long-awaited "environmental bill of rights" [13] and as an "atrocious piece of legislation . . . poorly thought out and ambiguous at all of the crucial points." [14]

The purposes of the statute, as set forth in Section 2,[15] were to:

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[9] A wealth of information on the involvement of the Department of Transportation and its subsidiary agencies in National Environmental Policy Act activities can be found in *The Fifth Annual Report of the Council on Environmental Policy,* United States Government Printing Office, Stock No. 4000-00327, Dec. 1974, Chapter 4. It is worth noting that the Department of Transportation has filed the largest number of environmental impact statements under the National Environmental Policy Act through July 1, 1974. For 1973, Department statements numbered 432 and comprised 37 percent of all filings. Although the percentage value of the Department's involvement in the total number of NEPA lawsuits does not equal 37 percent, it has been involved in approximately one quarter of all of the suits filed under the National Environmental Policy Act.

[10] 42 U.S.C. § 4332(2)(C) (1970).

[11] Unlike many other important federal statutes, NEPA is very short and simple reading. The statute is reproduced in its entirety in the Appendix of this paper.

[12] NEPA is a synthesis of two bills introduced in Congress in 1969. Space does not permit an extensive review of NEPA's legislative history here. For those interested in the legislative history of the Act, the Library of Congress has produced a compendium of Congressional material entitled "A National Policy for the Environment: Selected Excerpts from the Congressional Record and Congressional Documents, 91st Congress, 1st Session." An additional brief legislative history can be found in Monograph No. 17, ENVIRONMENT REPORTER, Vol. 4, No. 36, (Jan. 4, 1974).

[13] REITZE, ENVIRONMENTAL LAW Vol. I, at 151 (Wash.: North American International, 2 ed. 1972).

[14] George F. Trowbridge, former Attorney, Atomic Energy Commission, in remarks delivered September 11, 1970, to the ALI-ABA Course of Study On Atomic Energy Licensing and Regulation held in Washington, D.C.

[15] 42 U.S.C. § 4321 (1970).

> . . . declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality.[16]

It was the intention of its authors that NEPA compel the thorough integration of environmental considerations into the decision-making process in every instance in which an activity of the Federal Government would significantly affect the quality of the human environment.[17]

The Act is made up of a declaration of purposes and two separate titles. Title I consists of five sections. Notwithstanding the title's designation as "a declaration of policy," at least three of its five sections govern required procedures rather than policy.[18] Title II is basically concerned with the establishment and functions of the Council on Environmental Quality (CEQ).

In Section 101(a) of NEPA, a declaration of a national environmental policy was set forth as follows:

> The Congress, recognizing the profound impact of man's activity on the interrelations of all components of the natural environment, particularly the profound influences of population growth, high-density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances, and recognizing further the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man, declares that it is the continuing policy of the Federal Government, in cooperation with State and local governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.[19]

The national policy set forth in Section 101(a) of NEPA was based on congressional recognition of man's impact on the natural environment and awareness of a growing public concern over the deteriorating state of the environment.[20] Also involved was the seeming inadequacy of existing institutions to deal with environmental problems.

In enacting NEPA, Congress recognized the existence of these problems and "the importance to the welfare of man of restoring and main-

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[16] *Id.*

[17] ENVIRONMENTAL QUALITY: THE THIRD ANNUAL REPORT OF THE COUNCIL ON ENVIRONMENTAL QUALITY, at 224–227 (1972).

[18] Sections 101(b), 102, and 103. 42 U.S.C. §§ 4331(b), 4332, 4333 (1970).

[19] 42 U.S.C. §§ 4331 (1970).

[20] See debate on S.1075, 115 CONG. REC. p. 29051 (Oct. 8, 1969).

taining the quality of the environment." [21] Section 101(a) committed the Federal Government to use *all practicable means and measures* to restore and enhance environmental quality.

To ensure that the policy set forth in Section 101(a) and in the purposes clauses of the Act was carried out, Congress declared that the continuing responsibility of the Federal Government, consistent with other essential considerations of national policy, is "to use all practicable means" to improve and coordinate federal plans, functions, programs, and resources to the end that the nation may attain certain broad national goals in the management of the environment.[22]

Congress intended that the policies and goals set forth in Section 101 of NEPA be incorporated into the ongoing activities of the Federal Government. In some areas of federal action, there was no body of existing law, experience, or precedent to assure substantial and consistent consideration of environmental factors in decision-making. In many areas of federal activity, existing legislation did not provide clear authority to assure consideration of environmental factors that conflicted with other federal objectives.

To remedy shortcomings in the legislative foundation of existing federal programs and to establish action-forcing procedures which would help to ensure that the policies enunciated in Section 101 were implemented, Congress, in Section 102,[23] authorized and directed that the existing body of federal law, regulations, and policy be interpreted and administered to "the fullest extent possible" in accordance with the policies set forth in the Act.[24] Further, Congress established a number of operating procedures to be followed by all agencies of the Federal Government.

Section 102(2)(A) [25] requires that whenever federal planning takes place or decisions are made that may have an impact on the quality of man's environment, the responsible federal agency or agencies must "utilize a systematic, interdisciplinary approach." The systematic, interdisciplinary approach was required to "insure the integrated use of the natural and social sciences and environmental design arts in planning and in decision-making which may have an impact on man's environment."

Congress recognized, in drafting Section 102(2)(A), that many of the environmental controversies of recent years have been caused by failure to consider all relevant points of view and all relevant values

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[21] "A National Policy for the Environment: Selected Excerpts From the Congressional Record and Congressional Documents, 91st Congress, 1st Session, part II," p. 5.

[22] 42 U.S.C. § 4331(b) (1970).

[23] 42 U.S.C. § 4332 (1970, as amended Supp. V 1975).

[24] "A National Policy for the Environment: Selected Excerpts From the Congressional Record and Congressional Documents, 91st Congress, 1st Session," p. 20.

[25] 42 U.S.C. § 4332(2)(A) (1970).

in the planning and conduct of federal activities. Too often, Congress said, planning has been the exclusive province of the engineer and the cost analyst.[26] The skills of landscape architects, ecologists, and sociologists have been ignored. As a consequence, too often the relationship between man and his surroundings has been overlooked or purposely ignored. Section 102(2)(A) was an effort to include all relevant points of view in federal decision-making that significantly affect the human environment.

All federal agencies that undertake activities relating to environmental values, amenities, and aesthetic considerations were authorized and directed by Section 102(2)(B),[27] after consultation with the Council on Environmental Quality and other environmental control agencies, to make efforts to develop methods and procedures to incorporate those values in official planning and decision-making. This was done to assure that "presently unquantified environmental amenities and values may be given appropriate consideration in decision-making along with economic and technical considerations." Congress included Section 102(2)(B) in the Act because, in the past, environmental factors have frequently been ignored and omitted from consideration in the early planning of federal projects because of the difficulty of evaluating them in comparison with economic and technical factors. As a result, unless the results of planning were radically revised at the policy level, environmental enhancement opportunities were foregone and unnecessary degradation incurred.[28]

The heart of the action-forcing provisions of NEPA is found in Section 102(2)(C).[29] The statute requires that after consultation with, and obtaining the comments of, Federal and State agencies that have jurisdiction by law with respect to any environmental impact, each agency that proposes legislation or any other major federal action having a significant effect on the quality of the human environment shall prepare a detailed environmental impact statement (EIS).

The detailed environmental impact statement must be prepared "by the responsible official" [30] and must include:

> (i) the environmental impact of the proposed action,[31]
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> (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,[32]
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> (iii) alternatives to the proposed action,[33]
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> (iv) the relationship between local short-term uses of man's environ-

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[26] "A National Policy for the Environment: Selected Excerpts From the Congressional Record and Congressional Documents, 91st Congress, 1st Session," p. 20.

[27] 42 U.S.C. § 4332(2)(B) (1970).

[28] "A National Policy for the Environment: Selected Excerpts From the Congressional Record and Congressional Documents, 91st Congress, 1st Session," p. 20.

[29] 42 U.S.C. § 4332(2)(C) (1970).

[30] *Id.* 42 U.S.C. § 4332(2)(C) (1970).

[31] 42 U.S.C. § 4332(2)(C)(i) (1970).

[32] 42 U.S.C. § 4332(2)(C)(ii) (1970).

[33] 42 U.S.C. § 4332(2)(C)(iii) (1970).

ment and the maintenance and enhancement of long-term productivity,[34] and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.[35]

Section 102(2)(C) further provides that any Federal, State, or local agency comments on the required statement shall be made available to the President, the Council on Environmental Quality, and the public under the provisions of the Freedom of Information Act [36] and "shall accompany the proposal through the existing agency review processes." [37]

Section 102(2)(D)[38] of NEPA provides that whenever agencies of the Federal Government recommend courses of action that are known to involve unresolved conflicts over competing and incompatible uses of land, water, or air resources, it shall be the agency's responsibility to study, develop, and describe appropriate alternatives to the recommended course of action. The agencies are required to develop information and provide descriptions of alternatives in adequate detail for subsequent reviewers and decision-makers, both within the Executive Branch and in Congress, to consider alternatives along with the recommended course of action.[39]

In recognition of the fact that environmental problems are not confined by political boundaries, all agencies of the Federal Government that have international responsibilities were authorized and directed by Section 102(2)(E) of NEPA [40] to lend support to appropriate international efforts to anticipate and prevent a decline in the quality of the worldwide environment. The Act emphasizes international cooperation, but restricts federal action to that which is "consistent with the foreign policy of the United States."

Recognizing that environmental problems are in no way confined to the Federal Government, Congress, in Section 102(2)(F),[41] directed all agencies of the Federal Government to "make available to States, counties, municipalities, institutions, and individuals, advice and information useful in restoring, maintaining, and enhancing the quality of the environment."

All agencies of the Federal Government are authorized by Section 102(2)(G) [42] to use ecological information in planning and developing resource-oriented projects. Each agency that studies, proposes, con-

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[34] 42 U.S.C. § 4332(2)(C)(iv) (1970).

[35] 42 U.S.C. § 4332(2)(C)(v) (1970).

[36] 5 U.S.C. § 552 (1970, as amended Supp. V 1975).

[37] 42 U.S.C. § 4332(2)(C) (1970).

[38] 42 U.S.C. § 4332(2)(E) (Supp. V 1975).

[39] "A National Policy for the Environment: Selected Excerpts From the Congressional Record and Congressional Documents, 91st Congress, 1st Session," p. 20.

[40] 42 U.S.C. § 4332(2)(F) (Supp. V 1975).

[41] 42 U.S.C. § 4332(2)(G) (Supp. V 1975).

[42] 42 U.S.C. § 4332(2)(H) (Supp. V 1975).

structs, or operates projects that have resource management implications is authorized and directed to consider the effects of such projects on ecological systems and to study such effects as a part of its data collection.

Section 102(2)(H) directs all agencies of the Federal Government, within their areas of expertise or responsibility, to assist the Council on Environmental Quality.[43]

So that existing agency authority, administrative regulations, policies, and procedures would not conflict with the overriding principles of NEPA, Congress directed, in Section 103 of the Act,[44] that each federal agency review its statutory authority, administrative regulations, policies, and procedures to identify any deficiencies or inconsistencies which would prohibit full compliance with the purposes and provisions of NEPA. Moreover, Section 103 directed each federal agency to propose to the President any measures that might be necessary to bring its statutory authority and policies into conformity with purposes and procedures set forth in NEPA.

To ensure that nothing in NEPA would serve to constrict rather than expand the authority of federal agencies to deal with environmental problems, Congress, in Section 104,[45] directed that "nothing in Section 102 or 103 shall in any way affect the specific statutory obligations of any Federal agency (1) to comply with criteria or standards of environmental quality, (2) to coordinate or consult with any other Federal or State agency, or (3) to act, or refrain from acting contingent upon the recommendations or certification of any other Federal or State agency."

And in Section 105,[46] Congress said that "the policies and goals set forth in this Act are supplementary to those set forth in existing authorizations of federal agencies."

Title II of NEPA is comprised of seven sections dealing with the Council on Environmental Quality.[47]

Section 204 of NEPA [48] enumerated the duties and functions of the Council as follows:

> (1) to assist and advise the President in the preparation of the Environmental Quality Report required by Section 201; [49]
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> (2) to gather timely and authoritative information concerning the conditions and trends in the quality of the environment, both current and prospective, to analyze and interpret such information for the purpose of determining whether such conditions and trends are interfering, or are likely to interfere, with the achievement of the policy set forth in Title I of this Act, and to compile and submit to the President studies relating to such conditions and trends; [50]

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[43] 42 U.S.C. § 4332(2)(I) (Supp. V 1975).

[44] 42 U.S.C. § 4333 (1970).

[45] 42 U.S.C. § 4334 (1970).

[46] 42 U.S.C. § 4335 (1970).

[47] 42 U.S.C. § 4341–4347 (1970, as amended Supp. V 1975).

[48] 42 U.S.C. § 4344 (1970).

[49] 42 U.S.C. § 4344(1) (1970).

[50] 42 U.S.C. § 4344(2) (1970).

(3) to review and appraise the various programs and activities of the Federal Government in the light of the policy set forth in Title I of this Act for the purpose of determining the extent to which such programs and activities are contributing to the achievement of such policy, and to make recommendations to the President with respect thereto; [51]

(4) to develop and recommend to the President national policies to foster and promote the improvement of environmental quality to meet the conservation, social, economic, health, and other requirements and goals of the Nation; [52]

(5) to conduct investigations, studies, surveys, research, and analyses relating to ecological systems and environmental quality; [53]

(6) to document and define changes in the natural environment, including the plant and animal systems, and to accumulate necessary data and other information for a continuing analysis of these changes or trends and an interpretation of their underlying causes; [54]

(7) to report at least once each year to the President on the state and condition of the environment; [55] and

(8) to make and furnish such studies, reports thereon, and recommendations with respect to matters of policy and legislation as the President may request.[56]

As mentioned earlier, and as indicated by the length of the preceding section, NEPA is the most significant federal environmental statute affecting the highway program. Notwithstanding this, several other federal statutes, in which environmental concerns are something less than the primary purposes,[57] are worth an abbreviated review. The environmental provisions of these statutes are, for the most part, the result of recent amendments responding to growing public concern about the effects of the highway program on the environment.

The Federal-Aid Highway Act

The Federal-Aid Highway Act,[58] Title 23, is the basic federal statute regulating the administration and funding of the federal surface transportation program.[59] The present law, the Federal-Aid Highway Amendments of 1974, contains several important environmental provisions. Also, administrative regulations [60] supporting various environ-

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[51] 42 U.S.C. § 4344(3) (1970).
[52] 42 U.S.C. § 4344(4) (1970).
[53] 42 U.S.C. § 4344(5) (1970).
[54] 42 U.S.C. § 4344(6) (1970).
[55] 42 U.S.C. § 4344(7) (1970).
[56] 42 U.S.C. § 4344(8) (1970).

[57] An exception to this statement is the Clean Air Act which is a bona fide environmental statute with no nonenvironmental purpose.

[58] 23 U.S.C. § 101, *et seq.* (1970, as amended Supp. 1975).

[59] A general reference work to the Federal-Aid Highway Act, as Title 23 is sometimes referenced, is a United States Department of Transportation publication entitled *Federal Laws, Regulations, and Materials Relating to the Federal Highway Administration,* United States Government Printing Office Stock No. 5001–00074 (1974).

[60] As will be noted below, administrative regulations amplify the procedures called for under the existing federal environ-

mental provisions of the Amendments establish some rather important environmental procedures. In most environmental lawsuits involving highways, violations of NEPA and one or more of the environmental provisions or procedures of the Federal-Aid Highway Act are alleged.

The environmental provisions of the Federal-Aid Highway Act, Title 23, as amended, are included in Sections 109,[61] 128,[62] 131,[63] 134,[64] 135,[65] 136,[66] 137,[67] and 138.[68] In addition, other provisions of Title 23, though not specifically related to environmental concerns have been involved in environmental litigation. Such provisions are included in Sections 101,[69] 102,[70] 103,[71] 106,[72] and 145.[73]

Section 109 of Title 23 provides that the Transportation Secretary must assure that "possible adverse economic, social, and environmental effects relating to any proposed project on any Federal-Aid system have been fully considered in developing such project." [74] The Secretary is directed to make his final decision on each project only after balancing the need for

> . . . fast, safe, and efficient transportation, public services, and the costs of eliminating or minimizing such adverse effects and the following:
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> (1) Air, noise, and water pollution;
>
> (2) destruction or disruption of man-made and natural resources, aesthetic values, community cohesion, and the availability of public facilities and services;
>
> (3) adverse employment effects, and tax and property value losses;
>
> (4) injurious displacement of people, businesses, and farms; and
>
> (5) disruption of desirable community and regional growth.[75]

The Secretary also is directed to promulgate standards regulating highway noise and to disapprove the plans and specifications for any proposed project unless he determines that such plans and specifications include adequate measures to implement the appropriate noise stan-

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mental legislation which make up the real backbone of federal environmental law. The Department of Transportation and the Federal Highway Administration have recently revised their procedures for consideration of social, economic, and environmental effects in highway projects. These regulations which were published on December 2, 1974 (39 FR 41803) amend Chapter I of Title 23 CFR parts 771, 790 and 795, and establish the basic administrative regulations for the federal highway authorities' environmental activities.

[61] 23 U.S.C. § 109 (1970, as amended Supp. V 1975).

[62] 23 U.S.C. § 128 (1970).

[63] 23 U.S.C. § 131 (1970, as amended Supp. V 1975).

[64] 23 U.S.C. § 134 (1970).

[65] 23 U.S.C. § 135 (Supp. V 1975).

[66] 23 U.S.C. § 136 (1970, as amended Supp. V 1975).

[67] 23 U.S.C. § 137 (1970).

[68] 23 U.S.C. § 138 (1970).

[69] 23 U.S.C. § 101 (1970, as amended Supp. V 1975).

[70] 23 U.S.C. § 102 (1970).

[71] 23 U.S.C. § 103 (1970, as amended Supp. V 1975).

[72] 23 U.S.C. § 106 (1970).

[73] 23 U.S.C. § 145 (Supp. V 1975).

[74] 23 U.S.C. § 109(h) (1970).

[75] 23 U.S.C. § 109(h)(1)(2)(3)(4) and (5) (1970).

dards.[76] Consultation with the Environmental Protection Agency (EPA) is contemplated by Section 109. EPA also is mentioned in another portion of Section 109 that deals with air pollution.

> The Secretary, after consultation with the Administrator of the Environmental Protection Agency, shall develop and promulgate guidelines to assure that highways constructed pursuant to this title are consistent with any approved plan for the implementation of any ambient air quality standard for any air quality control region designated pursuant to the Clean Air Act, as amended.[77]

Section 128 of the Federal-Aid Highway Act, Title 23, is one of the most significant provisions of the Act by any measure. For the attorney interested in highway litigation with an environmental focus, this section is of particular significance because the provision deals with public hearings, and, as such, represents the statutory authority for the first official contact with opponents of the proposal and potential litigants.[78]

In view of the importance of Section 128 to environmental litigation, it is worth reproducing the section in its entirety herein:

> (a) Any State highway department which submits plans for a Federal-aid highway project involving the bypassing of, or going through, any city, town, or village, either incorporated or unincorporated, shall certify to the Secretary that it has had public hearings, or has afforded the opportunity for such hearings, and has considered the economic and social effects of such a location, *its impact on the environment,* and *its consistency with the goals and objectives of such urban planning as has been promulgated* by the community. Any State highway department which submits plans for an Interstate System project shall certify to the Secretary that it has had public hearings at a convenient location, or has afforded the opportunity for such hearings, for the purpose of enabling persons in rural areas through or contiguous to whose property the highway will pass to express any objections they may have to the proposed location of such highway. *Such certification shall be accompanied by a report which indicates the consideration given to the economic, social, environmental, and other effects of the plan or highway location or design and various alternatives which were raised during the hearing or which were otherwise considered.*
>
> (b) When hearings have been held under subsection (a), the State highway department shall submit a copy of the transcript of said hearings to the Secretary, together with the certification and report.[79] (Emphasis added.)

Little imagination is needed to understand the potential for litigation contained in Section 128.

Outdoor advertising in the form of billboards and signs along the highways is controlled by Section 131 [80] of the Act. Although this sec-

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[76] 23 U.S.C. § 109(i) (Supp. V 1975).
[77] 23 U.S.C. § 109(j) (1970).
[78] 23 U.S.C. § 128 (1970).
[79] *Id.* 23 U.S.C. § 128 (1970).
[80] 23 U.S.C. § 131 (1970, as amended Supp. V 1975).

tion has not been the subject of much significant environmental litigation, it does require the States to adopt controls governing such advertising within 660 ft of the right-of-way of any federal-aid highway, and could conceivably be involved in an important way in some future cases.

Sections 134,[81] 135,[82] 136,[83] 137,[84] and 138 [85] all involve transportation planning in certain urban areas. To the casual observer, these sections appear to be only marginally environmental; however, closer study reveals that they are primarily concerned with long-range land-use planning for urban areas, and, as such, are of great importance to environmental law.[86]

Section 134 [87] calls for the development of

> . . . long-range highway plans and programs which are coordinated with plans for improvements in other affected forms of transportation and which are formulated with due consideration to their probable effect on the future development of urban areas of more than fifty thousand population.[88]

This section requires a *comprehensive transportation planning process* to be carried on by the States and local communities. The section also provides that

> No highway project may be constructed in any urban area of fifty thousand population or more unless the responsible public officials of such urban area in which the project is located have been consulted and their views considered with respect to the corridor, the location and the design of the project.[89]

Section 135 [90] provides for assistance to States and localities with traffic-flow control in urban areas. And Section 136 [91] provides for control of junkyards adjacent to Federal-aid highways.

Section 137 deals with fringe and corridor parking facilities—to be constructed as part of the continuing comprehensive transportation planning process called for in Section 134.[92]

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[81] 23 U.S.C. § 134 (1970).

[82] 23 U.S.C. § 135 (Supp. V 1975).

[83] 23 U.S.C. § 136 (1970, as amended Supp. V 1975).

[84] 23 U.S.C. § 137 (1970).

[85] 23 U.S.C. § 138 (1970).

[86] As even a casual observer of recent environmental law developments will have noticed, there has been an abundance of national land-use legislation introduced in recent Congresses. Most environmentalists, and indeed most federal environmental agencies, believe that comprehensive land-use planning legislation is the key to successful environmental regulation. Undoubtedly, highway construction will be considered an important factor among the activities to be regulated by any national land-use legislation. Until such legislation is enacted, and there would appear to be some rather substantial impediments to its early enactment, "land use" provisions of other statutes will take on added significance.

[87] 23 U.S.C. § 134 (1970).

[88] 23 U.S.C. § 134 (1970).

[89] *Id.* 23 U.S.C. § 134 (1970).

[90] 23 U.S.C. § 135 (Supp. V 1975).

[91] 23 U.S.C. § 136 (1970, as amended Supp. V 1975).

Finally, Section 138 [93] deals with the preservation of parklands. This section has been the subject of considerable litigation. It is worth noting that the provisions of Section 138 are duplicated in Section 4(f) of the Department of Transportation Act.[94]

Section 138 calls for avoidance of the use of parkland for federally funded highway projects unless there is no feasible alternative.[95]

These Sections, 134, 135, 136, 137 and 138, recognize that highway construction must be a part of comprehensive land-use planning, and, as such, are significant environmental provisions. Although, with the exception of Section 138, they have not as yet figured significantly in environmental litigation, it is possible that they will.

The Department of Transportation Act

The Department of Transportation Act [96] created the Department of Transportation and provided for the transfer of federal transportation functions and programs to the new department.

Only one significant environmental provision appears in the Act. That provision, Section 4(f),[97] provides for the maintenance and enhancement of natural beauty of land traversed by transportation lines.[98]

As has been noted, Section 4(f) is a duplicate of Section 139 [99] of the Federal-Aid Highway Act. Both Section 4(f) and Section 138 require that

> . . . the Secretary shall not approve any program or project which requires the use of any publicly owned land from a public park, recreation area, or wildlife and waterfowl refuge of national, State, or local significance as determined by the Federal, State, or local officials having jurisdiction thereof, or any land from an historic site of national, State, or local significance as so determined by such officials unless (1) there is no feasible and prudent alternative to the use of such land, and (2) such program includes all possible planning to minimize harm to such park, recreational area, wildlife and waterfowl refuge, or historic site resulting from such use.[100]

There has been a substantial amount of litigation involving Section 4(f) and it is anticipated that there will be more.

The Clean Air Act

The Clean Air Act Amendments of 1970 [101] provided for a new approach to national air quality control. The Clean Air Act's stated goal is "to protect and enhance the quality of the Nations air resources so

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[92] 23 U.S.C. § 137 (1970).
[93] 23 U.S.C. § 138 (1970).
[94] 49 U.S.C. § 1653(f) (1970).
[95] 23 U.S.C. § 138 (1970).
[96] 49 U.S.C. § 1651, *et seq.* (1970, as amended Supp. 1975).
[97] 49 U.S.C. § 1653(f) (1970).
[98] 49 U.S.C. § 1653(f) (1970).
[99] 23 U.S.C. § 138 (1970).
[100] See 23 U.S.C. § 138 (1970) and 49 U.S.C. § 1653(f) (1970).
[101] 42 U.S.C. § 1857, *et seq.* (1970, as amended Supp. V 1975).

as to promote the public health and welfare and the productive capacity of its population." [102] Although the Act's sole aim is to improve and maintain the quality of the nation's air, the practical effect of the statute has been to require the States to adopt cohesive land-use planning in the form of air pollution control implementation plans. A maze of federal [103] and federally approved State regulations [104] have been promulgated to carry out the Act's purposes.

Few highway cases have been affected by the Clean Air Act; however, this fact gives a grossly deceptive picture of the importance of the Act to the discipline of environmental law as it affects highways and the highway program. Few cases involving the Clean Air Act have appeared primarily because promulgation of the administrative procedures necessary to enforcement of the Act has taken an unusually long time. Also, litigation over construction of the Act, regulations under it, and their application to some of the nation's major industries has taken considerable time and has prolonged the period during which uncertainty over the Act's real meaning and effect impeded its enforcement.

When confusion over the enforcement of the Act is eliminated, enforcement of its provisions will become a major part of highway planning. Environmental litigation over the highway program, consequently, can be expected to contain increasingly frequent references to the Clean Air Act as one of the major pieces of federal environmental legislation affecting the highway program.

Presently, there are several areas in which the highway program can be directly affected by the Clean Air Act. Most important at this point the Clean Air Act as one of the major pieces of federal environmental Protection Agency requiring review and approval of the following:

1. Any new parking facility or other indirect source (of air pollution) that has a parking capacity of 1,000 cars or more.
2. Any modification to a parking facility or other source that increases parking capacity by 500 cars or more.
3. Any new highway which, within 10 years of construction, anticipates an average annual daily traffic volume of more than 20,000 vehicles.
4. Any modification to an existing highway project which will, within

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[102] 42 U.S.C. § 1857(b)(1) (1970).

[103] Federal regulations under the Clean Air Act Amendments of 1970 are promulgated by the Environmental Protection Agency.

[104] Under the Clean Air Act, the various States have the option of promulgating State air pollution control implementation plan regulations which, if approved by the Environmental Protection Agency, regulate, with both federal and State authority, the air pollution control program for that particular area.

[105] 40 C.F.R. § 51.18 (1976).

10 years after modification, increase the average annual daily traffic volume by more than 10,000.[106]

Additional regulations under the Act dealing with air pollution created directly and indirectly by highway construction and use are a certainty. It is safe to predict that the future will see increased litigation in this area.

The National Historic Preservation Act

The National Historic Preservation Act[107] seeks to preserve and protect ". . . historical and cultural foundations of the Nation."[108] The Act recognizes the threat to these historical and cultural foundations represented by "ever-increasing extensions of urban centers, *highways,* and residential, commercial, and industrial developments."[109] (Emphasis added.)

Section 470f of the Act provides that "the head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking in any state . . . shall, prior to approval of the expenditure of any Federal funds on the undertaking . . . take into account the effect of the undertaking on any district, site, building, structure, or object that is included in the National Register."[110]

In addition to taking such effect into account, the federal official must "afford the Advisory Council on Historic Preservation[111] . . . a reasonable opportunity to comment wth regard to such undertaking."[112]

Although the National Historic Preservation Act has figured in few highway cases, and is not a significant factor in any of them, it is worth noting as one little-known statute with quasi-environmental implications for the highway lawyer.

Federal Environmental Regulations

As has been alluded to in a previous footnote, the federal environmental statutes are merely the tip of the iceberg when it comes to assessing the full body of environmental law. Most of the statutes provide federal agencies with extraordinary powers to promulgate environmental regulations. In many ways, these regulations comprise the most significant body of federal environmental law.

Space does not permit even a marginally adequate discussion of the federal environmental regulations here.[113] This deficiency is mitigated

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[106] *Id.*

[107] 16 U.S.C. § 470 *et seq.* (1970, as amended Supp. V 1975).

[108] 16 U.S.C. § 470 (1970).

[109] 16 U.S.C. § 470(c) (1970).

[110] 16 U.S.C. § 470f (1970).

[111] See, 16 U.S.C. §§ 470i to 470n (1970, as amended Supp. V 1975).

[112] 16 U.S.C. § 470f (1970).

[113] Regulations of particular significance to those interested in the subject matter of this paper are the Federal Highway Ad-

somewhat by the fact that the discussion of case law which follows deals on a case-by-case basis, where appropriate, with most of the significant federal environmental regulations. Suffice it to say at this point, that anyone hoping to understand the complexities of environmental litigation and the highway program must come to grips with the large body of law contained in the federal environmental regulations.

STANDING TO SUE

A logical beginning point for any discussion of environmental litigation as it affects the Federal–State highway program is with the question of standing to sue. This is true because standing is, in all but a few cases, the threshold question addressed by most courts.

The concept of standing to sue derives from the constitutional command that there exist a "case or controversy" before a federal court accepts jurisdiction. As stated in the landmark standing case, *Flast v. Cohen*,[114] the case must be "presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process." [115]

When the controversy is over the legality of an administrative action of the Federal Government, as is necessarily the case in those situations in which the federal environmental statutes are invoked, the Administrative Procedure Act requires that the person or group bringing the suit be "aggrieved by agency action within the meaning of a relevant statute" in order to have standing to sue.[116]

Overcoming the standing barrier has represented a vexing problem for individuals and organizations challenging the decisions of federal agencies. On a percentage basis, few challenges to the standing of citizens and citizens' groups suing under the federal environmental statutes and the Administrative Procedure Act have succeeded. Notwithstanding this fact, standing is not automatically achieved, and, further, judicial guidance on the standing question is less than uniform and concise.

At the present time, two Supreme Court cases, *Sierra Club v. Morton* [117] and *United States v. SCRAP* (a group of law students called Students Challenging Regulatory Agency Procedures),[118] represent

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ministration's regulations on the environment, 23 C.F.R. § 771.1 *et seq.* (1976) and the Council on Environmental Quality's regulations governing the preparation of environmental impact statements, 40 C.F.R. 1500.1, *et seq.*

[114] 392 U.S. 83, 20 L.Ed. 2d 947, 88 S.Ct. 1942 (1968).

[115] 392 U.S. at 95, 20 L.Ed. 2d at 958, 88 S.Ct. 1942, 1950 (1968).

[116] 5 U.S.C. § 702.

[117] 405 U.S. 727, 31 L.Ed. 2d 636, 92 S.Ct. 1361 (1972).

[118] 412 U.S. 669, 37 L.Ed. 2d 254, 93 S. Ct. 2405 (1973).

the leading cases on the question of standing where federal environmental law is at issue.

The United States Supreme Court was called on for the first time in *Sierra Club v. Morton, supra* n. 117, to apply the general rules of standing to an environmental dispute. Sierra Club brought suit to enjoin the development of Mineral King Valley into a summer recreation area and ski resort. Mineral King Valley, the site of the planned resort, was under the jurisdiction of the United States Forest Service. The United States District Court found that Sierra Club did have standing to bring its suit and granted the organization a preliminary injunction. This holding was reversed by the United States Court of Appeals,[119] which held that Sierra Club did not have standing.

The Supreme Court held that Sierra Club had not asserted a sufficient claim or interest in preservation of the land to have standing to bring suit. The Court's opinion did, however, strongly affirm the right of appropriate citizens and citizens' groups to sue to protect environmental values:

> Aesthetic and environmental well-being, like economic well-being, are important ingredients of the quality of life in our society, and the fact that particular environmental interests are shared by the many rather than the few does not make them less deserving of legal protection through the judicial process.[120]

The Supreme Court refused to recognize Sierra Club's standing to sue in the specific situation of *Sierra Club v. Morton, supra* n. 117, because it found that the impact of the proposed development of Mineral King Valley "will not fall indiscriminately upon every citizen." Development of the valley would be felt directly only by those who use the area, and, therefore, the Court held, only such users and organizations representing such users have sufficient threatened injury to aesthetic and recreational values to be entitled to contest the development in federal court.

In an effort to attain a sweeping declaration on standing in environmental cases, Sierra Club did not assert that its activities or those of its individual members would be directly affected by the Mineral King Valley development. It asserted that its institutional interest in protecting natural areas of the country was sufficiently established to confer standing in a case where one such natural area was threatened by illegal federal action.

The Supreme Court was not willing to expand the concept of standing to sue to that extent and held that Sierra Club had not asserted sufficient *direct* injury to form the basis for its suit. The Court did point out, however, that Sierra Club was free to return the case to the lower

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[119] Sierra Club v. Hickel, 433 F.2d 24 (9th Cir. 1970).

[120] 405 U.S. at 734, 31 L.Ed. 2d at 643, 92 S.Ct. at 1366.

federal courts by amending its complaint to claim a more direct and specific injury. It should be noted that Sierra Club immediately did so.[121]

In holding as it did in *Sierra Club v. Morton, supra* n. 117, the Supreme Court rejected the "private attorney general concept" by finding that an entity created to protect the public interest could not rely on that interest alone without an allegation of facts showing some adverse effect on its specific interests. Undoubtedly, the Court was concerned that there would be no limit on parties having standing unless there was some requirement that specific injury be shown.

In addition to its general pronouncements on the question of standing in environmental cases, the decision in *Sierra Club v. Morton, supra* n. 117, clarified one question of particular interest to environmental groups. The Court emphasized that a citizen or group of citizens that establishes standing to sue by showing a direct relationship to, and interest in, the environmental asset at issue, is not confined to asserting just their own interests in the case. The plaintiffs, having once established their standing to sue, also may assert the over-all interest of the general public in protecting the threatened environmental asset. Therefore, the requirement that a litigant show specific injury to attain standing does not limit his case to the injuries claimed by him. He may assert, argue, and defend the general public interest as well.[122]

The general rule of law to be derived from *Sierra Club v. Morton, supra* n. 117, would appear to be that if one can plead and establish that a few members of an organization such as the Sierra Club are "adversely affected," even though it be in a non-economic sense, the organization has standing.

The Supreme Court left several questions unanswered in *Sierra Club v. Morton, supra* n. 117; however, it did eliminate any doubt that the environmental interests announced in federal statutes stand on equal footing in the federal courts with economic and other interests.

These principles of standing in environmental cases were, for the most part, reiterated in *United States v. SCRAP, supra* n. 118, the Supreme Court's second decision on standing in environmental lawsuits. This case arose when the Interstate Commerce Commission (ICC) granted permission to the nation's railroads to impose a 2.5 percent surcharge on freight rates. A group of law students suing under the name Students Challenging Regulatory Agency Procedures (SCRAP) filed suit to enjoin the freight surcharge alleging that ICC was obliged under the National Environmental Policy Act to prepare an environmental impact statement covering the surcharge.

Having the benefit of the Supreme Court's ruling in *Sierra Club v. Morton, supra* n. 117, SCRAP alleged in its complaint that its members

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[121] 4 ERC 1561 (N.D. Cal. 1972).

[122] 405 U.S. at 737, 31 L.Ed. 2d at 644, 92 S.Ct. at 1367.

were individually aggrieved by the increased freight rates. They asserted that each member would suffer economic, recreational, and aesthetic injury as a result of the adverse environmental impact of the freight rate increases. SCRAP's reasoning was that the increased freight rates would reduce the total volume of recyclable materials transported by rail. The result, SCRAP claimed, would be the increased use of new raw materials, higher prices for finished products produced from those materials, and impairment of their enjoyment of the natural resources so depleted.

SCRAP's standing to sue was upheld by the United States District Court. In addition, the District Court enjoined the rate surcharge.[123] Sitting as Circuit Justice, Chief Justice Burger refused to stay the injunction.[124] However, the full Supreme Court held 6 to 2 [125] that the District Court had lacked jurisdiction to issue the injunction, and the ICC surcharge order was reinstated. The substance of the case thus disposed, the Court turned to the standing issue. Unfortunately, on that question a three-way split developed. Justices Brennan, Douglas, and Blackmun restated their dissenting views in *Sierra Club v. Morton, supra* n. 117, saying that they would grant standing to SCRAP on the basis of its allegation of harm to the environment alone. Justice White and Chief Justice Burger, joined by Justice Rehnquist, argued that SCRAP did not have standing because its members' allegations of injury were not sufficiently substantial to support a justiciable case and controversy. Justices Marshall and Stewart found that the standing test enunciated in *Sierra Club v. Morton, supra* n. 117, had been met by SCRAP in their allegations of individual injury to their members.

It is unlikely that the present Supreme Court will ever go so far as suggested by Justices Douglas, Blackmun, and Brennan; however, after *Sierra Club v. Morton, supra* n. 117, and *United States v. SCRAP, supra* n. 118, it would appear that an environmental group's standing to sue is dependent on its making supportable allegations that some individuals of the group have been personally injured or aggrieved, though such injury need not be economic.

This general statement of law as enunciated by the Supreme Court is not without its ambiguities. Notwithstanding this, as a practical matter, few challenges to the standing of citizens and citizens' groups suing under NEPA, other federal statutes, and the Administrative Procedure Act have succeeded. The federal courts have rather consistently confirmed the rights of citizens to invoke the protections afforded by federal environmental statutes when environmental values are threatened by an agency's failure to comply with the statutory requirements.

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[123] SCRAP v. United States, 346 F.Supp. 189 (D.D.C. 1972).

[124] Aberdeen and Rockfish R.R. Co. v. SCRAP, 409 U.S. 1207, 34 L.Ed. 2d 21, 93 S.Ct. 1 (Burger, Circuit Justice, 1972).

[125] Mr. Justice Powell did not take part in the Court's decision.

This does not mean that standing is automatically attained, or that the defense of lack of standing is no longer a viable one for an administrative agency. In the specific discussion of highway cases that follows, several significant cases denying standing under the *Sierra Club* and *SCRAP* holdings will be discussed.

Nonhighway Cases

There are a number of nonhighway cases involving federal environmental statutes and the question of standing to sue. Inasmuch as the National Environmental Policy Act applies to, and, indeed is the focal point of most environmental litigation involving highways, it is useful to review a few additional nonhighway cases under that statute. The general principles applied in these nonhighway NEPA cases will, of course, apply to problems of standing arising in highway cases under NEPA as well.

In most of the cases arising under NEPA to date, there is no discussion of the plaintiffs' standing to sue under NEPA. The federal courts have assumed that there was standing in most cases. In approximately 35 cases, the standing of a particular plaintiff has been seriously challenged and addressed by the court.

Interesting cases in which standing to sue has been granted by courts applying the rule established in *Sierra Club v. Morton, supra* n. 117, include: *Citizens for Clean Air Inc. v. Corps of Eng'rs;*[126] *Lee v. Resor;*[127] *Sierra Club v. Mason;*[128] *Harlem Valley Transp. Ass'n. v. Stafford;*[129] *Rucker v. Willis;*[130] *James River and Kanawha Canal Parks, Inc. v. Richmond Metropolitan Auth.;*[131] *Ward v. Ackroyd;*[132] and *Wilderness Soc'y v. Hickel.*[133] Cases in which standing to sue has been denied after the *Sierra Club v. Morton, supra* n. 117, ruling include: *San Francisco Tomorrow v. Romney;*[134] *Maddox v. Bradley;*[135] and, at least as it applied to the citizens group involved and its representation of itself, *James River and Kanawha Canal Parks, Inc. v. Richmond Metropolitan Auth., supra* n. 131.

In *Citizens for Clean Air v. Corps of Eng'rs, supra* n. 126, plaintiffs challenged the Corps' grant of a power plant construction permit on

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[126] 349 F.Supp. 696 (S.D.N.Y. 1972), *on further motion,* 356 F.Supp. 14 (S.D.N.Y. 1973).

[127] 348 F.Supp. 389 (M.D. Fla. 1972).

[128] 351 F. Supp. 419 (D. Conn. 1972), *injunction dissolved* 365 F.Supp. 47 (D. Conn. 1973).

[129] 360 F.Supp. 1057 (S.D.N.Y. 1973).

[130] 358 F.Supp. 425 (E.D.N.C. 1973), *aff'd* 484 F.2d 158 (4th Cir. 1973).

[131] 359 F.Supp. 611 (E.D. Va. 1973), *aff'd per curiam,* 481 F.2d 1280 (4th Cir. 1973).

[132] 344 F.Supp. 1202 (D. Md. 1972).

[133] 325 F.Supp. 422 (D.D.C. 1970), *rev'd on other grounds, sub nom.* Wilderness Soc'y v. Morton, 156 U.S. App. D.C. 121, 479 F.2d 1026 (D.C. Cir. 1973), *cert. denied,* 411 U.S. 917, 36 L.Ed. 2d 309, 93 S.Ct. 1550 (1973).

[134] 342 F.Supp. 77 (N.D. Cal. 1972), *rev'd* 472 F.2d 1021 (9th Cir. 1973).

[135] 345 F.Supp. 1255 (N.D. Tex. 1972).

the basis of alleged noncompliance with NEPA. In their complaint, plaintiffs merely claimed that (1) all members of the organization lived in and around the New York City metropolitan area; (2) the organization was engaged in study of the conditions of the region's waterways, and its members used the region's waterways for fishing, boating, and recreation; and (3) construction of the proposed power plant presented serious dangers to the air quality of the New York metropolitan area and to the water of the East River.

Relying on the Supreme Court decision in *Sierra Club v. Morton, supra* n. 117, the Court held that the *Sierra Club* rule governed the case and required that standing be granted. "While these allegations as to standing are just about as bare-boned as possible," the Court said, "they do marginally skirt the brink of dismissal." [136] In *Citizens for Clean Air, Inc. v. Corps of Eng'rs, supra* n. 126, the Court, obviously somewhat embarrassed by the meagerness of plaintiffs' assertions of standing, asked the plaintiffs to amend their complaint to make it more explicit; however, the Court did make specific findings that the plaintiffs' allegations of residence and of potential individual danger required that standing be granted.[137]

In *Lee v. Resor, supra* n. 127, a group of Florida fishermen and fish camp owners alleged economic injury from the Corps of Engineers' herbicide spraying on the St. James River. The spraying was part of the Corps' program to eradicate water hyacinths. The fishermen claimed that the Corps must prepare an environmental impact statement under the National Environmental Policy Act before spraying.

This case is not particularly noteworthy on its merits because "economic injuries" will provide standing sufficient to justify judicial review, even in situations where there is no statutory provision for judicial review.[138] The case is worth mention, however, because the Court, in relying on the opinion in *Sierra Club v. Morton, supra* n. 117, stated that "economic injury gives a person standing to seek judicial review, but once 'review is properly invoked, that person may argue the public interest in support of his claim that the agency has failed to comply with its statutory mandate'." [139]

Thus, where a NEPA plaintiff wants to use injury to the general public to strengthen his case for standing, the rule established in *Sierra Club v. Morton, supra* n. 117, permits the plaintiff to argue injury to the general public, after standing to seek review on his claim has been established, even where such injury could not be used to establish standing initially.

The United States District Court for the District of Connecticut engaged in a lucid interpretation of the *Sierra Club v. Morton, supra* n. 117, ruling in *Sierra Club v. Mason, supra* n. 128, which was decided

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[136] 349 F.Supp. at 705.
[137] *Id.* at 705.
[138] 348 F.Supp. at 392.
[139] *Id.* at 392.

about six months after the Supreme Court's decision in *Sierra Club v. Morton.* In *Sierra Club v. Mason, supra* n. 128, Sierra Club represented itself and individual members in charging that a Corps of Engineers plan to dredge New Haven Harbor and dump the dredged material into Long Island Sound required preparation of an environmental impact statement before it could be carried out. Sierra Club alleged that its local members used New Haven Harbor and Long Island Sound for recreational and commercial purposes. However, none of the local members were joined as individual plaintiffs in the lawsuit.

The Corps of Engineers challenged Sierra Club's standing, arguing that its failure to join individual members of the club as plaintiffs was fatal to the cause of action because all the allegations of injury in fact made in the complaint concerned injury to members, not to the club as an entity. The Court held, however, that *Sierra Club v. Morton, supra* n. 117, "nowhere suggested that the Club as a single party plaintiff could establish standing only where it alleged injury in fact to its *group* activities." [140] Rather, the Supreme Court took just the opposite position, stating that "it is clear that an organization whose members are injured may represent those members in a proceeding for judicial review."

Again relying on *Sierra Club v. Morton, supra* n. 117, the Corps of Engineers contended that Sierra Club had failed to allege injury in fact in its complaint. The Court said that *Sierra Club v. Morton, supra* n. 117, suggested that injury in fact requires not only that the plaintiffs use the affected area, but also that some impact on that use by the proposed federal action be alleged. Notwithstanding this, the Court reasoned that "the extent and specificity of allegations necessary to establish this second aspect of injury will in fact vary from case to case." The Court recognized that the nexus between some uses of a given area and the effect of the Government's proposed action may be more tenuous than was presented in *Sierra Club v. Morton, supra* n. 117. This does not mean, however, that the nexus must be specifically elaborated in the pleadings. The Court said that it is sufficient that a connection be reasonably inferrable from the facts alleged. The Court went further to warn against an overly strict requirement that specific injury in fact be alleged. "To oblige him (the plaintiff) to allege more than a generalized nonfrivolous threat to the environment in which he lives, works, or plays might, in some cases, require him to state what has not yet been determined but what may be detailed in the environmental impact statement he wants prepared." [141]

The Sierra Club's allegations that its members who use the waters of Long Island Sound for recreation would be injured by the proposed dumping of dredged materials into the sound was sufficient to confer

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[140] 351 F.Supp. at 423.

[141] *Id.* at 424.

standing under the Court's elaboration of the *Sierra Club v. Morton, supra* n. 117, decision.

In spite of the liberalized criteria for standing set forth in *Sierra Club v. Morton, supra* n. 117, and in subsequent decisions relying on the Supreme Court's decision in that case, the generally accepted view among environmental lawyers that standing has become merely a matter of proper pleading has been upset in a few cases. It should be noted before discussing those cases subsequent to *Sierra Club v. Morton, supra* n. 117, in which standing has been denied, that they represent the exception rather than the rule.

The United States District Court for the Northern District of California in *San Francisco Tomorrow v. Romney, supra* n. 134, appears simply to have ignored the reasoning of *Sierra Club v. Morton, supra* n. 117. The Court found that failure of the Department of Housing and Urban Development and the San Francisco Redevelopment Agency to file environmental impact statements under NEPA covering construction of two federally assisted urban renewal projects did not give a San Francisco citizens group, with a mere nonpecuniary concern that NEPA be enforced, standing to sue to enjoin construction pending preparation of an environmental impact statement.

The District Court's ruling was reversed in part by the Circuit Court of Appeals which permitted standing in *San Francisco Tomorrow v. Romney, supra* n. 134, but denied standing to Sierra Club because the club's corporate charter did not list lawsuits among the purposes of the club. It is predictable that this rationale will not find much currency among the federal courts, particularly since the Sierra Club has been one of the major environmental litigants over the past several years. In this respect, the *San Francisco Tomorrow* decision represents more judicial error than a case in which the rule in *Sierra Club v. Morton, supra* n. 117, applied to deny standing to sue, and, therefore, should not be cited for that proposition by a careful attorney.

Coalition for the Environment v. Linclay Dev. Corp. [142] is another case in which standing was denied, and unfortunately appears to be another case in which the reasoning of the court is suspect. The facts of the case reveal that three citizens groups and three individual plaintiffs sought to contest the construction of a 1700-acre residential, commercial, and light industrial development in St. Louis, Missouri. All the plaintiffs alleged that the requirements of the National Environmental Policy Act and several other federal statutes had not been met.

The United States District Court for the Eastern District of Missouri found that not even the three citizens who lived close to the proposed development site, and would unquestionably be affected by the development, had standing. They did not, the Court said, allege suffi-

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[142] 347 F.Supp. 634 (E.D. Mo. 1972), *rev'd sub. nom.* Coalition for the Environment v. Volpe, 504 F.2d 156 (8th Cir. 1974).

ciently individualized harm to support standing. The result, when compared to *Sierra Club v. Morton, supra* n. 117, and its progeny, appears to be incorrect on its face. The Court of Appeals apparently agreed.

Maddox v. Bradley, supra n. 135, is another case in which a Federal District Court denied standing in reliance on the *Sierra Club v. Morton, supra* n. 117, doctrine. But the case is more a curiosity than a precedent. The Court held that landowners who had been fully compensated by the Federal Government for land taken by condemnation do not have standing under NEPA to contest the Government's failure to prepare an environmental impact statement regarding construction of a fence around the condemned land. Although this case is not a highway case, it does have significance when the ruling is put in a highway context.

The Court said that the only injury claimed by the plaintiffs from the proposed fencing was that the building of the fence would prevent watering of their livestock. Apparently the plaintiffs had already been compensated for this loss in the condemnation proceedings. The Court ruled that the landowners were estopped from again asserting harm on this ground. In the absence of allegations of any additional harm to themselves or to the environment that might occur as a result of the fencing, *Sierra Club v. Morton, supra* n. 117, the court believed, dictated that standing be denied.

It should be noted that a more reasonable line of argument for the court to have taken in *Coalition for the Environment v. Linclay Dev. Corp., supra* n. 142, would have been that none of the interests of the landowners were even arguably within the zone of interest protected by NEPA, and therefore, the plaintiffs should have been denied standing under the *first* of the well established rules for standing under the Administrative Procedure Act.

Highway Cases

There are at least 12 environmental cases involving highways that merit study by the highway attorney faced with a standing problem. For those interested in defending the actions of a government agency on the basis of the plaintiffs lack of standing, each of these cases should be carefully reviewed: *Barta v. Brinegar;* [143] *City of Davis v. Volpe;* [144] *James River and Kanawha Canal Parks, Inc. v. Richmond Metropolitan Auth., supra* n. 131; *Akers v. Resor;* [145] *Citizens Comm. for the Hudson Valley v. Volpe;* [146] *Brooks v. Volpe;* [147] *Coalition for the Environment*

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[143] 358 F.Supp. 1025 (W.D. Wis. 1973).

[144] 5 ERC 1873 (E.D. Cal. 1973), *rev'd sub nom.* City of Davis v. Coleman, 521 F.2d 661 (9th Cir. 1975).

[145] 339 F.Supp. 1375 (W.D. Tenn. 1972).

[146] 302 F.Supp. 1083 (S.D.N.Y. 1969), *aff'd.* 425 F.2d 97 (2d Cir. 1970), 347 F. Supp. at 123.

[147] 329 F.Supp. 118 (W.D. Wash. 1971), *rev'd on other grounds,* 460 F.2d 1193 (9th Cir. 1972).

v. Linclay Dev. Corp.; [148] *Hanly v. Volpe;* [149] *Morningside-Lenox Park Ass'n, Inc. v. Volpe;* [150] *Nashville I-40 Steering Comm. v. Ellington;* [151] *Nolop v. Volpe;* [152] *Ragland v. Mueller;* [153] and *Ward v. Ackroyd, supra* n. 132.

In *Barta v. Brinegar, supra* n. 143, the United States District Court for the Western District of Wisconsin held that the National Environmental Policy Act required the Department of Transportation to prepare an environmental impact statement concerning a federal-aid highway segment through marsh and wetland areas. The case represents a rather easy one in which to determine the question of standing.

The plaintiff in the case was Eugene Barta, a farmer and landowner in Barren County, Wisconsin, across whose farmland the proposed new highway would cut, absorbing approximately 38 acres of his land and separating another 28 acres from the main farm building. In addition to these allegations of injury, the plaintiff added that he also hunted, fished, and trapped in the Barren County area, and that these activities would be curtailed to the extent that the new highway project would visit injury on the environment.

An additional plaintiff, Beatrice Irgens, did not live immediately adjacent to the proposed highway, but claimed that noise pollution and air pollution caused by construction work on the new highway interfered with her family's enjoyment of activities in and about their home and with the family's outdoor recreation in the Barren County area.

In *Barta,* the Federal District Court held that the plaintiffs enjoyed standing to bring their action because the disputed highway construction would injure substantially their aesthetic, conservational, and recreational interests. It is interesting to note that the Court did not find it necessary to rely on the economic interests obviously alleged by the plaintiffs. This reliance on aesthetic, conservational, and recreational interests alone mirrors the rationale for standing in environmental cases set forth by the Supreme Court in *Sierra Club v. Morton, supra* n. 117, and *United States v. SCRAP, supra* n. 118.

One case (*City of Davis v. Volpe, supra* n. 144) tried directly on the issue of standing involved a California city challenging construction of a federal-aid highway interchange. The United States District Court for the Eastern District of California held that a 1968 amendment to the Federal-Aid Highway Act requires the Department of Transportation and the State highway department to afford a municipality the opportunity to participate in design hearings concerning a proposed

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[148] 347 F.Supp. 634 (E.D. Mo. 1972), *rev'd* 504 F.2d 156 (8th Cir. 1974).

[149] 305 F.Supp. 977 (E.D. Wis. 1969), *aff'd on motion for summary judgment,* 322 F.Supp. 1306 (E.D. Wis. 1971).

[150] 334 F.Supp. 132 (N.D. Ga. 1971).

[151] 387 F.2d 179 (6th Cir. 1967), *cert. den.* 390 U.S. 922, 19 L.Ed. 2d 982, 88 S.Ct. 857 (1968).

[152] 333 F.Supp. 1364 (D. S.D. 1971).

[153] 460 F.2d 1196 (5th Cir. 1972).

federal-aid highway interchange that would bypass the municipality. However, the Court also held that the municipality, the City of Davis, lacked standing under either the National Environmental Policy Act or the California Environmental Quality Act to bring suit charging that construction of a federal-aid highway interchange would adversely affect the city's environment and water supply.

The Court did, however, permit the City of Davis to bring its action under Section 10 of the Administrative Procedure Act.

The interesting point about the *City of Davis* case is that although the municipality did have standing under the standing provisions of the Administrative Procedure Act, with respect to the plaintiff's allegations of standing under the National Environmental Policy Act and the California Environmental Quality Act, the Court found that the plaintiff did not have standing to maintain suit under those statutes alone. This conclusion of law, though it to some extent reduces the question of standing to a matter of pleadings, is significant in that the court's opinion leads to the conclusion that the National Environmental Policy Act and State statutes patterned after that Act do not in and of themselves confer standing.

It should be noted that at least one respected commentator on the National Environmental Policy Act has argued persuasively to the contrary.[154]

James River and Kanawha Canal Parks, Inc. v. Richmond Metropolitan Auth., supra n. 131, tried in the United States District Court for the Eastern District of Virginia, is another interesting case on the question of standing of parties to challenge highway projects. In this case, the Court held that an environmental group that seeks to preserve general environmental, historical, recreational, and community values does not have standing to contest construction of a highway, although the group was allowed to continue as a plaintiff with standing by virtue of a member's use and enjoyment of a canal and recreational facilities that would be affected by construction of the highway.

Discussing the history of the requirement of standing, the Court noted that the requirement is rooted in the case or controversy provision of Article III of the United States Constitution and seeks to ensure that parties involved in litigation have such a personal stake in the action as to make it a true adversary one. The Court noted that the principal cases governing the kind of standing problem presented by the *James River and Kanawha Canal Parks* case are *Ass'n of Data Processing Serv. Organizations, Inc. v. Camp,*[155] *Barlow v. Collins,*[156] and *Sierra Club v. Morton, supra* n. 117.

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[154] F. ANDERSON, NEPA IN THE COURTS, at 26 *et seq.* (Baltimore: Johns Hopkins University Press, 1973) [hereinafter cited as ANDERSON].

[155] 397 U.S. 150, 25 L.Ed. 2d 184, 90 S.Ct. 827 (1970).

[156] 397 U.S. 159, 25 L.Ed. 2d 192, 90 S.Ct. 832 (1970).

In *Data Processing,* the Supreme Court held that a party has standing to obtain judicial review under Section 10 of the Administrative Procedures Act where he has alleged that the action under attack caused him actual injury in fact and where the alleged injury was to an interest "arguably within the zone of interests to be protected or regulated" by the statutory requirements to which the plaintiff seeks to compel adherence.[157]

The *James River and Kanawha Canal Parks* Court also set forth a rather concise statement of the rule established by *Sierra Club v. Morton, supra* n. 117.

> . . . [T]he Court considered the meaning of the injury in fact requirement and reaffirmed its vitality. It concluded that while injuries other than economic ones can confer standing, an organization must allege that it or its members will be affected in their activities or pasttimes by the alleged illegal acts. A mere interest in a problem, regardless of how sincerely it might be held, is not sufficient to give standing to an organization or an individual. Such an organization may, however, have standing to represent its injured members.[158]

The Supreme Court in *Sierra Club* stated that "it is clear that an organization whose members are injured may represent those members in a proceeding for judicial review." The United States District Court for the Eastern District of Virginia in *James River and Kanawha Canal Parks* clearly had not imagined the issue to be so clear. It stated that generally a party may assert only his own rights in litigation, not those of a third party. It noted an exception to this rule was recognized in *Nat'l Ass'n for the Advancement of Colored People v. Alabama,*[159] where the assertion of their rights by the members of an organization would have had the effect of waiving those rights. This exception also has been extended in certain other First Amendment cases such as *Nat'l Ass'n for the Advancement of Colored People v. Button.*[160] Although the District Court did not seem happy to do so, it noted that the Supreme Court in *Sierra Club v. Morton, supra* n. 117, seems to have adopted this same exception for cases such as that presented to the District Court in *James River and Kanawha Canal Parks.* Taking some license with the Supreme Court's decision, the District Court noted that standing would be restricted, in its opinion, to those organizations whose purposes extend to the protection of the injured interests of their members.

However reluctantly, the District Court did conclude that the plaintiff, James River and Kanawha Canal Parks, Inc., fit this criterion. That is, the purposes of the organization extended to the protection of the interests claimed to have been injured by the construction of the

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[157] 359 F.Supp. at 624.

[158] *Id.* at 624.

[159] 357 U.S. 449, 2 L.Ed. 2d 1488, 78 S.Ct. 1163 (1958).

[160] 371 U.S. 415, 428, 9 L.Ed. 2d 405, 415, 83 S.Ct. 328, 335 (1963), cited in Sierra Club v. Morton, 405 U.S. 727, 739, 31 L.Ed. 2d 636, 645, 92 S.Ct. 1361, 1368 (1972).

highway as it would affect individual members of the organization.

The District Court held that the allegations in the complaint did not establish standing for the canal corporation on its own. All that the canal corporation alleged was that its objectives are "the preservation of the environment historical, recreational, and community values of the James River and Kanawha Canal." The Court noted that there was no suggestion in the complaint that the organization owned property near to or over which the downtown expressway would be located, or that it intended to make use of the canal area, once restored, by sponsoring events in that area. The Court noted that although the organization's contact with the restoration of the canal was certainly more particularized than was that of the Sierra Club in *Sierra Club v. Morton, supra* n. 117, it amounted to no more than a public interest in the development of the area. This interest was not, in the Court's view, sufficient to support standing. In this conclusion, the Court cited not only *Sierra Club v. Morton, supra* n. 117, but also *Ward v. Ackroyd, supra* n. 132.

Try as it might, however, the Court could not escape the clear rationale of *Sierra Club v. Morton, supra* n. 117. The conclusion that the organization did not have standing in and of its own right did not result in the rejection of the canal corporation as a party plaintiff. Because an individual member of the canal corporation had sufficiently met the criteria established in *Data Processing,* under the rationale of *Sierra Club v. Morton, supra* n. 117, his interests could be represented by the canal corporation. The individual, a man named Deaton, alleged that he was a resident of the city of Richmond and that he used and enjoyed the James River and Kanawha Canal for recreational activities and for its aesthetics, and that he intended to do so to an even greater extent in the future if the acts of the defendants did not make this impossible.

The District Court observed that these allegations were particularly unspecific; however, they did show a personal involvement with the area affected by the highway project, and, thus, stated an injury in fact sufficient to support standing.

Having established, although not without rather obvious misgivings, that the plaintiff's allegations showed injury in fact resulting from the defendant's acts, the Court held that it remained to be determined whether these interests were "arguably within the zone of interest to be protected" by the statutes in question as required by *Ass'n of Data Processing Serv. Organizations, Inc. v. Camp, supra* n. 155. Defendants (Richmond Metropolitan Authority and the Department of Transportation) had argued that the plaintiffs interests were not protected by the National Environmental Policy Act, the relative provisions of the Federal-Aid Highway Act, and the Department of Transportation Act, as well as by the National Historical Preservation Act.

The Court held that it had no option but to find that a user and enjoyer of resources allegedly protected by these acts is within their zone of protection. It should be noted, as an incidental matter, that when

the defense of standing is raised, it should be raised within the criteria established in *Ass'n of Data Processing Serv. Organizations, Inc. v. Camp, supra* n. 155, and *Sierra Club v. Morton, supra* n. 117. This means that the careful attorney will so frame his pleadings to assure that the plaintiff is put to the proof on (1) the question of his individualized injury in fact, and, (2) that such injury is arguably within the zone of interests to be protected or regulated by the statutory requirements to which the plaintiffs seek to compel adherence. So structuring the defendant's pleadings will rarely prevent a finding of standing where the plaintiff can meet the criterion. However, failure to do so represents negligent lawyering and could result in conceding the standing issue unnecessarily where the plaintiff could not meet *both* criteria.

The importance of requiring the plaintiff to meet both standing criteria is illustrated by *Akers v. Resor, supra* n. 145. Although the plaintiffs in that case later achieved standing under the National Environmental Policy Act and the Fish and Wildlife Coordination Act,[161] they failed to do so under 33 U.S.C. § 701c which provides for the enlargement and realignment of river channels by the Corps of Engineers.

With respect to the Corps of Engineers' authority under that statute and the plaintiff's claim of standing to allege ecological damage as a result of the Corps' violation of that statute, the Court said

> . . . it appears that plaintiffs do not have standing to complain about a failure to comply with the aforesaid statutory provision. The interest that the plaintiffs seek to protect is that of ecology; and since such interest is not arguably within the zone of interest intended to be protected by this statutory provision, they do not have standing.[162]

Nor, apparently, had the plaintiffs sufficiently argued or demonstrated that they would suffer injury in fact from the challenged activities of the Corps of Engineers. With respect to that test of standing the Court said:

> Moreover, the only conceivable way in which plaintiffs could suffer harm from a failure to comply with this statute would be harm from a failure to maintain the enlarged and realigned channels. And since it is the very maintenance of the enlarged and realigned channels, after the work is done, that will continue to do ecological damage (and, conversely, the failure to do so that would reduce such damage), plaintiffs will not in fact be harmed by a failure of the State of Tennessee to maintain these channels. Accordingly, having no "sponsoring agency" would not cause plaintiffs injury in fact and thus, for this reason also, they have no standing.[163]

The long and involved case of *Brooks v. Volpe, supra* n. 147, tried for the most part in United States District Court for the Western District

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[161] 16 U.S.C. 661, *et seq.* (1970, as amended, Supp. 1975).

[162] 339 F.Supp. at 1378.

[163] *Id.* at 1378.

of Washington, again illustrates the need for careful attention to the standing question. In that case individuals who used a recreational area were held to have standing to maintain a Federal District Court action to halt construction of Interstate highway 90 (I-90) that allegedly would have interfered with that area. However, conservation organizations that have as their purpose the preservation of scenic, recreational, and wilderness values were held not to have standing to maintain an action to halt construction of the same highway.

With regard to the individual plaintiffs who claimed injury to recreational areas which they personally used, the Court found that they clearly had standing to sue. However, with regard to the environmental groups involved (the North Cascades Conservation Council, the Alpine Lakes Protection Society, and the Federation of Western Outdoor Clubs), the Court held that these groups did not have standing. In so doing, it said:

> The requirement that litigants have standing to sue is not met by an association, such as these, simply because the organization has as its purpose such laudable goals as preservation of the scenic, recreational, and wilderness values of areas such as Alpine Lakes.[164]

In so holding, the Court relied on *Alameda Conservation Ass'n v. California.*[165] Although this holding would seem to be, at least superficially, supported by the later *Sierra Club v. Morton, supra* n. 117, Supreme Court decision, the organizations involved might have achieved standing by more adroit pleading. Nevertheless, where such pleading is not in evidence, careful practitioners will be able to successfully argue that goals alone, without an allegation of some specific injury to an individual member, or the organization itself, will not support standing.

Some evaluation of the liberalization of the standing requirement established by *Sierra Club v. Morton, supra* n. 117, and *United States v. SCRAP, supra* n. 118, can be observed in the opinion of the United States Court of Appeals for the Eighth Circuit reversing an opinion by a United States District Court in *Coalition for the Environment v. Linclay Dev. Corp., supra* n. 142, (*on appeal, sub nom. Coalition for the Environment v. Volpe*). In that case, an environmental group alleged that its individual members would be harmed by the increased congestion, noise, and air pollution resulting from a proposed commercial and residential development project.

The United States District Court held that none of the plaintiffs had standing to prosecute the action because none could allege facts showing that they had suffered or would suffer injury, economic or otherwise. The trial court continued:

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[164] 329 F.Supp. at 119–20.

[165] 437 F.2d 1087 (9th Cir. 1971), *cert. den.* 402 U.S. 908, 28 L.Ed. 2d 649, 91 S.Ct. 1380 (1971).

> The only injury to plaintiff [sic] is the apparent fact that the actions of defendants are personally displeasing or distasteful to them due to the parties' differing philosophies of land use planning. The plaintiffs want open space, while the corporate defendants want a planned urban community. Judicial review does not extend under the APA to those who seek to do no more than vindicate their own value preferences through the judicial process.[166]

The Court of Appeals disagreed with the District Court's characterization of the plaintiffs' allegations of injury. Contained in the Court's rationale holding that the plaintiffs did have standing is an excellent discussion of the current status of the law relating to the standing issue in environmental cases. The Court of Appeals found that the present test for standing is two-fold: (1) whether the challenged action has caused plaintiff injury in fact, and(2) whether that injury was to an interest arguably within the zone of interest to be protected or regulated by the statutes that the agencies were claimed to have violated. In so stating the rule, the Court cited *United States v. SCRAP, supra* n. 118, and *Adolphus v. Zebelman.*[167]

The Court noted that the requirement of injury in fact assures complainants "have the personal stake and interest that impart the concrete adverseness required by Article III of the United States Constitution. Injury in fact is therefore a constitutional limitation on federal jurisdiction and unless such injury is appropriately alleged a case or controversy does not exist."

The Court also observed that injury in fact has long included economic harm. *Sierra Club v. Morton, supra* n. 117, unequivocally determined that those who claim injury of a noneconomic nature also may have standing to challenge governmental action. Under the Supreme Court opinion:

> Aesthetic and environmental well-being, like economic well-being, are important ingredients of the quality of life in our society, and the fact that particular environmental interests are shared by the many rather than the few does not make them less deserving of legal protection through the judicial process.[168]

However, the Supreme Court also said that standing under Article III requires more than an injury to a cognizable interest. It requires that the party seeking judicial review be himself among the injured.[169]

In *Coalition for the Environment v. Volpe, supra* n. 142, the Court said that Sierra Club's omissions in *Sierra Club v. Morton, supra* n. 117, are instructive as to the requisite allegations to establish standing. It is helpful here to repeat the Supreme Court's holding as it relates to this issue:

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[166] 347 F.Supp. at 637–638.

[167] 486 F.2d 1323 (8th Cir. 1973).

[168] 405 U.S. at 734, 31 L.Ed. 2d at 643, 92 S.Ct. at 1366.

[169] *Id.* at 734–35, 31 L.Ed. 2d at 643, 92 S.Ct. at 1366.

> The Sierra Club failed to allege that it or its members would be affected in any of their activities or pasttimes by the Disney development. Nowhere in the pleadings or affidavits did the Club state that its members use Mineral King for any purpose, much less than they use it in any way that would be significantly affected by the proposed actions of the respondents.[170]

Limited to the parties involved, and to the specific facts of that particular case, *Sierra Club v. Morton, supra* n. 117, amounts to little more than a ruling on a technical defect in the plaintiffs' pleadings.[171]

In support of this conclusion, it should be noted that on remand the trial court permitted the Sierra Club to amend its complaint and, further, the complaint withstood motions to dismiss.[172]

The *Coalition for the Environment* Court also discussed the Supreme Court's most recent pronouncements on standing in *United States v. SCRAP, supra* n. 118. Standing was granted in the *SCRAP* case because the Supreme Court found the plaintiffs had made allegations that went beyond the allegations made by Sierra Club in *Sierra Club v. Morton, supra* n. 117. They asserted specific uses of benefits, experienced by defined individual members of the organization, that would arguably be impaired by the challenged agency action.[173]

Applying both the *Sierra Club v. Morton, supra* n. 117, and the *United States v. SCRAP, supra* n. 118, rationales to *Coalition for the Environment v. Volpe, supra* n. 142, the United States Court of Appeals for the Eighth Circuit held that the plaintiffs' allegations of injury went beyond mere displeasure, and therefore, had met the dual test for standing.

Additional Limitations On Judicial Review

As is apparent from the foregoing section on "Standing," the Supreme Court has established the general criterion for standing in environmental cases under federal environmental statutes in *Sierra Club v. Morton, supra* n. 117, and *United States v. SCRAP, supra* n. 118. An honest assessment of the present law of standing to sue under the federal environmental statutes indicates that standing is rather readily achieved by a careful plaintiff. There are, however, several other problems akin to standing that a plaintiff in an environmental lawsuit under one of the federal environmental statutes may confront that could impede or prohibit access to a hearing before a federal court.

One such problem that may prohibit judicial review of otherwise legitimate claims under the federal environmental statutes is the equit-

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[170] *Id.* at 735, 31 L.Ed. 2d at 643, 92 S.Ct. at 1366.

[171] See Scott, *Standing in the Supreme Court—A Function Analysis,* 86 HARV. L. REV. 645, 667 (1973).

[172] Sierra Club v. Morton, 348 F.Supp. 219 (N.D. Cal. 1972).

[173] 412 U.S. at 685, 37 L.Ed. 2d at 268, 93 S.Ct. at 2415.

able doctrine of laches. Plaintiffs in a case relying on a federal environmental statute may wait so long to press their claim that fairness demands that their case be barred. In most cases, however, public policy favoring environmental statutes, and most particularly the National Environmental Policy Act, has outweighed other considerations. Notwithstanding this fact, the defense of laches has been successfully pleaded in a number of environmental cases, and it does represent one weapon in the defending lawyer's arsenal that should always be considered along with the defense of lack of standing.

Highway cases in which the laches defense was raised and discussed by the federal courts to some extent include *Barta v. Brinegar, supra* n. 143; *Centerview/Glen Avalon Homeowners Ass'n v. Brinegar;* [174] *City of Davis v. Volpe, supra* n. 144; *I-291 Why? Ass'n v. Burns;* [175] *James River and Kanawha Canal Parks, Inc. v. Richmond Metropolitan Auth., supra* n. 131; *Lathan v. Volpe;* [176] *Arlington Coalition on Transp. v. Volpe;* [177] *Clark v. Volpe;* [178] *Harrisburg Coalition Against Ruining the Environment v. Volpe;* [179] *Nolop v. Volpe, supra* n. 152; *Pennsylvania Environmental Council, Inc. v. Bartlett;* [180] and *Ward v. Ackroyd, supra* n. 132.

In most cases, public policy favoring environmental protection set forth in the environmental statutes has outweighed other considerations. This was the case in both *Pennsylvania Environmental Council v. Bartlett, supra* n. 180, and *Harrisburg Coalition v. Volpe, supra* n. 179. *Arlington Coalition on Transp. v. Volpe, supra* n. 177, supported the view that public policy prevents the more traditional operation of laches to bar tardy lawsuits in NEPA cases. In that case, the Court did not invoke laches because of "the public interest accorded ecology preservation by Congress."

In *Arlington Coalition,* the Court declined to invoke laches to bar plaintiffs' suit even though they waited for over a year to file suit. Some measure of the Fourth Circuit's reluctance to apply the doctrine of laches is evidenced by the fact that it found that the public interest in environmental protection outweighed any costs of altering or abandoning the proposed route and did so even though most of the right-of-way had been acquired; the county's planning for zoning, traffic control, and location of utilities had been based on the proposed route; and location of numerous businesses had been chosen in reliance on the proposed route.

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[174] 367 F.Supp. 633 (C.D. Cal. 1973).

[175] 372 F.Supp. 223 (D. Conn. 1974).

[176] 455 F.2d, 1111 (9th Cir. 1971), *on remand* 350 F.Supp. 262 (W.D. Wash. 1972).

[177] 458 F.2d 1323 (4th Cir. 1972), *rev'g* 332 F.Supp. 1218 (E.D. Va. 1971), *cert. den.* 409 U.S. 1000, 34 L.Ed. 2d 261, 93 S.Ct. 312 (1972).

[178] 342 F.Supp. 1324 (E.D. La. 1972), *aff'd per curiam* 461 F.2d 1266 (5th Cir. 1972).

[179] 330 F.Supp. 918 (M.D. Pa. 1971).

[180] 315 F.Supp. 238 (M.D. Pa. 1970), *aff'd* 454 F.2d 613 (3rd Cir. 1971).

Additional arguments favoring the use of laches to bar environmental actions *only in the most drastic cases* were set forth in *City of New York v. United States.*[181] In that lawsuit, the Court rejected a laches defense that plaintiffs had waited too long to file their complaint because the primary responsibility for carrying out the provisions of the National Environmental Policy Act and other federal environmental statutes is with the Federal Government. The failure of the Government to carry out its duties under these statutes is so serious a transgression, according to the Court in the *City of New York* opinion, that it should not go unheeded merely because of the lateness of a plaintiff's claim.

On the other hand, in a case similar to *Arlington Coalition on Transp. v. Volpe, supra* n. 177, the Fifth Circuit Court of Appeals barred a lawsuit on the basis of laches. In that case (*Clark v. Volpe, supra* n. 178) the Court focused on the fact that the highway project was 30 percent complete and noted that the purpose of the National Environmental Policy Act is not served by suits delayed until after the environment has been substantially altered and millions of dollars already spent on construction. The Court distinguished projects under construction from those in the planning stage. This distinction, between projects under construction and projects in the planning stage, is a fundamental one in considering laches as a defense. Those interested in considering the laches defense to a tardy lawsuit against highway construction should concentrate on those cases in which construction is already underway.

Clark v. Volpe, supra n. 178, should receive attention from those seeking to defend against lawsuits brought to bar further construction of highways on which a substantial portion of the work has been completed. In this case, the plaintiffs, six individuals and two nonprofit environmental corporations, brought a class action for injunctive relief seeking to delay, and ultimately to prevent, construction of a federal-aid highway known as I-610 through City Park in New Orleans. The plaintiffs claimed that the Department of Transportation and the Louisiana Department of Highways had violated the Department of Transportation Act, the Federal-Aid Highway Act, the National Environmental Policy Act, and various sections of Title 23. The Federal and State defendants raised the defense of laches.

The facts and chronology of the case are particularly instructive. The prospect of constructing a federal-aid highway through the city park first came to public attention in 1956. A public hearing was held in 1958 at which the merits of constructing a highway through City Park were debated. The defendants were able to demonstrate that the proposed construction of the Interstate highway through City Park had been a matter of considerable and extensive public discussion ever

[181] 337 F.Supp. 150 (E.D.N.Y. 1972).

since the 1958 hearing. Right-of-way purchases were undertaken by the Louisiana Department of Highways beginning in 1956. Design approval for the highway was given in 1962. Advertisement for bids for subsurface drainage work was accomplished in 1968, and, advertisement for bids for clearance of the right-of-way was made in mid-1970. Final approval of the I-610 federal-aid highway project was given by the Secretary of Transportation on May 25, 1971. Highway construction work had proceeded on the sector of State-owned land through City Park since July 19, 1971, and was continuing at the time plaintiffs filed their suit on February 24, 1972 to enjoin further construction.

The United States District Court for the Eastern District of Louisiana, in addressing the question of laches, asked two questions—Can laches apply? and, Does laches apply? The plaintiffs cited *Newman v. Piggie Park Enterprises, Inc.*,[182] in support of the contention that laches cannot apply to a suit brought by a private citizen asserting a public right. In the *Newman* case, plaintiffs were awarded attorneys fees on the theory that they were "private attorneys general" suing in protection of the public interest protected by Title II of the Civil Rights Act of 1964. In *Clark v. Volpe, supra* n. 178, plaintiffs calling themselves private attorneys general, claimed derivative sovereign immunity to the defense of laches. The District Court rejected that argument citing *Pennsylvania Environmental Council, Inc. v. Bartlett, supra* n. 180, and *Harrisburg Coalition v. Volpe, supra* n. 179, both of which held that laches should not apply in those cases, but that the doctrine can apply in some circumstances.

The District Court in *Clark v. Volpe, supra* n. 178, agreed that laches did constitute a viable defense in that case. It reasoned that Congress did not intend that a plaintiff should be permitted inexcusably to delay the filing of an injunctive suit to the prejudice of other parties and after the expenditure of millions of dollars of public funds.

Thus, the Court reached the question of whether laches did apply to the particular facts of *Clark v. Volpe, supra* n. 178. The Court noted that laches is determined in light of all the existing circumstances and requires that the delay be unreasonable and cause prejudice to the adversary. The Court cited *Pennsylvania Environmental Council, Inc. v. Bartlett, supra* n. 180, for that proposition. Further, the Court held that laches is not merely a question of time, but a question of diligence as well, citing *Willey v. United States.*[183] Recognizing that there is no certain period of time within which a plaintiff may reasonably delay before filing suit, the Court said that "reasonable" varies depending on the circumstances of each case and cited the rule set forth in *Burnett v. New York Central Railroad Co.*:[184]

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[182] 390 U.S. 400, 402, 19 L.Ed. 2d 1263, 1266, 88 S.Ct. 964, 966 (1968).

[183] 245 F.Supp. 669, 676 (E.D. Ill. 1965).

[184] 380 U.S. 424, 435, 13 L.Ed. 2d 941, 949, 85 S.Ct. 1050, 1058 (1965).

> Whether laches bars an action in a given case depends upon the circumstances of that case and "is a question primarily addressed to the discretion of the trial court." [185]

Observing that the doctrine of laches is an equitable one, the Court said that it should be applied only where it would be inequitable to permit the plaintiffs to proceed. In light of these principles of law, the Court held, in *Clark v. Volpe, supra* n. 178, that the equitable doctrine of laches should properly apply in that case. The Court was convinced that for a period of many years before commencement of construction of highway I-610 through City Park in New Orleans, the plaintiffs and members of the class which they claimed to represent were charged with knowledge that a highway was to be built through the park.

The Court did not mean to suggest by this that the plaintiffs could have filed suit before the effective dates of the statutes upon which they relied. The plaintiffs, logically, had not slept on their rights until such rights had come into existence. However, in viewing all of the evidence, it was the opinion of the Court that the plaintiffs had delayed unreasonably after acquisition of their statutory rights. The statutes upon which the plaintiffs based their suit had become effective in various stages from 1965 to 1970. Thus, on August 23, 1968, plaintiffs were entitled to claims that no public hearings were held to consider the environmental impact of the highway,[186] and also that the Secretary of Transportation had made no determinations as to prudent, feasible alternatives to the highway, or as to possible planning to minimize harm.[187] On January 1, 1970, plaintiffs were entitled to assert that no environmental impact statement had been prepared covering the project.[188]

The Court found that the plaintiffs could have filed suit within a reasonable time after the effective date of the various statutes and sought a court order directing that the responsible officials comply with the newly enacted legislation. Further, the Court held that had the plaintiffs so filed, their cause might have been considered before a single tree had fallen and before a single dollar of public money had been expended on highway construction.

This reasoning, had it not gone further, would have ignored the one effective argument against a precipitous application of the laches doctrine. That is, that the plaintiffs were entitled to rely on a presumption that public officials would act in accordance with law. However, the Court did deal with this problematic area in the application of laches.

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[185] *Id.* at 435, 13 L.Ed. 2d at 949, 85 S.Ct. at 1058, citing Gardner v. Panama R. Co., 342 U.S. 29, 30, 96 L.Ed. 31, 72 S.Ct. 12, 13, (1951).

[186] As required by 23 U.S.C. § 128 (1970).

[187] As required by 49 U.S.C. § 1653(f) (1970); 23 U.S.C. § 128 (1970).

[188] As required by 42 U.S.C. § 4332 (1970), the action-forcing procedural provisions of the National Environmental Policy Act.

The Secretary of Transportation's final approval of the I-610 project was not given until May 25, 1971. Up to that date, plaintiffs might have presumed that the Secretary would not approve the project without first reporting on the project's environmental impact. And indeed, the plaintiffs did claim that it was not until that date that they were on notice that approval was given, and it was not until that date that they had reason to suspect noncompliance. However, the Court, even when it accepted for the sake of argument that May 25, 1971, was the crucial date in determining laches, found that the plaintiffs' action was barred. In so doing, the plaintiffs had in some sense contributed to the ultimate failure of their argument.

The Court recognized the plaintiffs, as indeed, the plaintiffs had urged them to do, as persons vitally concerned with the affairs of City Park and persons who visited the park frequently. It was, therefore, inconceivable to the Court that the plaintiffs, charged with the knowledge in approximately 15 years of publicity concerning the highway through the park, were not on notice as of May 25, 1971, that actual construction would soon proceed unless legal action was promptly initiated. Nevertheless, the plaintiffs stood idly by during the remaining months as bulldozers and chain saws stripped and leveled the land and as vast sums of public money were expended on highway construction. The Court found the very nature of the environmental group bringing the suit demanded the conclusion that they were well aware of their rights, if not before May 25, 1971, at least on that date.

The *Clark v. Volpe, supra* n. 178, Court held that under the circumstances of that particular case, the plaintiffs' delay in filing suit, during which time the very acts of which they complained were being performed, was unreasonable, and that defendants and intervenors would be substantially prejudiced if plaintiffs were allowed injunctive relief.

In all cases dealing with the defense of laches, the court must balance a number of factors. Among the factors to be balanced are the importance of preservation and protection of the environment and the public interest therein, the public need for highways as a means of transportation and as a significant economic factor in our culture, and the expenditure of massive amounts of public funds on challenged highway projects.

In *Clark v. Volpe, supra* n. 178, the Court reached the conclusion that the federal environmental statutes and the purposes for which they were enacted are not served when a lawsuit designed to enforce their provisions is delayed until after the environment is already substantially altered. In the Court's opinion, it was logical to conclude that Congress did not intend that plaintiffs should delay until after substantial alteration of the environment to demand studies as to the consequences of that alteration.

An additional argument that should be proffered by anyone raising the defense of laches in highway cases is the balancing that every court must, or should, do between the environmental goals and objectives set

forth in the federal environmental statutes and the social and economic objectives of the federal-aid highway program. In *Clark v. Volpe, supra* n. 178, the Court recognized that Congress, in addition to the environmental goals set forth in the environmental statutes, had also emphasized the urgency of completing the national Interstate highway system. Indeed, Congress has declared it to be in the national interest to accelerate construction of highways within the system. Citing the congressional declaration of intent in Section 101 of Title 23, the Court pointed to the following language to support this reasoning:

> It is hereby declared to be in the national interest to accelerate the construction of the Federal-aid highway systems, including the National System of Interstate and Defense Highways, since many of such highways, or portions thereof, are in fact inadequate to meet the needs of local and interstate commerce, for the national and civil defense.
>
> It is hereby declared that the prompt and early completion of the National System of Interstate and Defense Highways, so named because of its primary importance to the national defense and hereinafter referred to as the "Interstate System," is essential to the national interest and is one of the most important objectives of this Act.[189]

The defense of laches should of necessity be supported by substantial economic facts calculated to demonstrate prejudice to the highway authorities, and, not incidentally, to the public, which would result should plaintiffs be permitted to bring their lawsuit. In *Road Review League v. Boyd*[190] the United States District Court for the Southern District of New York stated:

> It does not follow, however, that a court of equity may close its eyes to the position in which the State now finds itself. The State has obtained a commitment from the Federal Government for many millions of dollars for the construction of this road. In reliance on this commitment, it has entered into a construction contract for over $26,000,000. The contractor has already spent or committed almost $9,000,000 under the contract for labor, materials, and equipment.
>
> The State has spent over $1,000,000 in engineering the Chestnut Ridge route. It has acquired 92 rights-of-way along that route. It has made offers to property owners totaling over $2,000,000, and has already reached agreement with property owners for rights-of-way on claims aggregating over $200,000. To enjoin defendants at this stage from carrying out the commitment of the Federal Government to provide 90 percent of the necessary funds for this project would create a chaotic situation. Plaintiffs argue that the damage to the State could be mitigated, that the rights-of-way which the State has acquired could be sold or returned to their former owners, that the course of the road could be changed without undue hardship. These arguments do not seem to me to be realistic. Some loss, as for example, engineering expenses,

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[189] 23 U.S.C. § 101(b) (1970, as amended Supp. 1975).

[190] 270 F.Supp. 650 (S.D.N.Y. 1967).

> would obviously be irretrievable. In all likelihood, the ultimate loss would amount to much more. Substantial delay, perhaps amounting to over two years, would be encountered before a new route could be surveyed and engineered.
>
> The Highway Administrator's decision was made on April 6, 1966. Plaintiffs could have sued then. Subsequent events have not materially affected that decision. This action was not begun until February 3, 1967. In the meantime, both federal and state authorities have changed their position in reliance upon that decision. This comes perilously close to laches.[191]

The degree of prejudice to defendants and to the public as an element of support for a laches defense has not always received the consideration it did in *Clark v. Volpe, supra* n. 178, however. In *James River and Kanawha Canal Parks, Inc. v. Richmond Metropolitan Auth., supra* n. 131, laches was found not to bar a suit challenging construction of a highway across the James River. The suit was filed in 1973 following the Richmond Metropolitan Authority's decision not to shift a highway route to preserve a canal site. The highway route was proposed initially in 1966 and plaintiffs were aware of the proposed route since that time. In addition, and most importantly, the Authority had purchased about $15 million of rights-of-way based on the decision to use the proposed cross-canal route. It also had sponsored a $51,300,000 bond issue premised on the decision to use that route. Notwithstanding these high expenditures of public funds, as well as the plaintiffs' long-standing knowledge of the proposed route, the Court said that to sustain their defense of laches the defendants had to prove "an unconscionable delay by the plaintiffs in bringing the action which has resulted in prejudice to them." Again, the Court felt that the special nature of environmental statutes and the special nature of the interests protected therein deserved particularized, special consideration.

> The defendants' burden is especially difficult to bear in this case, since the claims are based upon statutory provisions which seek to preserve the environment.[192]

The laches test, as enunciated by the Court in *James River,* was whether the cost of altering or abandoning the proposed route would *certainly* outweigh the benefits that might accrue therefrom to the general public. Balancing all the equities involved in applying the test set out previously, the Court found that laches did not apply as a defense to the plaintiffs' lawsuit.

Another case in which the Court granted special significance to protection of the environment was *Ward v. Ackroyd, supra* n. 132. In that case, the Court held that laches did not bar suit to enjoin a federal-aid highway project, construction of which had already cost the Federal Government $16 million even though plaintiffs did not bring their suit

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[191] *Id.* at 664.

[192] 359 F.Supp. at 627.

until 22 months after they had discovered the possibility of injury. Applying the previously stated test, the Court held that construction had not progressed to a point where the cost of altering the route would outweigh the benefits that might accrue to the public therefrom.

On the other hand, in *Centerview/Glen Avalon Homeowner's Ass'n v. Brinegar, supra* n. 174, the United States District Court for the Central District of California held that laches barred some homeowners' 1973 Federal District Court suit under the National Environmental Policy Act and the Federal-Aid Highway Act to enjoin construction of an ongoing federal-aid highway project of which the homeowners had notice several years before the effective date of either act and for which substantial expenditures had already been made.

Those interested in the arguments that can be made by plaintiffs in support of the principle which would call for the superiority of environmental statutes and the rights guaranteed therein over any countermanding public policy would do well to read Judge Blumenfeld's opinion in *I-291 Why? Ass'n v. Burns, supra* n. 175. In an opinion much too long to repeat here even in part, Judge Blumenfeld sets forth all the factors which mitigate towards giving environmental considerations more weight than economic or other considerations.

In conclusion, it is fair to say that judicial interpretation of the equitable doctrine of laches as a defense in environmental lawsuits concerning highways has taken two seriously divergent points of view. On the one hand the majority of cases seem to follow the rationale of *I-291 Why? Ass'n v. Burns, supra* n. 175, and *Arlington Coalition on Transp. v. Volpe, supra* n. 177. In balancing the various factors necessary in making an equitable decision on the question of a laches defense, those decisions and their progeny would grant substantially more weight to the protection of the environment as enunciated in federal environmental statutes than to other factors. On the other hand, however, the line of cases following *Clark v. Volpe, supra* n. 178, seem to stand for the view that the federal environmental statutes are not well served by suits delayed until after the environment has been substantially altered, and, further, that the expenditure of millions of dollars of public funds, as well as the national interests set forth in the federal highway legislation, should be given at least equal consideration in the balancing of equities. The conflict between the judicial approaches taken in these conflicting cases does not lend itself to resolution.

In addition to losing the right to judicial review by waiting too long to press rights granted by federal environmental statutes, a plaintiff's rights may be lost if he has failed to exhaust remedies available to him in the administrative process. Failure to exhaust administrative remedies is an old administrative law problem and need not be discussed in great detail here.

In cases where the defense of "failure to exhaust administrative remedies" is successfully brought, it might be said that the judicial review sought was pursued too early. The federal courts have acted on a

number of environmental law cases involving the exhaustion of administrative remedies argument. Unfortunately, none of these cases involve highways. However, the same principles would seem to apply.

Cases dealing with the National Environmental Policy Act and the failure to exhaust administrative remedies are *Businessmen for the Public Interest v. Resor,*[193] *Lloyd Harbor Study Group, Inc. v. Seaborg,*[194] and *Sherry v. Algonquin Gas Transmission Co.*[195] The general rule accepted by the federal courts in cases presenting this question and the reasons for it are set forth in *Sherry v. Algonquin Gas Transmission Co., supra* n. 195. In this case, the plaintiff asked the Court to review the initial decision of a Federal Power Commission hearing examiner on a proposed synthetic gas refinery. The Court refused, saying that the plaintiffs' suit was premature. "Until proceedings are complete and until the agency has acted, judicial review is unwise, and unauthorized by statutes or judicial decision." It is not inconceivable that the defense of failure to exhaust administrative remedies might readily be applied to highway litigation.

In addition to losing the right to judicial review by waiting too long to press statutory rights (laches) or by filing the lawsuit too soon (failure to exhaust administrative remedies), it also is possible to lose one's right to judicial review by failing to participate in administrative hearings dealing with the environmental effects of a particular project of the Federal Government. In a few cases, courts have held that plaintiffs were estopped from pursuing claims that they should have raised previously at administrative hearings.

In *Nat'l Forest Preservation Group v. Butz,*[196] the Court refused to enjoin the forest service from exchanging land to facilitate the recreational development of some Montana land on the basis of plaintiffs' claims that the forest service had failed to obtain EPA's comments on its impact statement covering the exchange. The Court said that the plaintiff had failed to raise the issue in forest service hearings on the land exchange, and therefore, could not rely on the absence of EPA comments to support its request for an injunction in the later judicial proceedings.

In *City of New York v. United States, supra* n. 181, the Court refused to overturn an Interstate Commerce Commission (ICC) railway abandonment decision, at least in part, because the plaintiffs waited until the judicial stage to raise their environmental objections rather than bringing them out at ICC hearings on the abandonment order.

It is not too difficult to conceive of many situations in which plaintiffs may have failed to raise environmental considerations during

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[193] 3 ERC 1216 (N.D. Ill. 1971).

[194] 2 ERC 1380; 1 ELR 20188 (E.D.N.Y. 1971).

[195] 4 ERC 1713, 3 ELR 20227 (D. Mass. 1972).

[196] 343 F.Supp. 696 (D. Mont. 1972), *rev'd* 485 F.2d 408 (9th Cir. 1973).

the numerous hearings held on each federal-aid highway project. In such circumstances, the defense of estoppel might readily apply. It is interesting to note, however, that the defense has not been at issue in any of the numerous highway cases to date.

Sovereign Immunity

One final additional limitation on judicial review in environmental highway cases is sovereign immunity. Sovereign immunity is based on the Anglo-American jurisprudential axiom that a government may not be sued without its consent. Most commentators believe that the theory is anachronistic and poses few obstacles to NEPA suits against administrative agencies.[197] This has been the general view of the federal courts with regard to suits brought under the federal environmental statutes against federal officials.

The defense of sovereign immunity was frequently put forth by federal defendants in many early National Environmental Policy Act cases. The general rule, however, is that the defense does not lie. This was the holding of the courts in *Environmental Defense Fund v. Corps of Eng'rs*[198] (Gillham Dam), *Environmental Defense Funds v. Corps of Eng'rs*[199] (Cross-Florida Barge Canal), *Kalur v. Resor,*[200] and *Ragland v. Mueller, supra* n. 153.

The defense, when raised by State agencies or State officials named as defendants in suits under federal environmental statutes, presents a more vexing problem. Such defendants have, on occasion, successfully raised the defense of sovereign immunity. At the United States District Court level in *Pennsylvania Environmental Council, Inc. v. Bartlett, supra* n. 180, the Court held that a State official could not be sued because the suit was, in fact, a suit against the Commonwealth of Pennsylvania which had not consented to the suit or waived its immunity.

There are a number of interesting highway cases in which the defense of sovereign immunity has been raised. Four cases of particular interest are *Named Individual Members of the San Antonio Conservation Soc'y v. Texas Highway Dep't*;[201] *Arlington Coalition on Transp. v. Volpe, supra* n. 177; *Ely v. Velde*;[202] and *Ward v. Ackroyd, supra* n. 132. In addition to these cases, other highway cases in which sovereign immunity is discussed are: *La Raza Unida v. Volpe;*[203] *James River*

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[197] See ANDERSON, *supra* note 154, at 122–25.

[198] 325 F.Supp. 728 (E.D. Ark. 1970), *injunction vacated* 342 F.Supp. 1211 (E.D. Ark. 1972), *aff'd* 470 F.2d 289 (8th Cir. 1972), *cert. den.*, 412 U.S. 931, 37 L.Ed. 2d 160, 93 S.Ct. 2749 (1973).

[199] 324 F.Supp. 878 (D.D.C. 1971).

[200] 335 F.Supp. 1 (D.D.C. 1971).

[201] 400 U.S. 968, 27 L.Ed. 2d 388, 91 S.Ct. 368 (1970), *petition for cert. before judgment on merits,* 5th Cir., *denied (with dissenting opinion),* 446 F.2d 1013 (5th Cir. 1971), *reversing and remanding district court decision with directions.*

[202] 321 F.Supp. 1088 (E.D. Va. 1971), *aff'd in part and rev'd in part* 451 F.2d 1130 (4th Cir. 1971), *on remand,* 363 F. Supp. 277 (E.D. Va. 1973).

[203] 337 F.Supp. 221 (N.D. Cal. 1971),

and Kanawha Canal Parks, Inc. v. Richmond Metropolitan Auth., supra n. 131; *Civic Improvement Comm. v. Volpe;* [204] *Concerned Citizens of Marlboro v. Volpe;* [205] *Harrisburg Coalition Against Ruining the Environment v. Volpe, supra* n. 179; *Knight v. New York;* [206] *Morningside-Lenox Park Ass'n v. Volpe, supra* n. 150; *Ragland v. Mueller, supra* n. 153; *Road Review League v. Boyd, supra* n. 190; *Sierra Club v. Volpe;* [207] and *Thompson v. Fugate.*[208]

One rationale successfully urged by plaintiffs in actions against State highway authorities participating in federal-aid highway projects is that the State loses its right to assert a sovereign immunity defense once it becomes the Federal Government's partner in the project.

In *Ward v. Ackroyd, supra* n. 132, the Court found that the State had waived its sovereign immunity by accepting federal funds. The Court placed controlling emphasis on the distinction between suits for damages and those for injunctive relief:

> In the latter case I believe that the defense of sovereign immunity should yield more readily where the issue sought to be litigated is the compliance or noncompliance by the state with the preconditions set forth in a federal statute or regulation for the enjoyment by the state of federal aid for the specific project for which the state has applied for the aid. In seeking the federal aid the state has necessarily agreed to be bound by the terms of the federal statutes and regulations which govern the availability and disposition of the federal aid.[209]

Although the question of sovereign immunity was not specifically raised in *Arlington Coalition,* the rationale of the Fourth Circuit's view of *pendent jurisdiction* was essentially the same as that applied by the Court in *Ward v. Ackroyd, supra* n. 132, to sovereign immunity.

The view that State participation in federal projects causes that State to forfeit its protection based on sovereign immunity was again presented in *La Raza Unida v. Volpe, supra* n. 203.

> In the present case, however, there is a question as to (1) the constitutionality of the state action, and (2) whether the officials involved have complied with the state and federal statutes. Under *Ex Parte Young,* . . . these two situations are generally considered exceptions to the sovereign immunity doctrine. A state official who exceeds his authority or who violates the Constitution is not covered by the protective mantle of sovereign immunity.[210]

In *James River and Kanawha Canal Parks, Inc. v. Richmond Metropolitan Auth., supra* n. 131, the Court found that the Richmond Metropolitan Authority could not claim a defense of sovereign immunity as

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aff'd 488 F.2d 559 (9th Cir. 1973), *cert. den.* 409 U.S. 890, 34 L.Ed. 2d 147, 93 S.Ct. 105 (1972).

[204] 459 F.2d 957 (4th Cir. 1972).

[205] 459 F.2d 332 (3d Cir. 1972).

[206] 443 F.2d 415 (2d Cir. 1971).

[207] 351 F.Supp. 1002 (N.D. Cal. 1972).

[208] 347 F.Supp. 120 (E.D. Va. 1972).

[209] 344 F.Supp. at 1215.

[210] 337 F.Supp. at 225.

a political subdivision of the public body corporate and the politic of the Commonwealth of Virginia for two reasons. First, the Court held that as a political subdivision, the RMA enjoyed the same status as a municipality and was not, therefore, within the purview of the Eleventh Amendment to the Constitution, citing *Lincoln County v. Luning.*[211] Secondly, the Court held that the allegations by plaintiffs that the RMA purposefully availed itself of the benefits of federal laws are crucial. This would constitute a waiver of sovereign immunity as to the requirements of the federal statutes involved. *Ex Parte Young,*[212] *Thompson v. Fugate, supra* n. 208, and *La Raza Unida v. Volpe, supra* n. 203.

Another exception to the sovereign immunity doctrine is that the defense of sovereign immunity will not shield unconstitutional actions. Where the plaintiff alleges that State officials acted unconstitutionally, the defense of sovereign immunity will necessarily fall.[213]

The Court in *Thompson v. Fugate, supra* n. 208, seems to have best summed up the prevailing law on the question of sovereign immunity as a defense by a State highway authority or State highway authority official against a plaintiff's environmental action.

> The Commissioner has moved to be dismissed as a party defendant on the grounds of sovereign immunity under the eleventh amendment to the Constitution. That contention must fail, for this is not a suit against the State (sic) of Virginia, but one against its Commissioner of the Department of Highways to compel him and others to comply with the requisite federal laws in the building of the highway involved in this case. See also *Ely v. Velde,* 321 F.Supp. 1088 (E.D.Va. 1971); *Citizens Committee for Hudson Valley v. Volpe,* D.C., 302 F.Supp. 1083, 425 F.2d 97 (2 Cir. 1970); see *Arlington Coalition on Transp. v. Volpe,* D.C. 332 F.Supp. 1218, rev'd on other grounds, 458 F.2d 1323 (4 Cir 1972).

In conclusion, it should be said that the defense of sovereign immunity is available only to State, and not to Federal, officials when faced with a lawsuit alleging violation of federal environmental statutes. With rare exceptions, the defense is not available to the State highway authority or State highway authority officials for two reasons. First, the subdivision or authority of the State does not enjoy protection of the State's sovereign immunity, and, second, once Federal–State partnership is shown, the State has waived its right to defend against violation of federal statutes with sovereign immunity. Additionally, the defense, even in the odd case where it might be successfully employed, does not stop the lawsuit, but only removes the State defendant. The plaintiff's case in chief is affected very little as a result.

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[211] 133 U.S. 529, 33 L.Ed. 766, 10 S.Ct. 363 (1890).

[212] 209 U.S. 123, 52 L.Ed. 714, 28 S.Ct. 441 (1908).

[213] 337 F.Supp. at 225.

APPLICABILITY OF PROCEDURAL REQUIREMENTS OF FEDERAL ENVIRONMENTAL STATUTES TO SPECIFIC HIGHWAY PROJECTS

The second line of defense to environmental lawsuits, after standing and the other limitations on judicial review, is usually a challenge to the applicability of the environmental statutes alleged to have been violated by the specific project in question.

Because there is little question that the Federal-Aid Highway Act and the Department of Transportation Act apply to all federal-aid highways, the vast majority of cases on the applicability of federal environmental statutes to specific highway projects are cases involving the National Environmental Policy Act. In the future it is expected that some cases will involve the applicability of the Clean Air Act; however, at present, the defense of applicability of statute is limited to NEPA cases.

The National Environmental Policy Act was discussed at great length in the introduction to this paper, and there is no need to repeat that discussion here. However, it is important to once again be reminded of the principles set forth in NEPA and of the fact that it is a particularly attractive statute from the point of view of plaintiffs challenging federal action that significantly affects the environment.

The defense of nonapplicability is frequently raised in NEPA suits. There is a substantial body of case law on the question of NEPA's applicability to many specific factual situations. The criteria for applicability of the Act are well established by judicial precedent, and the criteria for the applicability to any given project are established by Section 102 of the Act.

Section 102 requires a *detailed environmental impact statement to be prepared on every recommendation and report on proposals for legislation and other major federal actions significantly affecting the quality of the human environment.* At present, almost every case in which the question of applicability of the statute is raised can be resolved through interpretation of this language and application of it to the specific facts of any individual case. In addition, the applicability of the National Environmental Policy Act can also be affected by a retroactivity defense. That is, NEPA has been held not to apply retroactively. However, courts have diluted this holding substantially by holding that projects begun prior to NEPA's enactment but which are still ongoing in the sense that the portion of the project which remains to be completed will significantly affect the human environment are subject to the provisions of NEPA.

At present, there are no judicial decisions directly involving application of Section 102 to legislative proposals. On the other hand, there have been many decisions on the kinds of federal actions requiring an environmental impact statement.

Interpretation of the phrase "major federal actions significantly affecting the human environment" involves mixed questions of law and

fact. Most judicial opinions on NEPA have decided that the challenged actions were *federal, major,* and would have a *significant effect* on the human environment. Few of the decisions discuss in detail the criteria used to reach this determination. It is not clear from the decisions whether the judiciary has treated the phrase as having created one, two, or three tests.

Because it seems logical that the act should apply to an action only if it is *federal, major,* and *significantly affects* the environment, the phrase will, for the purposes of this paper, be treated as creating three distinct tests. It should be understood, however, that many courts have run the three criteria together to form a single test and any effort to organize a discussion of the phrase into distinct categories must suffer some artificiality.

With regard to the requirement that the action be "federal" before NEPA applies, the courts generally have considered even the slightest federal connection with the action to be sufficient. This is borne out by the small number of cases that have been dismissed because the proposed action was found not to be a "federal" action. There have been 12 such cases, 5 of which were highway cases.

Significant decisions involving federal-aid highway projects and the applicability of NEPA as tested by the federal action criteria are: *Thompson v. Fugate, supra* n. 208; *Lathan v. Volpe, supra* n. 176; *La Raza Unida v. Volpe, supra* n. 203; *Sierra Club v. Volpe, supra* n. 207; *San Antonio Conservation Soc'y v. Texas Highway Dep't, supra* n. 201; *Arlington Coalition on Transp. v. Volpe, supra* n. 177; *James River and Kanawha Canal Parks, Inc. v. Richmond Metropolitan Auth., supra* n. 131; *Citizens for Balanced Environment and Transp., Inc. v. Volpe;* [214] *Indian Lookout Alliance v. Volpe;* [215] *City of Highland Park v. Train;* [216] *Conservation Soc'y of Southern Vermont, Inc. v. Secretary;* [217] *I-291 Why? Ass'n v. Burns, supra* n. 175; *Movement Against Destruction v. Volpe;* [218] and *Civic Improvement Comm. v. Volpe, supra* n. 204.

Nonhighway Cases

The nonhighway cases in which the courts have declined to find that a particular action was a federal action within the meaning of NEPA were *Kitchen v. Federal Com. Comm'n,*[219] *Ely v. Velde, supra* n. 202, *Davis v. Morton* [220] (later reversed), *City of Boston v. Volpe;* [221] *Trans-*

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[214] 376 F.Supp. 806 (D. Conn. 1974).

[215] 345 F.Supp. 1167 (S.D. Iowa 1972), *aff'd* 484 F.2d 11 (8th Cir. 1973).

[216] 374 F.Supp. 758 (N.D. Ill. 1974).

[217] 343 F.Supp. 761 (D. Vt. 1972), *injunction cont'd,* 362 F.Supp. 627 (D. Vt. 1973).

[218] 361 F.Supp. 1360 (D. Md. 1973), *aff'd per curiam* 500 F.2d 29 (4th Cir. 1974).

[219] 464 F.2d 801 (D.C. Cir. 1972).

[220] 335 F.Supp. 1258 (D. N.Mex. 1971), *rev'd* 469 F.2d 593 (10th Cir. 1972).

[221] 464 F.2d 254 (1st Cir. 1972).

continental Gas Pipe Line Corp. v. Hackensack Meadowlands Dev. Corp.; [222] *Julis v. City of Cedar Rapids;* [223] and *Saipan by and through Guerrero v. United States Dep't of Interior.*[224]

It should be remembered that because of the mixing of the three tests by most courts, the question frequently involved in these cases was not whether there was any federal involvement at all, but whether an action was "sufficiently federal" for NEPA to apply. Thus, the question becomes one of measuring the necessary degree of federal involvement to render a particular project federal in nature for the purposes of NEPA.

In *Kitchen v. Federal Communications Comm'n, supra* n. 219, a citizens groups tried to apply NEPA to construction of a telephone exchange building that Bell Telephone Company of Pennsylvania proposed to construct in their neighborhood. The group claimed that construction of the building required approval under the Communications Act of 1934, and, therefore, the challenged action was sufficiently federal for NEPA to apply. The Court disagreed, finding that the Act specifically excludes Federal Communications Commission approval of telephone exchange facilities.

Cases where federal money is to be used present much more difficult questions as can be seen from the aftermath of *Ely v. Velde, supra* n. 202. In this case, the United States District Court for the Eastern District of Virginia determined that NEPA did not apply to a block grant by the Law Enforcement Assistance Administration (LEAA), part of which was to help pay for construction of a prison medical facility. The Court based its decision on its finding that the Organized Crime Control and Safe Streets Act overrode NEPA. The Court of Appeals, however, reversed the lower court's ruling and held that the Organized Crime Act did not preclude NEPA review. The Court of Appeals further found that the State's plans to finance 20 percent of its project with LEAA funds was sufficient to make the project federal for the purposes of NEPA. In this connection, the Court relied on LEAA's role in promoting and planning the proposed facility.

Virginia retaliated by withdrawing its request for LEAA funds for the project. The District Court subsequently found that NEPA did not require preparation of an environmental impact statement covering the medical center when the only federal contact was LEAA's approval of Virginia's federal funding request that was subsequently withdrawn. The important lesson of *Ely* does not lie so much in the final result as in the decision of the United States Court of Appeals for the Fourth Circuit. That Court's "over-all involvement" test implies rather strongly that NEPA will apply to projects funded, in whole or in part,

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[222] 464 F.2d 1358 (3rd Cir. 1972), *cert. den.,* 409 U.S. 1118, 34 L.Ed. 2d 701, 93 S.Ct. 909 (1973).

[223] 349 F.Supp. 88 (N.D. Iowa, 1972).

[224] 356 F.Supp. 645 (D. Hawaii 1973).

by the Federal Government through block grants or revenue sharing, if the federal agency retains some promotional or planning responsibilities.

A case defining the marginal limits of the term "federal action" was *Julis v. City of Cedar Rapids, supra* n. 223. Cedar Rapids undertook a street construction project. In reality, the project involved no more than an improvement of existing roadways. No rights-of-way or land acquisition of any kind were involved. The project was partly financed by federal funds. Notwithstanding federal funding, the Court held that the project was not a major federal action significantly affecting the human environment. Unfortunately, although the Court appears to base its finding on the fact that the action was not sufficiently federal to warrant application of NEPA, the case also bears the interpretation that the Court decided as it did either because the action was not "major" or was not one which "significantly affected the environment."

Because of the massive amounts of federal money involved in federal-aid highway projects, it must be assumed that the "federal" action criteria will be easily met by most plaintiffs challenging any substantial federal-aid highway project. For this reason, it is interesting to discuss some of the cases in which the courts have held that highway projects were not sufficiently "federal" to warrant application of NEPA.

In *Northeast Area Welfare Rights Organization v. Volpe,*[225] the Court declined to hold that NEPA applied, because at the time the lawsuit was filed, the highway project was proceeding with State funding only. The Court found that federal financial assistance had not as yet been contemplated. The fact that the highway would inevitably connect with federally funded roads, and that it was proposed by a federally funded transportation study, was not enough, in the court's mind, to change its opinion that the project was a nonfederal enterprise.

In *Indian Lookout Alliance v. Volpe, supra* n. 215, a similar holding is found. The proposed project was Iowa's statewide 1900-mile highway system, including a specific 270-mile segment. The State and Federal authorities had already conceded that segments of the system should be covered by impact statements, and a statement had been prepared for one segment for which final federal approval had been sought.

The Court decided that plans for the entire system were "tentative" for many years in the future. Federal money had not yet been involved, or even requested. As such, the plan was considered too tentative to be considered a federal action by the Court. The Court reasoned that it would not be possible to prepare an environmental impact statement on such indefinite proposals.

Bradford Township v. Illinois State Toll Highway Authority,[226] and *Civic Improvement Comm. v. Volpe, supra* n. 204, reached results simi-

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[225] 2 ERC 1704 (E.D. Wash. 1971).

[226] 463 F.2d 537 (7th Cir. 1972).

lar to those in *Indian Lookout Alliance* and *Northeast Area Welfare Rights.* In *Civic Improvement Comm.,* the Court conditioned its finding on the failure of the plaintiff to show *the eventuality* of federal funding. If the plaintiff could do so, then the proposed highway in that case would, in the view of the Court, be a "federal" action.

Comforting as these holdings may be to those faced with the responsibility for defending against plaintiffs' lawsuits seeking to enjoin highway projects, the reasoning in these cases suggests a short-sightedness that most courts have avoided in highway cases. In these cases, the fact that the Federal Government would be heavily involved financially and in the planning process in the foreseeable future was unavoidable. In light of the objective of NEPA to involve planning agencies in the impact statement process at the earliest possible time, and in light of the many cases granting that objective a preferred position, these cases seem to be rather shaky precedent. This is particularly true when it can be said that federal involvement in the project is readily foreseeable, but not an actual fact at the time of the suit. As such, the cases present questions on the timing of NEPA applicability rather than on the ultimate applicability of the statute.

There are a series of better-reasoned opinions on the applicability of NEPA to State highway activities where federal funding is an eventual certainty. Among these cases are *Thompson v. Fugate, supra* n. 208; *Lathan v. Volpe, supra* n. 176; *La Raza Unida v. Volpe, supra* n. 203; *Sierra Club v. Volpe, supra* n. 207; *Named Individual Members of the San Antonio Conservation Soc'y v. Texas Highway Dep't, supra* n. 201; and *Arlington Coalition on Transp. v. Volpe, supra* n. 177.

In these cases, the courts determined that the projects were federal at a stage when the federal role was relatively slight in order to ensure that the impact statement process was begun early. There have been only about a dozen cases in which the courts have held that a challenged action was not a federal action within the meaning of NEPA; this indicates the broad interpretation the courts have been willing to accord the term "federal action." So overwhelming are the cases in this respect, that it is safe to predict that where the Federal Government is involved in a project in any way, no matter how slight its involvement, or no matter that the involvement is for the most part in the future, it is likely the project will be considered a federal action within the meaning of NEPA by the federal courts. As has been indicated, most federal-aid highway projects, because of the involvement of the Federal Government in planning and its heavy financial commitment, are simply not supportive of the argument that NEPA does not apply because the project is not sufficiently federal.

Major Actions and Significant Effects

It is much more difficult to separate "major" actions from "action significantly affecting the human environment" than it is to separate federal actions from other criteria. At least one writer raises the ques-

tion of whether "major action significantly affecting the human environment" represents one test or two.[227]

Logically, it is possible for a federal action to be a major action, but not one which significantly affects the human environment. Likewise, it is presumably possible for an action of the Federal Government to significantly affect the environment, but not to be a major action. This last possibility seems less likely than the first, and, more likely than not, if the action had a significant effect on the environment, it would be considered major.

As was the case with the question of whether an action is federal, there has been little controversy over whether a proposed federal action is a "major action significantly affecting the human environment." The courts have construed the terms broadly, and have ruled out the applicability of NEPA on these grounds only in a few cases.

Once again it is significant to note that highway projects are unlikely, once deemed to be federal, to be considered of so little significance as to be minor, or to be considered of so little significance as to not affect the human environment. Thus, although it is important that counsel defending against an environmental suit evaluate the facts of his case to determine whether the applicability of NEPA can be challenged on the basis of either of these criteria, it is unlikely that these efforts will produce satisfying results in many cases.

Once again, it is more instructive to review those cases which represent the exception rather than the rule, or in other words, those cases in which the courts have held that NEPA does not apply because a proposed federal action was not major, or did not "significantly affect" the environment within the meaning of NEPA.

In *Citizens Organized to Defend the Environment, Inc. v. Volpe*,[228] a Federal District Court attempted to provide judicial definitions for the terms "major" and "significantly affecting the quality of the human environment." A "major federal action," the Court said, "is one that requires substantial planning, time, resources, or expenditure." [229] The Court added that "clearly the NEPA contemplates some federal actions which are minor, or have so little environmental impact, as to fall outside its scope." [230]

With regard to "significant effects," the Court said that "a federal action 'significantly affecting the quality of the human environment' is one that has an important or meaningful effect, directly or indirectly, upon any of the many facets of man's environment." On the subject of "significant effects," the Court went beyond its original definition by stating that "the phrase must be broadly construed to give effect to the purposes of the NEPA. A ripple begun in one small corner of an

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[227] See ANDERSON, *supra* note 154, at 89.
[228] 352 F.Supp. 520 (S.D. Ohio 1972).
[229] *Id.* at 540.
[230] *Id.* at 540.

environment may become a wave threatening the quality of the total environment. Although the thread may appear fragile, if the actual environmental impact is significant, is must be considered." [231]

Applying its definitions to the Secretary of Transportation's approval of specifications governing a mining company's transfer of a large strip mining machine across a federal-aid highway, the Court determined that the action was not a major federal action and that it would not have a significant effect on the environment.

In *Hanly v. Kleindienst,*[232] a United States Court of Appeals recognized the difficulty inherent in interpreting these basically "amorphous terms." In deciding whether a major federal action will significantly affect the human environment, the Court said that an agency should normally be required to review the proposed action in light of at least two relevant factors: first, "the extent to which the action will cause adverse environmental effects in excess of those created by existing uses in the area affected by it," and, second, "the absolute quantitative adverse environmental effects of the action itself, including the cumulative harm that results from its contribution to existing adverse conditions or uses in the affected area." [233]

None of these so-called tests is useful. At best the process of determining the applicability of the terms has become a question for each court to determine in its own way as best it can. Generally, the courts have set the threshold of each of the three criteria rather low, so as to include the most marginal projects in the mandate of NEPA. Cases where this has not been done are exceptions to the rule.

Virginians for Dulles v. Volpe [234] is one such exception. In this case, a citizens group attempted to compel the Federal Aviation Administration to prepare an environmental impact statement covering the introduction of larger jet aircraft into Washington's National Airport. The United States District Court for the Eastern District of Virginia held that use of the 727-200 jet at National Airport represented only minimal change from prior use of the 727-100 jet. On the basis of the relative slight alteration of past circumstances, the Court held that introduction of new jets did not constitute a "major action" under NEPA. Other cases in which federal actions were held to be minor rather than major were *Kisner v. Butz,*[235] involving construction of a 4.3-mile road in a national forest, and *Julis v. City of Cedar Rapids, supra* n. 223, involving municipal street repairs.

No other cases have declined to apply NEPA solely on the basis of a judicial finding that the proposed action was not a major federal action. A small number of additional cases have held that the particular

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[231] *Id.* at 540.

[232] 471 F.2d 823 (2d Cir. 1972), *cert. den.* 412 U.S. 908, 36 L.Ed. 2d 974, 93 S.Ct. 2290 (1973) 5 ERC 1416.

[233] *Id.* at 830–31.

[234] 344 F.Supp. 573 (E.D. Va. 1972).

[235] 350 F.Supp. 310 (N.D. W.Va. 1972).

actions would not have a "significant effect" on the environment. These cases include: *Town of Groton v. Laird* (Navy construction of a housing project);[236] *First Nat'l Bank v. Watson* (preliminary approval of a national bank charter);[237] *Hiram Clarke Civic Club v. Lynn* (Department of Housing and Urban Development's determination to construct a housing project);[238] *Citizens for Reid State Park v. Laird* (Navy's mock amphibious landing on a beach);[239] *Howard v. Environmental Protection Agency* (sewage treatment plant);[240] *Rucker v. Willis* (dredging permit for a marina), *supra* n. 130; and *Morningside Renewal Council, Inc. v. United States* (operating license for a university nuclear reactor).[241]

A few additional cases in which courts have discussed the problem of major actions significantly affecting the human environment as criteria for applying NEPA to specific highway project situations include: *Citizens for Balanced Environment and Transp., Inc. v. Volpe, supra* n. 214; *Robinswood Community Club v. Volpe;*[242] *Monroe County Conservation Council, Inc. v. Volpe;*[243] and *Scherr v. Volpe.*[244]

Before leaving the discussion of the statutory criteria for a threshold application of the National Environmental Policy Act to highway projects, there is one additional question over which considerable controversies have arisen relating to NEPA applicability that should be discussed here. Although, in most cases, federal-aid highway projects constitute major federal actions significantly affecting the human environment within the meaning of that language as expressed in NEPA, it is still interesting, and perhaps useful, to observe what the courts have said about what must be done when an agency determines that NEPA does not apply under these criteria.

Unlikely as it seems, it is possible that in some instances highway projects will be involved in such a decision. In such cases, the courts have defined specifically what must be done by the responsible federal officials to establish the nonapplicability of NEPA and thereby avoid the requirement that an environmental impact statement be prepared covering the project.

The major controversy in this area exists over the standard of review that the federal courts should apply in determining whether a federal agency's threshold determination not to file an environmental impact statement was correct.

The controversy has taken a number of forms, but generally speaking, it can be resolved into a question of how much discretion the agency

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[236] 353 F.Supp. 344 (D. Conn. 1972).
[237] 363 F.Supp. 466 (D.D.C. 1973).
[238] 476 F.2d 421 (5th Cir. 1973).
[239] 336 F.Supp. 783 (D. Me. 1972).
[240] 4 ERC 1731 (W.D. Va. 1972).
[241] 482 F.2d 234 (2nd Cir. 1973).
[242] 506 F.2d 1366 (9th Cir. 1974).
[243] 472 F.2d 693 (2d Cir. 1972).
[244] 336 F.Supp. 882 (W.D. Wis. 1971), upon reconsideration 336 F.Supp. 886 (W.D. Wis. 1971), *aff'd* 466 F.2d 1027 (7th Cir. 1972).

should have in deciding not to prepare a statement on any given action. Many agencies have taken the position that the determination of whether a particular action is a major federal action significantly affecting the quality of the human environment is primarily a question of fact for the agency to decide. This position calls for limited review by the courts of such agency decisions. On the other hand, environmental groups and others have argued that because of the paramount importance of the threshold decision, and because of the overriding importance of NEPA's provisions, any decision by an agency not to file an impact statement should be subject to full *de novo* hearings by the federal courts if challenged.

In *Hanly v. Kleindienst, supra* n. 232, the United States Court of Appeals for the Second Circuit opted for limited review of the General Services Administration's (GSA) decision not to prepare an environmental impact statement covering construction of a federal jail in New York City. In applying the "arbitrary and capricious" standard of review, however, the Court established stringent agency procedures for the determination of whether an impact statement was required. One writer has noted that the Second Circuit's opinion makes it easier for an agency to prepare an impact statement than to take the steps the Court thought were necessary to prepare a record supporting a negative threshold determination.[245] The *Hanly* Court held that GSA's determination that the jail construction would not significantly affect the environment must reflect GSA's consideration of the jail's qualitative, comparative environmental effects in relation to surrounding areas as well as the jail's absolute, quantitative environmental effects. Further, GSA was required to consider the proposed jail's effects on the surrounding area's crime rate which might be increased by the jail's being used by a drug treatment center. The Court also said that GSA must provide the public with an opportunity to be heard before determining not to prepare an environmental impact statement.

The Court's rationale for its holding is quite interesting. The Court based its decision on its finding that Sections 102(2)(A), (B), and (D) of NEPA are not limited to merely major actions found by the agency to require impact statements. The three sections apply whether or not the agency decides to prepare a statement, the Court said. In short, the Court required the agency to develop a full administrative record on its decision not to prepare the statement. The agency's negative determination could, under such circumstances, be thoroughly reviewed by a court, which would not overrule the agency's decision unless it was found to be "arbitrary and capricious."

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[245] This is Anderson's assessment, and the author concurs; however, it must be understood that the statement is made with tongue at least partially in cheek.

Timing, Retroactivity, and Segmentation

Although the threshold questions of NEPA applicability as determined by the criteria established in Section 102 calling for preparation of an environmental impact statement for all major federal actions significantly affecting the human environment are, in most cases, of little significance to highway cases because of the major nature of federal involvement in federal highway programs, there are three additional questions relating to the applicability of the statute which are not so easily decided. These questions relate to timing, retroactivity, and segmentation.

Timing

The question of the timing of applicability of the National Environmental Policy Act to any given highway project is a difficult one and has presented the courts with significant problems.

The question of when a Federal or State agency must comply with Section 102(2)(C) of NEPA by preparing an environmental impact statement covering a project it has determined to be a major federal action significantly affecting the human environment would seem to be answered clearly by the statute and its legislative history. Inasmuch as the environmental impact statement was intended to act as a tool in the decision-making process, preparation of such a statement should be completed before a final decision to proceed with any given project. Moreover, the statement ideally should be available early enough in the planning of a project so that it can be used to explore alternatives, including the alternative of abandoning the project altogether.

This view was set forth by the Court in *Citizens for Clean Air, Inc. v. Corps of Engineers, supra* n. 126. "Once a project has reached a coherent stage of development it requires an environmental impact study. The comprehensive review contemplated by the Act can only be efficacious if undertaken as early as possible." [246]

Notwithstanding the case of adopting the rationale set forth in the two preceding paragraphs, highway cases present serious problems on the question of determining the timing of federal involvement as it affects the applicability of NEPA. In highway construction cases, State governments and subdivisions thereof obviously may cause environmental impacts and narrow eventual federal options while readying a project for federal funding or approval. This creates a problem because the environmental impacts involved are not preceded by either federal action or the necessary environmental impact statement.

A number of interesting highway cases address this point, including: *Thompson v. Fugate, supra* n. 208; *Lathan v. Volpe, supra* n. 176; *La Raza Unida v. Volpe, supra* n. 203; *Northeast Area Welfare Rights*

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[246] *Id.* 349 F.Supp. at 708.

Organization v. Volpe, supra n. 225; *Named Individual Members of the San Antonio Conservation Soc'y v. Texas Highway Dep't, supra* n. 201; *Arlington Coalition on Transp. v. Volpe, supra* n. 177; *Indian Lookout Alliance v. Volpe, supra* n. 215; *Civic Improvement Comm. v. Volpe, supra* n. 204; *Barta v. Brinegar, supra* n. 143; *Conservation Soc'y of Southern Vermont v. Volpe, supra* n. 217; *Movement Against Destruction v. Volpe, supra* n. 218; *Comm. to Stop Route 7 v. Volpe;*[247] *Environmental Law Fund v. Volpe;*[248] and *Morningside-Lenox Park Ass'n v. Volpe, supra* n. 150.

In most of the cases addressing this question, the courts have considered a low degree of present federal involvement to be sufficient to invoke the NEPA impact statement procedures in view of the likelihood of eventual federal support or approval of the project. This was the case in *Thompson v. Fugate, supra* n. 208, in which the Commonwealth of Virginia wanted to begin condemnation of a portion of an historic site in order to complete a circumferential highway around the city of Richmond. Among the grounds cited for injunction by the plaintiffs was a claim that an impact statement under the National Environmental Policy Act had to be prepared prior to condemnation and federal approval or funding. The State argued that it had not yet requested federal approval or funding, and, therefore, the segment of highway in question was not yet "federal" within the meaning of NEPA. Notwithstanding the truth of these allegations by the State, the Court held for the plaintiffs, pointing out that the State admitted that the segment in question was an integral part of the completed beltway and that there had been prior federal approval of this particular segment of highway as a part of the Interstate system. The single segment could not be exempted from NEPA requirements and from federal involvement simply because it was part of a section of Interstate highway that had not as yet received federal approval or funding.

The Federal Government's approval of a State's location plans and of right-of-way acquisitions was sufficient for the Ninth Circuit to perceive the federal connection and order preparation of an impact statement before final funding approval in *Lathan v. Volpe, supra* n. 176.

On the question of timing, the Court said that it was especially important with regard to federal-aid highway projects that Section 102 (2)(C) statements be prepared early, given the nature of NEPA, to ensure that actions by federal agencies are taken with due consideration of environmental effects and with a minimum of such adverse effects.

On the question of timing of NEPA applicability and its coincidence with federal involvement, both the *Thompson* and *Lathan* Courts said

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[247] 346 F.Supp. 731 (D. Conn. 1972).

[248] 340 F.Supp. 1328 (N.D. Cal. 1972), 3 ERC 1941.

that it would be against the principles established in Section 102(2)(C) for States to begin a project, thereby making decisions that foreclosed future options possibly required by an environmental study, and then avoid the requirements of NEPA by delaying the request for federal funds until such options had been foreclosed.

La Raza Unida v. Volpe, supra n. 203, specifically considered this problem area. In that case a highway had received location approval from the Department of Transportation, but it had not received specific funding approval. In addition, the State had not requested funds at the time of the lawsuit. The Court held, over the objection of the Department of Transportation, that projects for which federal involvement in the form of funds may eventually be provided become "federal" upon location approval, and it is at that point that an impact statement under NEPA must be prepared. So, under the ruling in that case, the timing of NEPA applicability was tied to location approval and not to some later federal action. The rationale of the *La Raza Unida* decision, standing for the proposition that timing the applicability of NEPA and its procedural requirements must take into consideration the environmental effects of the action at a time prior to major federal involvement, was set forth well in *Sierra Club v. Volpe, supra* n. 207.

> The rationale of *La Raza Unida* is that Congressional policy statements in federal environmental and similar statutes, together with the legislative history of these enactments, indicate a great concern of Congress with problems of environmental protection, particularly in the area of highway construction; that common sense suggests that all the protections which the Congress has sought to provide would be futile gestures were the States and federal agencies allowed to ignore federal statutes and regulations until deleterious effects upon the environment have actually occurred while the option for receiving federal funds still remains open.[249]

Some States have attempted to discontinue federal involvement by withdrawing requests for federal funds and continuing the projects alone for the specific purpose of avoiding the National Environmental Policy Act impact statement requirements set forth in Section 102(2)(C). However, *Named Individual Members of the San Antonio Conservation Soc'y v. Texas Highway Dep't, supra* n. 201, showed that this ploy will not meet with much success. In that case, the Texas Highway Dep't claimed that it was committed to construction of the challenged highway and that the highway would be built with 100 percent State money, if necessary. The State refunded the federal funds already received for construction. The United States Court of Appeals for the Fifth Circuit would not accept the State's argument. The Court said the highway was a federal project and had been such since the Secretary

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[249] 351 F.Supp. 1002, 1007 (N.D. Cal. 1972), 4 ERC 1804, 1808.

of Transportation authorized federal participation. As such, the highway was subject to the laws of Congress, and the State as a partner in the construction of the project was bound by those laws. The State could not, the Court held, "subvert that principle by a mere change in bookkeeping or by shifting funds from one project to another." [250]

Arlington Coalition on Transp. v. Volpe, supra, n. 177, also concurred with avoiding, through early participation of the Federal Government in impact statement preparation, State action that would undercut the options open to federal decision-makers. The Court enjoined highway work in *Arlington Coalition* until the Department of Transportation fully carried out reconsideration of the project mandated by NEPA.

There have been four cases holding that NEPA is inapplicable where federal involvement was not alleged or shown, or where construction or early highway planning was done exclusively by the State before any federal involvement. In *Northeast Area Welfare Rights Organization v. Volpe, supra* n. 225, the Court held that a proposed freeway connector did not require a federally prepared environmental impact statement under NEPA because at the time of the lawsuit the project was proceeding with State funds alone, no final federal approval had been sought, and there was no immediate plan to seek federal financial assistance. It is interesting to note that federal funding of the Spokane Metropolitan Area Transportation Study, which had been responsible for proposing the connector, did not constitute sufficient involvement by the Federal Government in that particular project to mandate an environmental impact statement.

Indian Lookout Alliance v. Volpe, supra n. 215, is in accord with *Northeast Area Welfare Rights Organization, supra* n. 225. In *Indian Lookout Alliance,* plaintiffs contended that Iowa's projected statewide, 1,900-mile freeway system should be covered by separate impact statements on each segment under consideration. Federal as well as State authorities had already conceded that some segments required impact statements. However, the Court held that plans for the entire freeway system were "tentative" and subject to change. Thus, in this case the Court held that the timing of NEPA applicability would appropriately arrive at some later stage in the planning.

In this writer's opinion, *Northeast Area Welfare Rights Organization* and *Indian Lookout Alliance* should not give the attorney defending against environmental suits much solace. The better-reasoned cases seem to demand that the stage at which NEPA becomes applicable, so long as federal involvement is within the foreseeable future, is at a very early point in the planning stage. This is true because of the virtual inevitability of federal involvement, coupled with the clear language of NEPA demanding that environmental considerations be included in the earliest planning of federally supported projects, especially before

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[250] 446 F.2d at 1027.

various alternatives are foreclosed. An appropriate rule of law in the close cases would seem to be announced in *Civic Improvement Comm. v. Volpe, supra* n. 204. In this case, the Fourth Circuit held that a State funded project should not be subject to impact statement requirements until such time as plaintiffs could demonstrate NEPA applicability by showing the eventuality of federal participation.

Of course, there is the odd case in which the plaintiffs erroneously failed to allege federal involvement or prospective federal involvement. In such cases, it should be recognized that without such an allegation a NEPA lawsuit must be dismissed. *Bradford Township v. Illinois State Toll Highway Auth., supra* n. 226, is such a case. In this case, the Court held correctly that because there was no claim that the Federal Government or any federal agency was involved in any manner in the construction of a tollway extension or that federal funds would be used, the case based upon NEPA had to be dismissed.

The cases that extend the applicability of the National Environmental Policy Act and environmental impact statement requirements to highway actions that do not, at the time of the suit, have federal funding or immediate federal approval, although some federal involvement is present, are strongly supported by logic, and seem to be the better-reasoned cases when compared to the cases holding to the contrary.

The lesson to be learned from the existing case law on this subject is that when highway action by a State can reasonably be expected to involve the Federal Government either in planning or funding of the project, NEPA is applicable at the earliest possible planning stages. Present Federal Highway Administration regulations and procedures recognize this principle and seek to avoid conflict with the National Environmental Policy Act and plaintiffs using that Act to challenge highway projects while still at the State level.

Retroactivity

It is a well accepted law that the National Environmental Policy Act does not apply retroactively, or in other words, it does not apply to federal actions completed before its passage. The significant word in this general rule of law, enunciated many times over by the federal courts, is "completed." If a project was begun before passage of NEPA, but not completed, it may be an ongoing project and subject to the principles of NEPA. One defense to a NEPA lawsuit is that the plaintiff is attempting to apply the statute retroactively. This defense is successful in some cases; however, this writer does not consider it a particularly viable defense in highway cases.

Before discussing NEPA cases on the question of retroactivity, it is important to note that this problem will receive less and less attention as January 1, 1970, recedes farther into the past. NEPA procedures are rather well integrated into the federal bureaucracy by this time. There is no question that NEPA applies to federal actions begun after 1970. The number of cases to which the retroactivity defense can be

applied will diminish as time passes. In view of the relatively minor role to be played in future NEPA litigation by judicial reasoning in the approximately 50 cases that have been decided dealing with retroactivity, this paper does not engage in an extensive analysis of those cases. Nevertheless, because the cases present some significant questions and represent a rather large percentage of cases under the Act, some generalization should be made about this particular body of NEPA case law as a whole.

In almost all situations, the purposes of NEPA are to some extent thwarted by its application to a federal action already underway. The whole fabric of NEPA demands that environmental considerations be integrated into the federal decision-making process at a point prior to the time when the action was undertaken. By its nature, the environmental impact analysis set forth in the environmental impact statement must be made a part of the actual decision-making process if the purposes of the Act are to be fulfilled. So, application of the Act to a project already underway is a half-measure at best. Nevertheless, in a great number of cases, the courts have decided that the application of NEPA to partially completed projects would be beneficial, and indeed, is required by the Act.

In most of the cases where a court has found NEPA to be applicable to federal actions begun before passage of the Act, it has based its finding on one of two lines of reasoning. Some courts have held that if a substantial portion of the work remains to be completed before the action is finished, then NEPA can be applied to the action. In many such cases, the court also looked to the practicality of applying NEPA. If the cost of altering the work or abandoning it did not clearly outweigh the benefits of an environmental study, the courts usually permitted NEPA to apply and required an impact statement. The second line of reasoning was the more simplistic of the two. In these cases, a formal legal event was used as the watermark for determining whether NEPA applied. If a major federal action, such as approval of a highway, took place after January 1, 1970, then NEPA must apply. This was held to be the case even if a substantial amount of work on the project had already been completed. The peculiar nature of the federal-aid highway program makes very difficult the task of relating the Act to projects begun before January 1, 1970.

The statutory scheme set up for operation by the Federal Highway Administration of the federal-aid highway program establishes a uniquely fragmented system of approvals. One interesting article which delves into this system of approvals and procedures at much greater length than is possible in this paper is *An Analysis of Administration of the Federal-Aid Highway Program.*[251]

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[251] Peterson and Kennan, *An Analysis of Administration of the Federal-Aid Highway Program,* 2 ELR 50001 (Apr. 1972).

For the purposes of NEPA applicability, considered in terms of retroactive application, it is most significant under Federal-Aid Highway Act procedures to consider two procedures established by PPM 20-8: location approval and design approval, each of which must be preceded by a public hearing. This is not to say that a number of other approvals might not trigger an argument from some plaintiffs that NEPA should be applied.

PPM 20-8 is connected very closely with PPM 90-1, which is the Federal Highway Administration's directive implementing the National Environmental Policy Act. PPM 90-1 applied the Act, or better stated, said that the point of application was to be applied to all highway segments that received design approval after February 1, 1971. PPM 90-1 also set up special guidelines for highways receiving design approval before that date.

Unfortunately, the courts have more often than not found themselves lost in the complicated procedures of the Federal Highway Administration.

In his excellent book on the National Environmental Policy Act, *NEPA In The Courts, supra* n. 154, Frederick R. Anderson attempted to sort out the problem of applying the National Environmental Policy Act to the federal-aid highway program within the context of the aforementioned Federal Highway Administration procedures. Anderson divides the various approaches taken by the courts into two categories called the "critical action" approach and the "substantial action remaining" approach.

Anderson has located at least six cases holding that NEPA does not apply to ongoing work in cases where all discretionary federal decision-making preceded the enactment of NEPA. This is the case in *Pennsylvania Environmental Council v. Bartlett, supra* n. 180, and in *Elliott v. Volpe.*[252] In the *Elliott* case, the Court found that the planning of I-93 through Summerville, Massachusetts, had been completed before passage of the National Environmental Policy Act. The Court concentrated its discussion on the meaning of design approval as presented in PPM 20-8, even though that directive had not been in existence on the date when, in the Court's view, such approval had been given. Also, the Court found that right-of-way acquisition and site preparation had taken place before the enactment of NEPA. Further, one construction contract had already been let and another had been advertised for bid. The *Elliott* Court saw the case as one presenting the question of retroactivity, and concluded that Congress had not intended the Act to apply retroactively, especially when contract rights had been vested or planning had been completed.

In *Concerned Citizens of Marlboro v. Volpe, supra* n. 205, the United States Court of Appeals for the Third Circuit found that NEPA did

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[252] 328 F.Supp. 831 (D. Mass. 1971).

not apply when federal approval of funding for the purpose of rights-of-way took place in 1967 and no federal funding of construction had been contemplated. In this case, the Court of Appeals apparently believed that federal approval of the project was the same as final design approval.

In *Citizens to Preserve Overton Park, Inc. v. Volpe,*[253] the plaintiff, an environmental group, sought to amend their pleadings to insert a NEPA allegation. The plaintiffs' motion was denied by the District Court in a summary fashion.

Environmental Law Fund v. Volpe, supra n. 248, adopted the simplest approach, making NEPA applicable automatically to those projects receiving design approval after January 1, 1970, and to some projects approved before then, depending on the presence or absence of four specific factors. The four factors set forth in *Environmental Law Fund* were: (1) the participation of the local community in the planning of a project; (2) the extent to which the State department involved attempted to take environmental factors into account with regard to a particular project; (3) the likely harm to the environment if the project is constructed as planned; and (4) the cost to the State of holding up construction while it compiles environmental impact statements.

In *Environmental Law Fund,* the Court held that the balance of factors favored the defendant. That is, because all these factors were present, there was no need to enter into the NEPA process. One can only assume that if the Court had been unsatisfied about any one factor, an injunction might have been issued. Later cases cited the *Environmental Law Fund* approach as being the appropriate one, including *Conservation Soc'y of Southern Vermont v. Volpe, supra* n. 217; *Keith v. Volpe;*[254] and *Ward v. Ackroyd, supra* n. 132.

In discussing the *Environmental Law Fund* approach, Anderson finds a number of inherent deficiencies. Citing *Committee to Stop Route 7 v. Volpe, supra* n. 247, he notes that the Court declined to accord much weight to these factors because whatever validity they might have rests on a totally erroneous conception of one of NEPA's essential purposes. That is, NEPA is designed to ensure not merely that a major federal action is taken with minimum damage to the environment, but also requires an agency decision as to whether or not a major federal action should be taken at all. Anderson believes that it would be difficult to find a State highway agency that asks itself if other forms of transportation should be preferred alternatives to a

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[253] 401 U.S. 402, 28 L.Ed. 2d 136, 91 S.Ct. 814 (1971), *rev'g* 432 F.2d 1307 (6th Cir. 1970), *aff'g* 309 F.Supp. 1189 (W.D. Tenn. 1970), *on remand,* Citizens to Preserve Overton Park, Inc. v. Volpe, 335 F.Supp. 873 (W.D. Tenn. 1972), *on rehearing* 357 F.Supp. 846 (W.D. Tenn. 1973); *rev'd sub nom.* Citizens to Preserve Overton Park, Inc. v. Brinegar, 494 F.2d 1212 (6th Cir. 1974).

[254] Keith v. Volpe 352 F.Supp. 1324 (C.D. Cal. 1972) (*granting preliminary injunction*) (no West citation for decision on merits).

proposed road. Whether or not Anderson's cynicism with regard to the likelihood that highway officials would support or consider alternative means of transportation is justified is for each highway official to consider and determine for himself.

Anderson found that a number of highway cases rely ostensibly on a "critical action" test, but would reach the same result were the alternative test used; that is, the "substantial action remaining" test. These cases hold the Act applicable on the grounds that federal approval came after 1970. In *Harrisburg Coalition Against Ruining the Environment v. Volpe, supra* n. 179, the Court found that the Act was applicable to two highway segments on which the critical determinations were not made until May 1970. The Court distinguished *Bartlett* and ordered the project halted even though a construction contract had already been let on one of the segments. Likewise, in *Nolop v. Volpe, supra* n. 152, the Court ordered an environmental impact statement on a project on which design approval had not been received until July 1970, and was not under contract until the following October. Cases in which similar holdings are in evidence include the following: *Named Individual Members of the San Antonio Conservation Soc'y v. Texas Highway Dep't, supra* n. 201; *Scherr v. Volpe, supra* n. 244; *Conservation Soc'y of Southern Vermont v. Volpe, supra* n. 217; *Keith v. Volpe, supra* n. 254; and *Committee to Stop Route 7 v. Volpe, supra* n. 247.

Some of these cases have not raised the question of whether or not statements should have been prepared on projects that obtained location approval before 1970, but where no design approval had been sought at the time of the suit. Two cases, *Lathan v. Volpe, supra* n. 176, and *La Raza Unida v. Volpe, supra* n. 203, presented this question. The Ninth Circuit in *Lathan* answered in the affirmative. The Court ruled that location approval sufficiently federalized the project and that it was important to complete NEPA procedures as soon as possible thereafter. In *La Raza Unida* federal location approval was granted in 1966 and land was being acquired by the State, but no request had been made for the later stages of federal approval, which would have been necessary before federal funds could be allocated for the project. Notwithstanding the absence of federal commitments, the Court held that the strong congressional policy in favor of environmental protection resolved the uncertainty in the case in favor of requiring compliance with NEPA. Addressing the question the Court said:

> [C]ommon sense dictates that the federal protective devices apply before federal funds are sought. . . . All the protections that Congress sought to establish would be futile gestures were a state able to ignore the spirit (and letter) of the various acts and regulations until it actually receives federal funds. Given the realities of actual highway displacement and construction, the statutes and regulations must apply immediately or their purpose will be frustrated.[255]

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[255] 337 F.Supp. at 231.

Anderson's "substantial action remaining" approach is primarily set forth in the early case of *Morningside-Lenox Park Ass'n v. Volpe, supra* n. 150. In that case, location approval was made final in 1965 and design approval in 1967 or 1969. Final authorization of funds did not take place until 1971. Most of the right-of-way had been purchased; however, construction had not begun. The Court rejected the plaintiffs contention that any of the federal approvals had taken place after 1970; however, this did not extinguish plaintiff's right to allege that NEPA applied. Instead, the Court fashioned a new rule:

> As did the Courts in *Environmental Defense Fund* and *Calvert Cliffs, supra,* this Court relies upon the clear legislative mandate that Section 102 of the NEPA be implemented "to the fullest extent possible." Also, the interim guidelines of the Council on Environmental Quality, which strongly suggest the application of the Section 102 procedures to ongoing projects, are entitled to considerable weight. While much work has already been done, the court is not dealing with a *fait accompli.* In short, the Court holds that compliance with Section 102 of the NEPA is required as to an ongoing federal project on which substantial actions are yet to be taken, regardless of the date of "critical" federal approval of the project.[256]

The major decision supporting the "substantial action" test in highway cases is the *Arlington Coalition* case decided by the United States Court of Appeals for the Fourth Circuit. In that case, a section of I-66 was challenged. The corridor for that highway had been set in 1959. The county relied on location of the route for its planning, and acquisition of rights-of-way had been approved in 1966. In addition, 80 percent of the project was complete. Notwithstanding this, actual construction on the particular segment of the particular highway challenged had scarcely begun and plans, specifications, and estimates (P.S.&E.) approval had not yet been received.

The Court rejected the reasoning that some specific federal approval either determined whether or not the highway had reached the crucial stage or whether NEPA applied. Anderson believes that the heart of the *Arlington Coalition* Court's test could be found in the concept that "crucial stage" refers primarily to the amount of work remaining on a project itself and not to formal administrative approvals. Anderson cites the following quotation from the Court's opinion to support his conclusions:

> Doubtless Congress did not intend that all projects ongoing at the effective date of the Act be subject to the requirements of Section 102. At some stage of progress, the cost of altering or abandoning the project could so definitely outweigh whatever benefits that might accrue therefrom that it might no longer be "possible" to change the project in ac-

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[256] 334 F.Supp. at 144.

> cordance with Section 102. At some stage, federal action may be so "complete" that applying the Act could be considered a "retroactive" application not intended by the Congress. The congressional command that the Act will be complied with "to the fullest extent possible" means, we believe, that an ongoing project was intended to be subject to Section 102 until it has reached that stage of completion, and that doubt about whether the critical stage has been reached must be resolved in favor of applicability.[257]

The test stated by the *Arlington Coalition* Court requires judicial balancing. As with all balancing tests, the balance may be varied according to the weight given the factors by a particular court.

This raises the question of how complete a project must be for NEPA not to apply. There are two noteworthy cases that demonstrate factual situations in which construction of a highway was allowed to proceed in the absence of an impact statement. *Ragland v. Mueller, supra* n. 153, is one such case. In that case, the Court said:

> Analysis of the facts reveals that when NEPA became effective January 1, 1970, sixteen of the twenty miles of the disputed highway had already been fully *completed* and the right-of-way for the remaining four miles had been acquired. It is simply unreasonable to assume that Congress intended that at this point in time, construction should halt.[258]

The United States District Court, in *Pizitz, Inc. v. Volpe,*[259] held that exit ramps, which were the only remaining article to be completed on a federal-aid highway, were beyond the scope of NEPA.

In summarizing the judicial interpretation of the problems created by NEPA retroactivity and the application of NEPA to ongoing projects, it should be emphasized that all attorneys should look closely to those court decisions in which the courts enunciate either the "critical action" approach or the "substantial action remaining" approach. In addition, it should be recognized by such attorneys that even though critical federal approval might have taken place before NEPA's enactment in 1970, many courts, if not most, have been disposed to view as more important the amount of work to be completed on the project and the likelihood that the damage to the environment which still might be done outweighs the harm to be caused by stopping construction on the project pending preparation of an environmental impact statement as required by NEPA.

As was indicated at the outset of this section, problems relating to retroactivity are by their very nature limited to those cases in which the work began before 1970. As time goes on, this problem will be eliminated because fewer projects will have their genesis in the pre-NEPA period.

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[257] 458 F.2d at 1331; *see also* ANDERSON, *supra* note 154, at 171.

[258] 460 F.2d at 1198.

[259] 4 ERC 1195 (M.D. Ala. 1972), *aff'd per curiam* 467 F.2d 208 (5th Cir. 1972), *modified* 4 ERC 1672 (5th Cir. 1972).

Segmentation

One of the most difficult problems in highway environmental law cases is presented by the natural segmentation of highway sections for construction purposes, which is a part of the federal-aid highway program.

Interesting highway cases on this problem include: *Citizens For a Balanced Environment and Transp. v. Volpe, supra* n. 214; *Barta v. Brinegar, supra* n. 143; *Citizens for Mass Transit Against Freeways v. Brinegar;* [260] *Conservation Soc'y of Southern Vermont v. Secretary, supra* n. 217; *Daly v. Volpe;* [261] *Farwell v. Brinegar;* [262] *Indian Lookout Alliance v. Volpe, supra* n. 215; *James River and Kanawha Canal Parks v. Richmond Metropolitan Auth., supra* n. 131; *Movement Against Destruction v. Volpe, supra* n. 218; *Named Individual Members of the San Antonio Conservation Soc'y v. Texas Highway Dep't, supra* n. 201; *Comm. to Stop Route 7 v. Volpe, supra* n. 247; *Sierra Club v. Volpe, supra* n. 207; and *Thompson v. Fugate, supra* n. 208.

In these cases the main bone of contention is the plaintiffs' assertion that in order to fully comply with the environmental impact statement requirement set forth in NEPA, Federal and State agencies preparing an environmental impact statement must prepare a comprehensive "umbrella" impact statement covering the entire project rather than preparing a number of impact statements covering various segments of a total project. The three most interesting cases on this question are *Daly v. Volpe, supra* n. 261; *Movement Against Destruction v. Volpe, supra* n. 218; and *Indian Lookout Alliance v. Volpe, supra* n. 215.

In *Daly v. Volpe, supra* n. 261, the plaintiffs claimed that to fully appreciate the environmental effects of the entire highway project, which in this case was I-90 from Seattle to Snoqualmie Summit, the defendants must prepare a comprehensive impact statement covering the entire project. The Court rejected the plaintiffs' claim finding that an umbrella statement was neither required by law nor desirable under the circumstances in that particular case. The Court recognized that the proper scope of an environmental impact statement is frequently the subject of NEPA litigation. In addition, it correctly recognized that questions of this type normally arise in situations where portions of a larger project have been segmented and given separate NEPA considerations. The Court noted, however, the obvious problem with such a procedure (segmentation) is that occasionally the impact of the total project is much greater than the sum of its individual parts.

> Though project environmental impact statements may be appropriate for consideration of localized impacts, it is clear that the identification of broad social environmental alternatives may not be properly con-

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[260] 357 F.Supp. 1269 (D. Ariz. 1973). *aff'd,* 514 F.2d 1106 (9th Cir. 1975).
[261] 376 F.Supp. 987 (W.D. Wash. 1974), [262] 5 ERC 1939 (W.D. Wis. 1973).

sidered until the entire project is viewed in a comprehensive manner.[263]

The plaintiffs in *Daly v. Volpe, supra* n. 261, argued that by segmenting the I-90 impact statement the defendants had distorted the actual environmental effects of the project.

The Federal Highway Administration has promulgated guidelines which deal with the question of proper segmentation for impact statements and analysis under NEPA. These regulations are found in Federal Highway Administration PPM 90-1, 37 F.R. 21809 (Oct. 14, 1971). In *Daly v. Volpe, supra* n. 261, the Court reviewed these procedures and found that Federal and State defendants had fully complied with paragraph 6 of PPM 90-1 which provides as follows:

> The highway section included in an environmental statement should be as long as practicable to permit consideration of environmental matters on a broad scope. Piecemealing proposed highway improvements in separate environmental statements should be avoided. If possible, the highway section should be of substantial length that would normally be included in a multi-year highway improvement program.[264]

The Court held that the first requisite of a suitable highway segment is the requirement that it "connect logical termini." The *Daly* Court recognized that in deciding on logical termini some form of segmentation or piecemealing is inevitable. Thus, in *Indian Lookout Alliance v. Volpe, supra* n. 215, the Court said:

> [W]e think that as a practical matter is it necessary to permit the division of a State highway plan into segments for the purpose of environmental considerations. This division to some extent could correlate with present . . . piecemeal type operations.[265]

In *Citizens for Mass Transit Against Freeways v. Brinegar, supra* n. 260, the United States District Court for the District of Arizona held that the reasonable division of federal-aid highway projects into individual segments, and the preparation of separate environmental impact statements for such segments, does not, absent allegation and demonstration that such division was made clandestinely to avoid statutory requirements, violate NEPA.

Both *Citizens for Mass Transit Against Freeways v. Brinegar, supra* n. 260, and *Thompson v. Fugate, supra* n. 208, stand for the proposition that a population center bypass is a logical highway segment which may be covered in a single environmental impact statement, but which may not be split into separate segments.

In *Daly v. Volpe, supra* n. 261, the Court outlines the prerequisites of a suitable highway segment, the first being that the highway segment should link logical termini. Secondly, the highway authorities

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[263] 376 F.Supp. at 992.
[264] *Id.* at 993.
[265] 484 F.2d at 19.

must not have segmented the particular project in question to avoid compliance with NEPA. In addition, a reasonable highway segment should be such that it has independent utility, and the Court particularly cited *Indian Lookout Alliance v. Volpe, supra* n. 215, for this principle. An additional prerequisite for determining the reasonableness of a proposed highway segment is whether the length selected assures adequate opportunities for consideration of alternatives required by NEPA, and for this proposition the Court cited *Committee to Stop Route 7 v. Volpe, supra* n. 247.

Finally it should be inserted, although the Court did not spend much time discussing it, that an impact statement covering a particular segment of a total highway project should in some sense be compared to the potential of an impact statement for the entire project. If the impact statement for the entire project, or the "umbrella" impact statement, would in no way provide further assistance to the decision makers who ultimately have to decide on the best location for the intended bypass, or the intended segments, then segmentation should be upheld. Good discussions of the principles applying to situations where segmentation for NEPA purposes, or for other federal purposes, is impermissible, are provided in *Sierra Club v. Volpe, supra* n. 207, and particularly, in *Named Individual Members of the San Antonio Conservation Soc'y v. Texas Highway Dep't, supra* n. 201.

In the *Texas Highway Dep't* case, the Fifth Circuit held that a highway project could not be considered in separate "funding segments" for purposes of the Secretary of Transportation's administrative review under 23 U.S.C. § 138 (Federal-Aid Highway Act 1968), 49 U.S.C. § 1653(f) (Department of Transportation Act), and NEPA. In so ruling, the Court remanded the action to the District Court with directions to hold the case until the Secretary had completed his administrative review of the highway as one project under the relevant statutory provisions.

Subsequent developments in that case are relevant to the early topic of "federal" actions. After remand of the case to the District Court, the defendants moved for summary judgment for lack of subject matter jurisdiction on grounds that the highway in question was no longer a "federal project." This contention was based on an evidentiary showing that the State highway commission, which had initially sought federal funding for construction of the highway, had discontinued its relationship with the Federal Government on the highway in question. The District Court, although indicating that the argument might have some merit, denied summary judgment. Interestingly, the District Court denied summary judgment because it thought that the Court of Appeals decision in the case could be interpreted as permanently barring the State, once it had applied for federal funding for two of the three segments of the highway, from proceeding with construction of the highway until the federal defendants had complied with federal statutory requirements.

It also should be noted that in *Thompson v. Fugate, supra* n. 208, a case cited as well for the other side of the proposition, the Court, applying both the National Environmental Policy Act and the Federal-Aid Highway Act of 1968, held that meeting federal requirements for one 21-mile segment of a highway project in order to partake of federal-aid allotments for that segment, while claiming that a remaining 8-mile section is a separate project, would be an impermissible bureaucratic frustration of the purpose of these laws.

Although there are a number of additional cases on the question of segmentation, it is sufficient to conclude the discussion of this subject by indicating that most courts have upheld segmentation of a federal-aid highway for the purpose of compliance with the National Environmental Policy Act where that segmentation has complied with the standards set forth in the Federal Highway Administration's PPM 90-1, Section 6. The burden of proof placed upon the plaintiffs in these actions is a heavy one. Most courts will require the plaintiff to prove that the highway department defendants, along with the federal defendants, intentionally attempted to subvert the requirements of NEPA and other federal statutes by segmenting the highway in such a way as to avoid consideration of major environmental factors and adverse effects created by the project in its entirety. This is difficult to prove and appeals only to the most cynical. This does not mean that the allegation of improper segmentation cannot be legitimately raised. In addition, there are some instances where plaintiffs may show that although the highway authorities thought they had appropriately segmented the highway for purposes of compliance with NEPA, that indeed the segmentation precluded an appropriate environmental review as required by NEPA. In almost all instances, however, if the highway authorities follow PPM 90-1, Section 6, and the specific directives therein, such a claim will be difficult to support.

FAILURE TO COMPLY WITH PROCEDURAL REQUIREMENTS OF FEDERAL ENVIRONMENTAL STATUTES

The initial burdens of a plaintiff in an environmental lawsuit challenging construction of a federal-aid highway have been discussed in the preceding sections of this paper. Primarily these involve a plaintiff's having to demonstrate that he has standing, that it should not be precluded by any of the other limitations on judicial review, such as laches, and that the federal environmental statutes or other statutes, which it is alleging have been abridged, are applicable to the specific highway action challenged.

If the plaintiff is able to successfully overcome the multitude of defenses which fall within the categories discussed in the three initial sections of this paper, it then has the opportunity to turn to the offensive and attack frontally the Federal and State highway officials' performance of their obligations under the federal environmental statutes. Defense of this performance is a demanding task requiring great care,

(considering the many statutory requirements) and a tremendous amount of research documenting the officials' performance under those statutes. Environmental groups, and other plaintiffs, have proved themselves to be exceptionally adroit at structuring lawsuits designed to demonstrate either a complete failure to comply with some statutory requirements (or an omission), or the failure to comply adequately with statutory requirements.

It is important to make the distinction between omission and commission in consideration of the failure of federal agencies and State highway authorities to comply with the procedural requirements of federal environmental statutes. It must be understood by those defending the actions of highway authorities, and by those alleging violation of law by those authorities, that failure to comply can be comprised of both omission: that is, failure to do whatever is required by one of the statutes, and commission: failure to do properly or adequately that which is required by the statutes.

Counsel for defendants must be alerted to the need to defend against either acts of omission or commission, and counsel for plaintiffs should be aware that either will usually suffice to compel the court to enjoin highway construction pending adequate compliance with the statutory requirement.

National Environmental Policy Act

Although the Federal-Aid Highway Act and the Department of Transportation Act require procedural compliance by highway authorities, their importance is not nearly so great as that of the National Environmental Policy Act.

As set out in the introductory section of this paper, NEPA requires that the environmental impact statement be detailed in nature. This means that the agencies' analysis of proposed projects in terms of the criteria set out in Section 102(2)(C) of NEPA must, to the fullest extent possible, "fully disclose" all the known facts about the project.

The phrase "detailed statement" was translated into the requirement of "full disclosure" by judicial interpretation. Moreover, as judicially interpreted, the term "full disclosure" defines the minimum compliance required by the Act. The principle was set forth clearly in *Environmental Defense Fund v. Corps of Engineers* (Gillham Dam) in which the court said, "at the very least, NEPA is an environmental full disclosure law." [266]

Although the courts have been uniform in agreeing that NEPA requires full disclosure, they have not been equally precise in defining the requirements of full disclosure. Even though no single case sets out all the requirements of full disclosure, it is possible to put together a list

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[266] 325 F.Supp. 749 (E.D. Ark. 1971).

of the more obvious requirements by reviewing a number of NEPA cases.

Environmental Defense Fund v. Corps of Eng'rs, supra n. 266, is the leading case on the full disclosure stricture of NEPA. In that case, the Court said that full disclosure should, at a minimum, produce a statement that will alert the President, the Council on Environmental Quality, the Congress, and the public to all known possible environmental consequences of the proposed agency action. In addition, the environmental impact statement should contain a discussion of environmental consequences brought to the attention of the agency by other agencies, experts, public and private organizations, and the public. These consequences should be brought out in the impact statement, under reasoning set forth in *Environmental Defense Fund v. Corps of Eng'rs, supra* n. 266, even if the agency responsible for the statement disagrees with such consequences.

On the question of how far an agency must go in presenting opposing views in its impact statement, disagreement exists among the courts. Contrast the holding of *Environmental Defense Fund v. Corps of Eng'rs supra* n. 266, and *Comm. for Nuclear Responsibility, Inc. v. Seaborg.*[267] In *Comm. for Nuclear Responsibility,* the Court decided that "only responsible opposing views need be included" in the statement. The Court decided that the agency need not set forth at length views with which it disagrees. All that is required is a meaningful reference that identifies the problem at hand for the responsible federal official who will make the ultimate decision.

Some courts have held that full disclosure goes so far as to require that the public be permitted to take part in the impact statement process. In *Lathan v. Volpe, supra* n. 176, the Court said, "NEPA and the implementing regulations do indeed contemplate a reasonable opportunity for public comment in an impact statement." Although the *Lathan* case involved a federal-aid highway and a number of other federal statutes, some of which required hearings, the Court's holding with regard to public participation specifically referred to NEPA.

The view that the impact statement process must involve public participation is further supported by the decision of the United States Court of Appeals for the Second Circuit in *Hanly v. Kleindienst, supra* n. 232. In that case, the Court held that before a threshold decision about whether an impact statement must be prepared was made, "the responsible federal agency must give notice to the public of the proposed federal action and an opportunity to submit relevant facts which might bear upon the agency's threshold decision." Although the court left the precise procedural steps for such public participation to the agency, it said that in many cases the best forum for such participation would be a public hearing.

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[267] 463 F.2d 783 (D.C. Cir. 1971).

Courts have also held that full disclosure does not permit conclusory impact statements that omit specific, detailed discussion of various environmental problems. Cases where such statements were held to be inadequate for the absence of full disclosure such as that described include: *Environmental Defense Fund v. Corps of Eng'rs, supra* n. 266; *Daly v. Volpe, supra* n. 261; *Brooks v. Volpe, supra* n. 147; *City of New York v. United States, supra* n. 181; *Lathan v. Volpe, supra* n. 176; and *SCRAP v. United States, supra* n. 118. These cases hold that the environmental impact statement cannot be structured in the form of "findings" of the agency concerning the proposed project, but rather must be an objective presentation of all the facts, pro and con.

The general law on the question of full disclosure as it affects NEPA also states that the full disclosure requirement cannot be avoided because of the technical difficulty of the information involved. Even where the impact statement includes a number of highly technical reports and scientific conclusions, these conclusions, and the reasons therefor, must be set forth. Two particular questions have been addressed by the courts in this respect. First, in *Environmental Defense Fund v. Tennessee Valley Authority,*[268] the Court held that scientific conclusions presented in an impact statement must be accompanied by references to the relevant literature or to field studies from which the conclusions are made. Secondly, in *Sierra Club v. Froehlke,*[269] the Court held that the impact statement must be written in such a way as to be understood by laymen. "'All features of an impact statement must be written in language that is understandable to nontechnical minds and yet contain enough scientific reasoning to alert specialists to particular problems within the field of their expertise'." This view was supported in *Environmental Defense Fund v. Corps of Eng'rs, supra* n. 266.

The *Sierra Club v. Froehlke, supra* n. 269, decision stated that the reasoning for this standard is that impact statements must assist in a rational and thorough decision-making effort by officials higher up in the agency chain of command, including the Congress, the Executive, and the general public, some of whom may not possess the technical expertise of those who evaluated the impact and prepared environmental impact statements. In other words, full disclosure requires disclosure of all relevant facts in a manner understandable by those who have to make the decision and by those who will be affected by those decisions.

The full disclosure requirement, generally, and as it relates to highway cases, can be stated as follows: when an agency undertakes an environmental impact statement, it must address itself to the statutory criteria as set forth in Section 102(2)(C), and it must do so in a man-

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[268] 339 F.Supp. 806 (E.D. Tenn. 1972), *aff'd* 468 F.2d 1164 (6th Cir. 1972).

[269] 359 F.Supp. 1289 (S.D. Tex. 1973).

ner that assures full disclosure of all relevant facts about the project to the fullest extent possible. The statement must be objective and not conclusory, the public must be involved in the information-gathering process to some extent, and the views of the public, private organizations, and others commenting on the proposal must be clearly set out and discussed in the statement. The statement must present all the material in a manner that can be easily understood by those with nontechnical minds, or in other words, the statement must be presented in laymen's language. Finally, the source of all relevant technical information must be provided.

The objective of the full disclosure stricture is to provide the decisionmakers, and anyone else who might be interested, with a complete understanding of the environmental effects of the proposed action and the alternatives to that action. Failure by an agency to disclose fully all relevant factors in an environmental impact statement can usually be measured by the agency's compliance or noncompliance with other basic criteria for an environmental impact statement set forth in Section 102(2)(C). When an agency fails to discuss thoroughly and fully any of these criteria or fails to include a discussion of any of these criteria in its impact statement, it may be found by a federal court to have prepared an inadequate impact statement, since that statement fails to fully disclose all environmental factors required to be disclosed by the statute.

There are a number of interesting highway cases from which these general principles of NEPA law are derived. On the question of the policy of full disclosure, anyone interested in the specific factual situations that have led to the general principles stated should review: *Iowa Citizens for Environmental Quality, Inc. v. Volpe;*[270] *Lathan v. Volpe, supra* n. 176; *Citizens for Mass Transit Against Freeways v. Brinegar, supra* n. 260; *Conservation Soc'y of Southern Vermont, Inc. v. Secretary, supra* n. 217; *Daly v. Volpe, supra* n. 261; *Farwell v. Brinegar, supra* n. 262; *Finish Allatoona's Interstate Rights Inc. (FAIR) v. Volpe;*[271] *Ford v. Train;*[272] *I-291 Why? Ass'n v. Burns, supra* n. 175; *Life of the Land v. Brinegar;*[273] *Brooks v. Volpe, supra* n. 147; *Citizens Airport Comm. v. Volpe;*[274] *Comm. to Stop Route 7 v. Volpe, supra* n. 247; and *Sierra Club v. Volpe, supra* n. 207.

Of particular interest on the question of public participation in the impact statement process in highway cases are *Ford v. Train, supra* n. 272; *Keith v. Volpe, supra* n. 254; *Brooks v. Volpe, supra* n. 147; and *Citizens to Preserve Overton Park, Inc. v. Brinegar, supra* n. 253.

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[270] 4 ERC 1755 (S.D. Iowa 1972), *aff'd* 487 F.2d 849 (8th Cir. 1973).

[271] 355 F.Supp. 933 (N.D. Ga. 1973).

[272] 364 F.Supp. 227 (W.D. Wis. 1973).

[273] 485 F.2d 460 (9th Cir. 1973), *aff'g sub nom.* Life of the Land v. Volpe, 363 F.Supp. 1171 (D. Hawaii, 1972), *cert. den.* 416 U.S. 961, 40 L.Ed. 2d 312, 94 S.Ct. 1979 (1974).

[274] 351 F.Supp. (E.D. Va. 1972).

As is set forth in the preceding paragraphs, failure to meet the full disclosure requirement of Section 102(2)(C) is best measured by monitoring the defendant's compliance with the specific statutory requirements of Section 102(2)(C) as they relate to the ingredients of an environmental impact statement. For this reason, it is useful to analyze decisions dealing with these provisions of NEPA on a step by step basis.

Section 102(2)(C)(i)

Section 102(2)(C)(i) of NEPA requires that the impact statement discuss all known environmental impacts that will result as a consequence of the proposed project. It is the least complex of the statutory criteria for an impact statement. Nevertheless, it has resulted in some problems for various agencies, including the Federal Highway Administration and a number of State highway agencies involved in preparation of environmental impact statements.

The easiest cases are those in which the agency preparing the statement has committed the offense of omission. One such case is *Environmental Defense Fund v. Corps of Eng'rs, supra* n. 266, in which the Court held that the impact statement prepared by the Corps of Engineers covering the Cossatot River Dam in Arkansas did not "set forth all of the environmental impacts which are known to the defendants by their own investigations or which have been brought to their attention by others." [275]

More difficult are those cases in which the agency has discussed some environmental impacts, but not others, or has discussed all environmental impacts, but inadequately. Cases of this genre in the highway field include: *Citizens for Mass Transit Against Freeways v. Brinegar, supra* n. 260; *Farwell v. Brinegar, supra* n. 262; *Ford v. Train, supra* n. 272; *Movement Against Destruction v. Volpe, supra* n. 218; and *Brooks v. Volpe, supra* n. 147.

In addition to the requirement that the impact statement discuss all "known" environmental impacts or consequences of a proposed federal action, some cases have imposed what appears to be a more stringent standard. This has been the case when the range of uncertainties surrounding the proposed actions is unusually large. In such cases, some courts have required agencies to take extra precautions to point out the gaps in existing knowledge which prevent further or better prognostication. This was the case in *Environmental Defense Fund v. Corps of Eng'rs, supra* n. 266. Going somewhat further, other courts have required special agency action to determine suspected, but unknown, impacts before proceeding with the proposal; such was the case in *Environmental Defense Fund, Inc. v. Hardin,*[276] in which the Court

[275] 325 F.Supp. at 758.

[276] 428 F.2d 1093 (D.C. Cir. 1970).

found that a research program might be necessary to support the environmental impact statement's adequacy.

A review of a few of the highway cases in which the Section 102(2)(C)(i) requirement that environmental impacts be adequately discussed will be instructive. In *I-291 Why? Ass'n v. Burns, supra* n. 175, the plaintiffs challenged an environmental impact statement prepared by the Connecticut Highway Department on grounds that the statement failed to adequately discuss the noise and air quality impacts created by construction of the highway.

In that case, the Court concluded that the treatment of noise and air quality impacts in the I-291 environmental impact statement was both cursory and conclusory. The Court said that only 2 out of the 28 pages in the statement dealt with noise pollution and only a single paragraph dealt with air pollution. The impact statement noted that embankments and other landscaping features had been designed into the highway to reduce visual and noise pollution in sensitive areas, and then stated that "a summarization in advance of the actuality of I-291 can only be, at best, careful examination and projection." This statement, nevertheless, provided no data whatsoever on the expected volume of traffic along I-291 or on the noise expected to be generated by that traffic. Instead, the statement summed up its consideration of the noise pollution problem as follows:

> A high-type highway occupying a new corridor will obviously introduce a new character and level of sound. Accordingly, this report would conclude that the sound emanating along I-291 would not be of a magnitude sufficient to be noisome to those near enough to hear it. Considerable detail to abate sound reflection along sections of I-291 give the proposal merit by way of designed-in ways to attenuate the sound factor.[277]

The impact statement's consideration of air quality was even more cursory:

> No highway in itself can reduce air pollution from vehicles emissions. There is no question that some of the areas of the town traversed will have the intrusion of heavier traffic. Considering the region as a whole, however, it is within the realm of reason that a completed highway system will greatly reduce traffic volumes in other critical pollution areas. It is a fact that efficiently moving traffic emits far less pollutants than the same number of vehicles slowly moving on congested streets.[278]

Plaintiff showed that the air pollution portion of the impact statement was carried over verbatim from the unresearched rough draft of the preliminary environmental impact statement prepared by the highway department. The author of that rough draft admitted at the hearing on

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[277] 372 F.Supp. 223, 253, 54 (D. Conn. 1974), 6 ERC at 1296.

[278] *Id.* at 254, 6 ERC at 1297.

plaintiff's motion that this draft was written "off the top of my head" without the support of any empirical data.

The District Court, citing *Brooks v. Volpe, supra* n. 147, noted that the environmental impact study may not be used as a promotional document in favor of a proposal at the expense of a thorough and regular analysis of environmental risks. The District Court said further that in *Brooks v. Volpe, supra* n. 147, the Court ruled that an impact statement for an Interstate highway was inadequate because of a serious lack of detail and reliance on conclusions and assumptions without reference to supporting objective data. The *Brooks* case also raised the question of air and noise pollution and, although the information in the impact statement covering the *Brooks* case was more detailed, at least with respect to air pollution, than the I-291 environmental impact statement, the *Brooks* Court found it to be inadequate.

In *Lathan v. Volpe, supra* n. 176, the same Court invalidated another environmental impact statement for inadequately describing the detrimental effects of air pollution on people in the vicinity of the highway corridor, and for failing to back up its conclusions on noise pollution with scientific data or reference to specific studies. In yet another freeway case, a court held that "failure to closely examine the effect of the proposed freeway on air pollution was a grievious omission," and also demanded a "thorough examination of the relationship between the freeway and noise pollution," *Keith v. Volpe, supra* n. 254.

Based on the facts before it, and on the *Brooks, Lathan,* and *Keith* holdings, the District Court found in the *I-291 Why?* case that the environmental impact statement gave inadequate consideration to the potential noise and air quality impact of the highway.

On the other hand, there are limits to the number of things that must be considered effects of a particular project under Section 102(2)(C)(i). In *Life of the Land v. Brinegar, supra* n. 273, the United States Court of Appeals for the Ninth Circuit held that Federal and State defendants were not required to include a study of the effect of an airport runway project on the population of Honolulu and Hawaii. Plaintiffs had contended that a major incentive for construction of the runway was Hawaii's need to accommodate and encourage increased tourism to the State. They concluded from this that the effects of increased tourism would be to increase the permanent population of Honolulu to the detriment of the local quality of life, and hence argued that the environmental impact statement must contain an analysis of the demographic effects of the project.

The Court of Appeals rejected this reasoning. That an increase in Honolulu's tourism would result in an increase in the city's permanent population was, in the Court's view, speculative. The Court noted that there was no empirical data on the record supportive of the plaintiffs' allegation.

The whole question of compliance with Section 102(2)(C)(i) can be

reduced to a comparison of the approaches taken by two different courts in *I-291 Why? Ass'n v. Burns, supra* n. 175, and *Life of the Land v. Brinegar, supra* n. 273. The strict view, and that favored by most courts, is that in *I-291 Why? Ass'n v. Burns, supra* n. 175.

Section 102(2)(C)(ii)

In addition to demanding that the environmental impacts of a particular federal action be set forth, Section 102(2)(C), in subsection (ii), requires that the environmental impact statement fully discuss "any adverse environmental effects which cannot be avoided should the proposal be implemented." In large part, the admonition that unavoidable adverse consequences of the proposed federal action be discussed is an effort to ensure the objectivity of the impact statement as well as to ensure that all pertinent information is included.

On the importance of objectivity, *Sierra Club v. Froehlke, supra* n. 269, is instructive. In that case, the District Court said, "objectivity is required of federal agencies, particularly with respect to evaluation of environmental impacts." The test applied in that case was one borrowed from the United States Court of Appeals for the Eighth Circuit in *Environmental Defense Fund v. Corps of Eng'rs, supra* n. 198; the test of compliance with Section 102, then, is one of good faith objectivity rather than subjective impartiality.

In *Nat'l Resources Defense Council, Inc. v. Grant,*[279] failure to discuss fully and objectively the adverse environmental consequences of a stream channelization project resulted in the Soil Conservation Service's environmental impact statement being ruled inadequate. In that case, the environmental impact statement named some of the environmental consequences of the project that were unavoidable and adverse, but failed to discuss them in any depth. It was not enough, for example, for the Soil Conservation Service to note that the project would increase the amount of sediment carried downstream. The Court held that the statement must analyze and discuss the downstream effects of an increase in sedimentation. In addition, the Soil Conservation Service's impact statement failed to discuss the adverse effects of the project on fish resources, potential eutrophication problems, and downstream flooding. In addition, the Court held that failure of the statement to discuss the cumulative effect of all adverse effects rendered the statement additionally inadequate.

Not only must the adverse environmental effects be noted and discussed, but also, in the opinion of some courts, the statement must review harmful effects that cannot be avoided and indicate what measures can be taken to minimize the harm. This was the opinion of the Court in *Daly v. Volpe, supra* n. 261, an important highway case.

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[279] 341 F.Supp. 356 (E.D.N.C. 1972), *injunction extended* 355 F.Supp. 280 (E.D.N.C. 1973).

Perhaps the best discussion of the responsibility to discuss mitigation of unavoidable adverse environmental effects is found in *Sierra Club v. Froehlke, supra* n. 269. In that case, the Court believed that Section 102(2)(C)(ii) requires the discussion of mitigation of unavoidable adverse environmental effects. The Court reasoned that Section 101(b) of the Act, when read in connection with the requirement to discuss unavoidable adverse environmental effects, requires that the statement discuss in detail the aesthetically or culturally valuable surroundings, human health, standards of living, or environmental goals set forth in 101(b) which might be sacrificed to the project.

Two additional interesting cases on the question of inadequate discussion of unavoidable adverse environmental consequences of a proposed federal action are *Silva v. Romney* [280] and *Nat'l Helium Corp. v. Morton.*[281]

Highway cases of particular interest are: *Citizens for Mass Transit Against Freeways v. Brinegar, supra* n. 260; *Farwell v. Brinegar, supra* n. 262; *I-291 Why? Ass'n v. Burns, supra* n. 175; *Life of the Land v. Brinegar, supra* n. 273; and *Movement Against Destruction v. Volpe, supra* n. 218.

At the very least, judicial interpretation of Section 102(2)(C)(ii) has developed the section's requirements so that federal agencies, and State agencies participating in impact statement preparation, must include in their impact statements a clear statement and discussion of all known and foreseeable unavoidable adverse environmental consequences of the proposed action. In addition, some cases have held that not only must the consequences be discussed, but also they must be related to a discussion of plans to mitigate the unavoidable harm, and perhaps be related to the discussion of alternative courses of action to the original proposed action.

Section 102(2)(C)(iii)

The discussion of possible alternatives to the proposed action required by Section 102(2)(C)(iii) and Section 102(2)(D) of NEPA is particularly critical to the adequacy of environmental impact statements because it usually is through this medium that mitigation measures may be discovered. For this reason, plaintiffs in lawsuits involving NEPA will pay particular attention to the discussion of alternatives. Vulnerability in this particular area is frequently sufficient to justify an injunction in the eyes of most federal courts. This is the case because the discussion of alternatives required by the action-forcing provisions of NEPA lies at the very heart of the philosophy of the statute. That is, that the federal decision-maker be presented with

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[280] 342 F.Supp. 783 (D. Mass. 1972), *rev'd on other grounds,* 473 F.2d 287 (1st Cir. 1973), *rev'd sub nom.* Silva v. Lynn, 482 F.2d 1282 (1st Cir. 1973).

[281] 326 F.Supp. 151 (D. Kan. 1971), *aff'd* 455 F.2d 650 (10th Cir. 1971).

an impact statement that provides a number of choices, rather than justification for a course of action already decided.

A number of courts have carefully considered NEPA's requirements with regard to the discussion of alternatives. Interestingly, many of the leading cases on the subject are highway cases, including: *Citizens to Preserve Overton Park v. Brinegar, supra* n. 253; *Conservation Soc'y of Southern Vermont v. Secretary, supra* n. 217; *Fayetteville Area Chamber of Commerce v. Volpe;*[282] *I-291 Why? Ass'n v. Burns, supra* n. 175; *Iowa Citizens for Environmental Quality v. Volpe, supra* n. 270; *Life of the Land v. Brinegar, supra* n. 273; *Movement Against Destruction v. Volpe, supra* n. 218; *Farwell v. Brinegar, supra* n. 262; *Daly v. Volpe, supra* n. 261; *Akers v. Resor, supra* n. 145; *Brooks v. Volpe, supra* n. 147; *Citizens Airport Comm. v. Volpe, supra* n. 274; *Comm. to Stop Route 7 v. Volpe, supra* n. 247; and *Monroe County Conservation Council v. Volpe, supra* n. 243.

Significant nonhighway cases, which are nevertheless of importance to highway cases, include: *Calvert Cliffs' Coord. Comm. Inc. v. Atomic Energy Comm'n;*[283] *Environmental Defense Fund v. Corps of Eng'rs, supra* n. 266; *Comm. for Nuclear Responsibility v. Seaborg, supra* n. 267; *Nat'l Res. Defense Council, Inc. v. Morton, supra* n. 279; *Silva v. Romney, supra* n. 280; *Nat'l Helium Corp. v. Morton, supra* n. 281; *Sierra Club v. Morton, supra* n. 117; and *Sierra Club v. Froehlke, supra* n. 269.

If there is one case that stands out as the watermark in NEPA litigation it is *Calvert Cliffs' Coord. Comm., Inc. v. Atomic Energy Comm'n, supra* n. 283. This case, more than any other, marked the turning point in NEPA interpretation. Although there have been many more significant cases after *Calvert Cliffs'*, in the minds of most, none has had the impact of this case. One of the reasons for this impact is that the *Calvert Cliffs'* decision dealt with so many aspects of NEPA heretofore undiscussed. One such previously unplumbed area was the requirement that alternative courses of action be discussed.

In *Calvert Cliffs'*, the United States Court of Appeals for the District of Columbia, speaking through Judge J. Skelley Wright, explained NEPA's requirement to discuss alternative courses of action as follows:

> This requirement, like the detailed statement requirement, seeks to ensure that each agency decision-maker has before him and takes into proper account all possible approaches to a particular project (including total abandonment of the project) which would alter the environmental impact and the cost-benefit balance. Only in that fashion is it likely that the most intelligent, optimally beneficial decision will ultimately be made. Moreover, by compelling a formal "detailed state-

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[282] 463 F.2d 402 (4th Cir. 1972), *on remand* 386 F.Supp. 572 (E.D.N.C. 1974).

[283] 449 F.2d 1109 (D.C. Cir. 1971).

> ment" and a description of alternatives, NEPA provides evidence that the mandated decision-making process has in fact taken place and, most importantly, allows those removed from the initial process to evaluate and balance the factors on their own.[284]

If *Calvert Cliffs'* was the first important case to set forth the philosophy behind the Section 102(2)(C)(iii) requirement that alternatives be discussed, *Nat'l Res. Defense Council, Inc. v. Morton,* took the next step by establishing practical guidelines for compliance with the section.

> Congress contemplated that the impact statement would constitute the environmental source material for the information of the Congress as well as the Executive, in connection with the making of relevant decisions, and would be available to enhance enlightenment of and by the public. The impact statement provides a basis for (a) evaluation of the benefits of the proposed project in light of its environmental risks, and (b) comparison of the net balance for the proposed project with the environmental risks presented by alternative courses of action.[285]

As is the case with almost all NEPA's important provisions, the requirement that alternatives be discussed is something less than explicit with regard to the degree and kind of compliance required of the federal agencies; however, the courts have filled in the gaps rather effectively. *Nat'l Res. Defense Council, Inc. v. Morton, supra* n. 285 and *Environmental Defense Fund v. Corps of Eng'rs, supra* n. 266 instructed that the possibility of dropping the proposed action altogether must be considered as one alternative. In addition, those courts held that the range of alternatives to be considered in preparation of an impact statement must extend from the alternative of rejecting the proposed action up to and including alternatives that would fully accomplish the goal of the proposed action but avoid all its objectionable features.

Between the alternative of taking no action at all and the "faultless alternative," there exists a wide range of choices providing partial solutions to environmental problems. Such alternatives may or may not meet all the original project's objectives. In *Nat'l Res. Defense Council, Inc. v. Morton, supra* n. 285, the Court held that federal agencies cannot disregard alternatives simply because they "do not offer a complete solution to the problem."

Although the requirement that the full range of alternatives be discussed is strict, it is not unreasonable. *Nat'l Res. Defense Council, Inc. v. Morton, supra* n. 285, established that the search for appropriate alternatives need not extend beyond the reasonable towards the speculative and remote. The Court added, however, that although only those alternatives that are "reasonably available" need be considered, the discussion of those alternatives selected must not be superficial. A

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[284] *Id.* at 1114.

[285] 148 U.S. App. D.C. 5, 11, 458 F.2d 827, 833 (D.C. Cir. 1972).

thorough exploration of every reasonable alternative must be made.

It should be noted here that putting forth an alternative, as the impact statement preparer must of necessity do, presents the problem of evaluating the environmental effects of the proposed alternative. This process must be as thorough as the evaluation of the environmental effects of the major proposal as required by Sections 102(2)(C)(i) and (ii). In essence, the suggestion of alternatives to the proposed course of action creates the requirement that the responsible authorities fashion an impact statement within an impact statement in their treatment of the alternative suggestion.

On the question of the requirement of discussing alternatives that present only partial solutions to environmental problems, the Court in *Sierra Club v. Froehlke, supra* n. 269, had this to say:

> It is not necessary that a particular alternative offer a complete solution to all technical, economic, and environmental considerations. If a portion of the original purpose of the project, or its reasonably logical subcomponent, may be accomplished by other means, then a significant portion of the environmental harm attendant to the project as originally conceived may be alleviated.[286]

It also should be noted by the careful practitioner that because some reasonable alternative might require congressional action, or is not within the competence or the authority of the agency preparing the statements, it is not sufficient to place such alternative beyond the scope of the required discussion. This was one of the more significant parts of the Court of Appeal's decision in *Nat'l Res. Defense Council, Inc. v. Morton, supra* n. 285. Under the holding in that case, an agency must explore all reasonable alternatives, whether or not those alternatives are within the agency's competence or statutory authority.

As has been noted, in addition to requiring that federal agencies discuss the full range of reasonable alternatives, the Act requires that the alternatives selected for inclusion in the statement be discussed fully. In *Nat'l Res. Defense Council, Inc. v. Morton, supra* n. 285, the Court established the principle that the agency's analysis of alternatives to the proposed action include a discussion of the environmental consequences of each of those alternatives because without such an analysis, the decision-makers would have a difficult time evaluating the relative merits of the alternatives versus the merits of the original proposal.

Turning to a discussion of the requirement that alternatives be presented and discussed as they relate to highway cases, it should be said that highway cases present some unusual and difficult questions with regard to compliance with the requirement. Alternatives to highways frequently are limited by the fact that the statement is prepared to

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[286] 359 F.Supp. 1289, 1344 (S.D. Tex. 1973), citing Natural Resources Defense Council v. Morton, 148 U.S. App. D.C. 5, 458 F.2d 827 (D.C. Cir. 1971).

cover a portion or segment of the highway that will connect with an existing highway or highway system. Under such circumstances the range of alternatives is limited.

This problem makes defense of impact statements involving highways at least superficially difficult on the question of the discussion of alternatives. This is so because the very nature of highway construction does not permit a large range of alternatives, and the statement appears to be inadequate in that respect unless counsel charged with the responsibility for defending the statement carefully explains that there are only a limited number of options when construction of a highway from point *A* to point *B* is necessary.

This problem was discussed by the United States District Court for the District of Connecticut in *Committee to Stop Route 7 v. Volpe, supra* n. 247. The Court said:

> If an impact statement is prepared with respect to a small length of a proposed highway, NEPA's requirement of adequate consideration of alternatives cannot be complied with. . . . With respect to a proposed highway, consideration of alternatives has two dimensions: an initial choice between building the highway or relying on existing routes or alternative means of transportation, and a subsequent choice among various alternative routes and designs. Consideration of the environmental impact of a small segment of a proposed route makes impossible adequate consideration of either set of choices.[287]

As is clear from the quotation in the preceding paragraph, the problem of segmentation enters into the discussion of alternatives in highway cases. The courts have rejected impact statements when, as in *Committee to Stop Route 7,* the statement has covered such a small part of an over-all project that the proper discussion of alternatives was impossible. Two such cases were *Keith v. Volpe, supra* n. 254, and *Indian Lookout Alliance v. Volpe, supra* n. 215.

The importance of the discussion of alternatives requirement, and the difficulty of compliance in some cases, is illustrated by the difficulties experienced by the Connecticut Commissioner of Transportation and the Federal Highway Administration in *I-291 Why? Ass'n v. Burns, supra* n. 175. In that case, the plaintiffs alleged, among other things, that the defendants had failed to adequately discuss alternatives to the proposed I-291 route. In assessing whether the I-291 environmental impact statement adequately complied with the procedural mandates of NEPA, the Court relied on the Second Circuit's capsulization of the relevant inquiry in *Monroe County Conservation Council v. Volpe, supra* n. 243.

> The primary purpose of the impact statement is to compel federal agencies to give serious weight to environmental factors in making discretionary choices . . . It is, at the very least, "an environmental full disclosure law . . ." for agency decision makers and the general public. In light

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[287] 346 F.Supp. 731, 740 (D. Conn. 1972).

> of this, the Secretary of Transportation was bound fully to comply with the requirements of the statute, and mere token efforts in that direction do not suffice. There are many aspects to the adequacy of an EIS, of course, but the "requirement for a thorough study and a detailed description of alternatives" . . . "is the linchpin of the entire impact statement." [288]

The defendants in *I-291 Why? Ass'n* had prepared a 28-page impact statement covering the highway, one quarter of which was a discussion of alternatives. The Court noted that these seven pages represented a sevenfold increase over the discussion of alternatives in the preliminary draft of the statement. The Court observed that the seven pages of alternatives in the final environmental impact statement retained many of the flaws of the draft environmental impact statement. The final statement did not follow through on the Federal Highway Administration's suggestion that material from the "4(f)" statements required under Section 4(f) of the Department of Transportation Act of 1966, relating to alternatives to the taking of publicly owned space, be incorporated in the I-291 environmental impact statement. Thus, four of the seven pages discussed various alternative routes within the same general corridor and justified the rejection of those alternatives on the basis of cost, displacement of housing or businesses, or important existing land uses, and safety factors. Another page of the statement noted that the location of the general corridor for I-291 had been a matter of public knowledge since the late 1950's, and existing development patterns precluded anything but minor adjustments to the original concept. It was apparent to the Court that aside from a four-page discussion of "minor adjustments," the impact statement considered only three alternatives to route I-291 as proposed.

The statement dismissed in a conclusory paragraph the alternative of improving existing roads:

> It is unrealistic to believe that modernizing the existing network could greatly improve traffic flow. The high development of lands adjacent to these roads, the numerous side road intersections, the devious routes followed and the extremely high cost make this alternative impractical.[289]

Unfortunately for the preparer of the impact statement no data whatsoever were produced to support the foregoing conclusions.

The alternative of abandoning plans for the construction of I-291, termed the "do nothing" alternative by the statement, was given even shorter shrift and again echoed the draft statement. On that subject the highway department said:

> This could only lead to increased congestion on the highways through Newington in particular and to some degree in the other affected

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[288] 372 F.Supp. 223, 247 (D. Conn. 1974); *see also,* Monroe County Conservation Council, Inc. v. Volpe, 472 F.2d 693, 697–98 (2d Cir. 1972).

[289] 372 F.Supp. at 248.

> towns. Since this congestion would cause increased economic loss to the towns and to all potential users of the facility, this does not appear to be a reasonable and prudent alternate.[290]

Again, unfortunately, the impact statement offered no data to demonstrate existing or projected traffic congestion or economic loss which might result from alteration of the route.

The final alternative considered was mass transit. The need for mass transit facilities was admitted by the impact statement, but from two statistics on projected travel patterns along the I-291 route, the environmental impact statement concluded that a mass transit system would be impractical.

The Court's treatment of the I-291 environmental impact statement on the question of alternatives is rather instructive. The Court said that NEPA's requirement for discussion and consideration of alternatives seeks to ensure that each agency decision-maker has before him, and takes into proper account, all possible approaches to a particular project, including total abandonment of the project, which would alter the environmental impact and the cost-benefit balance. Only in that fashion, the Court said, is it likely that the most intelligent, optimally beneficial decision will ultimately be made. This language is clearly paraphrased from the *Calvert Cliffs'* decision and continues with a direct quote from that decision:

> Moreover, by compelling a formal detailed statement and a description of alternatives, NEPA provides evidence that the mandated decision-making process has in fact taken place and, most importantly, allows those removed from the initial process to evaluate and balance the factors on their own.[291]

The Court also noted that the Second Circuit has built on the *Calvert Cliffs'* decision to read NEPA as demanding (as part of the aforementioned thorough study and detailed description of alternatives) that careful consideration be given to the feasibility and impact of the abandonment of the project, citing *Monroe County Conservation Council v. Volpe, supra* n. 243. Mere passing mention of possible alternatives to the proposed action in a conclusory and uninformative manner renders the impact statement fatally inadequate. In a similar vein, the Court noted that the First Circuit has indicated that in its discussion of alternatives the agency must go beyond mere assertions and indicate the basis for such alternatives citing *Silva v. Romney, supra* n. 280.

The Court found in the *I-291 Why?* case that even as to the alternatives it did discuss, the impact statement fell far short of the required thorough study and detailed description. The Court said that no reasoned decision could be made on the basis of the impact statement's conclusion that departure from the expected corridor was precluded

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[290] *Id.* at 248.

[291] *Id.* at 249, quoting 449 F.2d at 1114.

by speculative development, that modernization of existing roadways was too costly, that mass transit was too inflexible to serve public needs, or that abandonment of the project was impractical. These difficult judgments, the Court said, have been committed by NEPA to the informed decision of the Federal Highway Administration and ultimately the Secretary of Transportation, and yet, rather than provide information, the impact statement provided only generalities and heavy-handed self justifications. In the Court's view, the impact statement treated the crucial decision to proceed with federal funding of I-291 not as an impending choice to be pondered, but as a foregone conclusion to be rationalized.

In addition to its conclusory treatment of the alternatives it did mention, the I-291 environmental impact statement, according to the Court, also failed to articulate at least two plausible alternatives to I-291 as it was proposed. One alternative was to use existing State routes as the basis for linking two segments of Interstate highway; the second involved a realignment of the I-291 and I-84 hookup.

The Court said that it is true that a "rule of reason" is implicit in NEPA's requirement that an environmental impact statement describe or discuss alternatives to proposed agency actions. Although this "rule of reason" was originally formulated in reference to NEPA's requirement of discussion of the environmental effects of stated alternatives, especially when these effects cannot be readily ascertained and the alternatives are deemed only remote and speculative possibilities, it has since been applied to the more basic question of whether certain alternatives had even to be described in an environmental impact statement, let alone discussed, *Life of the Land v. Brinegar, supra* n. 273.

Even under this expanded version of the "rule of reason" under NEPA, however, the absolute omission of the two alternatives in the *I-291 Why?* case clearly constituted noncompliance with NEPA in the Court's opinion.

One of the problems inherent in permitting the State highway authorities to prepare impact statements, which the Federal Highway Administration later reviews and approves, is that the Federal Highway Administration assumes responsibility for the work of the State highway department, and, where it is deficient, must correct the deficiency or bear the burden of the errors as its own. In *I-291 Why?* the Federal Highway Administration was faulted by the Court for failing, in its review of the State's environmental impact statement, to notice the overlooked alternatives. The Court found that neither alternative appeared to be so *prima facie* unreasonable as to warrant its exclusion from the statement. The Court also noted that single-purpose alternatives must, nevertheless, be described and discussed in an environmental impact statement for a multipurpose project, at least where the single purpose served is significant, citing *Environmental Defense Fund v. Corps of Eng'rs, supra* n. 266.

Of course, it does not follow that because each alternative is reason-

able it is therefore preferable to the major proposal; the Court noted this general principle. There may well have been major disadvantages to implementing either of the two omitted alternatives in the *I-291 Why?* case. What NEPA demanded, however, was that the impact statement be sufficiently inclusive and informative in its description and discussion of those alternatives to allow the Secretary of Transportation and his subordinates to make an informed choice to proceed with I-291 or to adopt one of the alternatives.

The Court found that the environmental impact statement in the *I-291 Why?* case, rather than informing federal decision-makers by objectively listing the alternatives facing them regarding I-291 and supplying some facts sufficient for them to judge the merits of each alternative, usurped the Secretary's decision-making role by framing its discussion of alternatives so that, based on the environmental impact statement alone, only one decision was possible—to proceed with I-291 as proposed.

This rather lengthy description of the problems faced by the highway authorities in the *I-291 Why?* case should indicate to those facing defense of environmental impact statements supporting highway proposals that the requirement that alternatives be set forth and fully discussed is not one to be taken lightly, nor is defense of a failure to comply fully easy once the damage has been done.

Sections 102(2)(C)(iv) and (v)

There are two remaining specific directions with regard to the impact statement requirements of NEPA. Sections 102(2)(C)(iv) and 102(2)(C)(v) have received virtually no attention from the courts. Although brief reference has been made to these sections in a few cases, they have not played a major or determinative role in any single case.

Section 102(2)(C)(iv) requires that the impact statement discuss the relationship between the local short-term uses of man's environment and the maintenance and enhancement of long-term productivity. Section 102(2)(C)(v) requires that the statement discuss any irreversible and irretrievable commitment of resources that would be involved in the proposed action should it be implemented.

Even though plaintiffs in NEPA cases have not relied on these sections to any great extent to date, the sections should not be considered insignificant. The requirements that the agencies consider and discuss to the fullest extent possible "the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity" and "any irreversible and irretreivable commitments of resources which would be involved in the proposed action should it be implemented" are an essential part of the action-forcing provisions. It should be assumed by the careful attorney that the sections are no less important in a legal sense than the other action-forcing sections of the statute.

Should an agency fail to meet adequately the requirement of either section in preparation of an impact statement, the resulting statement would violate NEPA to no less a degree than if the impact statement omitted the requirements of some other subsection of Section 102(2)(C), and the proposed action could be enjoined pending preparation of an adequate statement.

National Environmental Policy Act Commenting Procedures

In addition to the requirements of Section 102(2)(C) for specific information discussed in the preceding sections of this paper, Section 102(2)(C) also requires that before making any detailed statement, the responsible federal official shall consult with, and obtain the comments of, any federal agency that has jurisdiction by law or special expertise with respect to any environmental impact involved in the proposed project. Thus, officials who prepare an impact statement must obtain the comments of other federal agencies. In addition, the comments of State and local government agencies are required, under regulations promulgated, to implement NEPA requirements.

Failure to obtain and consider the comments and views of other agencies before preparation of a final impact statement violates Section 102(2)(C) of NEPA. Courts have held inadequate a number of environmental impact statements prepared without proper attention to this requirement. It is important to note that Section 102(2)(C) not only requires that agencies consult with and obtain the views of other interested agencies, but also that copies of the comments and views of the appropriate Federal, State, and local agencies accompany the proposal through the existing agency review process.

Highway cases that have involved questions concerning NEPA commenting procedures include: *Finish Allatoona's Interstate Right, Inc. v. Volpe, supra* n. 271; *Ford v. Train, supra* n. 272; *I-291 Why? Ass'n v. Burns, supra* n. 175; *Stop H-3 Ass'n v. Volpe;*[292] *Brooks v. Volpe, supra* n. 147; and *Monroe County Conservation Council, Inc. v. Volpe, supra* n. 243. At least two nonhighway cases, *Environmental Defense Fund, Inc. v. Corps of Eng'rs, supra* n. 266, and *Sierra Club v. Froehlke, supra* n. 269, are instructive on the question of NEPA commenting procedures.

In *Environmental Deefnse Fund, Inc. v. Corps of Eng'rs, supra* n. 266, three of the ten violations of NEPA set out by the Court related to the Corps of Engineers' failure to comply with the commenting procedures of Section 102(2)(C):

> (7) The evidence does not indicate that, prior to making the statements, the defendant did "consult with and obtain the comments of" all federal agencies which have "jurisdiction by law or special expertise

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[292] 349 F.Supp. 1047 (D. Hawaii 1972), *stay of injunction denied* 353 F.Supp. 14 (D. Hawaii 1972).

with respect to any environmental impact involved."

(8) The statements do not include the "comments and views" of *all* appropriate "State and local agencies which are authorized to develop and enforce environmental standards."

(9) The evidence does not indicate that the "statements and comments and views" of all the appropriate Federal, State, and local agencies did "accompany the proposal through the existing agency review process." [293]

The question of NEPA's commenting procedures and the requirement for such procedures also is appropriate when impact statements are amended. In *Nat'l Res. Defense Council v. Morton,* the Department of the Interior failed to convince either the Court of Appeals (*supra* n. 285) or the District Court that it adequately discussed the alternatives to a proposal to lease offshore lands for oil drilling. The department prepared an addendum to its original environmental impact statement in which it discussed alternatives to the leases. The addendum was not circulated for comment as required by Section 102(2)(C). The District Court, which had the case on remand, held that the statement was inadequate because:

> [T]he addendum, which is essentially a draft statement, has not been submitted for comment and review by any other Federal agencies, nor have the comments and views of the "appropriate Federal, State, and local agencies" been solicited with regard to this addendum.[294]

The duty to circulate the impact statement for comment and to submit the comments for review is a mandatory one. The requirement must be carried out even though the outcome of the process may be predictable.

> Whether or not the comments will be valuable in the end is not the question before this Court. The Court must only determine whether the opportunity for comment as required by Section 4332(2)(C) was afforded.[295]

A number of interesting questions arise when one considers what an agency must do with the views and comments of other agencies once it has received such comments. As has been discussed previously, the courts have required full disclosure of all views and comments received on an impact statement. In addition, many of the courts dealing with the problem have required that the comments be discussed and to some extent analyzed. Beyond those responsibilities, the courts have not established general principles as to the degree of attention that must be paid to the comments received on any given impact statement. One exception, however, is *Sierra Club v. Froehlke, supra* n. 269, in

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[293] 325 F.Supp. 749, 758 (E.D. Ark. 1971).

[294] Natural Resources Defense Council, Inc. v. Morton, 337 F.Supp. 170, 172 (D.D.C. 1972).

[295] *Id.* at 172.

which the United States District Court for the Southern District of Texas went well beyond any previous impact statements in describing the responsibility of the impact statement drafting agency with regard to the comments received from other agencies. According to the Court in *Sierra Club v. Froehlke, supra* n. 269, the interagency contact brought about by NEPA's circulation and commenting requirements must be "a true consultation." The Court said that it is the responsibility of the sponsoring agency to seek out and contact the appropriate authorities for comment. Notwithstanding this responsibility, the Court said that NEPA requires all federal agencies to keep track of the activities of other agencies so that they may notify a sponsoring agency that has failed to submit for comment an environmental impact statement within their area of expertise. The Court relied on NEPA's requirement that the agency use a systematic interdisciplinary approach to support this finding.

The most interesting feature about the Court's opinion in *Sierra Club v. Froehlke, supra* n. 269, is that the Court concluded that the sponsoring agency must defer to the opinion of some agencies consulted. The Court held that this was the case where the agency consulted possessed a particularized expertise not shared by the sponsoring agency. The Court said:

> Congress did not intend that a federal agency consult with another agency "which has jurisdiction by law or special expertise with respect to any environmental impact involved" and then have its comments accompany the impact statement through the review process, only to have them ignored. This would not satisfy the requirement that agencies "utilize a systematic, interdisciplinary approach." [296]

In the event of a conflict between the sponsoring agency and an agency with particularized expertise, NEPA obligates the sponsoring agency to defer to the opinion of the commenting agency in most cases, according to the Court in *Sierra Club v. Froehlke, supra* n. 269.

> Only upon the presentation of clear and convincing evidence that the reviewing agency was incorrect in its assessment should the sponsoring agency [in this case the Corp of Engineers] adopt another evaluation; even so, this refusal to defer should not occur until after the reviewing agency has had the opportunity to review the Corps' claimed evidence, and possibly reverse or modify its original evaluation.[297]

It is safe to predict that not many jurisdictions will go so far in extending the requirement to solicit comments, but the opinion in *Sierra Club v. Froehlke, supra* n. 269, is well reasoned and makes a convincing argument in support of its position.

Ignoring for the moment the extension of the rule represented in

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[296] 359 F.Supp. 1289, 1349 (S.D. Tex. 1973).

[297] *Id.* at 1349.

Sierra Club v. Froehlke, it is well established law that agencies preparing impact statements are required to circulate a draft of their statement to other federal agencies with particularized expertise, and the comments received from those agencies must be fully disclosed in the final impact statement. In addition, it is fairly well established that comments received from other agencies, if substantive, must be discussed and analyzed to some extent by the agency preparing the impact statement.

Obviously, when an agency fails to solicit the comments of other interested agencies, a violation of Section 102(2)(C) of NEPA occurs. This was the case in *Monroe County Conservation Council, Inc. v. Volpe, supra* n. 243, in which the Court said:

> While the record reveals that the Transportation Department did receive letters from the Department of the Interior and the Department of Housing and Urban Development concerning the taking of the parkland, there is no indication that they accompanied the statement through the review process as required by this section and in compliance with Department of Transportation Order 5610.1(7)(e), (g). Obviously there is no purpose in obtaining outside views if they are not placed before the decision-maker, especially those which may be opposed to the project. . . .[298]

Other Section 102 Requirements

In addition to the action-forcing provisions of Section 102(2)(C), the section imposes other requirements on federal agencies. A few courts have considered these provisions to be ancillary to Section 102(2)(C), but generally, judicial interpretation of NEPA has established that the other provisions, more likely than not, create separate and distinct obligations. Specifically, the courts have dealt with Sections 102(2)(A), 102(2)(B), 102(2)(D), and 102(2)(G).

In *Hanly v. Kleindienst, supra* n. 223, the Court held that the "major federal action" criteria applied only to Section 102(2)(C). The remaining subsections of 102 are not similarly limited. They apply to *all* federal actions, major or not. In *Citizens for Reid State Park v. Laird, supra* n. 239, the Court affirmed this interpretation by holding that even though the action involved did not qualify as a "major federal action," Sections 102(2)(A), (B), and (D) did apply and were satisfied.

Section 102(2)(A) requires that the methods and procedures used in making decisions that affect the environment employ a systematic and interdisciplinary approach, whereas Section 102(2)(B) requires that agencies develop methods and procedures to ensure that unquantified environmental amenities receive appropriate consideration along with economic and technical considerations.

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[298] 472 F.2d 693, 698 (2d Cir. 1972).

The Court said that in the *Hanly* case Sections 102(A) and (B) required compliance before a determination by the agency on whether to file an impact statement. Section 102(A) was satisfied in the *Hanly* case by the agency's use of specialists to assure an interdisciplinary approach. But, with regard to Section 102(2)(B), the Court found that the statutory standard had not been met. The *Hanly* Court considered the subsection to have independent meaning and significance, as well as an ancillary relationship to Section 102(2)(C) requirements. Thus, in that case, GSA's failure to hold public hearings before deciding that an impact statement was not required covering construction of a federal building in New York City violated Section 102(2)(B).

At least two cases have dealt with the claim that Section 102(2)(B) requires federal agencies and the Council on Environmental Quality (CEQ) to develop methods of actually quantifying environmental amenities. The courts have not seen fit to establish a moratorium on all federal projects pending the quantification of environmental factors, however. The Court said in *Environmental Defense Fund, Inc. v. Corps of Eng'rs, supra* n. 266, that the federal agency had been unable to value the environmental amenities to be affected by construction of a dam, but that this inadequacy alone would not support a finding of a NEPA violation.

> The Court is not here stating that an environmental impact statement, as required by Section 102(2)(C), would be inadequate simply because the defendants and the Council on Environmental Quality had not identified and developed the methods and procedures to quantify such values. The NEPA does not require the impossible.[299]

The Court did, however, require that the agency make note of this deficiency in its impact statement.

The previously mentioned opinion in *Sierra Club v. Froehlke, supra* n. 269, also dealt with the problem of quantifying environmental amenities. In that case the Court criticized the Corps of Engineers' failure to balance properly environmental costs against economic benefits. Much of the problem was, in the Court's opinion, caused by failure of the agencies, Congress, and CEQ to develop a system for quantifying environmental values. In the absence of such methodologies and procedures, the Court suggested alternative methods of dealing with environmental amenities so that the spirit of NEPA would not be overlooked.

> If such sophisticated techniques are not presently available for use, then interim alternative methods should be explored by Congress to ensure that we do not necessarily jeopardize the intent of NEPA between now and the time that agencies and ultimately the courts are sup-

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[299] 325 F.Supp. 749, 758 (E.D. Ark. 1971).

> plied with appropriate standards for evaluating the comparative degrees of benefits and costs.[300]

Section 102(2)(B) might be complied with, the Court suggested,

> If the Congress were to decide upon some arbitrary benefit-cost ratio below which a project would not be considered, only the more meritorious and urgently needed public works projects would survive close examination and be authorized until such time as a more all-encompassing and refined set of benefit-cost tools becomes available.[301]

Judge Bue believed, in *Sierra Club v. Froehlke, supra* n. 269, that establishment of a minimum cost-benefit ratio for federal projects would make judicial review of NEPA cases much easier.

> In this fashion, the formidable task assigned to the courts could be more adequately and intelligently undertaken, and hopefully the decisions rendered would comport more fully with the intent of Congress.[302]

In *Akers v. Resor, supra* n. 145, Section 102(2)(A) was cited to the effect that an "interdisciplinary approach" required that an impact statement must include comments from agencies with a particularized expertise in areas affected by the proposed action. And, in *Environmental Defense Fund v. Hardin, supra* n. 276, the Court held that Section 102(2)(G) required agencies to undertake more broadly based environmental research projects than they were authorized or directed to undertake before NEPA passage.

At first glance, Section 102(2)(D) merely mirrors Section 102(2)(C)(iii). However, closer study and judicial interpretation of Section 102(2)(D) have both developed the relationship between Section 102(2)(D) and Section 102(2)(C) as separate entities and indicated how the sections work together.

Neither *Nat'l Res. Defense Council, Inc. v. Morton, supra* n. 285, nor *Comm. to Stop Route 7 v. Volpe, supra* n. 247, separates the two sections. Both cases treat the requirement to discuss various alternatives in the statement as coming from both sections. However, in *Environmental Defense Fund, Inc. v. Corps of Eng'rs, supra* n. 198, the Court of Appeals for the Eighth Circuit noted that Section 102(2)(D) requires a more thorough discussion of alternatives than does Section 102(2)(C).

In spite of its holding, the Court of Appeals in *Environmental Defense Fund, Inc. v. Corps of Eng'rs, supra* n. 198, believed that Section 102(2)(D) consideration of alternatives should be included in the impact statement. The United States Court of Appeals for the Fourth Circuit's decision in *Conservation Council v. Froehlke,*[303] which merely

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[300] 359 F.Supp. 1289, 1381 (S.D. Tex. 1973).

[301] *Id.* at 1381.

[302] *Id.* at 1381.

[303] 473 F.2d 664 (4th Cir. 1973), *rev'g mem.* 340 F.Supp. 222 (W.D.N.C. 1972).

adopted the reasoning of the Eighth Circuit in *Environmental Defense Fund, Inc. v. Corps of Eng'rs, supra* n. 198, also took the position that the requirements in Section 102(2)(D) are more extensive than those in Section 102(2)(C)(iii).

The language of NEPA appears to lend itself to the interpretation that Section 102(2)(C)(iii) requires discussion of alternatives to the proposed action in every case in which an impact statement is prepared, but that Section 102(2)(D) requires an agency to study, "develop," and describe appropriate alternatives for "any proposal which involves unresolved conflicts concerning alternative uses of available resources." Thus, where such "unresolved conflicts" do not exist, no Section 102(2)(D) consideration would be involved. Presently, the cases deal with situations in which both sections must be applied. The better reasoned of these cases hold that the Section 102(2)(D) analysis must be made a part of the public record through the impact statement process.

Lead Agency

Most major federal actions require input by more than one agency of the Federal Government. One interpretation of NEPA might be that each agency involved in a major federal action must prepare its own environmental impact statement covering its portion of the project. Another would be that the agencies must prepare and issue a joint statement on the project. Finally, and perhaps most practically, a single agency could be designated to assume responsibility for compliance with NEPA's impact statement requirements for all the agencies involved.

The Council on Environmental Quality has stated in its guidelines that the lead agency is the agency responsible for preparing the impact statement covering the entire project. The lead agency is, as the term indicates, the agency which has the primary federal responsibility for the project. Thus, in highway construction projects, the Federal Highway Administration or the Department of Transportation is always the lead agency.

An excellent analysis of some of the problems inherent in the lead agency approach to multiagency actions was set forth in Frederick R. Anderson's *NEPA In The Courts.*[304] Anderson noted in his review of the lead agency process that the exempted agencies, in other words those agencies which do not have to prepare the statements, will be more likely to engage in pro forma consideration of the statement. Exempted agencies also miss the experience of having to identify and discuss the particular environmental effects of their portion of the project. This, according to Anderson, deters the shift in agency values and attitudes that NEPA was intended to initiate. The process allows

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[304] See ANDERSON, *supra* note 154, at 196.

agencies to cumulate impacts, which is desirable, but at the same time it permits each agency to escape concentrating individually on the specific impact of its own part of the over-all project.

In Anderson's opinion, the Council on Environmental Quality chose the least sound of the three possible interpretations of the Section 102 (2)(C) requirements with regard to who prepares the impact statement covering a multiagency action. He prefers either preparation of separate agency statements on each part of the over-all action (which assures maximum participation but at the cost of coordination, economy, shared expertise, and consideration of cumulative impacts), or joint statements (which involves all the agencies to a somewhat lesser degree, and achieves coordination, sharing of expertise, economy, and consideration of cumulative impacts, at the expense of poorly delineated ultimate responsibility).

Highway cases, on the other hand, do not seem to fall into the problem areas noted by Anderson. In most instances, highway projects are not within the context of Anderson's description of multiagency actions. However, those interested in a case bearing out Anderson's thesis might review *Upper Pecos Ass'n v. Stans,*[305] involving the Forest Service and the Economic Development Administration.

Delegation of Responsibility for Impact Statement Preparation

Of more importance to those interested in highway law is the question of *who* must prepare impact statements under the National Environmental Policy Act.

The Federal Highway Administration and the Department of Transportation have consistently argued that they can delegate impact statement preparation to State highway authorities or departments so long as they review the final draft and adopt it as their own. This argument has been accepted by the Council on Environmental Quality and has been upheld by most, but not all, courts. Notwithstanding this, the concept of delegation of NEPA responsibilities has been the source of substantial controversy.

The Act is not ambiguous on the question of who must prepare the impact statement. It states that "all agencies of the Federal Government shall . . . include in every recommendation or report on proposals for legislation or other major Federal actions significantly affecting the quality of the human environment, a detailed statement *by the responsible official.*" [306]

Section 102(2)(C) provides that impact statements are to be prepared by a responsible official of the federal agency undertaking a major project that will have a significant effect on the quality of the

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[305] 328 F.Supp. 332 (D.N.M. 1971), *aff'd* 452 F.2d 1233 (10th Cir. 1971), *vacated,* 409 U.S. 1021, 34 L.Ed. 2d 313, 93 S.Ct. 458 (1972).

[306] 42 U.S.C. § 4332(2)(C) (1970).

human environment. No one has seriously argued that the responsible official was meant to refer to anyone other than the responsible *federal official.*

Notwithstanding the apparent clarity of the NEPA command, considerable controversy has arisen over who shall actually prepare the impact statement. The controversy can logically be divided into two rather distinct problem areas. First, there is the question of which federal agency or agencies is required to prepare the statement in the case of a multiagency project requiring a statement. This question has been rather easily resolved by the CEQ guidelines and by agency cooperation, and was briefly discussed in the preceding paragraphs. The second problem area was not so easily settled. It involves the propriety of an agency delegating its impact statement responsibilities to nonfederal entities such as State government agencies or private consulting firms.

Some agencies, such as the Federal Highway Administration and the Department of Transportation, have permitted delegation of a significant portion of their responsibility under Section 102(2)(C) of NEPA. This practice has occurred when the major federal action involved has been the approval of a private license application, the funding of work carried out by a State, or the grant of funds to a private party.

In addition to the Department of Transportation and the Federal Highway Administration, other agencies that have delegated their impact statement responsibilities are the Department of Interior (DI), the Interstate Commerce Commission (ICC), and the Federal Power Commission (FPC).

The general rule that NEPA impact statement preparation responsibilities can be delegated to a State highway authority, in accordance with the principle set forth in the CEQ guidelines, could not have been predicted from the early cases on the subject. Most observers of NEPA litigation thought that the decision of the United States Court of Appeals for the Second Circuit in *Greene County Planning Board v. Federal Power Comm'n*[307] resolved the delegation issue. This was particularly true because the Supreme Court refused to grant certiorari in the case, permitting the lower court's decision to stand.

In the *Greene County* case, in accordance with FPC guidelines, the Power Authority of the State of New York prepared a draft environmental impact statement covering a transmission line proposed to service a pumped storage project. The transmission line was contested, and, at the licensing hearing before a FPC hearing examiner, the plaintiffs challenged FPC delegation of its impact statement responsibility to the power authority. The hearing examiner declined to rule that FPC must, under NEPA, prepare its own impact statement. The FPC

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[307] 455 F.2d 412 (2d Cir. 1972), *cert. den.*, 409 U.S. 849, 34 L.Ed. 2d 90, 93 S.Ct. 56 (1972).

affirmed the decision of the hearing examiner, and under applicable law, appealed the decision directly to the Court of Appeals.

The Appeals Court determined that NEPA required FPC to prepare its own environmental impact statement covering the transmission line before any formal hearings on the line were conducted. The Court concerned itself as much with the timing of the statement as with who must prepare it. In addition, the distinction between preparation of a final, as opposed to a draft, impact statement entered into the dispute. The FPC argued that it had reviewed and circulated the power authority's draft statement, and it sufficed for purposes of Section 102(2)(C) of NEPA. The FPC also argued that it did not have to prepare its own impact statement until it filed its final decision on the transmission line.

The plaintiffs argued that the FPC could not rely on the power authority for preparation of either the final or the draft statement, and that the draft statement had to be prepared before any formal hearings on the transmission line were conducted.

The Court held that by delegating the impact statement responsibility to the power authority, the FPC had abdicated a significant part of its own responsibility. In the Court's words the FPC appeared to be content to collate the comments of other federal agencies, its own staff, and the intervenors, and act as an umpire. "The danger of this procedure, and one obvious shortcoming, is the potential, if not the likelihood that the applicant's statement will be based on self-serving assumptions." [308]

On the question of who should prepare the impact statement, the Second Circuit rejected the FPC's reliance on the then-existing CEQ guidelines, which it had offered as support for its decision that it was under no obligation to prepare an impact statement before its licensing hearing on the transmission line:

> Although the Commission's interpretation of Section 10(e) of the guidelines is superficially appealing, it flies in the face of Section 102(2)(C) of NEPA which explicitly requires the agency's *own* detailed statement to "accompany the proposal through the existing agency review processes." [309]

The Court suggested that the FPC review the procedures of the Atomic Energy Commission (AEC) which were based on the decision of the United States Court of Appeals for the District of Columbia in *Calvert Cliffs' Coord. Comm. v. Atomic Energy Comm'n, supra* n. 283. Those procedures require, as do FPC procedures, that an agency submit an environmental report. A draft report is then prepared by the AEC staff and circulated among other federal agencies for comment. On the basis of comments received from these agencies and other interested

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[308] *Id.* at 420.

[309] *Id.* at 421.

parties, the AEC prepares a final detailed statement, which is offered in evidence at any hearing contesting licensing of the proposed project.

The Court of Appeals was obviously suggesting that it considered the AEC procedures to be a proper interpretation of NEPA's requirements, both with regard to who must prepare the draft and final impact statements and when those statements must be prepared.

As noted in the foregoing paragraphs, for many observers of NEPA litigation, *Greene County Planning Board v. Federal Power Comm'n, supra* n. 307, marked the end of the dispute over who must prepare the environmental impact statement mandated by Section 102(2)(C) of NEPA. Delegation, at least in the sense adopted by the FPC, was not permissible. In light of later developments, however, this conclusion was quite premature.

As the rule relates specifically to highway cases, there have been about 18 cases in which the issue was directly raised since *Greene County*. Only three times was the *Greene County* decision permitted to stand undistinguished. In all the other cases, the rule established in *Greene County* was interpreted and distinguished to permit preparation of environmental impact statements primarily by some party other than the federal agency directly responsible for that process under NEPA.

Federal Highway Administration procedures, as has been noted previously, not only permit, but require, States that are the recipients of federal funds for highway construction to prepare the environmental impact statements covering proposed highway construction. The *Greene County* rationale is avoided in this scheme by requiring the responsible federal official to clear draft impact statements for circulation to other federal agencies and interested parties. The responsible federal official also must sign and provide for review and acceptance of final impact statements before they are designated "officially approved." The procedure permits preparation of the statement to be delegated to the State agencies, but makes the federal official responsible for the statement.

Highway cases dealing specifically with this problem of delegation include: *Conservation Soc'y of Southern Vermont v. Secretary, supra* n. 217; *Fayetteville Area Chamber of Commerce v. Volpe, supra* n. 282; *Finish Allatoona's Interstate Right, Inc. v. Volpe, supra* n. 271; *Ford v. Train, supra* n. 272; *I-291 Why? Ass'n v. Burns, supra* n. 175; *Iowa Citizens for Environmental Quality v. Volpe, supra* n. 270; *Life of the Land v. Brinegar, supra* n. 273; *Movement Against Destruction v. Volpe, supra* n. 218; *Brooks v. Volpe, supra* n. 147; *Citizens Airport Comm. v. Volpe, supra* n. 274; *Comm. to Stop Route 7 v. Volpe, supra* n. 247; *Lathan v. Volpe, supra* n. 176; *Nat'l Forest Preservation Group v. Volpe;* [310] *Northside Tenants Rights Coalition v. Volpe;* [311] *Pizitz, Inc. v. Volpe, supra* n. 259; and *Scherr v. Volpe, supra* n. 244.

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[310] 352 F.Supp. 123 (D. Mont. 1972).

[311] 346 F.Supp. 244 (E.D. Wis. 1972).

The United States District Court for the Western District of Washington, in *Lathan v. Volpe, supra* n. 176, had an opportunity to decide whether Federal Highway Administration procedures complied with NEPA, but declined to do so. Although the Court seemed to accept the procedures as valid under the Act, the question was not raised until the case was on remand, and the Court determined that it had been introduced too late in the litigation to be decided. In *Pizitz Inc. v. Volpe, supra* n. 259; the Court approved the procedure, but then, not long after its decision in that case, withdrew its holding in a supplementary opinion in which it said that a decision on whether State agencies could prepare a NEPA statement was not necessary to its decision in the case.

The first case in which the *Greene County* ruling was directly discussed was *Comm. to Stop Route 7 v. Volpe, supra* n. 247. In that case, the Court decided that delegation of the impact statement duties, at least with regard to preparation of the final statement, violated NEPA. The Court found that the Federal Highway Administration regulations could not alter the clear meaning of the Act, and reasoned that the danger of self-serving assumptions that worried the *Greene County* Court were present in highway cases as well. However, in later proceedings in the *Comm. to Stop Route 7* case, the Court's decision was diluted. Following a request by the Federal Highway Administration, the Court ruled that it was premature to rule on the adequacy of "the broad outlines of the procedure." In addition, the generally diluted ruling of the original case was held by the Court to apply only to that particular case. The Federal Highway Administration explained that federal approval of an impact statement prepared by a State agency constituted federal preparation of the statement in a legal sense, and the Court seemed to be persuaded by that rationale.

An opposite result was reached by the United States District Court for the Eastern District of Wisconsin in *Northside Tenants Rights Coalition v. Volpe, supra* n. 311. Relying specifically on *Greene County,* the Court held that preparation of the impact statement by a State agency did not comply with NEPA requirements. The federal agency must prepare the statement and balance the project's value in light of environmental consequences, the Court said.

In *Nat'l Forest Preservation Group v. Volpe, supra* n. 310, a Federal District Court held that Federal Highway Administration procedures do not infringe upon the spirit of NEPA. This reasoning was supported by the conclusion that the federal agency would take full responsibility for the statement, and the statement would be available throughout the federal decision-making process. The Court also found that the danger of self-interest in the State agency was not present in that particular case. A case decided on similar logic was *Iowa Citizens for Environmental Quality v. Volpe, supra* n. 270.

The presumption that an impact statement prepared by the sponsoring agency of the State government would be less than objective, if not patently self-serving, was met in *Citizens Airport Comm. v. Volpe,*

supra n. 274. The Court recognized the danger, but ruled that the presumption was overcome by virtue of the actions taken by the federal agency after the statement was prepared. These actions included a complete review of the statement by a responsible federal official and issuance of a memorandum and report on the statement.

Likewise, in *Citizens Environmental Council v. Volpe,*[312] the United States District Court for the District of Kansas found that the State highway agency's preparation of a federal-aid highway's NEPA impact statement, followed by the Federal Highway Administration's review and approval of that statement, satisfied NEPA. The decision emphasized the CEQ guidelines and determined that the guidelines permitted delegations such as that contained in the Federal Highway Administration procedures. Further, the Court concluded that the CEQ guidelines "emphasized that state and local government units were to be drawn into the [Federal Highway Administration] administrative process so as to assess in detail the environmental impact of proposed action to be taken."

The Court concluded that for the purposes of preparing NEPA impact statements on federal-aid highways, State and local government agencies are actually "federal" agencies, or at least "quasi-federal."

The Federal Highway Administration procedures also were approved in *Movement Against Destruction v. Volpe, supra* n. 218. In that case, a Federal District Court decided that the Department of Transportation's good faith review and evaluation of a federal-aid highway project's environmental impact statement prepared by the Maryland Department of Transportation satisfied NEPA requirements. The Court relied in its decision on the reasoning of *Nat'l Forest Preservation Group v. Volpe, supra* n. 310.

An opposite result was reached by the United States District Court for the District of Vermont in *Conservation Soc'y of Southern Vermont, Inc. v. Secretary, supra* n. 217.

The Court held that a statement prepared by the Vermont Highway Department, and reviewed and approved by the Federal Highway Administration, did not satisfy NEPA because the Act requires direct preparation, rather than perfunctory review, by the concerned federal agency. The *Conservation Soc'y* decision relied directly on *Greene County Planning Bd. v. Federal Power Comm'n, supra* n. 307. The Court held that the Federal Highway Administration's attempt to distinguish federal-aid highway projects from Federal Power Commission licensing procedures must fail.

> [I]t is impossible for the Vermont Highway Department not to be an advocate of legislatively mandated construction and still act consistently with its duty as a State agency. This being true, delegation of preparation of an EIS to the VHD raises the danger that the EIS will reflect

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[312] 364 F.Supp. 286, 294 (D. Kan. 1973).

"self-serving assumptions" and brings the case directly within *Greene County.*[313]

With regard to the Federal Highway Administration's argument that it cooperated with the Vermont Highway Department on the statement through consultation and communications so that the statement could, for all practical purposes, be considered as prepared by the Federal Highway Administration, the Court said:

> Perhaps this is the most practicable or feasible method of handling the preparation of an EIS under present Federal and State highway agency procedures. But it is not what is required by NEPA, the purpose of which is to insure that the federal agency making the decision consider environmental values, potential alternatives and the overall consequences of the proposed action.[314]

The *Conservation Soc'y* decision was upheld by the Second Circuit. Some of the concern evidenced by the Court in that case would seem to be justifiably noted when viewing the Ninth Circuit's decision in *Life of the Land v. Brinegar, supra* n. 273, which is the most expansive decision on the question of permitting delegation of NEPA responsibilities.

The District Court held, in *Life of the Land,* and the Court of Appeals affirmed, that NEPA does not prohibit preparation of an impact statement covering an airport runway project by a private consulting company that had a substantial financial interest in the project. The Federal Aviation Administration and the State agencies involved worked with the consulting firm during preparation of the statement and reviewed and approved it when it was completed; this was held to be sufficient to satisfy the requirements of NEPA.

It is unlikely that the trend toward permitting delegation of NEPA responsibilities to State highway authorities will be reversed; however, it should be noted by the careful attorney that none of the cases that permit delegation of the impact statement preparation responsibility adequately deal with the conflict of interest problem raised by *Greene County Planning Bd. v. Federal Power Comm'n, supra* n. 307. Nor do they respond to the argument that NEPA was intended to compel integration of environmental concern into the federal decision-making process, at least in part, through requiring development by federal agencies of internal environmental capabilities which would be used in impact statement preparation.

Agency Regulations

As we have seen, failure to comply with the letter or spirit of NEPA through acts of omission or commission can result in injunctions barring further highway construction pending appropriate compliance. It

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[313] 362 F.Supp. 627, 631 (D. Vt. 1973). [314] *Id.* at 632.

should also be noted, however briefly, that failure to comply with executive amplification of NEPA in the form of executive orders, CEQ regulations, and agency regulations can also result in litigation and injunctive action.[315]

Although an agency may be able to argue that it is operating under a bona fide interpretation of NEPA and therefore erred in good faith if indeed it has erred, it is nearly impossible, on the other hand, for an agency to violate its own regulations governing NEPA procedures and argue good faith. In point of fact, plaintiff's counsel in environmental lawsuits look first to the agency's implementing regulations to see that they have been scrupulously complied with by the agency in question. Failure by an agency preparing an impact statement to comply with its own regulations is practically indefensible.

Procedural Requirements of Other Federal Statutes

Although, as mentioned previously in this paper, the Clean Air Act is expected to affect highway cases substantially in the future, presently there are no cases which specifically discuss the failure of the Federal Highway Administration or any of the State highway authorities to comply with procedural mandates under the Clean Air Act. Undoubtedly, procedural requirements will be developed and will become the focal point of a considerable amount of litigation in the future. This is particularly true inasmuch as the Environmental Protection Agency has begun increased activity in their consideration of air pollution problems and transportation sources of air pollution.

Both the Federal-Aid Highway Act and the Department of Transportation Act have some minor environmental provisions. As has been mentioned earlier, these provisions do not make the statutes primarily environmental statutes; they clearly are not. To the extent that procedural compliance with these "environmental" provisions is required, such compliance does not differ from compliance with other procedural requirements of those statutes and is governed by the case law in existence on those particular provisions. In fact, the most significant provisions of Section 128 of the Federal-Aid Highway Act, Title 23, and Section 4(f) of the Department of Transportation Act, are outgrowths of NEPA policy. Although there has been a substantial amount of litigation involving compliance with those procedural requirements, much of it has been handled by the courts in a NEPA context.

In spite of the situation set forth in the preceding paragraph, it is worthwhile to observe briefly the effect of NEPA on Section 128 of the Federal-Aid Highway Act, Title 23, and Section 4(f) of the Department of Transportation Act. The extent to which NEPA policy and spirit has infused the requirements of those sections is witnessed by the willing-

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[315] See notes 59 and 60, *supra*.

ness of courts to interpret those sections within the context of NEPA.

In *Movement Against Destruction v. Volpe, supra* n. 218, plaintiffs had contended that 23 U.S.C. § 128(a), interpreted in light of NEPA, required a further location hearing for I-170 to afford the public the opportunity to comment on its social and environmental effects. Location approval for the Interstate highway was granted in 1965 based on location hearings held in 1962. The plaintiffs did not contend that the location approval granted for the highway in 1965 was in any way invalid under the law then applicable.

Citing *Arlington Coalition on Transp. v. Volpe, supra* n. 177, the Court noted that the Fourth Circuit held in that case that NEPA required a further location hearing to be conducted under Section 128 (after deciding that the costs of altering or abandoning the proposed location would not certainly outweigh whatever benefits might be derived therefrom). In addition, the Court cited *Ward v. Ackroyd, supra* n. 132, in which Judge Miller applied the *Arlington Coalition* test to a segment of I-70N, which had previously received location approval based on the same 1962 location hearing as was the basis for location approval of the corridor expressway at issue in *Movement Against Destruction.* Under the circumstances of *Ward v. Ackroyd, supra* n. 132, a segment of I-70N traversing Leaking and Gwynns Falls Parks was required under NEPA to be the subject of a further location hearing under an amended Section 128(a).

FAILURE TO COMPLY WITH THE SUBSTANTIVE REQUIREMENTS OF FEDERAL ENVIRONMENTAL STATUTES

One of the most important and controversial issues presently undergoing judicial interpretation is the question of whether Section 101 of the National Environmental Policy Act creates judicially enforceable substantive duties and rights.

The clear language of NEPA as well as its legislative history confirm that the statute was intended to bring about substantive changes in the decision-making processes of the Federal Government. Notwithstanding this, controversy has developed over the judicial role in assuring that the agencies' actions conform to the national policy set forth in Section 101.

The early cases under NEPA held that the judiciary has a limited role in reviewing compliance with the Act. In *Bucklein v. Volpe,*[316] the Court said, "it is highly doubtful that the [National] Environmental Policy Act can serve as the basis for a cause of action." This conclusion presumably included Section 102 actions as well as Section 101 actions.

The rationale upon which the *Bucklein* Court based its decision was erroneous as it applied to Section 102, as the hundreds of lawsuits under that section have illustrated. However, considering the rationale as it

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[316] 2 ERC 1082 (N.D. Cal. 1970).

applied to Section 101, the Bucklein decision was to serve as the guide for other courts denying the judicial enforceability of Section 101 rights for some time to come. The Court reasoned that:

> Aside from establishing the Council [on Environmental Quality], the Act is simply a declaration of congressional policy: as such, it would seem not to create any rights or impose any duties of which a court can take cognizance.[317]

The *Bucklein* Court found the language of Section 101 too general to believe that it "could serve, or was intended to serve, as a source of court-enforceable duties."

The most frequently cited authority for the proposition that no judicially enforceable rights were established by Section 101, at least until it was overruled, was *Environmental Defense Fund, Inc. v. Corps of Eng'rs, supra* n. 266. In that case, the United States District Court for the Eastern District of Arkansas dismissed a Section 101 substantive rights claim which sought to block construction of the Gillham Dam project. The plaintiffs had argued that Section 101 of NEPA created rights to "safe, healthful, productive, and aesthetically and culturally pleasing surroundings," and "to an environment which supports diversity and variety of individual choice," and the "widest range of beneficial values." In rejecting that position, the District Court said:

> The Act appears to reflect a compromise which, in the opinion of the Court, falls short of creating the type of "substantive rights" claimed by the plaintiffs. . . . [Section 101] does not purport to vest in the plaintiffs, or anyone else, a "right" to the type of environment envisioned therein.[318]

This view was restated in *Upper Pecos Ass'n v. Stans,*[319] in which the United States Court of Appeals for the Tenth Circuit said:

> The mandates of the NEPA pertain to procedure and not to substance, that is, decision-making in a given agency is required to meet certain procedural standards, yet the agency is left in control of the substantive aspects of the decision.[320]

The question was faced head on in *Conservation Council v. Froehlke, supra* n. 303, in which the Court was asked: Does Section 101 of NEPA provide recourse against environmentally unsound federal agency action, even if all the procedural requirements of Section 102 are met?

The plaintiff in *Conservation Council* argued that NEPA required that a project be abandoned if the environmental impact statement or other evidence indicated that its completion would work a result contrary to the principles set forth in Section 101 of NEPA. The United States District Court for the Middle District of North Carolina, how-

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[317] *Id.* at 1083.

[318] 325 F.Supp. at 755.

[319] 328 F.Supp. 332 (D.N.M. 1971), *aff'd* 452 F.2d 1233 (10th Cir. 1971), *vacated,* 409 U.S. 1021, 34 L.Ed. 2d 313, 93 S.Ct. 458 (1972).

ever, relying on *Comm. for Nuclear Responsibility v. Seaborg, supra* n. 267; *Environmental Defense Fund, Inc. v. Hardin, supra* n. 276; *Environmental Defense Fund, Inc. v. Corps of Eng'rs, supra* n. 266; and *United States v. West Virginia Power Co.*,[321] held that the statute provided procedural remedies only. The Court said that the function of the courts is limited to assuring that Section 102 procedural requirements are met by the agency. If the decision-makers choose to ignore evidence that counsels against the project, the impact statement forces them to do so with their eyes open, but the Act cannot be used to enjoin such activities, even where they clearly mitigate against the stated purposes of the Act.

The thinking behind the decisions in these early cases was perhaps most forcefully stated in *Environmental Defense Fund, Inc. v. Corps of Eng'rs, supra* n. 266 and *Conservation Counsel v. Froehlke, supra* n. 303. In those cases, the Courts said that they could not find any explicit language in Section 101 conferring any enforceable rights, that the legislative history of the Act seemed to indicate that Section 101 was meant to be no more than a statement of national policy, and that general theories of administrative law oblige the courts not to substitute their judgment for that of the administrative agencies particularly in areas where the administrative agencies have special expertise.

As might be indicated by the tenor of the initial paragraph of this section, the courts eventually began to reconsider this line of cases. The first real hint that Section 101 might not remain forever simply a statement of national policy was seen in the often cited case of *Calvert Cliffs' Coord. Comm. v. Atomic Energy Comm'n, supra* n. 283. In that case, in discussing an agency's responsibilities under Section 102, the Court said with regard to Section 101:

> The reviewing courts probably cannot reverse a substantive decision on its merits, under Section 101, unless it be shown that the actual balance of costs and benefits that was struck was arbitrary or clearly gave insufficient weight to environmental values.[322]

The interesting thing about this statement by the United States Court of Appeals for the District of Columbia is the absence of a determination by the Court that Section 101 created no rights. On the contrary, the Court seemed to recognize that such rights exist. The statement concerns itself with the circumstances under which a court may reverse agency action under Section 101. It said a court cannot reverse *"unless the actual balance of costs and benefits that was struck was arbitrary or clearly gave insufficient weight to environmental values."* (Emphasis added.) In fact, in this sentence the Court is actually delineating a standard of review under Section 101.

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[320] 452 F.2d at 1236.

[321] 122 F.2d 733 (4th Cir. 1941), *cert. den.*, 314 U.S. 683, 86 L.Ed. 547, 62 S.Ct. 184 (1941).

[322] 449 F.2d 1109, 1115 (D.C. Cir. 1971).

Oddly enough, this was the position that had been argued by environmentalists in *Environmental Defense Fund, Inc. v. Corps of Eng'rs, supra* n. 266, and *Conservation Counsel v. Froehlke, supra* n. 303. If a federal agency complied with the procedural mandates of NEPA, but decided to act in spite of a gross imbalance in the cost-benefit ratio of the project, or in disregard of adverse environmental information developed in the environmental impact statement, then, the environmentalists said, the courts can reverse the agency action under Section 101. The *Calvert Cliffs'* language on substantive review was dicta, but it gave a definite signal that at least one United States Court of Appeals was prepared to extend substantive review under the right circumstances.

Somewhat surprisingly, both *Environmental Defense Fund, Inc. v. Corps of Eng'rs, supra* n. 266, and *Conservation Council v. Froehlke, supra* n. 303, were reversed on the question of substantive review of agency action under Section 101. Before the Eighth Circuit Court of Appeals the plaintiffs argued that the Corps' administrative determination that Gillham Dam should be constructed was arbitrary and capricious, contrary to the requirements of Section 101, and reviewable by the courts under NEPA and the Administrative Procedure Act. The Court of Appeals accepted that argument, and relying on the language of NEPA and its legislative history said, as has been previously referenced, that the act is more than an environmental full disclosure law. The statute is intended to effect substantive changes in decision-making, the Court said. Section 101(b) was cited as requiring agencies to use all practical means, consistent with other essential considerations of national policy to improve and coordinate federal plans, functions, programs, and resources, and to preserve and enhance the environment. Section 101, in the Court's view, set out a series of policies to direct agency action affecting the environment. Section 102 has as its purpose the function of assuring that the policies enunciated in Section 101 are actually carried out. The procedures included in Section 102 are not ends in themselves, according to the court.

> The unequivocal intent of NEPA is to require agencies to consider and give effect to the environmental goals set forth in the Act, not just to file detailed impact studies which will fill governmental archives.[323]

The fact that NEPA's Section 101 created substantive rights was, at least in an academic sense, only half the question. The more important issue was whether or not a court could enforce those rights. On that question, the Eighth Circuit said:

> Given an agency obligation to carry out the substantive requirements of the Act, we believe that courts have an obligation to review substantive agency decisions on the merits.[324]

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[323] 470 F.2d 289, 298 (8th Cir. 1972).

[324] *Id.* at 298.

On the question of the court's obligation or right to enforce these substantive policies set forth in NEPA, the Court said that whether it looked to the common law or to the Administrative Procedure Act, absent legislative language as to reviewability, an administrative determination affecting legal rights should be reviewable unless some special reason appears for not reviewing it. The Court could find no special reason for not reviewing the Corps of Engineers' decision. In fact, that Court said, public policy favored review in that the prospect of judicial review should improve the quality of agency decisions and should make it more likely that the broad purposes of NEPA would be carried out.

Less than a month after this ruling the Eighth Circuit reaffirmed the existence of substantive review of agency decisions under Section 101 in *Environmental Defense Fund, Inc. v. Froehlke.*[325] Not long thereafter the United States Court of Appeals for the Fourth Circuit followed the Eighth Circuit's lead by reversing the lower court decision in the other leading case holding that no substantive rights were created by Section 101 (*Conservation Council v. Froehlke, supra* n. 303).

These three opinions clearly wiped out the leading cases for the proposition that no substantive rights or duties were created by Section 101. The United States Court of Appeals for the Seventh Circuit joined the Second, Fourth, and Eighth Circuits in holding that the courts have jurisdiction under NEPA to review an agency's substantive as well as its procedural compliance with NEPA in *Sierra Club v. Froehlke.*[326]

Notwithstanding the decisions of the Second, Fourth, Seventh, and Eighth Circuits, all the circuits do not agree on these questions. The Fifth and Tenth Circuit Courts of Appeals have held, in *Nat'l Helium Corp. v. Morton, supra* n. 281, and *Pizitz, Inc. v. Volpe, supra* n. 259, that judicial review of substantive agency action is not available under Section 101. It should also be noted that the United States Supreme Court has denied certiorari in the one case presented to it which would have raised the question of the right of the federal courts to review substantive agency decisions under NEPA.

A number of interesting highway cases have raised either directly or indirectly the question of substantive rights under Section 101 of NEPA and the court's obligation to review substantive agency decisions under that section: *Citizens for Mass Transit Against Freeways v. Brinegar, supra* n. 260; *Conservation Soc'y of Southern Vermont, Inc. v. Secretary, supra* n. 217; *Farwell v. Brinegar, supra* n. 262; *I-291 Why? Ass'n v. Burns, supra* n. 175; *Iowa Citizens for Environmental Quality v. Volpe, supra* n. 270; *Bradford Township v. Illinois State Toll Highway Auth., supra* n. 226; *Brooks v. Volpe, supra* n. 147; *Comm. to*

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[325] 473 F.2d 346 (8th Cir. 1972), 4 ERC 1829.

[326] 486 F.2d 946 (7th Cir. 1973).

Stop Route 7 v. Volpe, supra n. 247; *Pizitz, Inc. v. Volpe, supra* n. 259; and *Scherr v. Volpe, supra* n. 244.

Before discussing some of these cases and their effect on highway environmental law, it would be well to note that the whole question of review of substantive agency decisions under the policies set forth in Section 101 of NEPA is subordinate to the question of the standard of review to be applied once it has been established that substantive rights do exist and that the federal courts have the right to review the substantive agency decisions to assure compliance with these rights. Although it may strain the logic of this subsection somewhat to omit a discussion of the standard of judicial review at this point, the subsection does not deal with the standard of review to be applied, but rather, only with the question of whether or not, in highway cases particularly, the courts have recognized first, the existence of substantive rights under Section 101 of NEPA and secondly, the judicial enforceability of those rights.

As noted previously, the Fifth Circuit affirmed the decision of the United States District Court for the Middle District of Alabama in *Pizitz, Inc. v. Volpe, supra* n. 259. In that case the Court said:

> [T]he requirements imposed upon the Federal Government by the National Environmental Policy Act provide only *procedural* remedies as opposed to *substantive* rights and that the function of the court in such cases is limited to ensuring that the procedural requirements of the Act are satisfied.[327] (Emphasis by the Court.)

In holding as it did in *Pizitz, Inc. v. Volpe, supra* n. 259, the District Court relied on *Environmental Defense Fund v. Corps of Eng'rs, supra* n. 266, and *North Carolina Conservation Council v. Froehlke, supra* n. 303, both of which were later reversed. It is difficult to predict whether the Fifth Circuit would affirm a similar opinion were such an opinion before it today.

The Seventh Circuit, in a decision which preceded its open affirmation of the substantive rights created by Section 101 in *Sierra Club v. Froehlke, supra* n. 325, held in *Scherr v. Volpe, supra* n. 244, that "pro forma compliance with the substantive guidelines of Section 101 simply will not suffice."

Bradford Township v. Illinois State Toll Highway Auth., supra n. 226, appears to be another case which might be decided differently were it tried today. In that case, citing the pre-reversal decision in *Environmental Defense Fund, Inc. v. Corps of Eng'rs, supra* n. 266, the Court held that Section 101 of NEPA "was merely a statement of policy and created no substantive rights. . . ."

In *Iowa Citizens for Environmental Quality v. Volpe, supra* n. 270, the Court did not address the question of judicially enforceable sub-

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[327] 4 ERC 1195, 1196 (M.D. Ala. 1972).

stantive rights directly; however, its decision makes clear that it would not receive the allegation of such rights agreeably. The Court said:

> The advisability of building an interstate highway and the desirability of using a diagonal route rather than a right angle route are not issues here. These are administrative decisions for the responsible governmental agencies, not the courts.[328]

The principle of judicially enforceable substantive rights under Section 101 of NEPA assumes just the opposite. That is, that the substantive agency decision to build or not to build a highway, or to build it in this or that way, is subject to judicial review under Section 101.

In the case of *Citizens for Mass Transit Against Freeways v. Brinegar, supra* n. 260, the United States District Court for the District of Arizona did not discuss directly the question of substantive review. However, it did say that "the court's function is limited to determining whether the Secretary's action followed the necessary *procedural* requirements." In so saying, the Court cited *Conservation Council v. Froehlke, supra* n. 303, in the District Court. Of course, as has already been noted, this case was reversed on appeal. Again it is impossible to predict the outcome of the same case before the Arizona District Court at some date after the reversal of *Conservation Council v. Froehlke, supra* n. 303.

In *Conservation Soc'y of Southern Vermont, Inc. v. Secretary, supra* n. 217, the United States District Court for the District of Vermont held that a Federal District Court reviewing the Federal Highway Administration's compliance with the National Environmental Policy Act must consider not only whether NEPA's procedural requirements had been met, but also whether the substantive result of the Federal Highway Administration's decision concerning a federal-aid highway project was consistent with a good faith weighing of the project's environmental impact. In so deciding, the District Court relied on *Conservation Council v. Froehlke, supra* n. 303, and *Environmental Defense Fund, Inc. v. Corps of Eng'rs, supra* n. 266.

A most interesting case on the question of substantive review of an agency's NEPA actions under Section 101 is *I-291 Why? Ass'n v. Burns, supra* n. 175, in which the Court seems undecided about whether substantive review of judicially enforceable rights under Section 101 exists or not. On the one hand, it seems to limit its review to the procedural issues so far as its decision is concerned; however, in dicta the Court rather clearly says, citing *Calvert Cliffs' Coord. Comm. Inc. v. Atomic Energy Comm'n, supra* n. 283, that that case contemplated the use of two different standards of review of agency actions subject to NEPA: a strict standard for reviewing compliance with NEPA's rigorous procedural duties and a lenient standard for reviewing compliance with NEPA's flexible substantive duties. Adopting this language,

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[328] 4 ERC 1755, 1756 (S.D. Iowa 1972).

the Court found that it could properly demand strict compliance with NEPA's procedural requirements and then said that although the Second Circuit has yet to pass on this exact issue, it appears that if the environmental impact statement survives this strict scrutiny, the reviewing court cannot extend its strict scrutiny to the agency's substantive decision to proceed with the project despite the impacts considered in the procedurally adequate environmental impact statement.

This author would interpret the decision in *I-291 Why? Ass'n v. Burns, supra* n. 175, as recognizing substantive rights. The language that seems to limit this conclusion goes more to the question of standard of review than to the question of the existence of rights. This conclusion is reached from that portion of the Court's opinion which reads:

> Under both the Administrative Procedure Act, as explicated in *Overton Park,* and Section 101 of NEPA, as explicated in *Calvert Cliffs',* an agency's decision to proceed with a project may be set aside upon review of its merits only when the decision is arbitrary or capricious or an abuse of discretion, as when the decision displays such callous disregard of the environmental considerations expressed in the EIS as to support an inference of bad faith on the part of the agency in deciding nonetheless to proceed with the project. [Citing, *Sierra Club v. Froehlke, supra; Silva v. Lynn,* 482 F.2d 1282 (1st Cir. 1973); *Conservation Council v. Froehlke, supra; Jicarilla Apache Tribe of Indians v. Morton,* 417 F.2d 1275 (9th Cir. 1973); *Environmental Defense Fund, Inc. v. Corps of Eng'rs, supra; Sierra Club v. Froehlke, supra; City of New York v. United States, supra; Scenic Hudson Preservation Conference v. Federal Power Comm'n, supra.*] [329]

Notwithstanding the controversy over the question of substantive review of agencies' compliance with the procedural policies of NEPA as set forth in Section 101, it does appear that those cases holding that such review does exist are the better reasoned cases and are beginning to predominate. Although the reader may adopt a contrary view, nevertheless, this would seem to be the trend. In addition, if the reader does support the opposing view, he is better off forewarned of the arguments in favor of what appears to be the prevailing rule of law. In view of this, it is worthwhile to review the rationale for those holdings which find that Section 101 of the National Environmental Policy Act creates judicially enforceable substantive rights permitting the federal courts to review the substantive decision of any agency under NEPA.

NEPA clearly called for substantive changes in the decision-making processes of the federal agencies. The agencies were required by the Act to balance their statutory functions with the national policy on the environment. Admittedly, this was, and is, no simple task. In addition,

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[329] 372 F.Supp. 223, 242 (D. Conn. 1974).

and perhaps also admittedly, there exists a natural, rather healthy bias on the part of most federal agencies in favor of doing what they were established to do. Unfortunately, much of what many agencies do, including the Federal Highway Administration and its State counterparts, is done at the expense of the environment.

Properly construed, at least in the view of those who support the judicially enforceable substantive rights principle, NEPA empowers the courts to monitor agency compliance with NEPA's requirement that costs and benefits be balanced. Thus, the courts act as a counterbalance to agency bias in cases where an agency has been unable properly to balance its functions with the environmental imperatives of the Act spelled out in Section 101. It would be helpful for those not entirely conversant with Section 101 to review that section, particularly Section 101(b).

Contrary to the arguments of many agencies, the courts are traditionally in a better position to evaluate an agency's compliance with the statutory standards of Section 101 than the agency itself. Statutes that commit federal agencies to self-regulation historically have not succeeded. Also, under rather well established principles of both common law and the Administrative Procedure Act, substantive review of agency action should be available under Section 101 of NEPA. The statute provides no specific guidance as to reviewability. In such cases, the rule is that administrative determinations affecting legal rights are reviewable unless some special reason appears for not reviewing. As Chief Judge Matthes speaking for the Eighth Circuit said in *Environmental Defense Fund, Inc. v. Corps of Eng'rs, supra* n. 198, no special reasons appear for not reviewing agency determinations under NEPA.

In fact, the argument can be made that quite the contrary is true. It is particularly important that review of agency decisions on the merits exists in NEPA cases so as to improve the quality of agency decisions and increase the likelihood that the broad purposes of the Act will be realized.

Finally, there is a statutory construction argument in support of judicially enforceable rights. A careful reading of Section 101(b)(1) through (6) supports the conclusion that such rights do exist. The argument that Section 101 merely states a national policy is appropriate with regard to Section 101(a), but not with regard to Section 101(b). That subsection clearly sets forth a series of continuing responsibilities of the Federal Government with regard to the environment. It also should be recognized that Section 101(b) begins by stating that these federal responsibilities are necessary "in order to carry out the policies set forth in this act," a phrase that would seem to dispell any serious argument that Section 101 merely sets forth policy.

In the final analysis, if Section 101(b) creates no obligations on the part of the federal agencies that are enforceable by the judiciary, then Congress created a national policy that nobody has the power to en-

force. Such a result defies logic and would in many ways render NEPA a meaningless statute. In view of the legislative history of the Act, it is difficult to attribute such motives to Congress.

The review of these arguments by the author does not suggest that countervailing arguments do not exist. However such arguments have not been presented in the existing case law. Moreover, the far more important question in this whole area of environmental highway law is the question of the standard of review to be applied in cases where the court is reviewing the substantive agency decision under Section 101 of NEPA.

JUDICIAL REVIEW

Judicial review of agency decisions under the federal environmental statutes has been applied under varying standards depending on the particular kind of violation alleged by the plaintiff. Although generalizations are difficult to make in this area, it can be safely said that the standard of review applied by the United States District Courts has in most cases been more searching than in other areas of administrative law. This has been the case even though traditional language has been used to describe the standard of review applied.

In most cases, the standard applied has been described as the traditional "substantial evidence" test, which requires that the court affirm the agency's action unless it can find that the agency acted in an arbitrary or capricious manner in reaching its decision. In other cases, the more liberal "substantial inquiry" test enunciated in *Citizens to Preserve Overton Park, Inc. v. Volpe, supra* n. 253, has been applied.

In environmental law, the cases to which the various standards of review have been applied generally have involved questions of compliance with the procedural requirements of Section 102 of NEPA. These cases can be divided into those in which the court is attempting to determine whether an agency's decision not to prepare a statement was correct, whether the statement prepared was adequate, or whether the agency actually used the statement as a part of its decision-making process. In addition, as has been noted in the previous section, some courts have granted review of the substantive agency decision. This has involved a determination of whether the agency's final decision to proceed with a particular project is in accord with the substantive policies of NEPA set forth in Section 101. In this process, the court must analyze the agency's balancing of environmental factors against the benefits of its proposed action in light of the mandate of Section 101.

Although most courts have not openly substituted their decision for that of the agency, it can be said that in many of the cases the courts have come as close to *de novo* review (a complete rehearing of the evidence) as is possible without achieving it.

Addressing the threshold question of whether an agency should prepare an impact statement under Section 102 of NEPA, the courts have

applied a rather stringent standard of review. The leading case of *Hanly v. Kleindienst, supra* n. 232, indicated that even though the court said it was applying the "arbitrary and capricious" standard of the substantial evidence test, they actually entered into a much deeper analysis of the agency's decision.

In the area of adequacy, or of compliance with the procedural requirements of the federal environmental statutes, it is sufficient to study the District of Columbia Circuit's opinion in *Calvert Cliffs' Coord. Comm. v. Atomic Energy Comm'n, supra* n. 283, to understand that the standard of review applied in some cases is very close to *de novo* review.

The standard applied by courts granting substantive review under Section 101 of the National Environmental Policy Act also has varied from case to case. The *Calvert Cliffs'* Court, of course, did not have to reach the question of a standard of review because its pronouncement on substantive rights was dictum. In *Environmental Defense Fund, Inc. v. Corps of Eng'rs, supra* n. 198, the United States Court of Appeals for the Eighth Circuit said that the applicable standard of review under Section 101 was the standard applied in *Citizens to Preserve Overton Park, Inc. v. Volpe, supra* n. 253. *Overton Park* was interpreted by that Court to require that the reviewing court determine whether the agency acted within the scope of its authority; whether the decision reached was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; and whether the agency failed to consider all relevant factors in reaching its decision, or if the decision itself represented a clear error in judgment.[330] This test has come to be known as the "substantial inquiry" test.

In *Environmental Defense Fund, Inc. v. Corps of Eng'rs, supra* n. 198, the Court said that the reviewing courts must determine, in cases involving environmental statutes, "whether the actual balance of costs and benefits that was struck was arbitrary or clearly gave insufficient weight to environmental values." [331]

The substantial inquiry test, however, does have limits. In *Overton Park,* the Supreme Court was careful to state that "Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The Court is not empowered to substitute its judgment for that of the agency." [332] This standard was applied in *Environmental Defense Fund, Inc. v. Froehlke, supra* n. 325, and *Conservation Council v. Froehlke, supra* n. 303, both cases in which the court recognized its authority to review the substantive agency decisions.

When compared to the better-known substantial evidence test, the *Overton Park* standard is less constrictive. An excellent comparison of

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[330] 470 F.2d 289, 300 (8th Cir. 1972).

[331] *Id.* at 300.

[332] 401 U.S. at 416, 28 L.Ed. 2d at 153, 91 S.Ct. at 824.

the two standards by Judge Carl O. Bue, Jr., of the United States District Court for the Southern District of Texas, is available in *Sierra Club v. Froehlke, supra* n. 269.

Basically, it can be said that the substantial inquiry test stops short of *de novo* review, but permits the reviewing courts greater flexibility than the "substantial evidence" test. Under the substantial inquiry test, the reviewing court undertakes a three-pronged inquiry into the questioned federal action. First, it decides whether the agency acted within the scope of its statutory authority. Secondly, it determines whether the actual decision was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. Finally, in applying the second test, the court must consider whether the decision was based on a consideration of all relevant factors, and whether there was a clear error of judgment.

This general summation of the applicable standards of review used in environmental cases can be applied in a general way to highway cases. On the other hand, review of some specific highway situations is necessary in order to point out some of the variations on the standard of review applied in those cases.

Interesting highway cases which discuss to some extent the question of the standard of review to be applied by a federal court reviewing compliance with federal environmental statutes by Federal and State highway authorities include: *Citizens for Mass Transit Against Freeways v. Brinegar, supra* n. 260; *Daly v. Volpe, supra* n. 261; *Finish Allatoona's Interstate Right, Inc. v. Volpe, supra* n. 271; *Ford v. Train, supra* n. 272; *Indian Lookout Alliance v. Volpe, supra* n. 215; *Iowa Citizens for Environmental Quality v. Volpe, supra* n. 270; *La Raza Unida v. Volpe, supra* n. 203; *Brooks v. Volpe, supra* n. 147; *Citizens Airport Comm. v. Volpe, supra* n. 274; *Citizens to Preserve Overton Park, Inc. v. Volpe, supra* n. 253; *Conservation Soc'y of Southern Vermont, Inc. v. Secretary, supra* n. 217; *I-291 Why? Ass'n v. Burns, supra* n. 175; *Lathan v. Volpe, supra* n. 176; *Life of the Land v. Brinegar, supra* n. 273; *Movement Against Destruction v. Volpe, supra* n. 218; *Citizens Organized to Defend the Environment v. Volpe, supra* n. 228; *James River and Kanawha Canal Parks, Inc. v. Richmond Metropolitan Auth., supra* n. 131; *Monroe County Conservation Council, Inc. v. Volpe, supra* n. 243; *Farwell v. Brinegar, supra* n. 262; *Fayetteville Area Chamber of Commerce v. Volpe, supra* n. 282; *Bradford Township v. Illinois State Toll Highway Auth., supra* n. 226.

The United States District Court for the District of Connecticut, in *I-291 Why? Ass'n v. Burns, supra* n. 175, set forth its view of substantive and procedural review under NEPA, and the court's opinion represents one of the best explanations of the restrictive or constrained philosophy of judicial review under federal environmental statutes. Citing *Comm. to Stop Route 7 v. Volpe, supra* n. 247, the Court said that NEPA confers no jurisdiction to review the wisdom of federal financing of a proposed expressway. Arbitrary decisions in that field may

be set aside by the Court under the Administrative Procedure Act, which permits judicial invalidation of only those administrative decisions that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law . . ."

The Court held that under this standard it must consider whether the decision was based on a consideration of the relevant factors and whether there had been a clear error of judgment. Although the inquiry into the facts should be searching and careful, the ultimate standard of review was conceived by the Court to be a narrow one. The Court is not empowered, under this rationale, to substitute its judgment for that of the agency, citing *Citizens to Preserve Overton Park, Inc. v. Volpe, supra* n. 253:

> The passage of NEPA has yet to be shown by authoritative construction to have broadened this limited grant of power to the judiciary to review the substantive merits of agency action. See *City of New York v. United States,* 344 F.Supp. 929, 939-940 (E.D.N.Y. 1972), (opinion of Circuit Judge Friendly) (three-judge court). However, the Administrative Procedure Act's narrow standard of substantive review does not preclude judicial "inquiry . . . whether the . . . action followed the necessary *procedural* requirements." *Citizens to Preserve Overton Park v. Volpe,* 401 U.S. at 417, 91 S.Ct. at 824. (Emphasis added.) It is in the area of procedural review that NEPA has indisputably opened wide judicial vistas, which were explored in detail in *Calvert Cliffs'*.[333]

With this statement, the Court in *I-291 Why? Ass'n v. Burns, supra* n. 175, stated its view that NEPA granted judicially enforceable procedural rights and that judicial review of compliance with the Act's procedural requirements could be had under the Administrative Procedure Act's standards set forth in 5 U.S.C. § 706(2)(A).

In spite of the Court's statement that the Administrative Procedure Act limited judicial review of compliance with NEPA to procedural matters only, the Court adopted that portion of the *Calvert Cliffs'* opinion which held as follows:

> The reviewing courts probably cannot reverse a substantive decision on its merits, under Section 101, unless it be shown that the actual balance of costs and benefits that was struck was arbitrary or clearly gave insufficient weight to environmental values.[334]

The Court's acceptance of this language in *Calvert Cliffs'* flies in the face of its determination that NEPA provides procedural review only. As has been discussed previously, the *Calvert Cliffs'* language actually recognizes the existence of substantive rights and delineates a standard for their review. In fact, the District Court in *I-291 Why?* recognized this fact:

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[333] 372 F.Supp. 223, 240–41 (D. Conn. 1974).

[334] *Id.* at 241, citing 449 F.2d at 1115.

> *Calvert Cliffs'* thus contemplated the use of two different standards of review of agency actions subject to NEPA: a "strict" standard for reviewing compliance with NEPA's "rigorous" procedural duties, a lenient standard for reviewing compliance with NEPA's "flexible" substantive duties. The reviewing court can properly demand strict compliance with NEPA's procedural requirements for gathering and discussing information on the environmental consequences of a proposed project in advance of a decision by the agency to proceed with the project. The agency's preparation of an EIS cannot be a cursory exercise in filling in blanks. "NEPA requires that an agency must—to the *fullest* extent possible under its other statutory obligations—consider alternatives to its actions which would reduce environmental damages. That principle establishes that consideration of environmental matters must be more than a pro forma ritual." *Calvert Cliffs', supra,* 449 F.2d at 1128 (emphasis in original). *Cf. National Helium Corp. v. Morton,* 486 F.2d 995, 1001-1002 (10th Cir. 1973); *Conservation Society of Southern Vermont v. Secretary of Transp., supra,* 362 F.Supp. at 632-636.
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> Although the Second Circuit has yet to pass on this exact issue, it appears that if the EIS survives this strict scrutiny, the reviewing court cannot extend its strict scrutiny to the agency's substantive decision to proceed with the project despite the impacts considered in the procedurally adequate EIS. Under both the Administrative Procedure Act, as explicated in *Overton Park,* and Section 101 of NEPA, as explicated in *Calvert Cliffs',* an agency's decision to proceed with a project may be set aside upon review of its merits only when the decision is arbitrary or capricious or an abuse of discretion, as when the decision displays such callous disregard of the environmental considerations expressed in the EIS as to support an inference of bad faith on the part of the agency in deciding nonetheless to proceed with the project.[335]

Actually, the Court in *I-291 Why?,* although saying that it was setting forth a strict standard of review that would enforce the exercise of judicial restraint, defined the substantial inquiry test. In doing so, however, the Court relied on the restrictive language of *Overton Park,* which states that the Court is not empowered to substitute its judgment for that of the agency, less than it relied on that part of the *Overton Park* decision which expands the old substantial evidence test.

Another case which recognized the circumscribed nature of the review of federal actions under the federal environmental statutes is *Life of the Land v. Brinegar, supra* n. 273. In that case the Court said that agency action under NEPA is subject to judicial review pursuant to Section 10(e) of the Administrative Procedure Act, 5 U.S.C. § 706(2)(a). Under that standard, the Court held, a reviewing court may set aside agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." However, the Court did recognize that the review of agency action extended to substantive agency action as opposed to simply procedural actions:

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[335] *Id.* 372 F.Supp. at 241–42.

> As we recently stated in *Jicarilla Apache Tribe of Indians v. Morton*, 471 F.2d 1275, 1281 (9th Cir. 1973): "Reversal of a substantive decision is appropriate only to situations where 'the actual costs and benefits that [were] struck [were] arbitrary or clearly gave insufficient weight to environmental values.'" [Citing *Environmental Defense Fund v. Froehlke, supra* n. 325 and *Nat'l Res. Defense Council v. Morton, supra* n. 285.] [336]

In *Movement Against Destruction v. Volpe, supra* n. 218, United States District Court for the District of Maryland relying on the *Overton Park* criteria said:

> Having made a substantial inquiry, the court, for all of the reasons set forth in the preceding parts of this opinion, finds that the respective federal officials acted objectively and within their respective authorities, and that their respective actions in approving the supplemental final EIS on I-170 . . . were not clearly in error, nor arbitrary and capricious, nor were they decisions which were not based upon a consideration of the relevant factors. [Citing *Citizens to Preserve Overton Park v. Volpe, supra* n. 253; *Conservation Council v. Froehlke, supra* n. 303; *Appalachian Power Co. v. Environmental Protection Agency*, 477 F.2d 495 (4th Cir. 1971).] [337]

Again, in *Finish Allatoona's Interstate Right, Inc. v. Volpe, supra* n. 271, the Court relied on the *Overton Park* test stating that:

> The Supreme Court has held that the standard of review to be used by the Courts in reviewing a decision of the Secretary of Transportation is a narrow one. . . . The Court is not empowered to substitute its judgment for that of the agency, but rather only to review the Secretary's findings to determine if all necessary procedural steps were followed and to make certain that the resulting administrative decision was not arbitrary or capricious.[338]

In view of these holdings, which run rather consistently through all highway cases involving disputes over the requirements of federal environmental statutes, it is fairly well established that the *Overton Park* test, that is, the "substantial inquiry" test, is the applicable standard of review in environmental highway cases.

The question of standard of review is one on which it is very difficult to delineate rules or tests. Although such tests as the substantial inquiry test suffice to describe in a general way the scrutiny a court will give a particular case, applying the standard to the actions of various courts produces varied results. As the reader will have noticed, the initial paragraphs of this section describe "substantial inquiry" as a test that occasionally approaches *de novo* review. Conversely, as applied in some of the highway cases described later in the section, the

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[336] 485 F.2d 460, 469 (9th Cir. 1973).

[337] 361 F.Supp. 1360, 1402 (D. Md. 1973).

[338] 355 F.Supp. 933, 937 (N.D. Ga. 1973).

test would appear to limit review by the courts. In fact, the question of review is one that illustrates the ultimate discretion of federal judges.

In defending highway actions against the suits of plaintiffs alleging violation of environmental statutes, counsel would be well advised to expect that the standard of review applied to the agency's actions will be somewhat broader than the standard applied in ordinary administrative law cases. Preparation for trial or for briefing on that basis will avoid the problem of being caught unawares when the court determines that its latitude on review extends beyond the traditional rules of laws. This does not mean that such attorneys should discontinue arguing that the proper standard of review in environmental highway cases is an extremely limited one. All things considered, the safest course for counsel is the argument that the standard of review established by the Administrative Procedure Act is the standard that should apply.

Burden of Proof

Few courts have addressed the question of where the burden of proof lies in a case in which an agency's compliance with environmental statutes is challenged. Traditionally, of course, the burden of proof in most lawsuits lies with the plaintiffs. In line with this tradition, in *Environmental Defense Fund, Inc. v. Corps of Eng'rs, supra* n. 266, the District Court said that the burden of proof rested with the plaintiffs. The Second Circuit, in *Scenic Hudson Preservation Conf. v. Federal Power Comm'n,*[339] also held that the burden of proof rested with the plaintiffs. On the other hand, in *Ely v. Velde, supra* n. 202, the United States Court of Appeals for the Fourth Circuit placed the burden on the Federal Government. Under NEPA, that Court said, the government is in the best position to prove that there has been actual compliance with the Act.

Language in support of shifting the burden to the federal defendant in a NEPA suit can be found in the *Calvert Cliffs'* decision of the United States Court of Appeals for the District of Columbia.

> It is . . . unrealistic to assume that there will always be an intervenor with the information, energy, and money required to challenge a staff recommendation which ignores environmental costs. NEPA establishes environmental protection as an integral part of the [agency's] basic mandate.[340]

This would seem to shift the burden to the federal defendant to establish that it complied with NEPA.

Notwithstanding the preceding paragraph, neither *Calvert Cliffs'* nor *Greene County* specifically said that the government has the burden of proof in NEPA cases or in other environmental cases. But, both cases

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[339] 453 F.2d 463 (2d Cir. 1971), *cert. den.* 407 U.S. 926, 32 L.Ed.2d 813 92 S.Ct. 2453 (1972).

[340] 449 F.2d at 1118–19.

set forth a rationale for placing it there after a plaintiff has made a prima facie case of a NEPA violation. The argument is that the agencies have all the data, whereas the public has little opportunity to develop expertise in the subject matter.

Some commentators believe that the soundest view seems to be that taken in *Sierra Club v. Froehlke, supra* n. 269. That is:

> [O]nce a prima facie showing has been made that the federal agency has failed to adhere to the requirements of NEPA, the burden must, as a general rule, be laid upon this same agency which has the labor and public resources to make the proper environmental assessment and support it by a preponderance of the evidence contained in the impact statement.[341]

Notwithstanding the decision of *Sierra Club v. Froehlke, supra* n. 269, or the decisions in *Calvert Cliffs' Coord. Comm., Inc. v. Atomic Energy Comm'n, supra* n. 283, and *Greene County Planning Bd. v. Federal Power Comm'n, supra* n. 307, it is unlikely that most courts, and particularly courts faced with environmental problems in highway cases, will place the burden of proof on the defendant. Given the paucity of cases on the question of burden of proof, it is safe to say that most NEPA cases and cases brought under other federal environmental statutes have placed the burden of proof where it traditionally has been placed, on the plaintiffs.

REMEDIES

The last section of this paper deals with remedies, the ultimate question of any lawsuit. In suits under the federal environmental statutes, the remedy sought invariably is some form of injunction barring continuation of the project. In highway cases in particular, injunctions are uniformly the remedy sought by environmental group plaintiffs.

Violation by Federal or State highway authorities of *any* of the substantive or procedural requirements of the federal environmental statutes can result in injunctions barring continued construction pending compliance with the statutory requirements.

Interesting highway cases in which injunctive remedies are discussed include: *Barta v. Brinegar, supra* n. 143; *Citizens for Mass Transit Against Freeways v. Brinegar, supra* n. 260; *Ecos v. Volpe;*[342] *Farwell v. Brinegar, supra* n. 262; *I-291 Why? Ass'n v. Burns, supra* n. 175; *Brooks v. Volpe, supra* n. 147; *Centerview/Glen Avalon Homeowners Ass'n v. Brinegar, supra* n. 174; *City of Davis v. Volpe, supra* n. 144; *Robinswood Community Club v. Volpe, supra* n. 242; *Arlington Coalition on Transp. v. Volpe, supra* n. 177; *Life of the Land v. Brinegar,*

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[341] 359 F.Supp. 1289, 1335 (S.D. Tex. 1973), 5 ERC 1033, 1062.

[342] Ecos v. Volpe, 486 F.2d 1399 (M.D. N.C. 1973).

supra n. 273; *Northside Tenants Rights Coalition v. Volpe, supra* n. 311; and *Scherr v. Volpe, supra* n. 244.

In reading these cases, counsel should look for two things. First, the criteria necessary to obtain injunctive relief should be evaluated. Secondly, the kinds of cases in which injunctive relief was granted should be studied.

The principles governing the granting of preliminary injunctions relied upon by most courts in highway cases are those stated in 7 J. Moore, FEDERAL PRACTICE ¶ 65.04[1], at 65-39 (2d. ed. 1975):

> [I]n actions in which only private interests are involved the trial court may, in the exercise of its discretion, properly grant an interlocutory injunction when it is satisfied that there is a probable right and a probable danger and that the right may be defeated, unless the injunction is issued; that the plaintiff is in substantial need of protection; and that the damage to him, if the injunction is denied, plainly outweighs any foreseeable harm to the defendant.

These principles, as was noted by the Court in *I-291 Why? Ass'n v. Burns, supra* n. 175, are qualified by the policy that courts in equity may, and frequently do, go much further both to give and withhold relief in furtherance of the *public interest* than they are accustomed to doing when only private interests are involved. Thus, the normal limitations on equitable doctrines and the balancing of equities are expanded when a federal court acts to make a declared policy of Congress effective.

NEPA and the other federal statutes affecting the environmental aspects of highway construction are clearly declarations of congressional policy that depend in great part for their effectiveness on judicial enforcement through injunctive relief, *Lathan v. Volpe, supra* n. 176, and *Environmental Defense Fund v. Tennessee Valley Auth., supra* n. 268. As was noted in the *Lathan* case, "unless the plaintiffs receive *now* whatever relief they are entitled to, there is danger that it will be of little or no value to them or anyone else when finally obtained." Further, in *Environmental Defense Fund, Inc. v. Froehlke, supra* n. 325, the court said:

> We recognize that the injunction is the vehicle through which the congressional policy behind NEPA can be effectuated, and that a violation of NEPA in itself may constitute a sufficient demonstration of irreparable harm to entitle a plaintiff to blanket injunctive relief.[343]

However, in *I-291 Why? Ass'n v. Burns, supra* n. 175, the Court said the fact that important public policies such as those set forth in the federal environmental statutes are at stake *does not preclude altogether* the Court's balancing of the equities in deciding on an application for injunctive relief. But, the cases cited in the foregoing paragraph do

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[343] 477 F.2d 1033, 1037 (8th Cir. 1973).

establish that where injunctive relief as a remedy for noncompliance with NEPA or other federal statutes concerning the environment is an issue, "the burden should be upon those urging that noncompliance should be excused." This also was the holding in *Comm. to Stop Route 7 v. Volpe, supra* n. 247.

In the *I-291 Why?* case the Court said if at the time of suit construction was nearly completed, the equities would not favor an injunction. However, construction of an initial 2-mile segment of the highway had been underway since only September of 1973 and was still in the preliminary stages at the time of the hearing on plaintiffs' motion for a preliminary injunction. Although considerable expense would have been involved in halting work on the highway, the Court found that it was better for this expense to be incurred in serving NEPA than to risk the illegal expenditure of much more substantial sums. Moreover, the Court held that the purpose of injunctive relief in environmental cases is to preserve realistic options for federal decision-makers, including the option of abandonment of the project. The defendants, according to the Court, were not entitled to assume that full compliance with NEPA would have no effect on their decision whether or not to build.

In *I-291 Why? Ass'n v. Burns, supra* n. 175, the Court found that it is cheaper to halt construction and proceed later, if that is the decision, than to continue to construct a project that may ultimately be abandoned and perhaps even dismantled. The *I-291 Why? Ass'n* Court cited Chief Judge Reynolds' opinion in an analogous case in *Northside Tenants Rights Coalition v. Volpe, supra* n. 311, as follows:

> It is far more consistent with the purposes of the Act [NEPA] to delay operation at a stage where real environmental protection may come about than at a stage where corrective action may be so costly as to be impossible. . . . Failure to grant a preliminary injunction at this time would allow further investment of resources into Park Freeway-West, making its abandonment or alteration in light of environmental concerns increasingly costly and increasingly difficult. Indeed it might even cost plaintiffs their case, for if construction continues it might well reach the stage where NEPA would be inapplicable.[344]

The basic requirements for injunctive relief were set forth in *Robinswood Community Club v. Volpe, supra* n. 242, in which the United States Court of Appeals for the Ninth Circuit said "to obtain a preliminary injunction Robinswood must satisfy at least two requirements: first, it must demonstrate a strong likelihood or reasonable certainty that it will prevail on the merits; second, it must show that it will suffer irreparable injury if the injunction is not granted." Further, the Court

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[344] 372 F.Supp. 223, 263–64 (D. Conn. Wis. 1972).
1974), *citing* 346 F.Supp. 244, 249 (E.D.

noted that the granting or denial of a motion for preliminary injunction rests within the sound discretion of the trial court.

The meaning of these initial criteria for injunctive relief does not present a particularly difficult problem where a clear violation of NEPA or other federal environmental statutes exists or where in addition, no irrevocable action concerning the highway project has been taken, for example where construction has not begun. In such cases, the balance between the costs of halting the project and the environmental harm that might be done need not even be made. However, in cases where substantial construction has been completed on the highway, the court is faced with the second segment of the test for injunction; that is, a determination as to the equities involved in barring continued construction. This is a much more difficult decision, and, additionally, an area of the law about which it is much more difficult to establish standard rules of law.

A statement of the general rule to be applied when courts are faced with the balancing of equities is not difficult when the costs of barring further construction pending compliance with a federal environmental statute clearly outweigh the benefits to be gained by such compliance. The courts should refuse injunctive relief in such cases, and the cases reveal that they have done so. In many ways, the balancing to be done by the courts in the more difficult cases involving requests for injunctive relief can be compared to the balancing done in evaluating the propriety of granting summary judgment on the basis of a defendant highway department's assertion of the defense of laches. Review of the subsection on laches in this paper would be helpful to the reader in making this analogy.

The intellectual connection between the rationale of courts dealing with the defense of laches and with the criteria for injunctions with regard to the court's balancing of equities is demonstrated in *Environmental Law Fund, Inc. v. Volpe, supra* n. 248, decided by the United States District Court for the Northern District of California. In that case, the Court balanced four factors and determined that the balance favored the continued construction of the highway even though a technical violation of NEPA existed. The factors considered by the court were (1) the participation of the local community in the planning of the project, (2) the extent to which the State had attempted to take environmental factors into account, (3) the likely harm to the environment if the project was constructed as planned, and (4) the cost to the State of halting construction while it complied with environmental requirements.

The Court found that the local community had been very active in planning the project; the State highway department had definitely attempted to take all environmental factors into account; the possible environmental harm was very slight; and, that if the State were enjoined while it complied with environmental statutes, a significant economic loss would result. In demonstrating the economic loss, the

State proved that it would lose approximately 10.8 million dollars in federal highway funds and, moreover, would be liable to various contractors for any loss the contractors suffered as a result of the delay. In an overview of the four factors to be considered, the Court found that an environmental impact statement was simply not practicable at the time requested.

On the other hand, the expenditure of money alone will not protect Federal and State highway defendants against injunctive relief if clear and obvious violations of the environmental and highway statutes have occurred. This lesson can be learned from *Arlington Coalition on Transp. v. Volpe, supra* n. 177, in which the Court enjoined construction of the highway and further purchase of rights-of-way on a showing of violation of NEPA, the Federal-Aid Highway Act, and the Transportation Act, even though the following circumstances existed:

> By January 11, 1965, acquisition of the right-of-way for the entire Arlington I-66 project had been approved, and by July 28, 1966, acquisition of right-of-way agreements between the state highway department and the Secretary had been entered into for the entire project. In the proposed corridor, 93.9 percent of all dwellings have been acquired; 98.5 percent of all businesses have been acquired; 75.6 percent of all families have been relocated; 84.6 percent of all businesses have been relocated; and 84.4 percent of all necessary right-of-way has been acquired. The costs of these acquisitions, for which the state has been reimbursed pursuant to the acquisition agreements, was $28,670,123.07. The estimated cost to complete the acquisition of right-of-way is $5,329,-876.93. The Commonwealth of Virginia has expended $1,500,000.00 in preliminary engineering which will not be reimbursed by the Federal Government. In short, most planning and preliminary work has been done. Most of what remains to be done is actual construction, which has . . .[345]

The *Arlington Coalition* case rather clearly demonstrates that the expenditures of funds alone will not tip the balance in favor of the defendants. However, as is noted in the final sentence of the foregoing quotation in *Arlington Coalition,* construction had not commenced. In cases where construction is substantially underway, the courts have been more reluctant to grant injunctions. This is not to say that courts will not halt construction on highway projects pending compliance with environmental statutes even though those highway projects are far along in construction. Again, review of the laches section is most instructive in this respect.

There is some support for the argument that the requirement that plaintiffs show "irreparable harm" in order to obtain injunctive relief does not apply quite so forcefully in environmental cases. In *Scherr v. Volpe, supra* n. 244, the United States Court of Appeals for the Seventh Circuit entertained an assertion by defendants that the injunction should

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[345] 458 F.2d 1323, 1328 (4th Cir. 1972).

not have been issued by the District Court because plaintiffs failed to show that construction of a highway would result in irreparable harm to the environment.

The defendant's argument in *Scherr* proceeded from the premise that even though there was a clear violation of the Act in that the responsible federal agency failed to assemble all pertinent information and to articulate clearly the various benefits and costs being balanced, no judicial relief could be afforded the plaintiffs absent a showing on their part that the project would damage the environment. The Court of Appeals accepted the District Court's rejection of that theory in the following language:

> . . . [T]o suggest that when the federal agencies flatly fail to perform this function, a plaintiff in a lawsuit such as this suit must perform it as a condition to obtaining injunctive relief is to suggest that one of the central purposes of the Act be frustrated.[346]

The Seventh Circuit held that to accept the defendant's argument on that point would have been to thwart the congressional mandate by rendering impotent the procedural requirements of the National Environmental Policy Act. What that argument attempted to do the Court found was to shift the burden of considering and evaluating the environmental consequences of particular federal actions from the agencies Congress intended to bear that burden to the public.

> If these agencies were permitted to avoid their responsibilities under the Act until an individual citizen, who possesses vastly inferior resources, could demonstrate environmental harm, reconsideration at that time by the responsible federal agency would indeed be a hollow gesture.[347]

The Court found that the kind of "irreparable harm" that must be shown in order to justify the issuance of a preliminary injunction in National Environmental Policy Act cases can be found in the language of the Act itself.

> As stated in *Calvert Cliffs'*, "Section 102 of NEPA mandates a particular sort of careful and informed decision-making process and creates judicially enforceable duties." Here if the project were allowed to proceed after the plaintiffs had demonstrated a probability of success on the merits this "careful and informed decision-making process" would be lost forever. In order to protect the rights of the plaintiffs to have the agency consider the environmental consequences of this project, the district court properly directed that a preliminary injunction issue during the pendency of the proceedings.[348]

This theme is echoed in *Brooks v. Volpe, supra* n. 147, and *Daly v. Volpe, supra* n. 261, in which the courts, previously worried about the

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[346] 466 F.2d 1027, 1034 (7th Cir. 1972).
[347] *Id.* at 1034.
[348] *Id.* at 1034.

additional expense to be incurred, hit upon the principle of strict NEPA compliance to reject their concern about additional public expense. In *Brooks,* the Court held that unless strong equities to the contrary dictate otherwise, the general rule requires that an injunction issue where violations of an environmental statute have been shown. In support of this position the Court cited a long list of cases including: *Environmental Defense Fund, Inc. v. Corps of Eng'rs, supra* n. 266; *Morningside-Lenox Park Ass'n v. Volpe, supra* n. 150; *Nat'l Helium Corp. v. Morton, supra* n. 281; *Scherr v. Volpe, supra* n. 244; *Arlington Coalition on Transp. v. Volpe, supra* n. 177; *Named Individual Members of the San Antonio Conservation Soc'y v. Texas Highway Dep't, supra* n. 201; and *Goose Hollow Foothills League v. Romney.*[349]

On the question of balancing the equities in favor of the general rule that projects proceeding in violation of environmental statutes should be enjoined until the mandates of the environmental statutes have been met in spite of the expense involved, the *Brooks v. Volpe, supra* n. 147, Court said:

> Imposition of the stringent requirements of NEPA, long after a project has begun, may sometimes appear to be too harsh. Yet the statute was intended not only to serve the convenience of the public today, but to provide future generations with protection of their interests as well. If NEPA had been enacted ten years ago, Seattle would surely not now be scarred with I-5, the hideous concrete ditch that runs through the heart of the city.[350]

In further support for the position favoring injunction, even though large sums of money have been spent, the *Brooks* Court said:

> [T]he Congress of the United States is intent upon requiring the agencies of the United States Government such as the defendants here, to objectively evaluate all of their projects, regardless of how much money has already been spent thereon and regardless of the degree of completion of the work.[351]

Thus, on the question of injunction and whether or not an injunction should be granted, it should be noted that in highway cases the requirement that the plaintiff demonstrate irreparable harm has been somewhat diluted by the courts. Also, those defending highway actions should not rely on the simple fact that construction is well underway (at considerable expense) to support their position that the equities favor permitting the project to be continued during compliance with environmental statutes. Finally, the balancing process entered into by courts when considering the defense of laches is analogous to the balancing process used by courts in the consideration of plaintiffs' requests for injunctions.

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[349] 334 F.Supp. 877 (D. Ore. 1971).

[350] 350 F.Supp. 269, 283 (W.D. Wash. 1972).

[351] *Id.* at 283.

Bonds and Attorneys' Fees

Before concluding, there are two final areas of concern that are important enough to merit brief mention. These areas are bonds and attorneys' fees.

As a general rule, the courts have refused to impose heavy bond requirements on NEPA plaintiffs. In most cases, this leniency in the amount of bonds has been the result of the courts' belief that NEPA lawsuits are in the general public interest and are instituted to enforce an emphatically stated national policy.

Most courts have imposed either no bond at all or minimal bonds. Cases illustrating this include *Nat'l Res. Defense Council v. Grant, supra* n. 279; *Sierra Club v. Volpe, supra* n. 207; and *Environmental Defense Fund, Inc. v. Corps Eng'rs, supra* n. 266.

Nat'l Res. Defense Council v. Grant, supra n. 279, is perhaps the best illustration of the issues involved in imposition of bond requirements in NEPA cases. Originally, the District Court imposed a bond of $75,000; however, the United States Court of Appeals for the Fourth Circuit reversed the lower court and imposed a nominal bond. The Court seemed to relate its decision to the strength of the plaintiffs' case. It said that any further preliminary injunctive order should not be issued unless the district judge, after examination of the environmental impact statement, is of the opinion that it is probably deficient, and that the plaintiffs more likely than not will prevail. If the judge satisfies himself on that score, there seems little or no reason for requiring more than a nominal bond of plaintiffs. The Court's rationale was clearly that the plaintiffs were acting as private attorneys general.

A similar result was reached in *Nat'l Defense Res. Council v. Grant, supra* n. 279. In that case, the Government requested a $750,000 bond, which was its estimate of the loss of revenue to the United States for one month as a result of having to delay execution of oil and gas leases. The Court balanced the loss of revenue to the Government against the interests plaintiffs were attempting to protect (in that case the environmental values of the outer continental shelf). It held that the public interest would be far more gravely damaged by failure of the courts to vigorously and consistently enforce NEPA than by any harm that could probably result from delaying the lease sale long enough to resolve the important legal issues presented by the case. The Court ordered bond set at $100, recognizing that if bond in the amount requested by the Government were established, the plaintiffs could not maintain their suit.

The award of attorneys' fees to plaintiffs in NEPA cases has not been so easily resolved as the question of bonds. Although courts may use their equity jurisdiction to award attorneys' fees in appropriate cases under ordinary circumstances, this was much more difficult in NEPA cases because in almost every instance the defendant was the Federal Government. This makes the award of attorneys' fees difficult because under federal law such awards are prohibited unless specifically

provided for by statute, 28 U.S.C. § 2412. Because NEPA makes no provision for the award of attorneys' fees, those courts, and indeed, those plaintiffs, have not thought that they could be obtained.

Notwithstanding the bar against attorneys' fees established by federal law, the courts have dealt with the question, and, under certain circumstances have granted them.

The prohibition against recovery of attorneys' fees is best illustrated by the Court's opinion in *Comm. to Stop Route 7 v. Volpe, supra* n. 247. The prohibition of 28 U.S.C. § 2412 precluded recovery of attorneys' fees from the Federal Government, the Court said, but not from State defendants. However, the Court decided that permitting recovery of fees from State defendants when the Federal defendants were the culpable party would be inequitable.

With regard to culpability, the Court said:

> [I]n this case, the failure to comply with the Act is properly laid at the doorstep of the federal, not the state agency. The state agency simply relied upon a federal regulation which attempted to postpone the effective date of the Act. In these circumstances, it would not be appropriate to impose attorneys fees as a cost upon the state, when the federal agency made the erroneous decision which led to the plaintiffs' judgment.[352]

In *La Raza Unida v. Volpe, supra* n. 203, and *Sierra Club v. Lynn,*[353] attorneys' fees were awarded to the plaintiffs. In *La Raza,* the Court did not consider 28 U.S.C. § 2412 a bar to imposition of attorneys' fees.

> Congressional silence, however, is not a bar to the awarding of fees. . . . The Court possesses within its equity jurisdiction the power to award fees. . . . And the equities of this particular case compel the award of attorneys' fees.[354]

The Court based its award of attorneys' fees in *La Raza* on three factors: (1) the effectuation of strong public policy; (2) the fact that numerous people received benefits from plaintiff's litigation success; and (3) the fact that only a private party could have been expected to bring the action.

Sierra Club v. Lynn, supra n. 353, did not ignore 28 U.S.C. § 2412, but went even further than *La Raza* by awarding attorneys' fees against the private defendant, even though the citizens' group had failed to prevail in the litigation. The Court held that it could award the fees even though the plaintiffs lost their suit because maintenance of the suit effectuated strong congressional policy in favor of environmental protection by forcing public consideration of the project's environmental effects and by requiring establishment of adequate environmental protective measures.

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[352] 4 ERC 1681, 1682 (D. Conn. 1972).

[353] 364 F.Supp. 834 (W.D. Tex. 1973), *rev'd* 502 F.2d 43 (5th Cir. 1974).

[354] 4 ERC 1797, 1801 (N.D. Cal. 1972).

APPENDIX

THE NATIONAL ENVIRONMENTAL POLICY ACT

PURPOSE

Sec. The purposes of this Act are: To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality.

TITLE I

DECLARATION OF NATIONAL ENVIRONMENTAL POLICY

Sec. 101. (a) The Congress, recognizing the profound impact of man's activity on the interrelations of all components of the natural environment, particularly the profound influences of population growth, high-density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances and recognizing further the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man, declares that it is the continuing policy of the Federal Government, in cooperation with State and local governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.

(b) In order to carry out the policy set forth in this Act, it is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may—

(1) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;

(2) assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings;

(3) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;

(4) preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity and variety of individual choice;

(5) achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; and

(6) enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.

(c) The Congress recognizes that each person should enjoy a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment.

Sec. 102. The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this Act, and (2) all agencies of the Federal Government shall—

(A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design

arts in planning and in decisionmaking which may have an impact on man's environment;

(B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by title II of this Act, which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations;

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

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of title 5, United States Code, and shall accompany the proposal through the existing agency review processes;

(D) Any detailed statement required under subparagraph (C) after January 1, 1970, for any major Federal action funded under a program of grants to States shall not be deemed to be legally insufficient solely by reason of having been prepared by a State agency or official, if:

(i) the State agency or official has statewide jurisdiction and has the responsibility for such action,

(ii) the responsible Federal official furnishes guidance and participates in such preparation,

(iii) the responsible Federal official independently evaluates such statement prior to its approval and adoption, and

(iv) after January 1, 1976, the responsible Federal official provides early notification to, and solicits the views of, any other State or any Federal land management entity of any action or any alternative thereto which may have significant impacts upon such State or affected Federal land management entity and, if there is any disagreement on such impacts, prepares a written assessment of such impacts and views for incorporation into such detailed statement.

The procedures in this subparagraph shall not relieve the Federal official of his responsibilities for the scope, objectivity, and content of the entire statement or of any other responsibility under this Act; and further, this subparagraph does not affect the legal sufficiency of statements prepared by State agencies with less than statewide jurisdiction.

(E) study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources;

(F) recognize the worldwide and long-range character of environmental problems and, where consistent with the foreign policy of the United States, lend appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation in

anticipating and preventing a decline in the quality of mankind's world environment;

(G) make available to States, counties, municipalities, institutions, and individuals, advice and information useful in restoring, maintaining, and enhancing the quality of the environment;

(H) initiate and utilize ecological information in the planning and development of resource-oriented projects; and

(I) assist the Council on Environmental Quality established by title II of this Act.

Sec. 103. All agencies of the Federal Government shall review their present statutory authority, administrative regulations, and current policies and procedures for the purpose of determining whether there are any deficiencies or inconsistencies therein which prohibit full compliance with the purposes and provisions of this Act and shall propose to the President not later than July 1, 1971, such measures as may be necessary to bring their authority and policies into conformity with the intent, purposes, and procedures set forth in this Act.

Sec. 104. Nothing in Section 102 or 103 shall in any way affect the specific statutory obligations of any Federal agency (1) to comply with criteria or standards of environmental quality, (2) to coordinate or consult with any other Federal or State agency, or (3) to act, or refrain from acting contingent upon the recommendations or certification of any other Federal or State agency.

Sec. 105. The policies and goals set forth in this Act are supplementary to those set forth in existing authorizations of Federal agencies.

TITLE II

COUNCIL ON ENVIRONMENTAL QUALITY

Sec. 201. The President shall transmit to the Congress annually beginning July 1, 1970, an Environmental Quality Report (hereinafter referred to as the "report") which shall set forth (1) the status and condition of the major natural, manmade, or altered environmental classes of the Nation, including, but not limited to, the air, the aquatic, including marine, estuarine, and fresh water, and the terrestrial environment, including, but not limited to, the forest dryland, wetland, range, urban, suburban, and rural environment; (2) current and foreseeable trends in the quality, management and utilization of such environments and the effects of those trends on the social, economic, and other requirements of the Nation; (3) the adequacy of available natural resources for fulfilling human and economic requirements of the Nation in the light of expected population pressures; (4) a review of the programs and activities (including regulatory activities) of the Federal Government, the State and local governments, and nongovernmental entities or individuals, with particular reference to their effect on the environment and on the conservation, development and utilization of natural resources; and (5) a program for remedying the deficiencies of existing programs and activities, together with recommendations for legislation.

Sec. 202. There is created in the Executive Office of the President a Council on Environmental Quality (hereinafter referred to as the "Council"). The Council shall be composed of three members who shall be appointed by the President to serve at his pleasure, by and with the advice and consent of the Senate. The President shall designate one of the members of the Council to serve as Chairman. Each member shall be a person who, as a result of his training, experience, and attainments, is exceptionally well qualified to analyze and interpret environmental trends and information of all kinds; to appraise programs and activities of the Federal Government in the light of the policy set forth in title I of this Act; to be conscious of and responsive to the scientific, economic, social, esthetic, and cultural needs and interests of the Nation; and to formulate and recommend national policies to promote

the improvement of the quality of the environment.

Sec. 203. (a) The Council may employ such officers and employees as may be necessary to carry out its functions under this Act. In addition, the Council may employ and fix the compensation of such experts and consultants as may be necessary for the carrying out of its functions under this Act, in accordance with section 3109 of title 5, United States Code (but without regard to the last sentence thereof).

(b) Notwithstanding section 3679(b) of the Revised Statutes (31 U.S.C. 665(b)), the Council may accept and employ voluntary and uncompensated services in furtherance of the purposes of the Council.

Sec. 204. It shall be the duty and function of the Council—

(1) to assist and advise the President in the preparation of the Environmental Quality Report required by section 201;

(2) to gather timely and authoritative information concerning the conditions and trends in the quality of the environment both current and prospective, to analyze and interpret such information for the purpose of determining whether such conditions and trends are interfering, or are likely to interfere, with the achievement of the policy set forth in title I of this Act, and to compile and submit to the President studies relating to such conditions and trends;

(3) to review and appraise the various programs and activities of the Federal Government in the light of the policy set forth in title I of this Act for the purpose of determining the extent to which such programs and activities are contributing to the achievement of such policy, and to make recommendations to the President with respect thereto;

(4) to develop and recommend to the President national policies to foster and promote the improvement of environmental quality to meet the conservation, social, economic, health, and other requirements and goals of the Nation;

(5) to conduct investigations, studies, surveys, research, and analyses relating to ecological systems and environmental quality;

(6) to document and define changes in the natural environment, including the plant and animal systems, and to accumulate necessary data and other information for a continuing analysis of these changes or trends and an interpretation of their underlying causes;

(7) to report at least once each year to the President on the state and condition of the environment; and

(8) to make and furnish such studies, reports thereon, and recommendations with respect to matters of policy and legislation as the President may request.

Sec. 205. In exercising its powers, functions, and duties under this Act, the Council shall—

(1) consult with the Citizens' Advisory Committee on Environmental Quality established by Executive Order numbered 11472, dated May 29, 1969, and with such representatives of science, industry, agriculture, labor, conservation organizations, State and local governments, and other groups, as it deems advisable; and

(2) utilize, to the fullest extent possible, the services, facilities, and information (including statistical information) of public and private agencies and organizations, and individuals, in order that duplication of effort and expense may be avoided, thus assuring that the Council's activities will not unnecessarily overlap or conflict with similar activities authorized by law and performed by established agencies.

Sec. 206. Members of the Council shall serve full time and the Chairman of the Council shall be compensated at the rate provided for Level II of the Executive Schedule Pay Rates (5 U.S.C. 5313). The other members of the Council shall be compensated at the rate provided for Level IV of the Executive Schedule Pay Rates (5 U.S.C. 5315).

Acceptance of Travel Reimbursement

Sec. 207. The Council may accept reim-

bursements from any private nonprofit organization or from any department, agency, or instrumentality of the Federal Government, any State, or local government, for the reasonable travel expenses incurred by an officer or employee of the Council in connection with his attendance at any conference, seminar, or similar meeting conducted for the benefit of the Council.

Expenditures for International Travel

Sec. 208. The Council may make expenditures in support of its international activities, including expenditures for: (1) international travel; (2) activities in implementation of international agreements; and (3) the support of international exchange programs in the United States and in foreign countries.

Sec. 209. There are authorized to be appropriated to carry out the provisions of this Act not to exceed $300,000 for fiscal year 1970, $700,000 for fiscal year 1971, and $1,000,000 for each fiscal year thereafter.