NCHRP
National Cooperative Highway Research Program

LEGAL RESEARCH DIGEST

May 1991 Number 20

Legal Research Digests are issued to provide early awareness and encourage application of research results emanating from NCHRP Project 20-6, "Legal Problems Arising Out of Highway Programs." These Digests contain supplements and new papers that are periodically compiled as addenda to the treatise, *Selected Studies in Highway Law*, published by the Transportation Research Board.

Areas of Interest: 11 administration, 12 planning, 15 socioeconomics, 17 energy and environment, 23 environmental design, 70 transportation law (01 highway transportation, 02 public transit, 03 rail transportation 04 air transportation, 05 other)

Supplement to

Legal Aspects of Historic Preservation in Highway and Transportation Programs

A report prepared under NCHRP Project 20-6, "Legal Problems Arising Out of Highway Programs," for which the Transportation Research Board is the agency conducting the research. The report was prepared by Ross D. Netherton, TRB Counsel for Legal Research and principal investigator.

THE PROBLEM AND ITS SOLUTION

State highway departments and transportation agencies have a continuing need to keep abreast of operating practices and legal elements of specific problems in highway law. This report supplements and updates a paper in Volume 4, Selected Studies in Highway Law, entitled "Legal Aspects of Historic Preservation in Highway and Transportation Programs," pp. 2O18-N71 to 1O18-N117. This paper will be published in a future addendum to SSHL.

Volumes 1 and 2 of SSHL, dealing primarily with the law of eminent domain, were published by the Transportation Research Board in 1976. Volume 3, dealing with contracts, torts, environmental and other areas of highway law was published and distributed early in 1978. An expandable publication format was used to permit future supplementation and the addition of new papers. The first addendum to SSHL, consisting of 5 new papers and supplements to 8 existing papers, was issued in 1979; and a second addendum, including 2 new papers and supplements to 15 existing papers, was released at the beginning of 1981. In December 1982, a third addendum, consisting of 8 new papers, 7 supplements, as well as an expandable binder for Volume 4, was issued. In June 1988, NCHRP published 14 new papers and 8 supplements and an index that incorporates all the new papers and 8 supplements that have been published since the original publication in 1976, except two papers that will be published when Volume 5 is issued. The text now totals some 4400 pages, comprising, in addition to the original chapters, 83 of which 38 are published as supplements and 29 as new papers in SSHL. Additionally, 10 supplements and 7 new papers appear in the Legal Digest series and will be published in the SSHL in the near future.

Copies of SSHL have been sent free of charge to NCHRP sponsors, other offices of State and Federal governments, and selected university and state law libraries. The officials receiving complimentary copies in each state are: the Attorney General and Chief Counsel and Right-of-Way Director of the highway agency. Beyond this initial distribution, the volumes are for sale through the publications office of the Transportation Research Board at a cost of $145.00 per set.

APPLICATIONS

The presence of at least a dozen major federal laws purporting to promote preservation of sites and structures having historical, architectural or archeological significance, plus a body of detailed standards and regulations to administer them, presents transportation project planners, administrators and contractors with numerous points where transportation and preservation interests compete. Mechanisms for reconciling these interests are provided in both transportation and preservation laws. Familiarity with this body of law is essential.

Properly orchestrated, this process can work for the best interests of both transportation and preservation, and avoid conflicts that are costly to both interests.

The foregoing should prove helpful to attorneys, planners, appraisers, environmental designers, landscape and preservation architects, construction engineers and managers, archeologists, environmentalists, and others representing transportation agencies, preservation agencies and associated organizations.

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Supplement to

LEGAL ASPECTS OF HISTORIC PRESERVATION IN HIGHWAY AND TRANSPORTATION PROGRAMS

SUPPLEMENTARY MATERIAL

Editor's note: Supplementary material to the paper entitled "Legal Aspects of Historic Preservation in Highway and Transportation Programs" is referenced to topic headings therein. Topic headings not followed by a page number relate to new matters.

FEDERAL LEGISLATION (p. 2018-N75)

The Antiquities Act of 1906 (p. 2018-N75)

Under the authority of the Antiquities Act the President by proclamation has established 98 national monuments and 25 national memorials during the period 1906 to 1990.[1] National monuments are established to recognize and protect historic landmarks, historic or prehistoric structures, and other objects of historic or scientific interest that are situated on lands owned or controlled by the United States. Initially, no special provision was made for administration of these monuments. In 1916 the National Park Service was established in the Department of the Interior and given the "supervision, management and control of the several national parks and national monuments" then under the jurisdiction of that department or to be created in the future. A proviso was added authorizing cooperation between the Secretaries of Agriculture and the Interior in managing national monuments located in or adjacent to national forests, and between the Secretaries of War and the Interior for national monuments located within national military parks. The legislative authority to create national monuments has been construed to deny the President authority to transfer to the National Park Service sites originally administered by the Departments of War or Agriculture.[2]

The authority to establish national monuments has been construed liberally, so that, even in cases where the presence of historic, prehistoric, or scientific objects was disputed, the designation generally has been sustained if there is any substantial evidence to support it.[3] Nor has reservation of land as national monuments or memorials been successfully challenged because it might interfere with the operation or maintenance of a state's highway system, or limit access to state-owned national resources, or reduce state revenue from grazing fees, or reduce a state's tax base by federal land acquisition.[4]

Good land management practice may require that from time to time it is desirable to add to or reduce the amount of land contained in a national monument or memorial. This has raised the question of whether the President may abolish altogether a monument or memorial established under the Antiquities Act. In 1938 the Attorney General of the United States considered this matter in connection with Castle Pinckney, a small fortification in Charleston (South Carolina) harbor, built in 1797 but deteriorating beyond the point where repairs were justified. It had been designated a national monument in 1924, and was located on part of a military reservation which the War Department wanted to use as a storage area. Interpreting the Antiquities Act, the Attorney General advised that in his opinion it did not authorize the President to abolish a national monument and transfer to some other use the land initially acquired for the monument. This was distinguished from other situations in which Congress authorized the President to temporarily reserve land for a particular federal use and later release it when it was no longer needed for that purpose.[5]

The Historic Sites Act of 1935 (p. 2018-N75)

Designation of National Historic Sites and Heritage Corridors

Between 1935 and 1990 some 71 properties were established as National Historic Sites or National Battlefield Sites meeting the criteria of national significance required by the National Historic Sites Act.[6]

In addition, Congress in 1984 established a new category of historically significant properties when it created the Illinois and Michigan Canal National Corridor.[7] The corridor was depicted in its official map as following the route of the 19th century canal from Chicago to LaSalle-Peru, Illinois, varying in its width to include the principal natural and manmade features that illustrated the cultural evolution of that area from the prehistoric aboriginal tribes and natural ecosystems in which they lived, through the periods of European exploration, settlement, and later development of agriculture, industry and commerce, to the present pattern of development. The purpose of this designation was to help revive the socioeconomic life of the corridor area by encouraging the preservation and renovation of the old Illinois and Michigan Canal as a unifying historic theme of the corridor. A Commission authorized by the federal legislation to assist in planning and coordinating state and local efforts to establish recreational trails and areas in the corridor, and encouraging preservation and interpretation of historical, architectural and engineering landmarks and natural archeological and geological resources therein. The Commission was essentially a planning and coordinating body with no power to regulate land use or permanently acquire and hold in its own right land for protective purposes.

Similar arrangements were made by Congress for establishment of the Blackstone River Valley National Heritage Corridor in Massachusetts and Rhode Island in 1986[8] and the Delaware and Lehigh Navigation Canal National Heritage Corridor in Pennsylvania in 1988.[9] Also in 1988 Congress created the Southwestern Pennsylvania Heritage Preservation Commission, authorizing it to carry on essentially similar activities to increase recognition and interpretation of the cultural heritage of a nine-county region in southwestern Pennsylvania associated with the history of the iron, steel, coal, and transportation industries.[10]

While use of the Historic Sites Act of 1935 to establish National Heritage Corridors has not directly resulted in giving or enforcing protected status to any properties, its mandate to "assist in the enhancement of public awareness of and appreciation for the historical, architectural and engineering structures . . . and the archeological and geological resources and sites in the corridor," and its authorization to assist states and local or private nonprofit organizations in restoring historic buildings in the

corridor, put it in a position to indirectly increase preservation activities through means already existing.[11]

Preservation of Historical and Archeological Data

The policy proclaimed in the Historic Sites Act of 1935 has been substantially extended to specifically provide for the preservation of historical and archeological data (including relics and specimens) which might otherwise be lost or irreparably damaged as a result of (1) flooding, construction of access roads, erection of workmen's communities, relocation of railroads and highways, or other alterations of the terrain caused by the construction of a dam by an agency of the United States or its licensee, or (2) any terrain alteration caused as a result of a Federal or federally licensed activity or program.[12] Before undertaking construction or issuing a license for construction of a dam, the agency involved must notify the Secretary of the Interior. In addition, whenever a Federal agency finds or receives written notice by an archeological or historical agency that its activities directly or through a licensee may cause irreparable damage to significant scientific, historical, prehistorical, or archeological data it must notify the Secretary of the Interior and provide information to facilitate protection, preservation, or recovery of such data. Funds appropriated for the projects may be used for necessary surveys, recovery, restoration, or similar activities. Provisions also are made for funding and licensing agencies to conduct such survey, recovery, and restoration activity, for coordinating these activities, disposing of recovered data, and arranging for expert technical assistance.[13]

The National Historic Preservation Act of 1966 (p. 2018-N77)

National Historic Preservation Act Amendments of 1980

Amendments to the National Historic Preservation Act in 1980[14] brought the first major changes in the Act since its passage in 1966, and were intended to provide better definition and guidance for carrying on a national preservation program at all levels—federal, state, and local. They recognized that both governmental and nongovernmental groups at state and local levels had developed the capacity to design and administer preservation activities, and they provided for these bodies to assume more responsibility in the national program. In addition, the responsibilities of other federal agencies under the 1966 Act and Executive Order 11593 were refined. The status of properties listed in the National Register of Historic Places was clarified, and authorization was provided for removal of places that had lost the qualities for which they were designated. For properties designated for the National Register in the future, it was required that owners be notified and concur before their property could be listed, or could be designated, as a National Historic Landmark. Owners' consent was not required in determination of eligibility for the National Register, however, and so did not affect the Advisory Council's right to comment on federal undertakings in which such properties were included.

New provisions were added to clarify responsibilities of federal agencies in carrying out the purposes of the 1966 Act. These related to properties owned or controlled by the agency, and included affirmative programs to locate and evaluate historic sites and structures, nominate for the National Register any that appear eligible, and monitor such property for any development that would call into action the review procedures of the Advisory Council. It also required that prior to acquiring, constructing, or leasing buildings for carrying on its activities, an agency must use, to the maximum extent feasible, any historic properties available to it. Specifically mentioned was the need for caution to assure that property which appeared to be eligible for inclusion on the National Register was not inadvertently transferred, sold, demolished, or substantially altered or allowed to deteriorate significantly. The amendments also authorized federal agencies that own historic property or lease it to others, or exchange it with comparable historic property to determine that the lease or exchange will adequately assure the preservation of the property. Such action must be taken in consultation with the Advisory Council on Historic Preservation.

In mandating that all federal agencies must carry out programs that affirmatively address historic preservation interests the House Report on these amendments commented:

> It is recognized that most Federal agencies have a primary purpose other than historic preservation; however, it is reasonable to expect that they also view themselves as multiple resource managers responding to diverse economic, social and environmental concerns—including the concerns for historic preservation.[15]

The 1980 amendments clearly intended that a higher standard of care be exercised by federal agencies when planning and carrying out undertakings that might directly and adversely affect National Historic Landmarks.[16] Such agencies are expected, to the maximum extent possible, to plan and act as may be necessary to minimize harm to historic landmarks, and provide the Advisory Council reasonable opportunities to comment on proposed actions. The legislative history of the amendments made this point as follows:

> Although the Committee deleted a mandatory requirement that an agency first determine that "no prudent and feasible alternative to such undertaking exists," . . . [it] does intend for agencies to consider prudent and feasible alternatives. This section does not supersede Sec. 106, but complements it by setting a higher standard for agency planning in relationship to landmarks before the agency brings the matter to the Council. . . . [And it] expects the Council, in its implementing procedures for this section, to provide clear guidelines to the agencies, including provisions for sequential application of this section and Section 106, when National Historic Landmarks are affected by Federal undertakings.[17]

It is also noted that these amendments should not be construed to require an environmental impact statement under NEPA where it is not otherwise required.

Amendments that directly dealt with the Advisory Council on Historic Preservation were intended chiefly to restructure its membership and

its procedures so as to improve operational efficiency and interagency coordination. In this regard, the existing authority of the Council to institute legal proceedings on its own behalf to enforce agreements with other federal agencies was strengthened. While in most instances it is to be expected that the Council would use the services of the Department of Justice in litigation, the Council's option to proceed in its own name was affirmed.[18]

Amendments relating to administration clarified the definitions of several terms used in the Act. As to "historic property" and "historic resources" it was noted that these terms were not intended to expand the scope of the 1966 Act to include natural areas, and reference to "prehistory" was to be understood in the context of human prehistory. Also, "undertakings," as used in the Act, should be given the same scope as described in Section 106 and the Advisory Council's regulations.[19]

To guide the Advisory Council in enforcing federal agency compliance with the NHPA, the legislative history emphasized that it was expected to take a "reasonable effort" approach. In evaluating federal agency efforts to carry out preservation responsibilities the degree of the agency's involvement in an undertaking and the relation of this involvement to an historic property should be considered when determining what actions should be taken to comply with NHPA requirements.

Following enactment of the 1980 amendments, but prior to promulgation of the Section 110 Guidelines, the spirit of their stronger protective policy was evident in certain cases involving historic resources on lands under federal ownership or control. In *Colorado River Indian Tribes v. Marsh*[20] it was held that the Corps of Engineers violated the NHPA by failing to take effective measures to protect archeological and cultural resources along a riverbank which would be subjected to erosion and destabilization as a result of a development project licensed by the Corps. The development in question was adjacent to Indian lands, which the Corps of Engineers divided into two parts for environmental impact analysis and mitigation: one, denominated the "affected area," was analyzed for mitigating measures; the other, referred to as the "permit area," was used mainly for identification and administrative purposes.

The court rejected this division of the protected resource, holding that the purpose of NHPA was for federal agencies to take into account the effects of their projects on potentially eligible resources as well as resources already designated as landmarks. The court said:

> The responsibilities incumbent upon the federal agencies imposed by NHPA and its regulations [extend to] . . . preservation and maintenance of the historical and cultural integrity of *all* properties that meet National Register criteria. The importance and significance of the property are a reflection of its interest to the general public and scientific community. The value is not enhanced because it is in the National Register or determined eligible for inclusion in the National Register by the Secretary of the Interior. Hence, to suggest, as the proposed regulations attempted to do, that properties of equal importance and significance should be afforded varying degrees of protection, eludes basic logic and reasoning. Society's concern to preserve and maintain historic and cultural resources that enrich this nation and enhance our national heritage, which was the driving force behind the enactment of the NHPA, should be extended to all significant cultural resources regardless of whether the property was "officially recognized."[21]

The National Environmental Policy Act of 1969 (p. 2019-N79)

In *Goodman Group, Inc. v. DISHROOM,*[22] plaintiff cited NEPA's declaration of federal policy to "preserve important historic, cultural and natural aspects of our national heritage"[23] and invoked it to oppose a plan to rehabilitate a building currently occupied by a group of artists. It was argued that the artistic occupants assured "esthetically and culturally pleasing surroundings," and so contributed to achieving the cited policy. The court held, however, that whatever cultural threat might be involved in the proposed rehabilitation did not require the redevelopment authority to prepare an environmental impact statement. NEPA regulations specifically stated that "economic or social effects are not intended by themselves to require preparation of an environmental impact statement,"[24] reflecting the fact that such effects are difficult to define in the context of NEPA as compared with physical effects on the environment which are more readily ascertainable and for which there is more documentation.

FEDERAL HISTORIC PRESERVATION LITIGATION (p. 2018-N94)

Jurisdiction, Standing and Scope of Review in Federal Preservation Litigation (p. 2018-N94)

Jurisdiction (p. 2018-N94)

In *Benton Franklin Riverfront Trailway and Bridge Committee v. Lewis*[25] jurisdiction to review Section 4(f) determinations was challenged alleging that no statutory authority for it existed in that section of the DOT Act.[26] The court held, however, that jurisdiction could be based on either that statute's provision that DOT proceedings were within the application of the Administrative Procedure Act[27] or on the provisions of 20 U.S.C. 1331a, which permits actions against federal defendants in their official capacity when a relevant statute exists.[28]

Standing (p. 2018-N95)

Doctrine governing the standing of parties to bring action to enforce NEPA and NHPA has continued to recognize the peculiar types of non-economic values and interests that pertain to historic properties as outlined in *Sierra Club v. Morton.*[29] Accordingly, standing has been approved for an unincorporated association of individuals who were residents of the city where the historic property in question was located, and subscribed to the association's purpose of preserving and protecting the city's architecturally and historically significant buildings.[30] Here, the court noted that the "injury in fact" requirement was satisfied by a showing of harm to the esthetic and environmental well-being of the city.

The imminence of demolition of a building in the city listed on the National Register was sufficient to establish plaintiff's standing.

A variation of this situation was illustrated where suit was brought to enjoin federal grants to aid construction of a civic, commercial and convention center in the historic district of Charleston, South Carolina.[31] The plaintiffs here were three organizations of local citizens, many of whom lived in residential neighborhoods adjacent to the proposed project, and whose use of the area designated for construction was direct and tangible. These neighborhood groups were joined as plaintiff by a nonprofit public interest law firm with offices in New York, Washington, and San Francisco, devoted to architectural, historical and neighborhood conservation. Among its primary functions this firm listed dissemination of legal and technical advice to preservation and other public groups and stimulation of public interest in, and discussion of, historic preservation issues. Standing for all these organizations was approved.

Whether an organization could have standing simply by showing that its objectives were the preservation of environmental, historical, recreational, and community values embodied in cultural resources generally or of some locality is questionable. This was the view of the Fourth Circuit U. S. Court of Appeals in *River v. Richmond Metropolitan Authority*[32] where a nonprofit corporation formed to preserve and restore the Kanawha Canal, a nineteenth-century engineering landmark, sought to enjoin construction of a proposed limited-access expressway in downtown Richmond. The organization did not allege that it owned or had any real interest in any property near to or over which the expressway would be located or that it had made or would make any actual use of the canal if it was preserved and restored. Despite the fact that its interest in restoration of the canal was more particularized than that of the plaintiffs in *Sierra Club v. Morton,* the court felt it amounted to little more than a general public interest in the manner in which downtown Richmond developed. By itself it was not sufficient to support standing.

When, however, this same organization appeared as representative of one of its individual members who, as a resident of Richmond, showed that he had enjoyed the James River and Kanawha Canal for recreation, cultural and esthetic benefits, and that he intended to do so to an even greater extent unless the proposed expressway made it impossible, a basis for the organization's standing was present. Although still a general interest, it showed "personal involvement" with the area affected by the proposed construction, and so it stated an injury in fact sufficient for standing. Thus, while not qualified in its own right, the corporate plaintiff acquired standing by association with its individual member.[33]

Standing to bring action to enjoin demolition of an historic highway bridge until the requirements of Section 4(f) of the Department of Transportation Act[34] were met was at issue in *Benton Franklin Riverfront Trailway and Bridge Committee v. Lewis.*[35] Here an old bridge was designated for demolition and replacement under the National Bridge Replacement Program,[36] and its replacement was completed prior to a declaration that the old bridge was eligible to be in the National Register. This declaration triggered the requirements of NHPA to let the Advisory Council review and comment on the proposed demolition, and it resulted in executing a Memorandum of Agreement under which, among other things, the U. S. Department of Transportation would conduct a review of the matter under Section 4(f) of the DOT Act.

The defendant, DOT, challenged the standing of the citizens group plaintiff to maintain their action under Section 4(f) and show any threatened or actual injury it sustained through the apparently lawful demolition that was within the "zone of interest" of the statute. The plaintiff committee attempted to do this by alleging the bridge was necessary to complete a trailway which it sought to establish, but the court regarded this as insufficient to show an injury in fact. Standing to sue, therefore, had to be sustained by the committee's association with its individual members who could show they currently enjoyed the bridge as a historical structure.

A second challenge to plaintiff's standing asserted that the old bridge was not within the scope of Section 4(f) coverage because it was a historic "object" rather than an historic site. While preservation of the historic bridge might be in the zone of interest of NHPA's protection, such preservation was not within the interest zone of Section 4(f), which applied only to use of land at an historic site and protection of "natural beauty" as distinguished from the beauty of man-made objects. Noting that the definition of "historical sites" was not provided in either the cases or regulations, the District Court construed the statutory language to mean that "natural beauty," as used, brought the old bridge within the scope of Section 4(f).

On appeal, the Ninth Circuit U.S. Court of Appeals affirmed these conclusions and the plaintiff Committee's standing to question DOT's compliance with Section 4(f).[37]

The scope of plaintiff's corporate purpose as a factor in defining plaintiff's interest in a protected property was considered in *Wade v. Dole.*[38] Here a nonprofit corporation which leased ten acres of wildlife sanctuary had a right under the lease to conduct research in the sanctuary, and did so under a corporate charter which listed preservation and restoration of the natural environment as one of its purposes. The court ruled that the plaintiff had standing to challenge the threat to the well being of plants and wildlife that would result from proposals to build a highway through the sanctuary. In so holding the court rejected DOT's argument that plaintiff lacked standing because its corporate purpose did not specify historic preservation and the land to be taken for the proposed highway was from an historic site. Responding to this, the court said, "We would do violence to the statutes' clear language if we were to fragment their terms into independent interests for purposes of determining standing."[39]

While neither NHPA nor its implementing regulations, Executive Order 11593, expressly create a private right of action to enforce their protective procedures, courts have been willing to find that a right of action is implied where it is "necessary to effectuate the purposes of both the act and the order."[40] Thus, where archeological sites were discovered on a small island that had been used for many years as a naval gunnery target practice area the court recognized the standing of state preserva-

tion agency officials to enjoin the Navy from further bombardment until the requirements of NEPA, NHPA, and E.O. 11593 were complied with.

Throughout the treatment of questions relating to standing, the fact that other potential plaintiffs did not choose to bring an action, despite the fact that they may have a more tangible and direct interest in an architectural, historical or archeological resource does not appear to adversely affect the standing of a plaintiff whose interest is real but more representative or generic.[41]

Scope of Review (p. 2018-N96)

Where administrative determinations are made in proceedings under Section 102 of NEPA, Section 4(f) of the Department of Transportation Act, and Section 106 of NHPA, the scope of the court's judicial review is a limited one. Judicial review of environmental impact statements covers only the question of whether statutory procedural requirements have been met and whether the EIS performs its primary function of enabling the agencies involved to make environmentally informed choices. Courts do not substitute their judgment for that of the responsible administrator regarding the environmental consequences of what has been determined. Essentially, the court's role is to "insure that the agency has taken a 'hard look' at environmental factors."[42] If the responsible agency has followed the proper procedure, its action will be set aside only if the court finds it to be "arbitrary and capricious," given the known or anticipated environmental consequences. Experience suggests that if it finds that an EIS has been prepared in good faith and contains a reasonably thorough discussion of the significant aspects of the probable environmental consequences, the court will hold that it is adequate to meet NEPA requirements.[43]

Applied to Section 4(f) determinations, the rule on scope of review laid down in *Overton Park*[44] has continued to guide the courts. Accordingly, for a determination that use of land of a qualified historic site is necessary and proper in a highway project, the Secretary of Transportation must have (1) properly construed his or her authority to approve that use as being limited to situations where there is no feasible alternative route or where feasible alternative routes involve uniquely difficult problems; (2) reasonably believed that that situation exists in the case at hand; (3) based his or her decision on consideration of relevant factors and evidence; and (4) not made any clear errors of judgment.[45]

Although the scope of judicial review is limited in this way, and the responsible administrative officials' determinations are accorded a presumption of regularity,[46] the conclusions reached in and through the NEPA Section 102 and DOT Act Section 4(f) processes are subject to thorough, probing, and in-depth review as to compliance with both their procedural and substantive requirements.[47]

In these judicial reviews courts frequently must deal with allegations that a Secretarial determination that a project will have "no effect" on environmental quality or that measures provided for in the project plans will mitigate anticipated adverse impacts on environmental quality are based on insufficient information or inadequate consideration of particular options or data.[48] In this regard, NEPA specifically requires an EIS to contain a detailed statement of alternatives to the proposed action.[49] This serves to insure that the decision-making official actually considers other appropriate methods of achieving the project objectives. But it also has served to encourage plaintiffs to criticize administrators for failing to consider all factors.

A "rule of reason" is favored in the level of thoroughness that should be required in judicial review of an EIS or administrative determination based on it. Citing this issue the U.S. Supreme Court in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.* declared:

> Common sense teaches us that the "detailed statement of alternatives" cannot be found wanting simply because the agency failed to include every alternative device and thought conceivable by the mind of man. Time and resources are simply too limited to hold that an impact statement fails because the agency failed to ferret out every possible alternative, regardless of how uncommon or unknown that alternative may have been at the time the project was approved.[50]

Consideration need only be given to reasonable alternatives, and an EIS is satisfactory if the treatment of alternatives, when judged against the "rule of reason," is sufficient to permit a reasoned choice among the various options.[51]

Thus, the administrative record already in existence and on the basis of which the responsible agency's administrator made his determination under NEPA or Section 4(f) is the focal point of any appellate review, and not any new record which may have originated in another reviewing tribunal. The responsible agency alone has the authority to make the determinations required by statute, and subsequent judicial review must judge the propriety of those determinations solely on the grounds invoked by the agency. The reviewing court may not substitute its own view on what would be a more adequate and proper basis of deciding the issues raised in the EIS.[52]

The importance of distinguishing between the scope of inquiry required by Section 4(f) of the DOT Act and the scope of review permitted by the law was noted in *Eagle Foundation, Inc. v. Dole.*[53] In affirming a decision that there was no feasible and prudent alternative route available to avoid construction of a highway through a wildlife refuge and historic farm, the court made the following observation:

> *Overton Park* calls for a "thorough, probing, indepth review" of a decision to build a highway through land covered by ¶ 4(f). The court also said 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. This calls for a fine distinction, one that is hard to make in practice, between the standard of inquiry ('thorough') and the standard of review ('narrow'). The 'probing' inquiry ensures that the court learns what is going on and does not decide on the basis of superficial beliefs and assumptions; the deferential review ensures that once the court is satisfied that the Secretary took a close look at the things that matter and made the hard deci-

sions, those decisions stick. The court's role is to find out whether the Secretary considered what she had to consider, put out of her mind what she was forbidden to consider, and dealt rationally with the competing relevant issues. As with cases under other statutes dealing with the environment 'we must see to it that the agency took a 'hard look' at the environmental factors implicated and based its decision on a rational consideration of relevant factors.' Because 4(f) is a substantive as well as procedural component, we must also ensure that the Secretary acted with her thumb on the scale, conscious of the importance of protecting the lands listed in the statute.

Searching but deferential review, an indepth probe to find a hard look but then to accept the results, is a difficult task. Such a thorough inquiry runs the risk that the judge, having learned enough to make up his own mind about the wiser course, will deem any other decision to be arbitrary. The judge must combine dogged pursuit of the evidence with humility about his own role, always keeping in mind the possibility that competent people of good will may reach different conclusions on the basis of the same record.[54]

The Question of "Effect" Under Section 106 and "Use" Under Section 4(f) (p. 2018-N97)

Beginning with the decision in *Overton Park,* judicial doctrine defining what constitutes "use" of property protected under Section 4(f) agreed that the term covered any direct physical taking or occupation of land, albeit a small one.[55] Neither the statutory language nor the legislative history, however, offered specific guidance regarding extension of this concept to instances of constructive use or to claims based on impacts of noise, air pollution, visual intrusion, esthetic loss, increased traffic, and the like. Judicial doctrine defining "use" for purposes of applying Section 4(f) and Section 106 has developed through experience in analyzing the causation and consequences of these impacts that generally are from off-site sources.

Among the factors which courts have discussed are proximity and directness of the causal activity; and many instances of the application of Section 4(f) have related to parkland, recreational areas, and wildlife refuges, sometimes alone and sometimes in combination with historic sites.[56]

So, in *Monroe County Conservation Council v. Adams*[57] options for completing a circumferential highway around a park included some routes which would have increased traffic that was incompatible with a parklike atmosphere and were regarded as a "use" of the park.

In *Conservation Society of Southern Vermont v. Secretary of Transportation*[58] plans for reconstruction of a highway bordering a wilderness area involved construction of a four-lane, limited-access divided facility and were treated as a "use" of the wilderness area because of the noise level resulting from this facility.[59]

In *Citizen Advocates for Responsible Expansion v. Dole*[60] plans for construction of a 30-ft-high elevated highway adjacent to a city park containing several buildings that were on the National Register or eligible for it were held to constitute a "use" of that property. But the court added that:

> to constitute a constructive use, the off-site activities of the proposed project must impair substantially the value of the site in terms of its environment, ecological or historical significance.[61]

And, commenting on the standards applied in determining when impacts from off-site sources reach levels that bring environmental protections into play, the court observed:

> Suffice it to say that both tests—NEPA's 'significantly affecting the quality of the human environment' test and Section 4(f)'s 'use test'—are roughly equivalent.[62]

Where, however, the impact of a proposed project is expected to be so small as to be insignificant in affecting the quality of the human environment, it may be treated as not constituting constructive use of the property in question. Thus, in *Falls Road Impact Committee v. Dole,*[63] evidence that noise was expected to increase less than 1 dB persuaded the court there was no constructive use of the protected property. Similarly, in *Arkansas Community Organization for Reform Now v. Brinegar*[64] the location of park facilities at a "substantial distance" from a proposed freeway project reduced the effect of noise and air pollution to the point of insignificance to activities in the park, and landscaping mitigated visual intrusion of the freeway.

In *Patterson v. Froehlke,*[65] expansion of an airport, including construction of a highway and bridge, was opposed because of its effect on an historic site consisting of a small museum located more than 10 miles from the airport. The court found that increased air pollution and traffic resulting from the expansion would not disturb activity at the historic site sufficiently to require application of NHPA procedures.

Quantifiable impacts on environmental conditions that are associated with recreation, conservation, and wildlife or wilderness management appear as one context for determining when there is constructive use of land protected by Section 4(f). Another set of analytical problems is presented by claims that highway projects diminish the historic value of a site. Here, the relevancy of the expected consequences of an impact is critical, as noted by the court in *Nashvillians Against I-440 v. Lewis,* as follows:[66]

> Stretching the definition of "use" to perhaps its broadest extent, plaintiffs argue that noise, air pollution, land use alteration, damage from blasting activity, and property value diminution illustrate the uses to which various historic properties will be subjected. . . . [The] court would question the relevancy of certain of these effects. Surely the means by which constructive use of property can be shown for purposes of section 4(f) should at least include proof that the claimed harm will affect the historic value or quality of the properties. The various historic districts addressed by this aspect of plaintiff's complaint are designated as such because they encompass houses that are architecturally significant. The simple truth is that noise, land use changes, property value diminution, and to a substantial extent air pollution, will not affect the architectural integrity of these areas and will not impair their historic value.

And, it went on to conclude:

> This is not to say necessarily that there will be no impact, but only that none will be encountered that differs in any real sense from the impact upon nonhistoric properties. The qualities protected by section 4(f), in other words, will be protected still.[67]

The relevancy of highway project impacts to historic values was successfully demonstrated in *Stop H-3 Association v. Coleman,*[68] where the court found that constructive use of a protected area occurred in a proposed highway widening and realignment on land near a historic petroglyph rock. The geographic closeness of the offsite construction was not the sole factor in the court's finding. The impact of the highway project activity within 100 to 200 ft from the petroglyph was considered as adversely affecting its "utility" or "importance as a site."

Although the court did not explain its finding further, it might have noted that criteria for identifying and evaluating impacts are available in the form of regulations and guidelines promulgated by the Department of the Interior for determining eligibility for listing in the National Register.[69] These provide a framework for analysis of the characteristics of a site or structure that contribute to its significance and value. Current historic preservation policy, reflected in local historic district ordinances and preservation planning guidelines, has evolved from an initial preoccupation with individual landmark structures and monuments to appreciation of the contribution made by their settings. Thus, historic districts may include structures or spaces that are important solely because they are "part of the scene" and reinforce an historic theme or character, as was the case in *Stop H-3 Association v. Coleman.*

Construction of Key Elements of Section 4(f) and Section 106

Preliminary to applying the procedures prescribed in Section 4(f) of the Department of Transportation Act or Section 106 of the National Historic Preservation Act, the circumstances of the case must show that the key elements of those statutes are present. As cases arise construction of the legislative language has continued to refine the judicial definitions of those elements, as follows.

"Agency Head"

Section 106 of the NHPA requires that "the head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking" shall take into account the effects of that undertaking on structures that are registered or eligible to be listed in the National Register. In *National Center for Preservation Law v. Landrieu*[70] the Secretary of Housing and Urban Development and the Administrator for Economic Development delegated to the City of Charleston, South Carolina, their responsibilities under NEPA (42 U.S.C. 4321), NHPA (16 U.S.C. 470) and Executive Order 11593 to assess the impact of a proposed urban redevelopment plan. The city subsequently approved a plan to condemn and demolish certain registered buildings in Charleston's historic district. The court held that this delegation was not improper and that in this instance the city could be considered the "agency official" under NHPA for purposes of taking into account the effects of a proposed urban renewal project on protected historic structures. Under HUD's program of Community Development Block Grants the city, as applicant, could properly become the "lead agency" and the federal agencies could perform a cooperating role to review and assist the undertaking.

"Approval" of Expenditure of Federal Funds

In Section 106 of NHPA the head of a federal agency must take into account the effect of an undertaking "prior to the approval of any Federal funds on the undertaking or prior to the issuance of any license" for an undertaking. If such approval occurred prior to the date when an historic structure was listed in or declared eligible for the National Register, Section 106 procedures do not apply. Accordingly the relationship of the date of approval and the date of the establishment of protected status is a threshold question where Section 106 of NHPA is invoked. This question has proved to be a controversial one in projects that involve planning, land acquisition, and construction activity spread over a period of years and organized for administrative purposes into successive phases. In such projects several possible dates may be available for marking the time of final approval.

Where circumstances show that the initial approval by the federal funding agency or the execution of a contract created a right to have the expenditure of the federal funds, the date of that approval has been used in determining whether a protected status exists. So, where a structure was not listed in the National Register until a year after the agency received approval of funding the acquisition and demolition of that structure, it was held that Section 106 procedures did not apply.[71]

This approach to the application of Section 106 was challenged in cases involving HUD's urban renewal grants which involved an extended and complex process, and offered several actions that might plausibly be considered "approvals." Initially the courts sought to identify specific dates by reference to which the further establishment of protected status could be cut off. When, as in *South Hill Neighborhood Association v. Romney,*[72] the project plans were amended several times, the date of the last amendment to the city's urban renewal plan was used for this purpose.

This view was further refined in *Central Oklahoma Preservation Alliance, Inc. v. Oklahoma City Urban Renewal Authority*[73] where the court held that adequate consideration had been given to the effect of an urban renewal project on historic structures in the initial project approval, and therefore reconsideration was not necessary in conjunction with subsequent amendments that were chiefly made to add further funding to the project and required no significant further action under the plan.[74]

In *Kent County Council for Historic Preservation v. Romney,*[75] plaintiffs contended that Section 106 required that opportunities to com-

ment be provided whenever expenditures of federal funds occurred in the form of partial payments to the urban renewal agency under the project agreement. The court disagreed, saying:

> Congress did not say "prior to the expenditure"—approval of expenditure and the expenditure itself are two separate and distinct concepts. Approval of expenditure requires judgment. The actual expenditure is a clerical, ministerial or mechanical act. As we understand it, plaintiff's position is that each and every time there is to be an expenditure pursuant to a prior appeal the entire approval machinery must again be set in motion and the approval process repeated. The court would have to be mad to place such a ludicrous interpretation on the simple clear language employed by Congress in section 470f.[76]

Questions have been raised as to whether amendments made for the purpose of continuing a previously commenced activity for which environmental impacts or historic preservation impacts were assessed, or transferring an urban renewal or redevelopment project from one federal program to another, constitute "approvals" that oblige the responsible agency head to reconsider the project's impacts. Here courts have borrowed from NEPA's concept of "major federal action" to help determine whether amendments to a project plan call Section 106 of NHPA into play.[77]

In 1979 the Second Circuit parted with this line of cases and expanded the applicability of NHPA by holding that as long as a federal agency maintained "continuous control" of a federally assisted project the statutory duty to consider and the right to comment remained in effect. In *Waterbury Action to Conserve Our Heritage, Inc. (WATCH) v. Harris,*[78] the building in question had not been listed or found to be eligible for listing in the National Register prior to the time that Waterbury's urban renewal grant contract was executed. As a result, the federal agency did not consider the building protected by the NHPA procedures. The court held, however, that this was too restrictive a view of a process that involved not only an initial approval of the project, but a series of additional approvals as the project progressed from stage to stage. Citing the lack of specific guidance in the legislative history, the existence of a consistent administrative interpretation that gave broad application to Section 106, and the effects of the 1976 amendments to NHPA (which extended its protection to "eligible" as well as listed properties), it summarized its view as follows:

> The sum and substance of all this is, we think, a Congressional purpose, expanding over the years, to make certain that federal agencies give weight to the impact of their activities on historic preservation. Throughout Congress has recognized that it is necessary to identify the properties that are of state, community or local significance, and this was one of the major purposes of the 1966 Act itself. The problems of identification were and remain considerable, as the 1976 legislative history recognizes. One would suggest that Congress, having these problems in mind, did not intend to adopt a strict cut-off date, at least as to grant and loan contracts such as this one where the federal agency gives its final approval to the expenditure of federal funds only in stages. . . . Such an interpretation of NHPA is entirely consistent with the regulations of the Advisory Council, the agency charged by NHPA to act, with Executive Order 11593 and with NEPA.[79]

The decision in *WATCH* construed Section 106 to apply to ongoing projects as long as the federal agency retains the authority to make funding approvals, and so allows its protection to extend to structures that receive or become eligible for National Register listing at any time throughout the life of the project. But commentators have warned that this interpretation may burden federally assisted programs with delays and added expense, and ultimately force consideration of when the economic costs and practical burdens of ongoing compliance with NHPA become greater than the cultural benefits of historic preservation.[80]

These issues were considered by the Third Circuit in *Morris County Trust for Historic Preservation v. Pierce,*[81] involving proposed demolition of an historic building called for in an urban renewal and street improvement plan for the town of Dover, New Jersey. At the time that the HUD Loan and Capital Grant Contract was executed in 1969, the building in question had not been listed or declared eligible for listing in the National Register. In fact, it was not found eligible until 1971 and was listed in 1982. Observing that "Congress designed the statute to draw a meaningful balance between the goals of historic preservation and community development," the court held that NHPA was applicable to an ongoing project "at any stage where a Federal agency has authority to approve or disapprove Federal funding and to provide meaningful review of both historic preservation and community development goals."[82] Reviewing the record, the court noted that at regular intervals the town of Dover submitted to HUD reports and proposals for implementation of its urban renewal plans, and these provided opportunities for the federal agency head to take into account the impacts of the project on historic resources if he had seen fit to use them. Accordingly, the project was enjoined until an environmental impact assessment was prepared to meet NEPA requirements and an historic and cultural resource review pursuant to NHPA was completed.[83]

A Federal or Federally Assisted Undertaking

The provisions of NHPA Section 106 apply to an agency head who has jurisdiction over a "proposed Federal or federally-assisted undertaking." A variety of factual situations have been considered in judicial construction of this term.

In *Weintraub v. Rural Electrification Administration, U. S. Department of Agriculture*[84] the plaintiff Pennsylvania Historical and Museum Commission brought action to enjoin demolition of an historic structure known as The Telegraph Building and listed in the National Register. The demolition was planned in order to gain more parking space at the headquarters building of a federation of electric cooperatives. Plaintiff joined as defendant the Rural Electrification Administration (REA) and contended that the head of the agency was required to apply the procedures of NHPA Section 106 when making loans of federal funds

to the co-ops. To determine this, the court considered whether the proposed demolition of the historic building in question was a federally assisted undertaking.

Examining the record, the court found that defendant REA had in fact loaned money to the co-op federation, but no federal funds had been directly used or allotted to the demolition of The Telegraph Building, and no federal agency had intended or authorized money for that purpose. Essentially plaintiff claimed that the demolition was a federally assisted undertaking because the REA's loan enabled the co-op federation to build a new headquarters building which created the need for additional parking space in the immediate vicinity, which was the occasion for the proposal to condemn and demolish The Telegraph Building.

The court disagreed, saying:

> Congress, in the court's view, only intended to control direct federal spending for actions or projects which would otherwise destroy buildings on the National Register. Congress did not intend to reach every effect of federal spending. The interpretation advocated by the plaintiffs would require detailed and elaborate tracing of the effects of federal funds because every action which was remotely caused three or four steps down the line by federal spending would be controlled by 16 U.S.C. 470f. Nothing in the language of 16 U.S.C. 470f or the legislative history supports such a novel and far-reaching interpretation.[85]

The court also dealt with the contention that REA's action constituted a "license" as the term is used in 16 U.S.C. 470f since its regulations required that it approve the construction plans for the co-op federation's headquarters building. The court insisted, however, that Congress intended the word "license" in NHPA to have its technical meaning—a written document constituting a permission or a right to engage in some governmentally regulated activity. REA's authority to approve the co-op headquarters building plan did not bring it under Section 106.[86]

In contrast, action constituting a "license" in this accepted usage was present in *National Indian Youth Council v. Andrus.*[87] Here the Department of the Interior approved a lease of land on an Indian reservation made for the purpose of gas exploration and development. As this lease was renewed over a period of years and its terms were renegotiated, plaintiffs challenged the adequacy of the department's consideration of the lease's impact on Indian archeological resources in the leased area. Arguing that NHPA Section 106 imposed on the Secretary a duty to assess the full range of impacts over the entire leasehold area before the initial approval of the lease was given, plaintiffs contended that this should have included the entire list of approximately 660 archeological sites identified by that time, with surveys, evaluations, and plans for mitigating damage if they were listed in the National Register.

The court rejected the view that NHPA Section 106 required compliance *in toto* prior to issuance of any license or lease. Events occurring during performance of a project might well result in modification of its original terms, and so involve matters that came within the purview of the Advisory Council's right to comment. In such a series of renewals and renegotiations, only those that involve activities likely to affect the historic value of protected properties obliged the responsible agency to comply with NHPA Section 106. In this case, the court explained, it was mining activity that threatened the archeological sites, and so only those lease modifications that affected lands where archeological resources were located were "licenses" for which compliance with NHPA was required. If new sites were discovered during mining operations the relevant provisions of the Historic and Archeological Data Preservation Act applied to protect them.[88]

Comparisons sometimes are suggested between the "undertakings" contemplated under NHPA Section 106 and the "major federal actions" under NEPA or "use of land" under Section 4(f) of the DOT Act. One point of distinction between them was developed in *Maryland Conservation Council, Inc. v. Gilchrist.*[89] Here plaintiff sought to enjoin county officials from authorizing construction of a highway allegedly designed to pass through a state park until and unless the county or state made environmental impact assessments required by NEPA and the environmental determinations required by Section 4(f) of the DOT Act. Initially, the trial court held that the case did not involve a "federal action" and so no EIS or other determinations were required. On appeal, the Fourth Circuit reversed the trial court as to the applicability of NEPA, citing the fact that federal funding would inevitably be involved in the road construction being planned, and that the park originally had been acquired by federal funding and would require federal approval for "conversion" of part of it to any nonrecreational use. These clear prospects, the court ruled, made the project a federal action without regard to whether the facts showed sufficient federal involvement to qualify it as a "partnership" between federal and nonfederal agencies.[90]

The appellate court affirmed the trial court's dismissal of the claim that Section 4(f) procedure should have been completed at this planning stage of the proposed project. Those determinations, the court said, need to be made when and if there is an application to acquire or convert parkland to highway use.

The precise point at which a project that is making its way through the planning process moves from being only an uncommitted possibility to being a proposal for action by a federal agency has not been settled in the case law. In *Monarch Chemical Works, Inc. v. Throne,* the court stated: "The mere contemplation of a project and the accompanying study thereof does not necessarily result in a proposal for major federal action. . . ."[91]

Also, where nonfederal agencies are responsible for the contents and implementation of a development plan, and adoption of the plan does not obligate the federal government, it is not considered to be a federal proposal within the purview of NEPA even though projects under the plan would be eligible for federal financial assistance if it was requested.[92]

Even direct participation of a federal agency in preparing a "location environment study" may not raise a project under consideration to the level of a "major federal action." In *Village of Los Ranchos de Albuquerque v. Barnhart*[93] the Federal Highway Administration at the request of the local Council of Governments assisted in performing certain

planning studies for proposed sites of bridge replacements that would be eligible for federal funding, but which the local government planned to pay for through its own general obligation bonds. When the necessity of complying with federal environmental and preservation laws was asserted, the court ruled that the federal involvement was not sufficient to trigger the application of either NEPA, NHPA, or Section 4(f) of the DOT Act. Summing up its analysis, the court stated:

> The touchstone of major federal action in the context of the case before us is an agency's authority to influence significant nonfederal activity. This influence must be more than the power to give nonbinding advice to the nonfederal actor.... Rather, the federal agency must possess actual power to control the nonfederal activity.[94]

Noting that here the federal agency merely compiled and reported information and advice on the location of a bridge as proposed by local agencies, the court found no evidence of federal control of the project and, therefore, no necessity to comply with federal environmental or historic preservation laws.

Federal Highway Administration regulations provide that planning and technical studies, as well as engineering to define the elements of proposed actions or alternatives so that social, economic or environmental effects can be assessed, are normally classified as categorical exclusions.[95]

The possibility that a project which is locally planned and funded may nevertheless become subject to federal environmental or historic preservation laws if it turns out to be part of an overall federal or federally assisted construction project was examined in *Historic Preservation Guild of Bay View v. Burnley.*[96] Here a plan for widening and improving a highway traversing several small towns in rural surroundings was segmented into six projects, each with differing specifications. One of these projects called for making a three-lane highway through an historic town. Federal highway authorities denied federal participation in the cost of this project because it did not meet federal highway safety standards. Notwithstanding this, local historic preservation groups sought to enjoin the three-lane widening until the state complied with NEPA Section 102, NHPA Section 106, and DOT Act Section 4(f), arguing that the project was part of an overall, integrated federal undertaking. The court disagreed, stating:

> [Plaintiff] failed to show that the project ... [in question] is *primarily* federally funded. The portions ... [in question] were widened solely with state funds. Although the widening of Segments Five and Six may have made the current Bay View widening more likely to occur, under the several factors discussed in the *River v. Richmond Authority* case, we believe that the totality of the circumstances was insufficient to establish federal action.[97]

The analysis which courts have adopted in determining when federal participation in project planning processes is sufficient to make it a federal action would seem to be applicable to other kinds of consultation between federal agencies or with state or local entities. Distinctions that help determine when federal involvement raises a project to a level requiring compliance with environmental or preservation review procedures become especially critical where minimal impact on an historic site leads to consultations among affected agencies or nongovernmental groups under NHPA Section 106. In such instances it may be argued that any impact sufficient to cause consultations amounts to an admission that is sufficient to constitute a constructive use of the property in question under Section 4(f).

Insufficient involvement of federal agencies and federal interest to qualify a project as a "federally assisted undertaking" led to denial of the application of NHPA Section 106 procedures in *Techworld Development Corporation v. D. C. Preservation League.*[98] Here proposed construction of an international high-tech trade center would cover two blocks, close a street, and install overhead bridges in downtown Washington, D. C., where the city's original street and development plan was preserved (L'Enfant Plan). By law the National Capital Planning Commission was required to review and comment on street closings, and plaintiff argued that this made the project a federally assisted undertaking. It cited the Advisory Council's definition of "undertaking" as any "federal approval, sanction, assistance or support" of a nonfederal project.[99]

The court held that the Planning Commission review did not make the project federal or federally assisted. Rather, the court stuck to the statutory definition of "undertaking" in terms of expenditure of federal funds or issuance of licenses.[100] It noted that in its 1980 amendments to NHPA Congress apparently accepted this narrow construction since it did not change the statutory language.[101] Moreover, it pointed out that the National Capital Planning Commission's recommendations were not binding and so, arguably, would not even qualify under the Advisory Council's definition. Summing up, it observed:

> Examples of such federal involvement include projects directly undertaken by the agency, projects supported by federal loans or contracts, projects licensed by the agency or projects proposed by the agency for congressional funding or authorization. The regulation requires the federal agency be substantially involved in the local project, either with its initiation, its funding, or its authorization, before a local project is transformed into a federal undertaking.[102]

Another example of failure to establish sufficient federal involvement is provided in *Ringsred v. City of Duluth.*[103] Here a warehouse was purchased for a joint development project of the City of Duluth and the Lake Superior Chippewa Indian Tribe. Since federal funds assisted in the purchase, environmental impact assessments were duly prepared and showed that renovation and adaptive use of the building in question would have no adverse impact on the environment, neighborhood, or nearby historic properties. The EIS did not, however, cover possible effects of a parking ramp to be constructed on city-owned land adjacent to the renovated facility. When plaintiff contended that the project was subject to the procedures of NEPA Section 102 and NHPA Section 106, the court held that the situation did not qualify either as a "major federal action" or a "federally assisted undertaking." The court stressed the fact that the parking ramp site could be and had been acquired with the city's own

authority and funds, so there was no occasion for federal involvement in the project. It noted that the federal connection was a threshold question for application of either NEPA or NHPA, but it did discuss the possibility of a different outcome for either of these bases if the Advisory Council's broader definition of federal involvement is used.

National Register Eligibility

The duties that federal agency heads have under § 106 of NHPA apply where federal undertakings affect a district, site, building, structure, or object that is included in or eligible for inclusion in the National Register.

Inclusion of a site or structure in the National Register is accomplished by official action taken in accordance with NHPA and procedures promulgated by the Secretary of the Interior.[104] Normally the determination of eligibility for inclusion in the National Register is based on nominations by federal agencies or by state historic preservation officers, and sometimes with the advice of the Advisory Council on Historic Preservation. In addition, since 1977 the Keeper of the National Register has been authorized to issue such determinations unilaterally, without federal request or state nomination.[105] Under this authority, however, the only consequence of unilateral action by the Keeper is notice to the federal and state agencies concerned and to the public, with a request to the appropriate state historic preservation officer to nominate the property in question. Publication of the Keeper's findings provides actual notice of the property's significance for the planning process on projects which could affect the property, but it has not been recognized as creating any duty for planners or developers to review, reconsider, or modify their plans.[106]

The lack of a completed formal determination of eligibility for inclusion in the National Register is not, however, considered by all courts as excusing federal agencies from consideration of this matter in their planning process. In *Hough v. Marsh*[107] the absence of any official determination of eligibility was noted in the decision of the Corps of Engineers to reclaim wetlands for development which allegedly would adversely impact the scenic and esthetic values of an historic lighthouse. Because there had been no formal determination of eligibility, the Corps did not comply with § 106. The court held that the absence of this determination did not render the statute inapplicable, saying:

> In contending that the lighthouse was not "eligible" for listing within the meaning of the statute and thus did not trigger the Advisory Council's regulations, the defendants point to the absence of any official determination of eligibility.... The Advisory Council regulations, however, belie any suggestion that the Corps can passively rely on other agencies to satisfy its responsibilities under NHPA. "Eligible property" is defined as "any district, site, building, structure or object that *meets* the National Register criteria." 36 C.F.R. 800.2(f) (emphasis added)—not any structure that *has been determined* to meet such criteria. More specifically, the regulations speak of an agency's "affirmative responsibilities to locate and identify eligible properties that are within the area of the undertaking's potential environmental impact and that may be affected by the undertaking."[108]

The court noted that its view appeared to differ with that of the court in *Committee to Save the Fox Building v. Birmingham Branch, Federal Reserve Bank of Atlanta*,[109] which had stated that "without such a determination or finding, the building was ineligible for nomination to the Secretary of the Interior for inclusion in the National Register." To the extent that that holding differed from the reasoning here (*Hough v. Marsh*) the court felt it was contrary to the clear import of the statute and the Advisory Council's regulations. It pointed out, however, that despite the absence of an official determination of eligibility the court in *Committee to Save the Fox Building* ruled that the requirements of § 106 applied.[110]

This difference over the significance of an official determination of eligibility was noted in *Boyd v. Roland*[111] where it was argued that § 106 procedures did not apply to a proposed renovation of a church in an historic district for use as housing for elderly and handicapped residents because the church and district never had been officially determined to be eligible for the National Register. The Fifth Circuit ruled that property qualifies as eligible "on the bases of literal eligibility under the National Register criteria" and "is not restricted to property that has been officially *determined* eligible." It cited with approval the statement in *Colorado River Indian Tribes v. Marsh*[112] that "what is an eligible property for purposes of NHPA turns upon the inherent historical and cultural significance of the property and not opinion of its worth by the Secretary of the Interior."

If the foregoing construction of § 106 is to be taken as the prevailing view, it puts added strain on the criteria of eligibility for the National Register and their application by federal agencies and state historic preservation officers in the varying circumstances of the field, and who must develop justifications for eligibility in the administrative record. Some idea of the implications of this responsibility was expressed in *Birmingham Realty Company v. General Service Administration*,[113] as follows:

> A literal construction of the phase "eligible for inclusion in the National Register" would, under the broadly stated criteria for eligibility set forth in 36 C.F.R. 60.6, lead almost inescapably to the conclusion that every building over fifty years old in this country is eligible for inclusion in the Register. Virtually all of the skyscrapers of the urban areas of the nation would appear to be eligible. Surely Congress did not intend that each such building be placed on the National Register.[114]

Faced with this prospect, the skill and success with which justification for eligibility is developed in the administrative record assumes critical importance.

Duty to "Take Into Account"

The head of a federal agency having jurisdiction over a proposed federal or federally assisted undertaking, or having the authority to license such an undertaking must "take into account the effect of the undertaking on any district, site, building, structure or object that is included in or eligible for inclusion in the National Register."[115]

By this language Congress clearly meant to require some sort of evaluative process to be performed, but it did not specify details of how it was to be carried out or the depth to which it should go. The essential elements of this process have been supplied in regulations issued by the Advisory Council on Historic Preservation,[116] and in 1985–86 were the subject of a comprehensive rule-making action aimed at reducing regulatory burdens and paperwork, increasing the flexibility of compliance with § 106, and generally streamlining the administrative process.[117] Through these regulations the obligation of federal agency heads to "take into account" the effects of their undertaking is structured in phases or steps in which they (1) review existing information about historic properties in the area of the project and needs for new or added information; (2) supplement existing information with data from the state historic preservation officer (SHPO) local government sources, historical organizations, professional societies, and Indian tribes; (3) carry out surveys, predictive modeling, and similar investigative activities; (4) locate historic properties subject to NHPA and compile data to evaluate the properties' eligibility for listing in the National Register and the effects of the proposed project on them; (5) in consultation with the state historic preservation officer, reach agreement if possible regarding whether any identified site or structure should be recommended to the Secretary of the Interior as eligible for inclusion in the National Register; (6) where there are historic properties that may be affected by a project, evaluate such effects; and (7) in consultation with the SHPO and other interested parties, agree, if possible, on how the effects of the project will be dealt with in the planning and performance of the work.[118]

If this process succeeds in achieving agreement among the interested parties its results are set forth in a Memorandum of Agreement. The emphasis in this approach is on encouraging the resolution of any differences between the preservation needs of the SHPO and the construction needs of the project agency at their particular level through consultation and cooperative action. To do so conserves the resources of the Advisory Council and avoids expensive delay for the project agencies.[119]

Whether consultation at the agency head-SHPO level produces a Memorandum of Agreement or the parties reach a point where it will not be productive and terminate it, the matter must be submitted to the Advisory Council for an opportunity to comment. This provides another level on which to try to resolve differences and achieve agreement on how the effects of the project in question upon the historic values of a property will be handled. The agency's response to the Council's comments completes the § 106 process.[120]

The process of "taking into account" also includes a duty to provide documentation for determinations made by an agency official explaining how they were reached. As described in the Advisory Council's rules promulgated in 1986, these documentation requirements generally reflect what would be considered necessary for any adequate administrative record.[121] Through descriptions of the proposed undertaking, the efforts made to identify historic properties that may be affected by the undertaking, and the characteristics of the properties found are always essential elements of the documentation. In addition, where adverse effects are expected, they should be described in terms of evidence produced through the consultative process and the earlier evaluations of significance. If a finding of no adverse effect is made by the agency, its documentation should show how the criteria of adverse effect were found inapplicable to the activity associated with the project. In addition, the views of the state historic preservation officer, and any concerned local governments, federal agencies or Indian tribes, plus the public, to the extent they are provided, should be documented. Wherever information has been solicited from parties other than the project agency the documentation should describe the means used in the solicitation.

Finally, and as a means both for documenting and implementing the protection of affected historic properties, Memoranda of Agreement must include descriptions and evaluations of proposed mitigation measures or alternatives that were considered, and summaries of the views of SHPOs and other interested parties.

Details of the documentation for historic properties may differ from case to case, but ultimately they are judged for sufficiency by how well they achieve the purpose of providing enough information to explain how the agency reached a finding of no adverse effect or to enable the Advisory Council to make an independent review of the proposed undertaking's effect on historic properties and prepare informed and constructive comments to the agency.[122]

In view of these regulations it was held in *Hall County Historical Society v. Georgia Department of Transportation*[123] that the Federal agency head (Federal Highway Administrator) having jurisdiction over a highway improvement project failed to comply with NHPA § 106 when it relied too much on the findings of the state transportation agency responsible for performing the project in question. The court faulted FHWA for failing to undertake any independent studies or evaluations of the project's potential environmental effects and for not making any independent effort to properly identify properties within the area of the project's impact that were included in or eligible for the National Register. Characterizing the agency's action as "little more than blind reliance . . . upon the state's determination and finding," the court observed:

> While joint participation by federal and state officials may, under the proper circumstances, be totally consistent with the Congressional intent behind 16 U.S.C. ¶ 470f . . . this statute requires that the determinations of effect, adverse effect, or no effect by the appropriate federal agency official be an independent one, and not simply a "rubber stamp" of the state's work.[124]

The necessity for independent study and evaluation is generally well understood and provided for in federal highway program regulations.[125] Instances of apparent noncompliance with the statutory duty to "take into account" are more likely to occur because of disagreement over the scope of the review which a project agency should conduct. This may be especially difficult to avoid where projects to construct or improve public facilities are planned in phases which go on over an extended period of

time and must be coordinated with others in an overall project plan. Housing, urban redevelopment and highway programs share this characteristic, and the issues regarding the sufficiency of assessments made for compliance with NEPA and NHPA requirements were discussed in *Vieux Carre Property Owners, Residents and Associates v. Pierce.*[126]

Using departmental guidelines originally developed to assist environmental assessments under NEPA, the court said that a project of HUD's Urban Development Action Grant Program (UDAG) encompassed all actions funded or authorized to be funded with federal program funds and any related actions not federally funded or authorized which are "part of [the applicant's] strategy for treatment of a project area."[127] So, the court continued:

> Regardless of funding sources, integrally related activities designed to accomplish, in whole or in part, a specific goal are to be grouped together for consideration as a single project. Moreover, closely related and proposed or reasonably foreseeable actions that are related by timing or geography also must be considered together.[128]

Applying this to the problem of determining how broad the UDAG assessment should be, the court had no difficulty including relocation of power lines, screening and landscaping public areas, street lighting, construction of roadways, sidewalks and elevated pedestrian walkways. Further, despite the fact that private funding would be used for construction of hotels and shopping malls in the projected redevelopment, this phase of the construction plan should be grouped with the federally funded phases as "integrally related and part of the developer's strategy for treatment of the project area."[129]

While laying this down as a rule for determining what the federal agency must consider in taking into account the impacts of a proposed activity, the court emphasized that a distinction must always be made between activities that are firmly proposed and those that are still in the study and design stages. The latter may well be so uncertain and speculative that inclusion in an environmental or historical impact assessment is premature and not required by NHPA § 106. Where this can be demonstrated, exclusion of these phases from the impact assessment can be justified without improperly limiting or foreclosing consideration of alternatives to the proposed project.[130]

As to property within the scope of the project's impact, regulations promulgated by the Advisory Council under Executive Order 11593 offer specific criteria for taking into account their impacts, namely:

> Criteria of adverse effect "include but are not limited to: (1) Destruction or alteration of all or part of a property; (2) Isolation from or alteration of the property's surrounding environment; (3) Introduction of visual, audible, or atmospheric elements that are out of character with the property or alter its setting; (4) Neglect of a property resulting in its deterioration or destruction; [and] (5) Transfer or sale of property without adequate conditions or restrictions regarding preservation, maintenance, or use."[131]

These criteria were applied in *Wicker Park Historic District v. Pierce*[132] where plaintiffs charged that the federal agency's determination of no adverse effect resulted from a proposed redevelopment project that failed to provide adequate information on possible impacts or alternatives, or to consider other sites where the impacts would be lessened. The court held, however, that the agency's administrative record adequately sustained its determination of no adverse effect and so the agency was not obliged to submit information on possible modifications of the project. The court stated:

> If we were to adopt the plaintiff's argument that HUD must consider completely independent and different proposals for the use of federal funds . . . then any proposal for construction within an historic district would always have to be rejected since the alternatives always would create less of an impact on the district. This court does not believe the NHPA was intended to go so far.[133]

Agency responsibility to take into account the effects of their undertakings generally does not extend to the temporary impacts resulting from highway construction. This was the conclusion of the court in *Cobble Hill Association v. Adams,*[134] which stated:

> NHPA was not intended to review temporary effects resulting from maintenance efforts and repair programs. Rather, it deals with such effects as "may cause any change, beneficial or adverse, in the quality of the historical, architectural, archeological, or cultural character that qualifies the property under the National Register criteria." In most cases . . . NHPA is intended to forestall the wrecking ball until responsibilities under the statute are fulfilled.[135]

"Reasonable and Prudent Alternatives"

Section 4(f) of the Department of Transportation Act directs that the Secretary of Transportation "shall not approve any program or project which requires the use of 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 such use of land and (2) such program includes all possible planning to minimize harm to such . . . historic site resulting from such use."[136] Although often spoken of as a major limitation on highway construction because highway programs have more often than others involved the need to use parkland and historic sites, § 4(f) actually applies to all of the operating administrations under the authority of the Secretary of Transportation. In the decade following its enactment, § 4(f) became preeminent among federal statutes enacted to protect the natural and cultural environment because of its direct and concise protective mandate and its results in forcing development of administrative processes to implement that mandate.[137]

Judicial construction of the language of § 4(f) began with the U. S. Supreme Court's holding in *Citizens to Preserve Overton Park v. Volpe*[138] that it is a "plain and explicit bar" to the use of federal funds in highway projects through parks, and that in balancing the public's interest in highways and in protected parkland, the latter is to have "paramount importance." *Overton Park* involved an urban park, but

the principles endorsed by the court have been applied to other resources within the purview of § 4(f), and have included historic sites.

The two-step substantive standard established in § 4(f) is in contrast with the procedural "consult and coordinate" requirements of NEPA § 102 to prepare impact assessments and NHPA § 106 to "take into account." Accordingly, determination of whether "feasible and prudent" alternatives exist to the use of land at an historic site is critically important to the application of the law. In principle, the construction given by the court in *Overton Park* was simple and straightforward: a "feasible" alternative is, essentially, one that is consistent with sound engineering.[139] A "prudent" alternative means one that "presents no unique problems" or unusual factors and consequences. That is, a road must not take land protected by the law "unless a prudent person, concerned with the quality of the human environment is convinced that there is no way to avoid doing so."[140]

Determining what is "prudent" in this context inevitably involves evaluating consequences and balancing interests, but the *Overton Park* court rejected the argument that this required the Secretary to engage in "a wide-ranging balancing of competing interests," in which the detriment resulting from taking parkland is weighed against the costs of other possible routes, the calculable costs to safety and convenience, and other factors customarily considered in determining transportation needs. "No such wide-ranging endeavor was intended," declared the court:

> It is obvious that in most cases considerations of cost, directions of route, and community disruption and dislocation will indicate that parkland should be used in highway construction wherever possible.... [T]here will always be a smaller outlay required from the public purse where parkland is used since the public already owns the land and there will be no need to pay for right-of-way. And since people do not live or work in parks, if a highway is built on parkland no one will have to leave home or give up his business. Such factors are common to substantially all highway construction. Thus, if Congress intended these factors to be on an equal footing with preservation of parkland there would have been no need for the statutes.
>
> Congress clearly did not intend that cost and disruption of the community were to be ignored by the Secretary. But the very existence of the statutes indicates that protection of parkland was to be given paramount importance.... [T]he Secretary cannot approve destruction of parkland unless he finds that alternative routes present unique problems.[141]

Courts have ruled that the Secretarial duty to examine feasible and prudent alternatives cannot be fulfilled by comparing only those proposed routes that use parkland or historic sites; all feasible and prudent routes must be examined, whether or not they use protected land.[142] This, in turn, led to questioning whether the Secretarial duty required consideration of what would happen if the proposed project was not undertaken at all and the "highway need" that the project was conceived to meet was left to be met in other ways. This inquiry, sometimes called "the No-Build Option," has been accepted by several courts as part of the standard established in *Overton Park.*[143]

In *Stop H-3 Association v. Dole*[144] the proposed highway route would have used land from two public parks and made constructive use of another. In holding that the Secretary of Transportation erroneously determined that there was no feasible and prudent alternative to this proposed route the court stated that it did not see from the record how the Secretary could reasonably conclude that the No-Build option was not a prudent alternative. The mere fact that a "highway need" might be demonstrated on behalf of the proposed project did not preclude examination of the consequences of not undertaking the project. "It must be shown," the court said, "that the implications of not building the highway pose an 'unusual situation,' are 'truly unusual factors,' or represent cost or community disruption reaching 'extraordinary magnitudes.' "[145] When the administrative record was examined closely, the court found not only that the documented detriments from abandoning the project could not be considered "unique problems" or costs of "extraordinary magnitudes," but that the record failed to address questions that were pertinent to the Secretary's determination. Ultimately, the court emphasized that it did not hold that the No-Build option was "in fact reasonable and prudent," but only that the record before it "does not demonstrate that the stringent requirements of section 4(f) have not been satisfied."[146]

Secretarial dismissal of the No-Build option was criticized as an "oversimplification" in *Benton Franklin Riverfront Trailway and Bridge Committee v. Lewis*[147] as the Ninth Circuit held that the Secretary arbitrarily concluded that there were no feasible and prudent alternatives to demolition of an historic bridge.[148]

Delineation of the scope of a No-Build alternative has become a focal point of concern in some instances where the adverse impacts that are complained of may be avoided by cancelling only a part of the project in question. In these instances it is argued that a project-wide No-Build alternative is not prudent under § 4(f) because that procedure is intended to address the question of how to construct the project, and not whether the project should be undertaken.[149]

Interpretation of § 4(f) as applying only to selection of the best method of accomplishing the purpose of an already-authorized project has obvious appeal to the courts and provides a specific reference point for evaluating competing engineering alternatives as well as the No-Build option. In *Ringsred v. Dole*[150] the Secretary of Transportation dismissed a parkway alternative because it would not remove heavy commercial traffic from local streets and residential areas. The court upheld this determination, saying: "While the Secretary is obliged to consider all reasonable alternatives, an alternative that does not effectuate the project's purpose is, by definition, unreasonable, and she need not evaluate it in detail."[151]

A No-Build alternative was held to be an imprudent option in *Maryland Wildlife Federation v. Lewis,*[152] where the court ruled that its adoption would mean that the general purposes of the Appalachian Regional Development Act, under which the project was being undertaken, would not be achieved.[153]

In *Ashwood Manor Civic Association v. Dole*[154] the No-Build alternative to an expressway project which required use of parkland and wet-

lands was discussed in two aspects, namely: whether doing nothing would be reasonable and prudent, and then whether local road improvements would be feasible and prudent alternatives if the expressway was not constructed. Neither was regarded as prudent by the court, because neither would meet the regional transportation need for a limited-access highway and traffic projections showed that existing facilities in the region would soon become severely congested.[155] Severe congestion of local roads and the "stifling effect" of the lack of adequate highway service on the local economy, the court felt, raised the cost and disruptive consequences of the No-Build option to the "extraordinary magnitude" necessary to make it an imprudent alternative.

Courts have been cautious about recognizing the No-Build option where doing so would seem to substitute their judgment for that of the Secretary. So, in *Adler v. Lewis*[156] the Ninth Circuit emphasized:

> The Secretary's decision is entitled to a presumption of regularity. Absent argument . . . pointing to the record and demonstrating with specificity the alleged errors of judgment or irrelevant factors that formed the basis for his decision, we are not inclined to make their case for them. Even if the decision of the Secretary be different from the one this court would make if it were our responsibility to choose, we will not substitute our judgment for that of the Secretary.[157]

And, in *Louisiana Environmental Society, Inc. v. Dole*,[158] the Fifth Circuit stated:

> On judicial review courts may not disturb an administrative determination when, as here, a simple balancing process is involved, and where the Administrator has reached a Section 4(f) choice on a rational basis after including the relevant considerations in his analysis.. . . . While the agency must articulate a rational connection between the facts found, and the choice made, and while courts may not supply a reasoned basis for the agency's action that the agency itself has not given, nevertheless on judicial review an administrative decision of less than ideal clarity will be upheld if the agency's path may reasonably be discerned.[159]

The determination of whether there are feasible and prudent alternatives to the use of protected land must be made as early as possible in the project planning process. The longer this determination is postponed, the greater chance there is that alternatives will be foreclosed by refinement of the project proposal and, possibly, commitments of resources by the project agency, other public agencies, and the community.[160] This means that FHWA and the other project agencies must complete the necessary environmental studies, related engineering studies, review coordination, and public participation procedures prior to the approval of the general project location and design concepts. And certainly it contemplates that final design action, property acquisition (except for hardship or protective reasons as defined in 23 C.F.R. 771.117), purchase of construction material or equipment, and construction activities will be deferred until there has been compliance with NEPA § 102, NHPA § 106, and DOT Act § 4(f) requirements.[161]

Regulation of the timing of the agency's evaluation process to assure early consideration is generally successful in avoiding the occurrence of bias in favor of a project because of the fact that resources have already been committed to it. Where, however, projects are not undertaken in isolation from others realism requires recognition that costs in other parts of a highway system may have been incurred with an expectation that another project will be completed. The estimated cost of the latter project plus the previously incurred costs—or "sunk costs"—may be used as the "cost of completing this highway." Whether or not "sunk costs" are included in the assessment may well influence whether a particular alternative is determined to be prudent or not.

This issue was faced in *Wade v. Dole*,[162] where the court expressed reservations about the validity of an analysis which permits such wide discretion in allocating previously incurred costs. The court determined, however, that in the case before it the amount of these costs could not have been a decisive influence, and so they were not critical to the agency's determination.

In *Wade v. Dole* a more decisive issue was whether the agency's analysis of adverse impacts associated with the available alternatives should be considered in terms of the cumulative effect of the factors involved. The court held that the cumulative impact approach in evaluating the effects of various alternative highway routes was an acceptable method of determining the prudence of these alternatives. Citing numerous instances of judicial approval of its use, the court ruled that it was consistent with the plain meeting of "prudent," the holding in *Overton Park*, and the regulations of the major environmental statutes.[163] And, it concluded, "adverse impacts which considered separately would not be 'truly unusual factors' may support a finding of 'not prudent' when considered collectively."[164]

All Possible Planning to Minimize Harm

The duty to use "all possible planning to minimize harm" applies when the Secretary determines that there is no feasible and prudent alternative to the use of land that is entitled to protection under § 4(f). It requires the Secretary to evaluate the adverse impacts that will occur to the protected property under each of the available alternatives, and adopt the plan that will result in the least harm due to carrying out the project.[165] In contrast, with the "feasible and prudent" inquiry, the mandate to minimize harm creates an affirmative and ongoing duty which extends throughout the various stages of construction, at least until the costs of the measures to minimize harm rise to the point where they outweigh their benefits.[166]

As courts have construed the statutory language of § 4(f)(2) they have tended to use a standard of reasonableness, adopting the analysis applied by the Fifth Circuit in *Louisiana Environmental Society, Inc. v. Coleman*.[167] Here the court said that the Secretary must first evaluate the harm that each alternative measure or combination of measures involves for the situation in question, and then select the one which does the least harm.[168] The range of measures that may reasonably be considered is broad and includes screening, platning, tunneling, use of embankments, and even relocating the highway corridor itself.[169]

The choice among these measures is to be made in terms of the resulting benefits to the protected property. Considerations that might make an alternative (such as realignment of a route) imprudent when applied to the use of protected land due to displacement of residences or businesses or failure to satisfy the project's purpose are simply not relevant to determining whether that alternative would minimize harm to the values for which a particular site is being protected.[170] It is essential that the administrative record contain adequate information to document the Secretary's compliance with this process.[171] Guidelines for an acceptable analysis were offered by the Eleventh Circuit in *Druid Hills Civic Association, Inc. v. Federal Highway Administration*[172] when remanding the record relating to the Presidential Parkway in Atlanta, as follows:

> This review should encompass an accurate assessment of the characteristics of the property that will be affected by the alternative, e.g., if the property is in a historic district, whether it has been previously impacted by commercial development and if so, to what extent. The Secretary's review must also address the quantity of harm that will accrue to the park or historic site and the nature of that harm, e.g., visual impact or physical taking. It would not suffice to simply state that an alternative route would affect properties without providing some rational, documented basis for such a conclusion. In short, the same consideration must be given to whether these alternative routes would minimize harm to the section 4(f) properties as was accorded the adopted route.[173]

Evaluation of measures to minimize harm may be affected by the way in which the protected property is designated. In *Wade v. Dole*[174] it was argued that the highway agency improperly treated an historic site and a parkland tract as a single resource for purposes of assessing the harm resulting from proposed highway construction. The court held, however, that this was reasonable and acceptable because the two properties, although differing in the values requiring protection, were adjacent and each was likely to be affected by what happened to the other. Accordingly, an alignment which reduced harm to one property might increase harm to the other to such an extent that harm to both properties, considered together, might not be minimized.

Minimization of harm must be considered in terms that go beyond the simple loss of acreage. Where the quality of wildlife habitat is adversely affected by construction, the measures to minimize harm may involve seasonal restrictions on some construction operations.[175] In other instances, offers by project agencies to replace property taken for the project with other property suitable to carry on the functions of the lost land are considered as adequate mitigation of harm.[176]

In *Coalition on Sensible Transportation, Inc. v. Dole*[177] the Secretary found from the assessment of alternatives that those available varied only in very minor ways and resulted in substantially equal harm to the protected property. Under these circumstances the court held that the Secretary was free to choose between them as she saw fit.

A recurring problem which project agencies face in meeting the requirement to minimize harm to protected property is the difficulty in anticipating all the specific items of damage that may need to be dealt with, especially when evaluation of alternatives for mitigation of damage must be made before plans, specifications, and estimates are finalized. Thus, in *Maryland Wildlife Federation v. Dole*[178] plaintiffs argued that the requirement for plans to minimize harm to protected property could not be met by the highway agency because detailed design plans had not yet been adopted. "Generalized agreements to mitigate the specific environmental impacts of a particular route" would not satisfy § 4(f)(2), they urged, when the agency could not make a meaningful evaluation of the harm to be expected. The court disagreed, however, and answered that it was "totally unrealistic," as well as improper under FHWA regulations, to make such final design plans for a highway before the corridor location is finally approved.[179] It explained the highway agency's duty under § 4(f) as follows:

> FHWA has an obligation "to implement those mitigation measures stated as commitments in the environmental documents prepared" which it will fulfill through reviews and approval of designs, plans, specifications and estimates (P.S.&E.) and construction inspections. While the FHWA and the state highway officials are obliged to complete *any necessary* design work . . . required to make those engineering and environmental decisions necessary to complete . . . an EIS, other design work cannot proceed until the EIS has been approved and a location decision made.
>
> [In the present case] some preliminary design work was obviously done to determine the environmental impacts, and, as contemplated by the regulation, 23 C.F.R. 771.109(b), a mitigation plan has been adopted to minimize the potential harmful effects.... On this record, this court cannot say as a matter of law that insufficient design work took place to allow the Secretary to make a location decision which, in all events is conditional and tentative until final P.S.&E. approval has taken place. To the extent, if at all, *D. C. Federation of Civic Associations* is to the contrary, we decline to follow it.[180]

Selection of measures to minimize harm to historic sites that are protected under § 4(f) may differ from cases involving protected parklands, recreation areas, or wildlife refuges because the values for which these resources are protected differ. These differences influence the determination of whether the effects of a proposed project will constitute "constructive use" of the property or not, and, if constructive use occurs, what measures will effectively minimize that particular "use." So, in *Nashvillians Against I-440 v. Lewis*[181] plaintiffs argued that the proposed freeway project would subject certain historic sites to noise, air pollution, land use alteration, blasting damage, and loss of property value. In questioning the relevancy of these effects, the court said:

> . . . constructive use of property . . . for purposes of section 4(f) should at least include proof that the claimed harm will affect the *historic* value or quality of the properties. The various historic districts addressed by this aspect of plaintiff's complaint are designated as such because they encompass houses that are architecturally significant. The simple truth is that noise, land use changes, property value diminution, and to a substantial extent air pollution, will not affect the architectural integrity of these areas and will not impair their historic value. Most of the cases cited

> by plaintiff in support of the "constructive use" theory deal with parks and recreation areas or wilderness areas rather than historic properties. In those cases, the purpose for which such properties are protected were threatened by the "use."[183]

The court noted that relevancy of the harm involved affected the standard used for determining the sufficiency of measures to mitigate a project's adverse impacts, and suggested that possibly plaintiff had confused the standards required under § 4(f) with those required for consideration of the effects on historic properties under § 106 of the National Historic Preservation Act.

Use of Land

The Secretary of Transportation is required to apply § 4(f) procedures where a transportation project requires "use of land of an historic site of national, State or local significance." Construction of this term was necessary in *National Trust for Historic Preservation v. Dole*[183] where plans were made to install metal picket fences along the sides of the Duke Ellington Bridge in Washington, D. C., as a deterrent to suicides attempted from the bridge. Since the bridge was an historic landmark that had been declared eligible for the National Register, plaintiff contended that the Secretary was obliged to comply with the requirements of § 4(f) of the DOT Act and § 102 of NEPA.

The court ruled that the Secretary was not obliged to apply § 4(f) procedure because the proposed protective fence designed to prevent people from leaping off the bridge had no relation to facilitating traffic flow on the bridge, and the project did not involve the use of land within the meaning of § 4(f).[184] The case was thus distinguished from others that could demonstrate a clear transportation purpose.[185]

In *Coalition on Sensible Transportation, Inc. v. Dole,*[186] the highway agency planned to widen roadways and improve channelization of traffic through an area of publicly owned parkland using existing right-of-way. Although no new right-of-way was needed, the agency acquired temporary construction easements in narrow strips of parkland adjacent to the road. The agency's plans called for grading this area to facilitate construction work, and at the end of the project the strips would be regraded, landscaped and revegetated, and returned to the control and use of the local park authorities. Plaintiffs sought to have these temporary easements declared to be a use of parkland within the purview of §4(f).

The court agreed that the easements constituted a "use of land." Emphasizing that the construction project would last at least 5 years and permanently change the topography of about 10 acres of the park, the court found sufficiently substantial effect to activate § 4(f). It emphasized that despite its temporary nature the project would remove numerous oak trees which would take two generations to replace and would permanently alter the park's topography notwithstanding promises of mitigation measures at the end of construction work.[187] Noting that not every change within the park boundaries as a result of transportation projects outside the park constituted a "use" of parkland under § 4(f), the court distinguished *Sierra Club v. Department of Transportation*[188] as involving changes that were relatively minor and required only insignificant adjustment.

In *Benton Franklin Riverfront Trailway and Bridge Committee v. Lewis*[189] the Ninth Circuit considered the question of whether a proposal to allow demolition of a 60-year-old truss bridge which had been replaced by a new one constituted a "use of land from an historic site" within the purview of § 4(f). The bridge was considered significant for its "distinctive characteristics of type, period, or method of construction" and its "association with events that have made a significant contribution to the broad patterns of our history," and was eligible for listing in the National Register. For the transportation agency it was argued that the bridge might be an historically significant "structure" or "object," and its preservation might be "within the zone of interest" of the NHPA, but it was not within the scope of § 4(f) of the DOT Act which spoke of "natural beauty" of historic sites and not to man-made features. The court declared, however, that this reading of the statute was entirely too restrictive and illogical. Specifically:

> there would be no sense in allowing the destruction and removal of structures on land and then determining whether the "land" will be used by the proposed federal action. The land will often lose its historical significance once the object is removed. Hence, we conclude the removal of the Old Truss Bridge from its current location across the Columbia River would be a use of "land" from an historic site and therefore Section 4(f) . . . must be satisfied.[190]

Application of Section 4(f) to Archeological Resources

Determination of Archeological Significance

Archeological sites that are found to be entitled to protection under § 4(f) generally qualify under the National Register criterion covering properties "that have yielded or may be likely to yield information important to prehistory or history." Section 4(f) applies to all such archeological sites that are on or are eligible for inclusion on the National Register, including those discovered during construction activities. In the latter situations the § 4(f) process is expedited to reduce delay in the construction project, and the evaluation of feasible and prudent alternatives must take into account both the physical changes and the level of investment that has been made in the work already performed.[191]

Whether discovered during construction or known at the time the project was initiated, archeological resources often prove to be difficult to deal with under § 4(f), mainly because their historic significance and scientific value cannot be fully determined unless and until the data contained in a site are retrieved (usually by excavation) and analyzed by professional archeologists and historians. Once this is done, however, the site may cease to be of any further significance as a source of scientific, cultural or historical information.[192] Under these circumstances the question arises as to whether use of the site for a highway or other transportation project should be covered by § 4(f). This matter was discussed in the

rule-making process carried out in 1980 to clarify FHWA regulations for federal and federally assisted or licensed highway and mass-transit construction projects, as follows:

> Frequently the consultation required by Section 106 results in a determination that data recovery is the appropriate form of mitigation for the archeological site. Such determinations are typically made when the recovery of the material contained in or on the site renders more valuable information than leaving such material at the specific location. Applying Section 4(f) to archeological sites where data recovery is appropriate would impose the Section 4(f) test to sites for which all interested agencies have agreed that the removal of the archeological material is in the best public interest. This regulation . . . [applies] Section 106 and Section 4(f) sequentially. If data recovery under Section 106 is appropriate, then Section 4(f) would not apply, since recovery results in the removal of materials which make the site significant for purposes of Section 4(f). It should be noted that Section 4(f) continues to apply to archeological sites on or eligible for the National Register where the site has significance for reasons other than the materials contained.[193]

Accordingly, after completing the rule-making process, the Secretary of Transportation promulgated the following modification of FHWA procedures for application of § 4(f):

> Section 4(f) does not apply to archeological sites where the Administration, after consultation with the SHPO and the ACHP, determines that the archeological resource is important chiefly because of what can be learned by data recovery and has minimal value for preservation in place. This exception applies both to situations where data recovery is undertaken or where the Administration decides with agreement of the SHPO and, where applicable, the ACHP, not to recover the resource.[194]

The first opportunity for judicial interpretation of the "DOT Archeological Regulation," as it came to be called, was in *Arizona Past and Future Foundation, Inc. v. Lewis.*[195] The validity of the regulation was not challenged in this case because the Secretary of Transportation voluntarily applied the § 4(f) test—availability of a feasible and prudent alternative—to the highway agency's proposal to construct a road through or close to a series of Native American archeological sites. Plaintiff challenged the Secretary's determination of no feasible and prudent alternative to use of the affected sites since there were other alternatives that would not have done so. The Ninth Circuit upheld the reasonableness and correctness of the Secretarial determination, noting that none of the alternatives preferred by plaintiff would have achieved the highway project's purpose of providing transportation service needed in the Phoenix area. And further, the court considered and approved a Data Recovery Plan to mitigate the harm that would result in the sites that would be used.

Subsequently, in *Town of Belmont v. Dole,*[196] the Archeological Regulation was challenged as it was applied to a proposal to construct a freeway bypass through an area containing both Native American and historic European settlement sites. Here the Department of Transportation, the state highway agency, and the SHPO all agreed there was no need to preserve the archeological information in place, and so § 4(f) did not apply. Notwithstanding plaintiff's contention that § 4(f) was an absolute bar to use of qualifying historic sites unless no feasible and prudent alternative existed, the First Circuit held that the Archeological Regulation actually promoted the preservation purpose of the statute by retrieving the significant artifacts contained in the site, It commented:

> Instead of completing this task and contributing to the body of knowledge associated with archeology, the Department will [under the plaintiff's view] be faced with the mandate of Section 4(f) to avoid the site unless no feasible and prudent alternative exists. If such an alternative is found, the site will then be abandoned. The site will be left, in most cases, in private ownership with no absolute restraints against total destruction or vandalism. . . . Instead of serving the historical preservation goal stated in Section 4(f), the Department would be assisting in the loss of irreplaceable archeological resources.[197]

Comments on *Belmont* have been critical of the fact that it has the effect of giving the Secretary, the project agency and the SHPO the discretionary authority to select those archeological sites that will receive the protection of § 4(f) and those that will not simply by making a formal determination that a site's significance consists primarily in the information that can be acquired from a close study of the site and the artifacts found there.[198] Such an interpretation, the commentary runs, is not consistent with the intent of Congress, expressed in *Overton Park,* that § 4(f) should be applied as a "thumb-on-the-scales" to protect parks, wildlife refuges, and historic sites.

Criticism of *Belmont's* interpretation of the DOT Archeological Regulation might also be based on its apparent inconsistency with FHWA practice that stresses the benefits of avoidance of impacts on protected property preliminary to developing options for mitigation of impacts. Where successful, however, avoidance of impact through selection of alternative routes or modification of design, results in a finding of "No Effect" and eliminates the resources from further consideration in the planning process. This fact has left the states without detailed documentation of their experience, but many have indicated that, where reasonably possible, avoidance of property was their most cost-effective technique in planning, and was always a source of goodwill at the local project level.[199]

The DOT Archeological Regulation highlights the importance attached to the source of a resource's significance, and it specifies that § 4(f) continues to apply "where the site has significance for reasons other than the materials contained."[200] The history accompanying promulgation of the regulation offers little to explain this distinction, but an earlier opinion of FHWA counsel noted that:

> Many archeological sites are significant for reasons other than, or in addition to, the data they contain. For example, a site may be a National Historic Landmark, a National Historic Site in non-Federal ownership, or a site that has value as an "exhibit-in-place" for public understanding, or a site with historic significance to a community, ethnic or social group. In these and other similar situations Section 4(f) would apply.[201]

Data Recovery Options

Where a highway or other transportation construction project cannot avoid using or adversely impacting the land of an archeological site, and where it is determined that that archeological site may be important chiefly because of what can be learned from the data it contains, the process of planning to minimize the harm to such resource naturally turns to the options that are available for recovery of the data. To determine whether a data recovery program will mitigate the adverse impacts of the proposed project, the project agency, in consultation with the state historic preservation officer, should answer the following questions:[202]

- Does the significance of the property, as documented in the determination of eligibility for the National Register, lie primarily in retrievable data, so that such retrieval would be an appropriate way to preserve this significance?
- Does it appear that preservation in place would be more costly or otherwise less practical than data recovery?
- Will the expected effects of the proposed project be minor relative to the size and nature of the property? For example, minor disturbance of the surface of an archeological site where the important data are in subsurface deposits would be unlikely to have long-range impacts on subsurface conditions.
- Is the property subject to destruction regardless of the proposed project, so that it only slightly hastens an inevitable loss of the site from natural forces, vandalism, or development?

In addition to these practical considerations, the agency must be sure that under the DOT Archeological Regulation the site in question is appropriate for preservation by a data recovery program. That is, the site must *not* be:

- A National Historic Landmark, a National Historic Site in non-federal ownership, or a property of national historic significance so designated within the National Park System.
- Important enough to fulfillment of purposes set forth in the State Historic Preservation Plan to require its protection in place.
- In itself, or as an element of a larger property, significantly valuable as an exhibit in place for public understanding and enjoyment.
- Known or thought to have historic, cultural, or religious significance to a community, neighborhood, or social or ethnic group that would be impaired by its disturbance.
- So complex, or containing such complicated data, that currently available technology, funding, time, or expertise are not sufficient to recover the significant information contained in the site.

If the project agency and the SHPO answer these questions affirmatively, and the agency goes on to prepare a data recovery program that is consistent with the Advisory Council's standards,[203] the agency has grounds for determining that its project will have "no adverse effect" on the protected property.

The decision to conduct data recovery must be treated as an investment, both of the archeological resources involved and of the funding and effort that will be needed. Often it will be the most expensive of all the measures that are taken to mitigate adverse impacts of a construction project. Accordingly, data recovery should not be undertaken without a clear understanding of the potential value the data will have for the research priorities of the archeological, historical and scientific communities, nor should it be started without sound plans for accomplishing the recovery and making the information available to assist research. Because even the most careful data recovery destroys the context of the artifacts (data) that are found and makes the complete site no longer available for future examination, all data recovery work should be based on reasonable and carefully prepared plans. It is, of course, best to make such plans as early as possible in the project planning process; at the same time, sound planning depends on using the results of certain preliminary exploratory surveys to learn as much as possible about the site and its contents.

No data recovery program can assume that it will exhaust the information that a resource has to give or answer all possible research questions. New questions about the past always arise as old ones are being answered, and techniques of field study and analysis are constantly improving. Therefore, the "data recovery option" always should include arrangements to preserve in place as large a range of archeological properties as possible even if the research community cannot say precisely how it can presently use the information they contain. There are obvious limits to the application of this principle, but generally if it is practical to leave an archeological resource in place and protect it from destruction, it should be done. Various techniques are available for this purpose, including:

- Designing construction projects so as to leave archeological property in reasonably protected open space (e.g., a highway median strip).
- Covering an archeological site with fill, using caution to limit compaction, chemical changes, soil structure and disturbance of the soil, and assuring reasonable access for future research.
- Protecting properties from damage by nearby project activities through fencing, shoreline armoring, use of berms, and rerouting of construction activity.
- Designing structures over an archeological site so as to minimize subsurface disturbance.
- Establishing protective covenants or other arrangements with residents and other users of the constructed facilities to protect archeological properties from any adverse impacts from their use.

Combinations of data recovery and preservation in place may also be part of the data recovery option. This so-called "partial recovery" option

may be adopted where early data recovery work on a site shows that it contains data similar to that found at other previously examined locations. Any further work, therefore, would only verify or slightly refine existing research knowledge. Under these circumstances the decision to have only a partial data recovery would result in limiting the retrieval of data to only a representative sample of specific significant parts of the resource, and preserving significant parts of the site in place for future research. Partial recovery efforts generally are most appropriate when employed in conjunction with some more complete data recovery work elsewhere, which furnishes a frame of reference for avoiding redundant excavations. Because of this need to coordinate recovery operations carried on at several sites, and because the consequences of preservation in place by burial under fill are not at present fully known, the option of partial recovery may present unusual difficulty in its application.

Principles for the treatment of archeological resources recognize that where it is not practical to protect archeological resources in place the destruction of the property without recovery of data may have to be accepted as a regrettable, but necessary, loss in the public interest. If the data contained in the property cannot be used to address pertinent research questions or reinforce other significant cultural values, a data recovery effort is unlikely to be an appropriate use of public funds and should not be undertaken. The decision to destroy an archeological site without data recovery is a serious one. The project agency and its contractors should suggest it only after they have considered the widest reasonable range of potential research topics that might be benefitted by data from that site. Similarly, the agencies reviewing such a decision—the project agency, SHPO, Advisory Council, and perhaps others—should give close scrutiny to the justification for destruction without recovery.

The Data Recovery Plan

When a decision is made to undertake data recovery at an archeological site it is critically important to develop a data recovery plan which will assure, as far as possible, that the work will be done properly, efficiently, economically, and productively. Although standards for acceptable plans are not established in either the DOT Archeological Regulation or the regulations of the Secretary of the Interior or the Advisory Council on Historic Preservation, the requirement that a project agency must have a sound data recovery plan is implicit in the way the court in *Belmont* commented on the plan developed in that case. Guidelines for data recovery planning may, however, be found in the nonregulatory technical information publications of FHWA and the Advisory Council.[204]

Data recovery plans are sometimes referred to as "research designs," suggesting that their function closely parallels the type of plan formulated to direct and coordinate applied research in aid of public programs. In such a parallel comparison, it has been suggested that a list of essential elements for a data recovery plan might be as follows:

1. Specification of the properties to be studied and not studied in the impact areas, clearly showing the rationale of the selections.
2. Definition of the research objectives, taking into account the known and expected value of the site in relation to scientific, historical, archeological, cultural, and other research needs. To the extent possible, these objectives should be stated in terms of questions that are specific, readily identifiable, measurable, and answerable from the information recovered.
3. Description of the specific study topics through which the research questions or objectives will be addressed.
4. Establishment of study priorities and allocation of levels of effort for the study topics.
5. Definition of the amounts and types of data that will have to be recovered in order to accomplish the research goals.
6. Description of the methods to be used in the recovery field work and data analysis.

Preparation of, and adherence to, a carefully prepared data recovery plan strengthens the administrative record of the project agency and other agencies and officials having responsibilities for consultation or review in the preservation planning process. When completed, the plan should show that the project agency based its decisions on prior surveys of the state of knowledge about other similar archeological properties and the environment of the site in question; and it should reflect an appropriate level of familiarity with the background of the region, the details of local history and prehistory, and the theoretical and methodological issues involved in conducting research on the subject sites. And central to the data recovery plan is its relationship to the "state historic preservation plan," for the data recovery effort should always be managed so as to produce information that supports the objectives and priorities of the state plan. The importance of this relationship is indicated by the following comment:

> Ultimately, each State Historic Preservation Plan should provide a logical basis for determining which classes of archeological property contain no needed information and are hence neither eligible for the National Register nor appropriate for data recovery. Accordingly, data recovery efforts should be planned with reference to the State Historic Preservation Plan where relevant, and the results of such efforts should be used to the extent possible in State Historic Preservation Plan development.[205]

The plan should also indicate the points at which further data recovery and documentation may become duplicative or cease to produce useful archeological information. And its investigative strategies should indicate the time and funds needed and available for the work, the relative cost efficiency of the efforts planned, and the plan's responsiveness to the concerns of local groups (e.g., Native Americans) associated with the properties in question.[206] Professional qualifications of personnel participating in the recovery effort must also be shown to meet those described in the Secretary of the Interior's guidelines for archeological investigations.[207]

Completion of a data recovery plan, developed in consultation with and approved by the State Historic Preservation Officer, clears the way to carry out data recovery operations in the field. Where needed, the plan

should also be reviewed by the Advisory Council and others having particular connections to the site. Recovery operations must follow the plan, and at the conclusion of the work the recovered data must be forwarded to the depository that has been agreed upon for curation and access to researchers and the public. At this point the project agency's responsibility for preservation of archeological resources is at an end.[208]

The Segmentation Question: State Project or Federal Project (p. 2018-N100)

Where regional transportation system plans include proposals for several projects capable of being carried on separately over a period of time, the "segmentation question" may be raised in connection with environmental impact assessments that are prepared for such projects. Objections may be made to the adequacy of such statements or to negative impact declarations on grounds that they do not consider the full extent of planned improvements for the regional system and, therefore, result in segmentation of the total regional plan. Guidelines for handling the segmentation question in this context were laid down in *Piedmont Heights Civic Club, Inc. v. Moreland*[209] as follows:

> As a general rule under NEPA, segmentation of highway projects is improper for purposes of preparing environmental impact statements. However, the rule against segmentation is not required to be applied in every situation. To determine the appropriate scope for an EIS courts have considered such factors as whether the proposed segment (1) has logical termini, (2) has substantial independent utility, (3) does not foreclose the opportunity to consider alternatives, and (4) does not irretrievably commit federal funds for closely related projects.[210]

In *Piedmont Heights Civic Club* a series of projects was planned to relieve traffic congestion in the Atlanta, Georgia, metropolitan area. Plaintiffs objected to three of these projects which involved widening existing expressways, and challenged the adequacy of the highway agency's environmental impact statement as being merely an attempt to justify planning and engineering decisions that the agency had made earlier without considering their environmental consequences. In holding that the agency's environmental impact statements were adequate in these instances, the court emphasized the independent utility of each of the projects in question.

The court also observed that regional transportation plans prepared by independent planners outside the highway agency are not "major federal actions" requiring preparation of an EIS for the entire plan or for the anticipated cumulative impacts of the resulting transportation system.[211] There is, the court declared, a "statutory minima" of analysis of the cumulative effects of other projects that may be prepared for the area, and the highway agency covered that statutory minima in its environmental impact statements and considered it in assessing the impacts of the several component projects.[212]

Not all four of the criteria cited in *Piedmont Heights* need to be met in order to rebut the charge of improper segmentation. It is enough if any one of them is demonstrated. Therefore, in *Coalition on Sensible Transportation, Inc. v. Dole*,[213] plaintiffs charged that a project to improve part of an urban beltway was improperly segmented, arguing that it did not include a spur (or "connector") section of the beltway and a number of interchanges, all of which prevented the section from meeting the "logical terminus" criterion. The court disagreed, observing that within any metropolitan area—as opposed to connecting major cities—this criterion was "unusually elusive," adding:

> it is inherent in the very concept of a highway network that each segment will facilitate movement in many others; if such mutual benefits compelled aggregation, no project could be said to enjoy independent utility. The proper question is whether one project will serve a significant purpose even if a second related project is not built. . . . The record clearly indicates that the highway and interchange here would serve such purposes in the absence of the I-270 expansion, and thus are sufficiently independent. They are expected to result in less congestion at interchanges, facilitate local traffic, and provide access to mass transit.[214]

In dealing with the environmental impact assessment of metropolitan area transportation plans—as with other instances where the rule of reason is used—both current regulations and case law appear to require that a project segment have termini that are logical and relevant to the circumstances; they do not, however, require that the project have the most logical or the very best possible termini.[215]

In *Chautauqua County Environmental Defense Council v. Adams*,[216] plans for construction or improvement of the Southern Tier Expressway involved crossing three counties in western New York and included the option of constructing a highway bridge across Lake Chautauqua. Although a Draft Environmental Impact Statement was prepared for the state transportation agency, processing for approval of the proposed lake bridge was commenced before the remaining parts of the Southern Tier Corridor plan were submitted. Plaintiffs sought to enjoin action on the bridge project, arguing that if the bridge construction were approved there would be no remaining alternative but to construct the entire series of projects to conform to it. "To consider only the bridge issue," plaintiff contended, "would be to 'segment' the project and present the danger of improperly 'piggybacking' several related projects only to discover that the overall combination of the subjects may do more harm than good."[217] The court ruled, however, that regardless of the decision regarding bridge construction the ability to choose among possible alternative routes in the greater part of the proposed Southern Tier Expressway corridor remained unimpaired. Approval of the bridge plan was not a prohibited form of segmentation.

Award of Attorneys' Fees in NHPA Cases (p. 2018-N106)

Whether the unsuccessful plaintiffs in a suit to enjoin the U. S. Forest Service from repossessing their buildings may still qualify for an award of attorneys' fees was considered in *Paulina Lake Historic Cabin Owners Association v. U.S.D.A., Forest Service.*[218] Although the court denied the requested injunction because the Forest Service was merely asserting

a right that it had as owner of the property, plaintiffs argued that they still qualified as a "prevailing party" because they had succeeded in getting the property accepted for listing in the National Register of Historic Places and, thereby, protected under the National Historic Preservation Act. In this instance plaintiffs were the moving force for getting the property listed, and defendant stipulated to this fact in pretrial statements. In these negotiations the Forest Service also stipulated that it would preserve the buildings pending a decision by the Keeper of the National Register as to their eligibility for NHPA protection. Viewing the matter in this way, the court awarded attorneys' fees to plaintiffs up to the date of the Keeper's determination to list the property in the National Register.[219]

In *Save the Tivoli Theater, Inc. v. U. S. Department of Housing and Urban Development,*[220] pursuant to § 305 of NHPA, a local preservation organization sued to prevent demolition of an historic movie theater in connection with redevelopment of a part of downtown Washington, D. C. In the contract awarding development rights between defendant HUD and the developer, it was agreed that the theater would be demolished and HUD applied for a permit to do so. Subsequently plaintiff obtained HUD's agreement to delay demolition until the matter could be reviewed under NHPA § 106, but the department did not withdraw its demolition permit application. Accordingly, plaintiff filed suit to enjoin demolition. Twenty days later the department withdrew its application and the suit was settled by stipulation and a consent decree requiring the local government and developer to maintain the theater pending completion of the § 106 procedure.

When plaintiff sought an award of attorneys' fees, the court applied a two-step test of (1) whether plaintiff substantially received the relief he sought by commencing the suit, and (2) whether the suit was a "catalytic, necessary and substantial factor" in obtaining the relief. It was clear that plaintiff had substantially received the relief sought, but defendant argued that the stipulation and consent decree merely served to clear up plaintiff's own "confusion and uncertainty" over the parties' intentions. The court ruled, however, that since the stipulation required an amendment of the initial agreements between the department, the developer and the local authorities, it was more than a simple clarification of the agreements' terms. Award of attorneys' fees was therefore approved.

In *National Trust for Historic Preservation v. U. S. Army, Corps of Engineers*[221] the court dealt with a number of issues relating to award of attorneys' fees in cases arising under NHPA, including eligibility of plaintiff preservation organization for any award, determination of hourly rates and billing methods, status of work done by paralegal and law clerk personnel, and whether upward adjustments in fees may be awarded. Noting that NHPA's provision for award of attorneys' fees had very little case law interpretation and that the award of such fees is discretionary, the court observed that "the test . . . is not the reasonableness of the losing party's position, but rather whether the party seeking such an award substantially prevailed," and that "once the court finds that the plaintiff has substantially prevailed, it is required to award reasonable attorneys' fees."[222]

The court also rejected the federal government's argument that institutional attorneys and public interest law firms should be regarded differently than private attorneys, and that expenses of paralegals and expert witnesses should not be treated as recoverable expenses. And the court agreed to a request for upward adjustment of the award based on the exceptional success" plaintiffs achieved and the fact "of the substantial risk that they would not prevail."[223]

Arguments that award of attorneys' fees for litigation in the U. S. Court of Appeals was not authorized because NHPA refers only to civil actions "brought in the U. S. district court"[224] were rejected by the Third Circuit in *Morris County Trust for Historic Preservation v. Pierce.*[225] The court stated:

> If HUD is correct that a successful party can receive fees . . . only for services rendered in the district court, it would mean that a party who sues HUD and loses in the district court would not [be] entitled to fees and costs even though that party prevailed on appeal. That consequence is so lacking in logic that unless the language of the statute leaves us no alternative we are unwilling to say that Congress intended it. . . . There is no language that expressly excludes payment for services incurred in the Court of Appeals, and had that been the intention of Congress it would have been easy to say so. Indeed it is not improbable that the language relied on by HUD was intended instead to exclude awards of fees for services rendered in non-judicial proceedings.[226]

Arguments that fees sought by plaintiff should be reduced by five-sixths because the court held favorably on only one of six counts in the complaint were rejected by the court in *Coalition Against a Raised Expressway, Inc. (CARE) v. Dole.*[227] Citing earlier U. S. Supreme Court cases,[228] it applied the following test:

> First, did the plaintiff fail to prevail on claims that were unrelated to the claims on which he succeeded? Second, did the plaintiff achieve a level of success that makes the hours reasonably expended a satisfactory basis for making a fee award?[229]

Claims in a case will be considered "related" if they involve "a common core of facts or . . . related legal theories."[230] In this instance all plaintiff's claims involved the same administrative decision or the same highway project, and came on for judicial review on the same administrative record. As a result of the litigation the highway project was modified to take into account certain threatened historic properties.

In contrast, defendants' objections to the insufficient documentation of the attorneys' fees were well taken when plaintiff failed to submit time and billing data or itemized statements in support of its application. Contemporaneous time records are not necessary where other reliable evidence supports the claim for attorneys' fees and can be used to reconstruct time records.

It was held in *CARE v. Dole* that only service as an attorney of record may be the basis of a free award, and this limited the eligibility of a party who appeared as a client at the opening of the litigation but who later became an attorney of record.[231] Intervenors may also be eligible for award of attorneys' fees where the record shows their contribution to the case was a substantial factor.[232]

Rates for compensation of attorneys are subject to the Equal Access to Justice Act (EAJA) provision that:

> Attorneys' fees shall not be awarded in excess of $75 per hour unless the court determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee.[233]

Cost of living data are computed by using the Consumer Price Index (CPI) of the Bureau of Labor Statistics.

Highway Bridge Replacement and Rehabilitation Program

Background and Program Objectives

Federal-aid highway law directs the Department of Transportation to provide a safe and efficient network of public highways. An integral part of this network is the system of bridges that carry roadways over waterways, terrain obstacles, railroads, and other highways. When bridges perform their function well, the efficiency, convenience, economy, and safety of highway travel benefit greatly. As bridges get old, however, they experience physical deterioration and functional obsolescence, and become unsafe for use. When they become so bad that they must be closed, the result invariably is hardship on residents, commerce, and industry in the communities that they serve. These considerations have made the rehabilitation and replacement of deficient bridges a continuing concern of the federal-aid highway program.

At the same time, in other parts of the federal law, 23 U.S.C. 138 and § 4(f) of the Department of Transportation Act require that use of land of an historic site must be avoided unless there is no feasible and prudent alternative to so doing and unless all possible planning is done to minimize harm to the site resulting from such use. Furthermore, the National Historic Preservation Act and other federal laws and regulations establish their own processes by which avoidance and mitigation are encouraged.

The potential for conflict between these two aspects of the federal law is apparent. The problems of deficient bridges cannot be corrected if integral parts of the bridges' physical structure or design may not be altered or replaced; and the goals of preservation cannot be achieved unless historical integrity is maintained. Because bridges are part of the highway system and an implicit objective of their preservation is to keep them performing their intended functions, the issues that arise in applying preservation law to historic bridges may differ somewhat from cases where the protected site or structure derives its historical significance from functions that do not involve transportation and where, accordingly, options for avoidance and mitigation may be more numerous or varied.

Evolution of the Highway Bridge Replacement and Rehabilitation Program

Concern for the condition of bridges on the federal-aid highway systems became a national priority in 1967 as a result of the collapse of a 40-year-old suspension bridge over the Ohio River. The following year, in the Federal-Aid Highway Act of 1968, Congress initiated work on national bridge inspection standards and a program of inspection.[234] Federal-aid highway legislation in 1970 established a Special Bridge Replacement Program and passed the first of a series of funding authorizations that extended over the next 8 years.[235]

The emphasis of this program was on removing from service those highway bridges that were most in danger of failure and replacing them with new ones. In determining eligibility for replacement, it relied on state inventories and classification of highway bridges according to their serviceability, safety, and essentiality for public use, with consideration of the economy of the area involved. The Special Bridge Replacement Program applied specifically to structures on the federal-aid highway systems, and between 1970 and 1978 just over 2,000 bridges were identified and approved for replacement.[236] Some of these bridges were listed on the National Register of Historic Places or determined to be eligible for such listing. These bridges were routinely demolished after measured drawings were made in accordance with the standards of the National Park Service for its Historic American Engineering Record (HAER).

During these same years, national interest in preservation of historic transportation structures increased and became focused in programs carried forward under the National Historic Preservation Act of 1966 and Section 4(f) of the DOT Act, both of which contemplated the possibility that alternatives to the routine demolition of historic structures would be used wherever they could be identified and agreed upon. Achievement of the national goals of these preservation policies called for a better approach to "the bridge problem" than routine demolition of structures that were unable to meet prevailing AASHTO standards.

At the same time the costs of bridge replacement as it had been carried on under the Special Bridge Replacement Program forced its reevaluation. From 1970 to 1978 the replacement program had been inadequately funded to accomplish its goal. In 1978 Congress was told that it would take over 100 years before the 105,500 bridges then known to be deficient could be replaced if funding remained at its 1970–1978 level.[237] Moreover, Congress suspected that the emphasis on replacement had deemphasized efforts to rehabilitate some bridges that might be retained in efficient and effective service.[238] Appropriate rehabilitation or restoration which extended the service life of a bridge was shown to cost less than demolition and replacement of that same bridge. Accordingly, the Surface Transportation Assistance Act of 1978 inaugurated a number of changes in dealing with the bridge problem, including extension of the program to all bridges on public roads (not just those on federal-aid highway systems), authorization to rehabilitate or replace substandard bridges (instead of only replacing them), and authorization for federal inventories of bridges on

and off the federal-aid systems for their historic significance.[239] The new Highway Bridge Replacement and Rehabilitation Program (HBRRP) established in 1978 was not specifically authorized to engage in preservation of historic bridges (except to conduct inventories), but it was interpreted administratively to permit such mitigation measures as rehabilitation, restoration, moving, and marketing of such structures.

The Surface Transportation Assistance Act of 1978 (STAA) replaced the Special Bridge Replacement Program with the Highway Bridge Replacement and Rehabilitation Program (HBRRP) and authorized funding for it through 1982. The 1982 STAA continued the program and authorized funding through 1986.[240] Funds for the HBRRP were made available in two categories: (1) apportioned funds distributed to the states according to their needs relative to the total national need, and (2) discretionary funds allocated by the Secretary of Transportation to replace or rehabilitate deficient but critically needed, high-cost bridges on the federal-aid systems.

The Federal Highway Administration in consultation with the state highway agencies establishes general bridge priorities by assigning a sufficiency rating to each bridge inventoried. Applying the rating criteria to the state's inventory data, FHWA compiles for each state a list of bridges eligible for HBRRP funding. These lists include all bridges with a sufficiency rating of 80 or less, and such bridges are eligible for rehabilitation treatment. Bridges with sufficiency ratings of less than 50 are eligible for replacement. Priorities for use of HBRRP funds are determined by the individual states for apportioned funds and by the Secretary of Transportation for discretionary funds. Each year FHWA requests the state highway agencies to update their portions of the National Bridge Inventory as they carry out the required inventory and inspection programs for all public highway bridges. Individual bridge projects may advance or fall back in their priority from year to year because that priority is influenced by the total number of bridges, number of deficient bridges, and their distribution among the various highway systems. Since this procedure for prioritizing candidate bridges was begun in STAA 1982, between 6,000 and 7,000 bridge projects have been authorized each year for HBRRP assistance. In addition, most states and local governments carry on their own bridge projects with their own funds, resulting in improvement of between 1500 and 2500 bridges annually.[241]

During the 1980s, experience with innovative but proven bridge rehabilitation techniques suggested that the HBRRP criteria for replacement should be tightened to encourage rehabilitation rather than demolition and replacement. The 1986 annual report to Congress on the bridge program explained:

> The Secretary's Annual Reports over the last several years have generally shown increases in both the number of bridges eligible for replacement or rehabilitation under the HBRRP and the estimated cost of bringing all deficient highway bridges up to standard. The estimate to improve all deficient bridges to current standards is idealistic. In reality, many eligible bridges will not be replaced or rehabilitated within the next decade or more. A measure that takes into account the severity of deficiency, not just deficiency, would give a more realistic picture of the Nation's priority bridge needs.[242]

Legislative amendments addressing this matter were enacted in the Surface Transportation Assistance Act of 1987.[243]

The 1987 amendments also, for the first time, specifically addressed application of the HBRRP to rehabilitation of historic bridges. In reporting the addition to 23 U.S.C. 144, the Senate Committee stated:

> Many States and localities have demonstrated that there are historic bridges which are structurally sound and can remain useful as a transportation facility. Often the preservation of such a bridge is less costly than demolition and replacement.
>
> Citizens across the country recognize the value of preserving historic bridges. Not only are they of value to the transportation system, but also to the economic well-being of a community either as a tourist attraction or a point of interest which attracts further economic development.
>
> The purpose of . . . [the amendment] is to encourage the inventory, protection, adaptive reuse and continued transportation use of historic bridges. This goal is consistent with the Secretary's responsibilities to encourage the repair and replacement of bridges.
>
> The section establishes historic bridge preservation as an affirmative priority and directs the Secretary to explore preservation solutions. Its purpose is to grant the Secretary and State officials the maximum possible flexibility in their use of Highway Bridge Replacement and Rehabilitation Program (HBRRP) funds to facilitate their efforts to accomplish historic preservation and to develop a safe and efficient highway network.[244]

The report made it clear, however, that the amendment did not change the requirements or responsibilities of the Secretary under 23 U.S.C. 138 or Section 4(f) of the DOT Act. Consequently, it did not, by its own terms, require that any historic bridge be preserved, adaptively reused, demolished, or rehabilitated. Such determinations continued to be based on a bridge's inspection report and sufficiency rating.

The 1987 amendments made four specific provisions for the preservation of historic bridges:

1. They directed that inventories of historic bridges be completed in all states. A majority of the states already had done this, but a nationwide set of such inventories was considered critical to accomplishing the preservation purpose of the amendments.
2. They clarified that HBRRP funds were available for taking actions to avoid or minimize harm to historic bridges during work to maintain their structural soundness and functional sufficiency.[245] Such actions might include, but were not limited to: (a) rehabilitation of a bridge for continued vehicular use; (b) rehabilitation of a bridge for nonvehicular recreational, historical, or other use; (c) salvage of significant features for reuse or historical uses; (d) movement of a bridge to another location; (e) dismantling and storage of a bridge for possible reconstruction and reuse; and (f) documentation of a bridge for preservation in the Historic American Engineering Record.

3. They directed state officials to make available for donation any bridges that would otherwise be destroyed. Donations could be made to states, localities, or responsible private entities upon execution of an agreement that the recipient would maintain the bridge and the features that give it historical significance, and will assume all future legal financial responsibility for the bridge, including, if requested, an agreement to hold the state highway agency harmless in any liability action. The Secretary of Transportation was directed to further define this requirement and establish criteria and procedures for administering it.[246]

4. They directed the Secretary to make appropriate arrangements with the Transportation Research Board of the National Academy of Sciences to study the effects of the bridge program on the preservation and rehabilitation of historic bridges and develop recommendations for specific standards to be applied to such activities.

Application of Section 4(f) and Section 106 to Historic Bridges

Historic bridges that are determined to be deficient are subject to the protection afforded by Section 4(f) of the DOT Act and Section 106 of the NHPA. Accordingly a decision to replace and demolish an historic bridge with HBRRP funding must undergo scrutiny to see if feasible and prudent alternatives to demolition and replacement exist and, if not, whether there has been planning to minimize the impact of these actions. A number of issues that can be raised in the course of these processes were considered in *Benton Franklin Riverfront Trailway and Bridge Committee v. Lewis.*[247]

The bridge in question was a truss bridge over the Columbia River between the cities of Pasco and Kennewick, Washington, built in 1922. The cities requested to have it replaced under the Special Bridge Replacement Program. The state's bridge inventory listed the bridge as unsafe, and the Coast Guard approved construction of a new replacement bridge, provided the old one was demolished so as to prevent it from becoming a hazard to navigation.[248] The project's environmental impact statement filed in 1973 approved demolition of the old bridge. Construction of a new replacement bridge was completed and the old truss bridge was closed to all use in 1978.

At this point the plaintiff committee commenced efforts to prevent demolition of the old bridge by successfully seeking a determination that it was eligible for listing in the National Register. Steps were commenced to comply with Section 4(f) of the DOT Act and comments were obtained from the Advisory Council pursuant to NHPA Section 106. A Memorandum of Agreement was executed which provided, among other things, for a local referendum on the disposition of the bridge. The referendum, held in 1980, favored demolition, and was considered in evaluating alternatives in the Section 4(f) process. In 1981, the Secretary of Transportation made a determination that no feasible and prudent alternative to demolition existed.

Judicial review of this determination focused on the issue of whether the alternatives to demolition had been adequately considered. The administrative record discussed only the alternatives of "no action" (i.e., "do nothing"), or preservation by the riparian cities or the plaintiff committee.[249] The possibility of preservation or rehabilitation under the federal bridge program was not explored. The Ninth Circuit Court criticized the administrator for concluding that the options to demolition were limited by the results of the environmental impact statement (which called for demolition) and the municipal referendum (which asked for a vote only on the question of whether the cities should assume responsibility for preserving the old bridge). The court ruled that the departmental review had failed to consider all relevant factors and, thus, it had brought forth an arbitrary result.[250]

In its opinion the court particularly noticed the failure of the state to have the bridge inventoried as "a potentially historically-protected site" at the time when the replacement bridge was first considered and when, accordingly, the number of alternatives was larger than later on after the replacement bridge had been completed.[251] The failure to have and consider this information when the EIS was prepared was repeated by FHWA when it evaluated the new bridge proposal despite the agency's duty, as the court saw it, "to identify or cause to be identified any National Register or eligible property that is located within the area of the undertaking's potential environmental impact and that may be affected by the undertaking."[252] These circumstances, plus the fact that federal funding was being sought through a program emphasizing replacement of old bridges with new ones, may explain much regarding how the alternative of rehabilitation was overlooked. But it did not excuse the fact that the oversight occurred and was not corrected before FHWA and the state became committed to demolition of the old bridge.

The ruling in *Benton Franklin,* emphasizing the highway administrator's obligation to actively identify and consider possibilities of rehabilitation with HBRRP or other similar funds, even where, as here, these possibilities evolved during a protracted period of planning and construction, presented practical difficulties in its implementation.[253] One of these was the project delay—at least 3 to 6 months—involved in evaluating and documenting alternatives, if any, to avoid the use of Section 4(f) property and to identify mitigation measures to be taken if use of protected property was found to be unavoidable. A step to reduce this delay by simplifying the analytical process and streamlining the documentation needed in order to comply with rules relating to historic bridges was taken in 1983 when FHWA promulgated standards and procedures for a Programmatic Section 4(f) Evaluation and Approval for Projects Necessitating Use of Historic Bridges.[254]

Where it was found applicable, the programmatic approval would constitute a determination that there was no feasible and prudent alternatives to the "use" of an historic bridge (i.e., replacing it or rehabilitating it so as to impair its historic integrity) and that the project included all possible planning to minimize harm resulting from such use. Noting that this was not a regulation or rulemaking action, and that it would not change or affect the obligation to comply with Section 106 of NHPA, the Federal Highway Administration explained that execution of the programmatic document would constitute compliance with Section 4(f)

requirements for analysis of alternatives to use of historic property and would eliminate the need for preparation of separate site-specific Section 4(f) documents which are repetitive in nature because of the limited options available.[255]

Compliance with Section 4(f) would be accomplished by comparing the project under consideration with the criteria for applicability, alternatives, and mitigation set forth in the programmatic evaluation. If the FHWA Division Administrator finds that the programmatic evaluation is applicable, the project is moved on to the next step in its environmental clearance. If it is found not to be applicable, a separate individual Section 4(f) evaluation must be prepared and processed.[256]

Finally, the programmatic Section 4(f) evaluation and approval may be used only for projects where the FHWA Division Administrator ensures that the proposed project includes planning measures that will rehabilitate the bridge with preservation of its historical integrity "to the greatest extent possible consistent with unavoidable transportation needs, safety, and load requirements"; or, for bridges that are to be replaced, the existing bridge must be made available for an alternative use by a responsible party that agrees to maintain and preserve it. When bridges are demolished or moved, documentation shall be prepared and filed in the Historic American Engineering Record. For bridges that are adversely affected, the project must incorporate an agreement between the SHPO, FHWA, and the Advisory Council on measures to mitigate such adverse impacts.[257] The inclusion of these specific restrictions on the scope of the Programmatic Section 4(f) Evaluation and Approval is the result of public review of the FHWA draft proposals in the rulemaking process where public comments were received.[258]

The Rehabilitation Option

The mandate to consider options for repair and rehabilitation when dealing with bridges that are structurally or functionally deficient may require adaptation of remedial measures to highly individualized structures. Moreover, selection of such measures inevitably is influenced by the objectives of the repair or rehabilitation, which may not be fully or finally agreed upon by all of the parties involved. This threshold question may be appreciated by comparing the definitions of "rehabilitation" used by the American Association of State Highway and Transportation Officials (AASHTO) in its *Standard Specifications for Highway Bridges* and by the Secretary of the Interior in his *Standards for Rehabilitation* and *Guidelines for Rehabilitation of Historic Buildings*. The AASHTO document is a detailed manual on bridge design, emphasizing safety and functional performance. The Interior documents are stated in broad terms for application to a wide variety of building types. Thus, the Interior standards define rehabilitation as "the process of returning a property to a state of utility, through repair or alteration, which makes possible an efficient contemporary use while preserving those portions and features of the property which are significant to its historic, architectural and cultural values."[259] In contrast, the regulations implementing the Highway Bridge Replacement and Rehabilitation Program define "rehabilitation" as "the major work required to restore the structural integrity of a bridge as well as work necessary to correct major safety defects."[260]

Bridge and highway engineers tend to equate rehabilitation to achievement of compliance with AASHTO standards of structural strength and geometric capacity. Preservationists tend to judge compliance by how well the historical and architectural integrity of a structure is preserved while the transportation function is being restored. Bringing these two viewpoints together is made more difficult in the case of bridges because, unlike most buildings, the structural elements of bridges are largely uncovered and exposed to view, so that repairs and alterations can easily affect the structure's appearance in ways that jeopardize its historical value.[261]

The need to provide a way over these obstacles has been recognized. In the AASHTO policy on geometric design, issued in 1984, the historical significance of a structure was mentioned as a factor to be considered in granting exceptions to the standards. It was explained that:

> Existing substandard structures should be improved, but because of their high replacement cost, reasonably adequate bridges and culverts that meet tolerable criteria may be retained. Some of the nontechnical factors that should be considered are the esthetic value and the historical significance attached to famous structures, covered bridges, and stone arches.[262]

Also, as a practical matter various nonengineering factors may influence decisions on replacement or rehabilitation of historic bridges including local public interest in the bridge, the bridge's significance in representing an historic design or technology, the extent of variance from AASHTO standards, and the cost effectiveness of rehabilitation. FHWA Division Administrators are authorized to grant exceptions on a case-by-case basis where they believe it is justified.[263]

Recognition in the AASHTO manual that historical significance is an appropriate reason for granting exceptions to strict compliance with bridge design standards has made it easier to encourage use of the repair and rehabilitation options. These options range from minor repairs that may be performed in maintenance operations to major replacements of structural elements on such a scale as to affect a bridge's historical integrity. The purpose of bridge rehabilitation is always to return the structure to a state of usefulness in the total highway system of which it is a functioning part, and to accomplish that with minimal impairment of the bridge's historical significance. While it has been suggested as a rule of thumb that replacement of less than 50 percent of structural elements should not be considered as jeopardizing historical integrity, such generalizations must yield to a case-by-case evaluation taking into account how well the replacements match the design, scale, mass, color, and materials of the historic structure.

The final result of rehabilitation should not be a restoration, a replication, or an imitation of the original structure; but it should so strengthen and adapt it that it can be continued in present and future use—and in

the case of bridges, a transportation use—functioning safely and efficiently. In this process, modifications may have to be made in the transportation function of the structure. For example, the result may be to limit service to travel in one direction only, or to restricted vehicle weights and sizes, or solely to pedestrian and bicycle traffic.

Rehabilitation for a less demanding transportation use may involve relocation of a bridge from its original historic site to a new one. Or, it may result in building a new structure parallel or in close proximity to the historic one. In such instances, a rehabilitation plan cannot be considered complete unless it assures that the historic bridge is relocated in a setting that is compatible with its distinctive character or is maintained so that the integrity of the original setting is not impaired by the new structure that is built.[264] Bridges located in designated historic districts may also be local landmarks contributing to and reinforcing the character of the district. Rehabilitation of an historic bridge for continued transportation use or introduction of a new or replacement bridge within the historic district should take into consideration the character of the district as a whole and utilize design, materials, scale, and similar elements that are compatible with that character.[265]

Although the preferred use of an historic bridge is continued service for vehicular traffic, rehabilitation may be undertaken for the purpose of adapting the structure to one of many nonvehicular uses that can be carried on at the original historic site or a relocated site. Rehabilitation in such circumstances may involve adaptation to a variety of residential, commercial, educational (museum), recreational, or public service (e.g., tourist information) uses.[266] Where architectural adaptation is necessary it should be done in such a way that the essential nature of the original bridge still shows through in its adaptive use.[267] Finally, there have been instances where utilitarian use of an historic bridge, either for vehicular or nonvehicular service, cannot be worked out and so the bridge has been stabilized and left standing as an historic attraction or, if it has sufficient significance, moved to a more appropriate site to serve as an outdoor museum or historic monument.[268]

Options of Replacement with Mitigations Measures

When rehabilitation for continued transportation use or an adaptive use cannot be accomplished or justified as feasible and prudent, attention turns to replacement and the application of measures to mitigate the resulting harm to the historic structure or site. As in the problem of planning for rehabilitation, selection of mitigation measures depends on accurate evaluation, case-by-case, of the nature and basis of the historic structure's particular significance and maintaining a sensitive treatment of these elements. Thus, if replacement involves "reconstruction" of an existing historic bridge, the reconstruction plan should assure that the new one will be a faithful "visual reminder of the form and detail" of the old bridge. This may well require research to document changes made in the old bridge during earlier years of service and evaluation of their significance in making it a community landmark. And it may result in deliberately eliminating elements or details that were added over the years to facilitate maintenance or modify the original design for other purposes.[269]

Reconstruction must be careful also to maintain the same structure-to-site relationship that was a factor in the particular historic significance of the original structure. This aspect of the mitigation plan may extend from designing new alignments of the approaches to retaining specific ornamental details that contribute esthetic qualities which the public recognizes and associates with the bridge even more than its technical engineering aspects.

Similar care is called for in planning mitigation measures where an historic bridge is replaced by a new bridge at a new location. Consideration should be given to whether the site of the replaced bridge has historical or esthetic associations that the community values, and which should be respected in designing a replacement bridge. This is especially pertinent if the location selected for the new bridge is in or close to designated local historic districts or landmarks.

Replacement of an historic bridge need not always ordain its demolition. Reference has been made earlier to various nonvehicular adaptive uses that may be possible objectives of rehabilitation. Where, however, these have been considered and it is determined that it is not feasible or prudent to preserve a bridge intact for any purpose, certain measures for salvage and documentation are in order.

Documentation is probably the most common form of mitigation in situations where physical preservation of an historic bridge cannot be undertaken and the structure is designated for demolition. The concept of documentation is that, although a structure may not survive, the creation of a permanent record for the study of it can contribute to understanding and interpreting bridge design, fabrication, engineering, and technology. Historical insight into the work of individuals and engineers who advanced bridge technology is an incidental benefit of documentation. These benefits accrue not only when documentation is used to mitigate losses through demolition, but when it is employed in conjunction with relocation, rehabilitation, or other actions that alter historic sites or structures.[270]

Documentation may include any combination or all of the following techniques:

- On-site photography of the structure and site in their present condition.
- Preparation of measured scale drawings showing dimensions and details.
- Copying important early photographs, drawings, plans, blueprints, maps, annotations, and similar documents.
- Preparation of narrative reports on the structure, and history of its design and construction, and its significance.

Standards and guidelines for obtaining and maintaining this information have been formulated by the Historic American Engineering Record (HAER), administered by the National Park Service, U. S. Department

of the Interior. Upon acceptance by HAER and the Advisory Council on Historic Preservation, the permanent records of such documentations are maintained by the Library of Congress and the archives of the state involved.[271]

When a bridge designated for demolition has unusual historical importance or contains elements that are worthy of preservation, its document may be supplemented by full or partial salvage of the structure. This action may preserve in disassembled form the entire bridge (if it is small enough to be stored) or specific details or portions of it for future display, research, or reuse. Such salvage measures depend for success on making arrangements for funding and carrying out the salvage and subsequent storage as early as possible in the replacement planning process. Selection of appropriate recipients and advance planning should be carried out in cooperation with the SHPO in order that scheduled demolition work on a bridge will not be unnecessarily delayed to allow salvage activities.

Marketing Historic Highway Bridges

In any rehabilitation treatment leading to relocation of an historic bridge for conversion to some nonvehicular adaptive use, or for storage or salvage of its parts, it is essential to have community support and a local agency or private sector entity that is willing and able to commit funds and effort to the preservation task. Terms on which an historic structure may be turned over to such a recipient are worked out through the comment process of the Advisory Council on Historic Preservation and formalized in a Memorandum of Agreement to which the state highway or transportation agency, the receiving entity and the Advisory Council are parties.

Efforts to sell, transfer, or donate historic highway bridges that are determined to have no further role in transportation service are normally referred to as "marketing efforts," although such historic bridge structures rarely are sold for more than one dollar. Also, because the transfer of ownership is subject to the terms of the Advisory Council Memorandum of Agreement regarding the property's preservation and reuse, so-called marketing decisions are influenced by this frame of reference. Thus, decisions to market an historic bridge are likely to be based on interagency coordination with the SHPO and ACHP, an evaluation of the bridge's condition, a survey of possible reuses of the structure, an assessment of the qualifications of potential recipients, and determination of the community interest in the structure.

A state highway or transportation agency must work out the marketing of an historic bridge in accordance with the basic statute law governing disposition of public property and the formalities required by FHWA regulations.[272] Legal authority for the transfer or disposal must be documented. If reversionary rights in the highway right-of-way arise in the event that land or fixtures at the bridge site cease to be used for highway purposes, they should be extinguished. Formal procedure for disposal of public property must be followed, and typically entail running public or legal notices in newspapers.

Practical experience of FHWA field offices, state highway and transportation agencies, and SHPOs suggests, however, that the highly specialized nature of historic bridge transfers requires more than adherence to statutory formalities if success is to be achieved. News articles carried in newspapers, magazines, radio, and television are thought to be more helpful in gaining the attention of the public at large than the usual public notice process. Such coverage is subject to the judgment of news editors, however, and may become difficult to obtain as instances are repeated. The most-cited method of marketing historic bridges is personal contact, focused on state or local governments and outdoor recreation agencies, and coordinated with the SHPOs and state natural resources agencies.[273]

No time limits are prescribed for the minimum effort needed to demonstrate that a bona fide attempt is made to market an historic bridge. Circumstances and the terms of the Advisory Council's Memorandum of Agreement will suggest in each instance what is realistic and reasonable. Experience to date, however, indicates that successful marketing efforts have required from several months to several years. And, of course, some bridges have turned out to be simply unmarketable.[274]

One suggestion for increasing the likelihood of locating potential recipients for historic bridges is to offer incentives to a new owner. These might take the form of performing or funding some of the basic rehabilitation, reconstruction, or restoration needed to prepare the structure for a new adaptive use. They might also take the form of preparing necessary footings or piers where a bridge is to be relocated in a new site. Although such measures might well strengthen the marketing effort, expenditure of federal highway funds for such purposes are not now authorized by law, and would divert federal-aid highway funds from their primary purpose.[275]

Limitations on potential recipients of historic bridges may exist either because of practical considerations or because local governmental bodies lack legal authority to accept and maintain such structures. Considerations of a practical sort may pertain to the difficulty of arranging for adequate funding or personnel to maintain the structure and carry on a new adaptive use. The adequacy of a local or regional body's legal authority to accept and maintain an historic bridge must always be evaluated in light of the rule that local governments have only those powers which the sovereign states grant to them, either expressly or as fairly and necessarily implied or as indispensable to the accomplishment of a properly declared purpose or objective. As a result, the statutory authority of local governmental bodies is construed narrowly, and where there is reasonable doubt about its existence or extent those doubts are resolved against a local agency.[276]

Historic preservation is sufficiently new as a field of planning and land-use management so that the possibility of narrow construction of local legal authority must always be recognized. At the same time, it is true that expansive interpretation of the extent to which authority for specific preservation projects may be implied in or may be regarded as indispensable to other statutory grants are not uncommon.[277] Thus experience in states where local governmental powers are strictly con-

strued suggests that most local bodies which have express legal authority to acquire and manage land for park systems and recreation facilities may find it can be construed to cover acquisition of property for historic preservation and adaptive use for recreation.[278]

Conclusion

Where historic bridges in a highway system are found to be deficient for continued transportation service the central issue is likely to be how far the responsible highway agency should be forced to go in identifying and utilizing alternatives that avoid replacement of such bridges or mitigate the adverse impacts of replacement if it occurs. Two sets of laws—one intended to serve the public interest in safe and efficient vehicular travel, and the other intended to serve the public's interest in advancing science, education, and cultural values—make demands on highway agencies in deciding how to deal with this issue. If either of these legal mandates is applied strictly, conflict is certain to follow. Thus, preservationists claim that engineers insist too much that bridges must be replaced unless they meet current AASHTO standards; and highway administrators, in turn, accuse preservationists of using environmental statutory procedures to overrule sound engineering judgment and needlessly delay transportation improvements.

More reasonable approaches to this issue can be developed based on language in both the highway and environmental policies that contemplate waiver of strict compliance with AASHTO standards in the evaluation of bridge sufficiency and authorize liberal construction of the standards for historic integrity in the interest of maintaining continued transportation service or achieving appropriate adaptive uses. Over the years federal policy and procedures have steadily moved away from routine replacement of deficient bridges and toward an emphasis on rehabilitation for continued service. At the same time, as national interest in historic preservation has increased, the options and techniques for rehabilitation have increased. In terms of construction technology, the great majority of preservation challenges can be resolved if it is decided to do so.

The critical element for success in reconciling current preservation and transportation objectives, therefore, usually is the willingness to try. The National Transportation Policy announced in March 1990 contained a strong commitment to environmental quality which was explained by one federal spokesman as follows:

> The laws we are dealing with, be it NEPA or even a more demanding law, such as Section 4(f) of the DOT Act, give great flexibility to decision-makers. The difference between a strongly "pro-environmental decision" and one seen as being based on other factors is only partially related to the legal regime in which the decision is made. Much more significant is the importance which decision-makers assign to these issues. Thus, the policy is aimed at redirecting our approach. There is an emphasis on reaching out, both to those affected by a project and to groups having a strong interest in the environmental issues involved. Thus, if this policy is successful, it will change the way all of us—state, local and federal officials—approach the decisions we are making.[279]

THE ADMINISTRATIVE RECORD IN HISTORIC PRESERVATION PROJECTS

At first impression detailed descriptions of federal historic preservation statute law and the regulations implementing them may seem to digress from a straightforward approach to defense of a highway project through litigation or the accommodation of competing transportation and preservation interests through negotiations. In fact, however, familiarity in detail with the substance of this law and the procedures for its implementation is essential to successfully representing a party to proceedings in either the courtroom or the conference room. The great proportion of significant historic preservation litigation involves judicial review of administrative actions taken in the course of carrying out delegated functions. In these cases, the fortunes of the parties rise or fall on the administrative record; and nothing spells defeat for a party more quickly than for that record to disclose that there was a lack of understanding of what the law required or that an agency did not follow the procedure laid down for resolving disputes or reconciling competing public interests in carrying out its own responsibilities.

The administrative record consists of documentation of what the project agency considered in reaching its decision on the matters in question. A good administrative record accounts for the agency's action in terms of showing everything that was taken into consideration and explaining how it was considered. Thus, it is not limited to what the agency head ultimately relied on in making and justifying his decision; everything that contributed to reaching that decision is pertinent, even if its relevance is in the fact that after being considered it was felt to be unpersuasive and was rejected by the decision-maker.[280]

Since the purpose of the administrative record is not to advocate the agency's position but rather to inform the court as to how the agency head reached a decision, documents that disagree with the decision should not be excluded from the record. Nor should documents otherwise pertinent be omitted because they were seen and considered only by the agency's technical staff but not passed along to the agency head. From final formal findings and determinations at the end of the process, through the internal memos and meeting minutes that show how the deliberative and consultative processes worked, back to the summaries of information developed in the investigative stage, the record should give the reviewer a full and accurate view of the actions of the project agency and those other agencies that were consulted.

While the necessity for comprehensiveness is stressed, the administrative record must also be organized with sufficient selectivity to avoid certain problems. One is the practical risk of overwhelming the court with an unwieldy collection of papers. Even though it is voluminous, the court will appreciate a record that is neatly compiled and tabbed so that the back-up material can be readily located after it is identified in a well-structured executive summary and index.[281] A second area of problems is concerned with the handling of documents covered by the privilege

of the deliberative process which protects the advice which subordinates give their superiors. Privileged or not, such information should be considered part of the administrative record, but because of its nature it may have to be treated specially in the court's review.[282] A third area of problems is opened up when it is discovered that the original administrative record may be inadequate and requires strengthening by supplementary impact analysis, testimony of witnesses, or more investigative activity. Such problems may arise as a record is remanded to the agency for correction of its deficiencies, or they may be caught during the agency's own review as it prepares to defend its decisions. Few agencies wish to risk losing in the courts, and so will try to meet all known objections to their proposal in the administrative record as it goes forward for judicial review. In addition, a well-prepared administrative record may strengthen an agency's position by showing how potential objectors had opportunities to participate in the agency's deliberative process, and how well these opportunities were used.[283]

When an action which is subject to the Section 4(f) or Section 106 processes is under attack, it is to be expected that the administrative record will be searched for evidence that the agency did not comply with all of these procedures or meet all of the substantive requirements of the law.[284] The validity of this strategy has been acknowledged in numerous cases by remarks that reflect the frustration of courts in having to deal with administrative records that are not sufficient for the searching review the courts feel obliged to give. This frustration was expressed with feeling in *Benton Franklin Riverfront Trailway and Bridge Committee v. Lewis*, where Judge Sneed concurred in remanding a record back for more administrative consideration with the following observation:

> I concur . . . [and] write only to underscore the sense of frustration that grips me when confronted by cases of this type. Years have passed since demolition of this bridge was initially considered during which its eligibility for preservation as an historic landmark was enhanced. Agencies of government at both state and federal level have been involved with each having its own perception of its mission and each subject to somewhat different rules and regulations. Out of such a melange of agencies any decision has difficulty emerging. Certainly it is quite likely that in the process of reaching a decision one or more of these agencies are going to bend a rule or two in a manner the courts will find improper. Such is the case here. This will add at least several years to the decision-making process and also enhance the venerability of the bridge which at present is younger than I am. This is the system, however, under which we labor. Let these grumpy comments attest to the fact that in this case I find no pleasure in doing what, under the law, I must do.[285]

In *Benton Franklin* the record failed to show that the Secretary had considered one particular alternative to demolition of an historic bridge which plaintiffs showed was, in fact, available.

Under the mandate of *Overton Park* that the administrative record must demonstrate that the agency head took a "hard look" at the environmental consequences of a proposed project, courts have felt compelled to make the difficult (and dissatisfying) decisions about which Judge Sneed complained above. This has meant that in the case of historic buildings, where substantive standards and procedural rules and criteria promulgated by several sources may all apply or be interrelated, the administrative record inevitably becomes both extensive and complex as it seeks to be comprehensive in width and depth.[286] As this has occurred, however, tendencies in the opposite direction have tempered the rigor of judicial review with a rule of reason. So, in *Coalition on Sensible Transportation v. Dole*, the court had the following reaction to the administrative record:

> Evaluation of environmental effects of major road-building projects and adequately explaining the various choices made is a long and arduous process, as is reviewing such determinations. It is unlikely that any such undertaking will ever be absolutely flawless; perfection is elusive. We do not think the process was flawless here. However, after carefully examining each objection to the various administrative findings and explanations, we are persuaded that the appellees satisfied all statutory requirements.[287]

This approach helps account for the difference in treatment of the administrative record in cases where project agencies are obliged by law to "locate, inventory and nominate . . . all sites . . . that appear to qualify" for protection that may be affected by the project.[288] In *Romero-Barcelo* the record showed that the agency complied with this mandate by a random sampling plus a predictive expert opinion. But it did not follow up with further investigation of possibilities that still other archeological sites existed. This record was remanded for further work.[289] Yet in *Wilson v. Block* data from a 35 percent sample was sufficient because other evidence showed that a complete survey would not change the result.[290]

Understandably, courts have not offered to provide any check list of the contents of a satisfactory administrative record, nor have they encouraged agencies to take this approach, except insofar as programmatic determinations may be justified by the circumstances. Administrative records must be developed case-by-case, just as they are reviewed by the courts case-by-case. Advice on how the record should be prepared has remained on a general level. The District Court in *Ashwood Manor Civic Association v. Dole* may have come close to giving agency heads a reliable guide to follow in its comments on the record before it, as follows:

> . . . [M]erely reciting the categories of adverse impacts associated with building any highway would not provide a sufficient basis for the Secretary of Transportation to conclude that there was no feasible and prudent alternative. The current section 4(f) determination, in contrast to the previous one, is not based on conclusory statements that any alternatives involve hopelessly severe impacts. It details and specifies the reasons for the determination that there is no feasible and prudent alternative.
>
> The FHWA has documented the need for the highway, providing data showing severe current congestion on existing major local roads. It has conducted an exhaustive, objective search for an alternative corridor that would meet the transportation needs of the area without using section 4(f) land. This avoidance corridor analysis documents, in objective terms, the adverse impacts associated with any alternative to taking section

4(f) land. There is no evidence that any of the data considered by the decision-maker was inaccurate. That data provides an adequate basis for the decision-maker reasonably to conclude that there was no feasible and prudent alternative to building the highway in the Blue Route corridor.

. . . Although the highway was originally planned in an era when planners were less careful about environmental consequences than the planners of today, the FHWA has subjected those original plans to the rigorous scrutiny required of today's projects. As a result . . . the highway has been scaled down, and the plans incorporated extensive measures to reduce the environmental impacts of the highway construction. . . . After ten years of study and thousands of pages of documentation . . . no one could convincingly argue that the FHWA did not take a good, hard look at the environmental consequences of the project and the possible alternatives.[291]

Agencies with experience in regularly preparing and defending administrative records in environmental and preservation cases recognize the strategic benefits and advantages of this role. Courts rarely turn their review of agency actions into *de novo* proceedings, but will try to limit the scope of the case to the administrative record. Because the agency controls what goes into the administrative record it enjoys an obvious advantage—or at least an opportunity—in presenting the issues to the court. To make the most of this opportunity, one commentator has urged that the record be shaped to show these basic propositions, namely:

1. The agency decision-makers understood the legal standards applying to the decision.
2. They applied it properly, i.e., they considered the proper information, evaluated all of the factors requiring evaluation, and considered relevant factors in terms of the legal requirements governing the action.
3. The action they took is reasonable in terms of the information and analysis that they had.[292]

In doing this the attorney will be greatly assisted, both before and at trial, by a technical professional who is familiar with the entire record and whose task it is to monitor the proceedings in terms of the documents in the record.

Tort Liability (p. 2018-N113)

General

Concern about the possibility of increasing their legal liability for tortious conduct in connection with personal injuries or property damage has made state and local governmental agencies extremely cautious about retaining historic bridges in transportation service, either in their original or rehabilitated condition. This concern has been influential in decisions as to whether replacement rehabilitation should be undertaken, as to the selection of measures to mitigate the impacts of replacement, and has even influenced the success of efforts to "market" bridges no longer able to perform transportation functions. There is a perception that tort liability risk may be greater where historic bridges are involved as compared to instances involving facilities not having particular historical significance. This is because where a bridge is admittedly deficient in structure or design and is functionally obsolescent for current and expected use, and still is not replaced, there is the appearance of a deliberate refusal to meet accepted standards for accommodating the traveling public and assuring its safety. Considerations that excuse or mitigate a transportation agency's failure to maintain state-of-the-art service and safety under other circumstances do not seem to the public to apply where the replacement option is specifically rejected in favor of cultural and esthetic values.

Whether this perception carries as much weight in the actual litigation of tort claims involving historic bridges as it does in the exercise of administrative discretion and policy-making can be argued. The investigation of negligence in courts is tightly controlled by judicial rules of proof and by reference to common law concepts of negligence that are well understood. Most questions regarding proof of negligence or defenses against liability for negligence in highway design, construction, maintenance, or operation where historic structures are involved can be resolved according to precedents from experience involving other parts of the highway system. These are discussed at length in Chapter 7 of this work. Only a limited further discussion is warranted regarding problems of proof that may be peculiar where historic structures are involved.

Defining Transportation Agencies' Duty of Care

Adjudication of tort claims against transportation agencies follows a familiar analysis: liability depends on fault; fault is established by proof of negligence and freedom from contributory negligence; and negligence may be proved by showing failure to meet or perform a required duty of care. Circumstances may occur which allow a claimant to allege that the negligence necessary to support its claim takes the form of activity that is hazardous by its nature and directly inflicts the injury complained of, but typically the cases analyzed in Chapter 7 turn on a showing of whether the transportation agency defendant failed in its duty to provide highways or bridges that are safe and free from hazards.

Disagreements over whether an applicable duty of care to highway users has been met may well begin with disagreement over the purpose of the duty. Views that the purpose of the agency's duty is to prevent the occurrence of highway accidents have been expanded to include reduction of the injury and damage involved.[293] This expansion rests on a premise that despite determined efforts to prevent accidents it is inevitable that a certain level of accidents will always occur in highway traffic, and, therefore, a prudent plan for highway safety must include measures to reduce the severity of accidents when they occur. When this new dimension is added to the transportation agency's duty of care, the inquiry into a defendant's compliance is broadened to include efforts to eliminate deficient, defective, and functionally obsolete features of the highway system for which it is responsible and replacement of them with others that meet relevant safety standards.

From a claimant's viewpoint, it may well appear possible to demonstrate a transportation agency's failure to meet the necessary duty of

care by showing that it permitted conditions to exist that do not meet "nationally recognized standards" of highway design, construction, maintenance, or operation. And in fact this has been easy to do in numerous cases of bridges built in the roadbuilding era of the 1920s and 1930s and still in highway service, or in the case of others built in the nineteenth century and the turn of the twentieth century. In these cases claimants may cite apparent inconsistencies with a long list of so-called standards promulgated under the authority of federal-aid highway laws, federal domain statutes and regulations, the Highway Safety Act of 1966 as amended, and even statutes that were only peripherally concerned with highway safety—all of which could be argued as part of the definition of a transportation agency's duty of care. Also available for this purpose is a long list of documents prepared and published by AASHTO, called "policies" and "guidelines," constituting the views of that organization on the best ways to design, construct, maintain, and operate highways. Local and state laws and regulations might also be found that contained provisions promoting highway safety, and these, too, offered possibilities of being construed as standards defining the duty of care.

Formidable as this body of policy and technical doctrine appears to be when used by claimants in efforts to redefine transportation agencies' duty of care to prevent highway traffic accidents and reduce the severity of those that occur, its ultimate usefulness depends on agreeing on the nature of this doctrine as "safety standards." With regard to AASHTO "policies" and "guidelines," the *Policy on Geometric Design of Highways and Streets*—publicized as the latest edition of "nationally recognized design standards" when it was published in 1984—is in reality a collection of design criteria pertinent to the time of their publication, and thus a description of the "state-of-the-art" in such criteria. As such it is not a "standard" that functions as a set of specifications, but a policy referring designers to a "recommended range of values for critical dimensions."[294] The foreword of the AASHTO book addresses its implications for tort liability as follows:

> The fact that new design values are presented does not imply that existing streets and highways are unsafe. . . . This publication is intended to provide guidance in the design of new and major reconstruction projects. It is not intended as a policy for resurfacing, restoration or rehabilitation (R.R.R.) projects.[295]

Applied to existing older roadways and structures, a transportation agency's duty of care tends to be defined in terms of how much agency practice deviates from the state-of-the-art criteria and what foreseeable effect the deviation has on highway safety at the site in question. The duty of care regarding such roads and structures does not insist on strict achievement of state-of-the-art criteria. Nor does it require acceptance of facilities that are not realistic for contemporary traffic service. Neither is practical. It requires, rather, a reasonable concern for safety and reasonable action to address that concern. State-of-the-art criteria expressed in policy or guidelines form help indicate the range of options the agency has in the action it takes.

Comparable problems arise when legislation promoting highway safety is cited as defining a transportation agency's duty of care. Thus, litigation has been needed to determine whether provisions of the Highway Safety Act of 1966 which establish national highway safety standards for state programs have the effect of creating a private cause of action for failure to comply with those standards. Federal courts in 1972 ruled that no federal cause of action resulted from failure to comply with Highway Safety Act standards,[296] and this view has been followed since that time.[297]

It is likely that similar conclusions would be reached for most other federal and state laws intended to assure that safety is a major consideration in designing, constructing, and maintaining highways. Because such laws must apply systemwide, most are forced to speak in very general terms and thus be of limited use in defining duties of care for tort liability. Exceptions may occur where regulatory laws specify that highway structures must be designed for certain capacity—such as to accommodate fire and emergency vehicles—or must be equipped with certain features for safety proposes—such as lighting, signing, or pavement marking.

When a statute establishes safety requirements for transportation agencies to meet, but fails to specify a standard by which to determine compliance, it may still be possible to utilize it in defining the agency's duty of care by reference to common law doctrine on the same subject. This is most readily done where the statute has codified some aspect of common law tort liability doctrine. Where a statutory safety requirement has no reference in common law experience, or where it exceeds common law standards, courts must review carefully the substance of the statutory standard, its legislative history and purpose, and its remedies and enforcement to determine what role it may have in defining a duty for the purpose of tort liability. In such cases courts are free to fashion their own definitions of the transportation agency's duty of care, applying the statutory standard to the extent it is sufficiently precise and clearly in accord with the legislative intent, or, if not, applying some version of the standard that the court finds will further the general purpose of the legislation.[298] In this process care must be taken to distinguish requirements that are for the protection of highway users from particular injury-causing conditions from requirements that are for the interests of the community, the public at large, or the transportation agency. Thus, design, construction, maintenance, or operational standards that are for environmental protection or the convenience of administration and funding are not proper to use in defining the transportation agency's duty of care for tort liability purposes.[299]

Recourse to highway safety laws, regulations, standards, and guidelines in defining transportation agencies' duty of care is complicated by one further factor where historic bridges are involved. A substantial body of federal, state, and local legislation now exists for the purpose of promoting preservation of historic sites and structures. Instances could be visualized where action proposed to correct a deficiency or eliminate a hazardous condition in an historic bridge conflicts with action designed

to carry out the purpose of one or more historic preservation laws. How is the responsible transportation agency's duty of care affected by that body of law, which, in the case of Section 4(f) of the DOT Act imposes substantive limits on action that impairs the historical integrity of a site or structure? Or, how is the duty of care affected by an agency's undertakings in a Memorandum of Agreement in the NHPA Section 106 process?

Judicial reaction to these questions remain speculative at present, but certain basic principles of tort liability would seem to prevail. The existence of requirements based on laws promoting historic preservation does not change the transportation agency's obligation to build and operate highways that are safe to use. Nor can it relieve the agency of liability for negligence in performing that mission. It can, however, affect a definition of the agency's duty of care to highway users by sharpening the focus on the character of the property involved, and so helping identify the range of measures that are available to rehabilitate the structure or mitigate the effects of rehabilitation. Thus, if a decision is made to carry out a limited rehabilitation which leaves its capacity and load-bearing limit insufficient to serve all types of highway traffic, it may be determined that under the circumstances the transportation agency's duty of care is met by posting the bridge and its approaches with warnings of the vehicle size and load limits that apply to the bridge, and installing additional lighting on the bridge and its approaches.

Conclusion

The most recent revisions and republications of "nationally recognized highway safety standards" show a preference for avoiding establishment of precise and mandatory criteria (or standards) for the design, construction, maintenance and operations of highway systems, and for providing ranges of suitable options from which engineering discretion can select the one to achieve a program objective. Tort lawsuits therefore often become contests of hindsight regarding whether other options open to the transportation agency would have prevented or lessened the severity of the injury of which the claimant complains. In litigation of this sort it is critically important that the defendant agency's duty of care be defined fully and correctly. Where claims of negligence involve historic bridges the definition of the applicable duties of care involves correlation of a large and growing body of regulations, standards, guidelines, and policies coming from laws relating both to highway safety and historic preservation. Apparent conflicts of purpose among these laws complicate the analysis. The best defensive position for a transportation agency is likely to be a full documentation of the decision-making process used in determining the appropriate duty of care and selecting the appropriate measures to meet that duty.

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[1] 16 U.S.C. 431 (1989).
[2] 36 Op. Att'y Gen. 75 (July 8, 1929).
[3] Cappaert v. U.S., 426 U.S. 128 (1976).
[4] State of Wyoming v. Franke, 58 F. Supp. 890 (D.C. Wyo. 1945).
[5] 39 Op. Att'y Gen. 185 (Sept. 26, 1938).
[6] See annotation following 16 U.S.C.A. ¶ 461.
[7] Pub. L. No. 98-398, 98 Stat. 1456 (Aug. 24, 1984).
[8] Pub. L. No. 99-647, 100 Stat. 3625 (Nov. 10, 1986).
[9] Pub. L. No. 100-692, 102 Stat. 4552 (Nov. 18, 1988).
[10] Pub. L. No. 100-698, 102 Stat. 4618 (Nov. 19, 1988).
[11] Pub. L. No. 98-398, tit. I, §§ 108–109, 98 Stat. 1456 (Aug. 24, 1984.
[12] Pub. L. No. 86-523, 74 Stat. 220 (June 26, 1960), 16 U.S.C. 469 (1989). As originally enacted this legislation applied only to consequences of the construction of dams by federal agencies or their licensees. The second clause of the current law, relating to "any Federal construction or federally-licensed activity or program" was added by Pub. L. No. 93-291, May 24, 1974, 88 Stat. 174 (1989).
[13] 16 U.S.C. 469a–469c (1989).
[14] Pub. L. No. 96-515, 94 Stat. 2987, (Dec. 12, 1980) codifies as 16 U.S.C. 470h-1 to h-3 (1989). See generally: Lawson, *The Historic Preservation Act Amendments of 1980: A Move in the Right Direction*, 5 GEO. MASON U. L. REV. 195, 209 (1982).
[15] H. REP. 96-1457 (Oct. 10, 1980) to accompany H.R. 5496, p. 37.
[16] Mayes, *Protection of Nationally Significant Historic Sites Under Federal Law*, 4 PRESERVATION L. REPR. 2010, 2013–2015 (1985). Final guidelines for implementing the 1980 amendments—the so-called Section 110 Guidelines—were promulgated by the Secretary of the Interior and Advisory Council on Historic Preservation on February 7, 1988. They set forth ten basic requirements to be met and described the types of agencies and situations to which each applied, together with advice on how agency implementation should be carried out. Generally, the guidelines set standards for protection of National Historic Landmarks that were similar to those provided under Section 4(f) of the DOT Act and so gave National Historic Landmarks substantially more protection than had been possible previously through the Section 106 process.
[17] H. REP. 96-1457 (Oct. 10, 1980) at p. 38.
[18] *Ibid.*, p. 42.
[19] 36 C.F.R. 800.2(o) (1989).
[20] 605 F.Supp. 1425 (C.D. Cal. 1985).
[21] 605 F.Supp. at 1438.
[22] 679 F.2d 182 (9 Cir. 1982).
[23] 42 U.S.C. 4331(a) (1990).
[24] 40 C.F.R. 1508.14 (1981).
[25] 529 F.Supp. 101 (E.D. Wash. 1981).
[26] 49 U.S.C. 1653(f) (1989).
[27] 49 U.S.C. 1655(h) (1989).
[28] Califano v. Sanders, 430 U.S. 99, 105 (1976).
[29] 405 U.S. 727 (1972).
[30] Committee to Save the Fox Building v. Birmingham Branch, Federal Reserve Bank of Atlanta, 497 F.Supp. 504 (N.D. Ala, 1980). *See also,* Weintraub v. Rural Electrification Admin., 457 F.Supp. 78 (M.D. Pa. 1978). Being federal taxpayers alone has never been sufficient to give standing to enforce federal laws and regulations. Plaintiffs must show they are injured in fact by showing that they "use or can be expected to use" the property in question, and that their ability to occupy, use, or otherwise enjoy the particular esthetic resource embodied in the historic property in question will be deprived or impaired. Neighborhood Development Corp. v. Advisory Council on Historic Preservation, 632 F.2d 21 (6 Cir. 1980, distinguishing Gibson v. Perin Co. v. City of Cincinnati, 480 F.2d 936 (6 Cir. 1973); South Hill Neighborhood Assn. v. Romney, 421 F.2d 454 (6 Cir. 1969).
[31] National Center for Preservation Law v. Landrieu, 496 F.Supp. 716 (D.S.C. 1980), *aff'd* 635 F.2d 324 (4 Cir. 1980).
[32] 359 F.Supp. 611, *aff'd* 481 F.2d 1280 (4 Cir. 1973).
[33] *See also,* Weintraub v. Rural Electrification Admin., 457 F.Supp. 78 (M.D. Pa. 1978).
[34] 49 U.S.C. 1653(f).
[35] 529 F.Supp. 101 (E.D. Wash. 1981), *aff'd in part, re'd in part,* 701 F.2d 784 (9 Cir. 1983).
[36] 23 U.S.C. 144, *et seq.*
[37] Benton Franklin Riverfront Trailway and Bridge Comm. v. Lewis, 701 F.2d 784, 787 (9 Cir. 1983).
[38] 631 F.Supp. 1100 (N.D. Ill. 1986).
[39] 631 F.Supp. at 1106.
[40] Aluli v. Brown, 437 F.Supp. 602 (D.Haw. 1977), *aff'd* 602 F.2d 876 (9 Cir. 1979); Save the Courthouse Comm. v. Lynn, 408 F.Supp. 1323 (S.D.N.Y. 1975).
[41] Committee to Save the Fox Building v. Birmingham Branch, Federal Reserve

Bank of Atlanta, 497 F.Supp. 504 (N.D. Ala. 1980).

[42] Stop H-3 Ass'n v. Lewis, 538 F.Supp. 149, 159 (D.Haw. 1982).

[43] Columbia Basin Land Protection Ass'n v. Schlesinger, 643 F.2d 585, 592 (9 Cir. 1981).

[44] Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971).

[45] Stop H-3 Ass'n v. Lewis, 538 F.Supp. 149 (D.Haw. 1982).

[46] Benton Franklin Riverfront Trailway and Bridge Comm. v. Lewis, 529 F.Supp. 101 (E.D. Wash. 1981).

[47] Citizen Advocates for Responsible Expansion v. Dole, 770 F.2d 423 (5 Cir. 1985); Chautauqua County Environmental Defense Council v. Adams, 452 F.Supp. 376 (W.D.N.Y. 1978); Ashwood Manor Civil Ass'n v. Dole, 619 F.Supp. 52 (E.D.Pa. 1985); *aff'd* 779 F.2d 41 (3 Cir. 1985); Arizona Past and Future Foundation v. Lewis, 722 F.2d 1423 (9 Cir. 1983); Township of Springfield v. Lewis, 702 F.2d 426 (3 Cir. 1983).

[48] E.g., Chautauqua County Environmental Defense Council v. Lewis, 452 F.Supp. 376 (W.D.N.Y. 1978), alternative routes; Druid Hills Civic Ass'n v. Fed. Highway Admin., 772 F.2d 700 (11 Cir. 1985), traffic, noise, safety.

[49] 42 U.S.C. 4332(2)(c)(iii) (1989); *see also,* 40 C.F.R. 1504.14(a), (b) (1989).

[50] 435 U.S. 519, 551 (1978).

[51] Druid Hills Civic Ass'n v. Fed. Highway Admin., 772 F.2d 700, 713 (11 Cir. 1985).

[52] Druid Hills Civic Ass'n v. Fed. Highway Admin., 772 F.2d 700, 714 (11 Cir. 1985).

[53] 813 F.2d 798 (7 Cir. 1987).

[54] 813 F.2d at 803.

[55] Louisiana Environmental Society, Inc. v. Coleman, 537 F.2d 79 (5 Cir. 1976); Arkansas Community Organization for Reform Now v. Coleman, 531 F.2d 864 (8 Cir. 1976); Township of Springfield v. Lewis, 702 F.2d 426 (3 Cir. 1982).

[56] Comment: *Department of Transportation's Section 4(f): Paving the Way Toward Preservation,* 36 AM. U. L. REV. 633–667 (1987).

[57] 566 F.2d 419 (2 Cir. 1977), *cert. den.,* 435 U.S. 1006 (1978).

[58] 443 F.Supp. 1320 (D. Vt. 1978).

[59] *See also,* Citizens for Mass Transit Against Freeways v. Brinegar, 357 F.Supp. 1269, 1280 (D. Ariz. 1973), proposed freeway adjacent to public park.

[60] 770 F.2d 423 (5 Cir. 1985).

[61] 770 F.2d at 441.

[62] 770 F.2d at 442. This dictum should be read strictly in the context of the search for a definition of constructive use, and not applied literally to both actual and constructive takings. For example, a minor safety improvement might require a sliver of land qualifying for 4(f) protection. This would be sufficient to require a 4(f) analysis to be made, but would not by any stretch of the imagination constitute a significant effect on the quality of the human environment. FHWA regulations avoid this doctrinal difficulty by providing categorical exclusions for certain types of projects and procedures for accepting findings of "no significant impact" in instances where it is appropriate. See 23 C.F.R. 771.135(i) (1990).

[63] 581 F.Supp. 678 (E.D. Wis. 1984), *aff'd* 737 F.2d 1476 (7 Cir. 1984).

[64] Arkansas Community Organization for Reform Now v. Brinegar, 398 F.Supp. 685 (E.D. Ark. 1975), *aff'd* 531 F.2d 684 (8 Cir. 1976).

[65] 354 F.Supp. 45 (D.C. Ore. 1972), *rem'd* 494 F.2d 124 (1972) as moot.

[66] 524 F.Supp. 962, 970 (M.D. Tenn. 1981).

[67] 524 at 976, n.30. *See also* Cobble Hill Ass'n v. Adams, 470 F.Supp. 1077 (E.D.N.Y. 1979), noting that the construction impact threat to the historic district was indirect because detours routed traffic around the neighborhood districts so there was nothing in the record to suggest harm to the historical or architectural character of the area involved in the project.

[68] 533 F.2d 434 (9 Cir. 1976) *cert. den.* 429 U.S. 999 (1976). *See also,* Citizen Advocates for Responsible Expansion Now v. Dole, 770 F.2d 423, 427-428 (5 Cir. 1985).

[69] 36 C.F.R. pt. 800. *See also,* U. S. Cong., Office of Technology Assessment, *Technologies for Prehistoric and Historic Preservation,* 1986; Advisory Council on Historic Preservation, *Identification of Historic Properties: A Decisionmaking Guide for Managers,* 1988; Advisory Council on Historic Preservation, *Treatment of Archeological Properties: A Handbook,* 1980.

[70] 496 F.Supp. 716 (D.S.C., 1980).

[71] Committee to Save the Fox Building v. Birmingham Branch, Federal Reserve Bank of Atlanta, 497 F.Supp. 504 (N.D. Ala. 1980). St. Joseph Historical Soc'y v. Land Clearance for Redevelopment Auth. of St. Joseph, Missouri, 366 F.Supp. 605 (W.D. Mo. 1973).

[72] 421 F.2d 454 (6 Cir. 1969), *cert. den.,* 397 U.S. 1025.

[73] 471 F.Supp. 68 (W.D. Okla. 1979).

[74] *See also,* San Francisco Tomorrow v. Romney, 472 F.2d 1021 (9 Cir. 1973).

[75] 304 F.Supp. 885 (W.D. Mich. 1969).

[76] 304 F.Supp. at 888.

[77] Preservation Coalition, Inc. v. Pierce, 667 F.2d 851 (9 Cir. 1982). *See also,* St. Joseph Historical Soc'y v. Land Clearance for Redevelopment Auth. of St. Joseph, Missouri, 366 F.Supp. 605 (W.D. Mo. 1973), stating that enactment of NEPA did not broaden the scope of NHPA for protection of historic buildings.

[78] 603 F.2d 310 (2 Cir. 1979), *cert. den.,* 444 U.S. 995.

[79] 603 F.2d at 325.

[80] Note: 12 CONN. L. REV. 156, 171 (1979), noting that NEPA has been applied to ongoing projects despite similar risks and costs.

[81] 714 F.2d 271 (3 Cir. 1983).

[82] 714 F.2d at 280.

[83] *See also,* National Indian Youth Council v. Watt, 664 F.2d 220 (10 Cir. 1981), where mining lease renewal was made dependent on lessee's protection of environment and archeological sites.

[84] 457 F.Supp. 78 (M.D. Pa. 1978).

[85] 457 F.Supp. at 91.

[86] 457 F.Supp. at 92.

[87] 501 F.Supp. 649 (D. N.M. 1980).

[88] 16 U.S.C. 469a-1 (1989); 36 C.F.R. 800.7(a) (1979).

[89] 308 F.2d 1039 (4 Cir. 1986).

[90] Ely v. Velde, 451 F.2d 1130 (4 Cir. 1971), using the "partnership" test to measure federal involvement.

[91] 504 F.2d 1083, 1090 (8 Cir. 1979).

[92] Atlanta Coalition on the Transportation Crisis v. Atlanta Regional Commission, 599 F.2d 1333 (5 Cir. 1979), distinguishing Kleppe v. Sierra Club, 427 U.S. 390 (1973).

[93] 906 F.2d 1477 (10 Cir. 1990).

[94] 906 F.2d at 1480.

[95] 23 C.F.R. 771.117(c)(1) (1990).

[96] 896 F.2d 985 (6 Cir. 1989).

[97] 896 F.2d at 992, noting also that denial of eligibility for federal funding for safety reasons rather than environmental or historic preservation considerations was not significant to the decision.

[98] 648 F.Supp. 106 (D. D.C. 1986).

[99] 36 C.F.R. 800.2(c) (1985).

[100] 16 U.S.C. 470F.

[101] H.R. REP. No. 1457, 97th Cong., 2d Sess. 45, *reprinted in* CODE CONG. & ADMIN. NEWS 6378 (1980).

[102] 648 F.Supp. at 120.

[103] 828 F.2d 1305 (8 Cir. 1987).

[104] 16 U.S.C. 470a; 36 C.F.R. 60.1 *et seq.*

[105] 36 C.F.R. 63.4(c), effective Sept. 21, 1977, 42 F.R. No. 183, pp. 47662–47663. Prior to 1977 the Keeper could neither act without request from a federal agency or state historic preservation officer nor review a finding made by them.

[106] Cent. Okla. Preservation Alliance v. Okla. City Urban Renewal Auth'y, 471 F.Supp. 68 (W.D. Okla. 1979) 80–81.

[107] 557 F.Supp. 74 (D. Mass. 1982).

[108] 557 F.Supp. at 88, citing Stop H-3 Ass'n v. Coleman, 533 F.2d 434, 441 n.13 (9 Cir. 1976), *cert. den.,* 429 U.S. 999 (1976).

[109] 497 F.Supp. 504, 512–513 (N.D. Ala. 1980).

[110] 557 F.Supp. at 88 n.19.

[111] 789 F.2d 347 (5 Cir. 1986).

[112] 605 F.Supp. 1425, 1437 (C.D. Cal. 1985).

[113] 497 F.Supp. 1377 (N.D. Ala. 1980).

[114] 497 F.Supp. at 1388, n.22.

[115] 16 U.S.C. 470f.

[116] 36 C.F.R. 800.1–800.13 (1989).

[117] 51 F.R. No. 109, pp. 31115–31125 (Sept. 2, 1986).

[118] 36 C.F.R. 800.4 and 800.5 (1989).

[119] 51 F.R. No. 109, p. 31115 (Sept. 2, 1986).

[120] 36 C.F.R. 800.6 (1989).

[121] 36 C.F.R. 800.5(e)(2); 800.8(a), (b).

[122] 36 C.F.R. 800.8(a), (c), (d) (1989).

[123] 447 F.Supp. 741 (N.D. Ga. 1978).

[124] 447 F.Supp. at 751–752.

[125] FHPM 7-7-2.

[126] 719 F.2d 1272 (5 Cir. 1983).

[127] 719 F.2d at 1277.

[128] *Ibid.*

[129] *Ibid. And see,* 24 C.F.R. 58.2(a)(1) (1989).

[130] *See* Piedmont Heights Civic Club v. Moreland, 637 F.2d 430 (5 Cir. 1981), noting that one factor in determining where there is an improper segmentation of highway projects is whether the scope of the EIS forecloses an opportunity to consider alternatives.

[131] 36 C.F.R. 800.3(b) (1989).

[132] 565 F.Supp. 1066 (N.D. Ill. 1982).

[133] 565 F.Supp. at 1076. *See also,* Aertsen v. Landrieu, 637 F.2d 12 (1 Cir. 1980); Nat'l Center for Preservation Law v. Landrieu, 635 F.2d 324 (4 Cir. 1980).

[134] 470 F.Supp. 1077 (E.D. N.Y. 1979).

[135] 470 F.Supp. at 1090.

[136] 49 U.S.C. 1653(f) (1989).

[137] *See,* Wilburn, *Transportation Projects and Historic Preservation: Recent Developments Under Section 4(f) of the Department of Transportation Act,* 2 PRESERVATION L. REP. 2017–2029 (1983); Comment: *Department of Transportation's Section 4(f): Paving the Way Toward Preservation,* 36 AM. U. L. REV. 633–667 (1987).

[138] 401 U.S 402, 412–413 (1970). While *Overton Park* was proceeding through the courts, another case was generating experience at the administrative level over the proposed New Orleans Riverfront Expressway. See, Baumbach & Borah, *The Second Battle of New Orleans* (1981); Farrer, *Impact of Environmental Litigation on the Transportation Decision-Making Process in New Orleans: The Derailment of the I-340 Riverfront Expressway,* 51 J. URB. L. 687 (1974).

[139] Monroe County Conservation Council, Inc. v. Volpe, 472 F.2d 693, 700 (2 Cir. 1972); Brooks v. Volpe, 350 F.Supp. 269 (W.D. Wash. 1972.

[140] Monroe County Conservation Council, Inc. v. Volpe, 472 F.2d 693, 700 (2 Cir. 1972). *See also,* Citizens to Preserve Foster Park v. Volpe, 466 F.2d 991 (7 Cir. 1972).

[141] Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 410–412 (1970).

[142] Monroe County Conservation Council, Inc. v. Volpe, 472 F.2d 673 (2 Cir. 1972), where the only routes considered were ones traversing parkland.

[143] For an early application of the No-Build option see D. C. Fed'n of Civic Ass'ns v. Volpe, 459 F.2d 1231 (D.C. Cir. 1971), stating that if the Secretary determines that foreseeable traffic volumes can be handled with constructing an additional bridge "an entirely prudent and feasible alternative to the . . . [proposed project] might be no bridge at all." 459 F.2d at 1238. *See also,* Benton Franklin Riverfront Trailway and Bridge Comm. v. Lewis, 701 F.2d 784 (9 Cir. 1983); Coalition for Canyon Preservation, Inc. v. Bowers, 632 F.2d 774 (9 Cir. 1980); Arlington Coalition on Transp. v. Volpe, 458 F.2d 1323 (4 Cir. 1972) (dictim), *cert. den.* 409 U.S. 1000 (1972).

[144] 740 F.2d 1442 (9 Cir. 1984) *cert. den.* 471 U.S. 1108 (1983).

[145] 740 F.2d at 1455, n.21.

[146] 740 F.2d at 1458.

[147] 701 F.2d 784 (9 Cir. 1983).

[148] The court observed that it did not consider its holding as contrary to Brooks v. Coleman, 518 F.2d 17 (9 Cir. 1975) which determined it was "not necessary for every conceivable variation of an alternative to be discussed before an environmental impact statement complies with NEPA." 701 F.2d at 790.

[149] See dissenting opinion in Stop H-3 Ass'n v. Dole, 740 F.2d 1442, 1466–1468 (9 Cir. 1984).

[150] 828 F.2d 1300 (8 Cir. 1987).

[151] 828 F.2d at 1304.

[152] 560 F.Supp. 466 (D. Md. 1983), *aff'd* 747 F.2d 229 (4 Cir. 1984).

[153] 40 U.S.C. App. Sec. 2. *See also,* Coalition for Canyon Preservation v. Bowers, 632 F.2d 774 (9 Cir. 1980), modification of highway design suggested instead of No-Build option; Louisiana Environmental Soc'y, Inc. v. Coleman, 537 F.2d 79 (5 Cir. 1976), rejecting a No-Build option for entire bridge project.

[154] 619 F.Supp. 52 (E.D. Pa. 1985).

[155] 619 F.Supp. at 74–75, citing that highway capacity is so strained that drivers often use secondary roads and residential streets to bypass congested arterial routes.

[156] 675 F.2d 1085 (9 Cir. 1982).

[157] 675 F.2d at 1094. *See also,* Coalition on Sensible Transp. v. Dole, 826 F.2d 60 (App. D.C. 1987), esthetic alternatives.

[158] 707 F.2d 116 (5 Cir. 1983).

[159] 707 F.2d at 122–123.

[160] 23 C.F.R. 771.135(b) (1989) states: "Any use of lands from § 4(f) property shall be evaluated early in the development of the action when alternatives to the action are under study."

[161] 23 C.F.R. 771.113 (1989).

[162] 631 F.Supp. 1100, 1111–1112 (N.D. Ill. 1986).

[163] 40 C.F.R. 1508.7 (1989) states: "Cumulative impacts" can result from individually minor but collectively significant actions taking place over a period of time.

[164] 631 F.Supp. at 1110–1111.

[165] Adler v. Lewis, 675 F.2d 1085, 1095 (9 Cir. 1982).

[166] Arlington Coalition on Transportation v. Volpe, 458 F.2d 1323, 1334–1335 (4 Cir. 1972) *cert. den.* 409 U.S. 1000 (1972), duty extends to minimizing harm until costs outweigh benefits; Druid Hills Civic Ass'n, Inc. v. Fed. Highway Admin., 772 F.2d 700 (11th Cir. 1985), affirmative duty.

[167] 537 F.2d 79 (5 Cir. 1976).

[168] Druid Hills Civic Ass'n, Inc. v. Fed. Highway Admn., 772 F.2d 700, 716 (11 Cir. 1985). The Secretary must use a balancing process that "totals the harm caused by each alternative so that the option can be selected which does the least harm."

[169] DOT Order 5610.1(c), 44 Fed. Reg. 56,420, 56,431–56,432 (1979).

[170] Adler v. Lewis, 675 F.2d 1085, 1095 (9 Cir. 1982).

[171] Druid Hills Civic Ass'n, Inc. v. Fed. Highway Admn., 772 F.2d 700, 716 (11 Cir. 1985), finding that administrative record did not show Secretarial compliance with § 4(f)(2).

[172] *Id.*

[173] 772 F.2d at 718.

[174] 631 F.Supp. 1100 (N.D. Ill. 1986).

[175] 631 F.Supp. at 1120, suspension of construction during nesting season.

[176] Nat'l Wildlife Fed'n v. Lewis, 519 F.Supp. 523, 535–536 (D. Conn. 1981), replacement of land for displaced housing; Ringsred v. Dole, 828 F.2d 1300, 1303 (3 Cir. 1987), replacement of land from park, temporary relocation of rose garden during construction phase, and replacement of landscape features on completion of construction.

[177] 826 F.2d 60, 65–66 (D.C. Cir. 1987).

[178] 747 F.2d 229, 239 (4 Cir. 1984).

[179] 23 U.S.C. 103(d) and (f); 23 C.F.R. 790.7(e)(2)(i) (1983); FHWA Policy and Procedure Memorandum 20-8.

[180] 747 F.2d at 240.

[181] 524 F.Supp. 962 (M.D. Tenn. 1981).

[182] 524 F.Supp. at 976.

[183] 819 F.2d 1164 (D.C. Cir. 1987).

[184] 819 F.2d at 1168. *But see* dissent, 819 F.2d at 1171.

[185] Louisiana Environmental Soc'y v. Coleman, 537 F.2d 79 (5 Cir. 1976), construction of bridge over a protected park; Falls Road Impact Comm., Inc. v. Dole, 581 F.Supp. 678 (E.D. Wis. 1984), construction of bridge and traffic corridor; Citizen Advocated for Responsible Expansion, Inc. (I-CARE) v. Dole, 770 F.2d 423 (5 Cir. 1985), highway widening; D. C. Fed'n of Civic Ass'ns v. Volpe, 459 F.2d 1231 (D.C. Cir. 1971), construction of bridge over Potomac River.

[186] 826 F.2d 60 (D.C. Cir. 1987).

[187] 826 F.2d at 62–63.

[188] 753 F.2d 120 (D.C. Cir. 1985).

[189] 701 F.2d 784 (9 Cir. 1983).

[190] 701 F.2d at 788.

[191] 23 C.F.R. 771.135 (1989). Provisions for resources discovered during construction were promulgated by the Advisory Council on Historic Preservation in 1979 (44 F.R. No. 21, pp. 6071, 6077, Jan. 30, 1979) as an addition to its 1974 regulations. In these amendments the proposal for a mandatory halt of construction was rejected in favor of an expedited valuation process, during which time good faith efforts by the construction agency would be relied on to avoid foreclosing options for mitigation while Advisory Council comments were being prepared.

[192] Criteria of effect and adverse effect on historical and archeological resources were promulgated by the Advisory Council on Historic Preservation, 44 F.R. No. 21, p. 6074 (Jan. 30, 1979).

[193] 45 F.R. No. 212, p. 71976 (Oct. 30, 1980).

[194] 23 C.F.R. 771.135(g)(2) (1989).

[195] 722 F.2d 1423 (9 Cir. 1983).

[196] 766 F.2d 28 (1 Cir. 1985).

[197] 766 F.2d at 33. This rationale was criticized, however, in Nat'l Trust for Historic Preservation v. Dole, 819 F.2d 1164, 1168 (D.C. Cir. 198); 828 F.2d 776, 780 (D.C. Cir. 1987).

[198] Note, *The Roads Through Our Ruins: Archeology and Section 4(f) of the Department of Transportation Act,* 28 WM & MARY L. REV., 155 (1986); Comment, *Department of Transportation's Section 4(f): Paving the Way Toward Preservation,* 36 AM. U. L. REV., 633, 664 (1987). *See also,* dictum in Nat'l Trust for Historic Preservation v. Dole, 819 F.2d 1164, 1168 (D.C. Cir. 1987), 828 F.2d 776, 780 (D.C. Cir. 1987).

[199] FHWA, *Mitigation Options Related to Historic and Archeological Properties,* Office of Environmental Policy (Oct. 1983) p. 42.

[200] 45 F.R., No. 212, p. 71976 (Oct. 30, 1979).

[201] Memorandum, FHWA, Acting Asst. Chief Counsel for Right-of-Way and Environment (HCC-40) to Chief, Environmental Quality Division (HEV-20), "Sec. 4(f) Applicability to Archeological Sites," FHWA Precedent File No. 98 (June 27, 1978); Advisory Council on Historic Preservation, *Treatment of Archeological Properties: A Handbook* (Nov. 5, 1980), p. 16 also cites archeological property that is also valuable to a local community for cultural reasons.

[202] Advisory Council for Historic Preservation, *Treatment of Archeological Resources: A Handbook* (Nov. 1980) 18–19.

[203] *Id.,* 23–31; 36 C.F.R. 800.9(c)(1) (1989).

[204] FHWA, *Mitigation Options Related to Historic and Archeological Properties*, Office of Environmental Policy (Oct. 1983) 43–48; Advisory Council on Historic Preservation, *Treatment of Archeological Properties: A Handbook* (Nov. 1980) 12–14, 24–25; FHWA, *Historic and Archeological Preservation: An Orientation Guide* (1982) 4–11 to 4–17.

[205] Advisory Council on Historic Preservation, *Treatment of Archeological Properties: A Handbook* (Nov. 1980) 14.

[206] Secretary of the Interior, *Standards of Guidelines: Archeology and Historic Preservation*, 48 F.R. No., 190, p. 44735 (Sept. 29, 1983).

[207] *Id.*, at 44739.

[208] Responsibility may arise again if unexpected data are discovered after the consultation process outlined in 36 C.F.R. 800.4 and 800.6 has been concluded. In such an unexpected circumstance the responsibility of the project agency is guided by the provisions of 36 C.F.R. 800.7 and the recommendations of the Department of the Interior.

[209] 637 F.2d 430 (5 Cir. 1981).

[210] 637 F.2d at 439.

[211] Movement Against Destruction v. Volpe, 361 F.Supp. 1360 (D. Md. 1971), *aff'd* 500 F.2d 29 (4 Cir. 1973), charging a highway project EIS erroneously failed to consider effects of a mass transit plan for the region.

[212] Piedmont Heights Civic Club, Inc. v. Moreland, 637 F.2d 430, 441–442 (5 Cir. 1981). But see dissenting view that the projects could not be treated as "separately proposed to accomplish independent purposes." 637 F.2d at 445.

[213] 826 F.2d 60 (D.C. Cir. 1987).

[214] 826 F.2d at 69. *See also*, Taxpayers Watchdog, Inc. v. Stanley, 819 F.2d 294 (D.C. Cir. 1987); College Gardens Civic Ass'n, Inc. v. Dep't of Transp., 522 F.Supp. 377 (D. Md. 1981); Citizen Advocates for Responsible Expansion v. Dole, 770 F.2d 423 (5 Cir. 1985).

[215] North Buckhead Civic Ass'n v. Skinner, Civ. No. 1; 88-CV-2744-JOF (N.D. Ga. June 13, 1989).

[216] 452 F.Supp. 376 (W.D.N.Y. 1978).

[217] 452 F.Supp. at 379. *See also*, Greene County Planning Board v. Fed. Power Comm'n, 559 F.2d 1227, 1232–1233 (2 Cir. 1976) as to "piggybacking" danger and agency duty to determine what constitutes "reasonable scope" of a project of "system changes" in electrical transmission.

[218] 577 F.Supp. 1188 (D. Ore. 1983).

[219] Citing WATCH v. Harris, 535 F.Supp. 9 (D. Conn. 1981).

[220] No. 83-1281, (D.D.C. Oct. 16, 1986).

[221] 570 F.Supp. 465 (S.D. Ohio 1983).

[222] 570 F.Supp. at 468.

[223] 570 F.Supp. at 469–474. Comparable issues of billing and upward adjustment of attorneys' fees and expenses have arisen under the Civil Rights Attorneys Fees Act of 1976, 42 U.S.C. 1988 (1976 ed.), and are discussed in Hensley v. Eckerhart, 461 U.S. 424 (1983) and Blum v. Stenson, 465 U.S. 886 (1984). As to award of attorneys' fees in historic preservation cases generally, see Wilburn, *Attorneys Fees Awards in Historic Preservation Litigation*, 1 PRESERV. L. REP. 2042 (1982); Dods and Kennedy, *The Equal Access to Justice Act*, 50 UMKC L. REV. 48 (1981).

[224] 16 U.S.C. 470w-4 (1990).

[225] 730 F.2d 94 (3 Cir. 1983).

[226] 730 F.2d at 95–96.

[227] Civ. Action 84-1219C (U.S.D.C.S.D. Ala. Aug. 9, 1989).

[228] Hensley v. Eckerhart, 461 U.S. 424 (1983).

[229] 461 U.S. at 434.

[230] "Litigants in good faith may raise alternative legal grounds for a desired outcome, and the court's rejection of or failure to reach certain grounds is not a sufficient reason for reducing a fee. The result is what matters. . . . Again, the most critical factor is the degree of success attained." 461 U.S. at 435.

[231] Coalition Against a Raised Expressway, Inc. (CARE) v. Dole, Civ. Action 84-1219C (U.S.D.C. S.D.Ala. Aug. 9, 1989), where the chairman of the plaintiff organization was substituted as its attorney later in the trial.

[232] *Id.*, regarding claim of National Trust for Historic Preservation as intervenor.

[233] 28 U.S.C. 2412(d) (2)(A) (1990).

[234] Pub. L. No. 90-495, 82 Stat. 815, 829, (Aug. 23, 1968) *amending* 23 U.S.C. 116. *See also*, S. REP. 1340, 90th Cong., 2d Sess. (June 28, 1968), REP. OF U.S. SENATE COMM. ON PUBLIC WORKS to accompany S. 3418.

[235] Pub. L. No. 91-605, 84 Stat. 1713, 1741 (Dec. 31, 1970).

[236] FHWA, *Eighth Annual Report on Special Bridge Replacement Program*, S. Doc. 96-25, 2 (June 1979).

[237] 1978 U.S. CODE CONG. ADMIN. NEWS 6593–6594, "Surface Transportation Assistance Act of 1978," p. 1. 95-599, 92 Stat. 2702 (Nov. 6, 1978). *See also*, FHWA, *Eighth Annual Report on Special Bridge Replacement Program*, S. Doc. 96-25, 5 (June 1979), stating that 105,500 bridges were structurally deficient and/or functionally obsolete, with 40,700 on the Federal-aid systems and 64,500 not on the Federal-aid systems. Estimated replacement cost was $29.3 billion.

[238] Memorandum, Director, FHWA Office of Environmental Policy to Regional Federal Highway Administrators, June 6, 1986, "Review of Efforts to Market Historic Highway Bridges."

[239] Pub. L. No. 95-599, 92 Stat. 2702 (Nov. 6, 1978).

[240] Pub. L. No. 97-327, 96 Stat. 1612 (Oct. 15, 1982).

[241] FHWA, *Eighth Annual Report of the Secretary of Transportation, Highway Bridge Replacement and Rehabilitation Program*, S. Doc. 100-22. 100th Cong., 1st Sess. (Nov. 18, 1987) 2–11.

[242] *Id.*, 27.

[243] Pub. L. No. 100-17, 101 Stat. 163. (Apr. 2, 1987).

[244] S. REP. 100-4, 100th Cong., 1st Sess. (Jan. 27, 1987) to accompany S. 387, 9.

[245] "Reasonable costs associated with actions to preserve, or reduce the impact of a project . . . on the historic integrity of historic bridges shall be eligible as reimbursable project costs . . . if the load capacity and safety features of the bridge are adequate to serve the intended use for the life of the bridge, except that in the case of a bridge which is no longer used for motorized vehicular traffic, the costs eligible as reimbursable project costs pursuant to this subsection shall not exceed the estimated cost of demolition of such bridge." Pub. L. No. 100-17, 101 Stat. 163 (Apr. 2, 1987), (codified as 23 U.S.C. 144(o)(3) (1989)).

[246] Among other things, these regulations were expected to deal with award of bridges where more than one entity requests a bridge, and with standards for advertising the availability of a bridge for donation. S. REP. 100-4, 100th Cong., 1st Sess. (Jan. 27, 1987) 9.

[247] 701 F.2d 784 (9 Cir. 1983), *reversing in part* and *affirming in part* 529 F.Supp. 101 (E.D. Wash. 1981).

[248] The Coast Guard's position was that when the old bridge ceased to be used for transportation it became an unjustified "inherent obstruction to navigation," and the city's failure to guarantee its maintenance would allow it to deteriorate into a safety hazard, 701 F.2d at 786.

[249] 701 F.2d at 789.

[250] The court's conclusion was consistent with its previous *holding in* California v. Block, 690 F.2d 753, 765-768 (9 Cir. 1982), relating to preparation of EIS evaluations under NEPA. *Benton Franklin* distinguished its holding from Brooks v. Coleman, 518 F.2d 17 (9 Cir. 1975), saying that once an alternative is identified and discussed it is not necessary that every conceivable variation of it be discussed. The EIS need only set forth those alternatives that are sufficient to permit a "reasoned choice" to be made. 701 F.2d at 790.

[251] Department of the Interior regulations require the State Historic Preservation Officer to prepare a comprehensive statewide inventory of historic properties, the purpose of which is "the identification, protection and preservation of all districts, sites, buildings, structures and objects within the state that are potentially significant in American history, archeology and culture at national, state and local levels." 36 C.F.R. 61.2(a)(3) (1982).

[252] 36 C.F.R. 800.4(a) (1989). The importance of early identification of protected places was emphasized in FHWA regulations providing that "any use of lands from a section 4(f) property shall be evaluated early in the development of the action when alternatives to the proposed action are under study." 23 C.F.R. 771.135(b) (1989). *See also*, 23 U.S.C. 144(o)(2) (1989) authorizing historic bridge inventories.

[253] E.g., joint development of highway corridors, multiple use of roadway properties, and adaptive reuse of parts of local trail system were mentioned as other potential sources of fundings. 701 F.2d at 790.

[254] 48 F.R. 38139 (Aug. 22, 1983).

[255] "Programmatic approval" was explained as follows: "When a particular program or activity has a limited purpose and function, and when the range of alternatives is well known and predictable, it is then possible to execute a portion of the administrative action for the program as a whole, i.e., to take a programmatic action. This is the case with replacement of historic bridges. . . . [T]he replacement of deficient bridges is an activity of narrow and specific purpose having a predictable range of alternatives . . . [and consequently] is well suited to a programmatic treatment." 48 F.R. 38137 (Aug. 22, 1983).

[256] 23 C.F.R. 771.135 (1989).

[257] 48 F.R. 38139–38140 (Aug. 22, 1983).

[258] Some preservation agencies argue that the proposed programmatic evaluation and approval were unauthorized because Section 4(f) establishes "a plain and explicit bar" to use of federal funds for construction of highways through historic sites or to destroy historic bridges, which was not reflected in the programmatic procedure. Others felt that removal of the Departments of Agriculture, Interior and Housing and Urban Development from the planning process was contrary to the language of both Section 4(f) and Executive Order 11593. Most challenged FHWA's assertion that use of the programmatic approval would "strengthen the Section 106 process and the role of the SHPO." See, e.g., letters from the Advisory Council on Historic Preservation, National Trust for Historic Preservation, and Department of the Interior in FHWA Docket 82-8, "Historic Bridges," Nov. 15, 1982; letter summarized and answered in 48 F.R. 38137 (Aug. 22, 1983).

[259] Secretary of the Interior's Standards for Rehabilitation and Guidelines for Rehabilitating Historic Buildings, National Park Service (1983 Revision) p. 5.

[260] AASHTO, *Standard Specifications for Highway Bridges* (1983 ed.). *See also,* "Bridges on Secondary Highways and Local Roads: Rehabilitation and Replacement," *NCHRP Report 222* (May 1980); *NCHRP Report 243* (Dec. 1981).

[261] Spero, *Trial Guidelines for the Conservation of Virginia's Historic Bridges,* Virginia Highway & Transportation Research Council, VHTRC-87-R5 (Sept. 1986), p. 2.

[262] AASHTO, *A Policy on Geometric Design of Highways and Streets* (1984 ed.) 464.

[263] *Mitigation Options Related to Historic and Archeological Properties,* FHWA, Office of Environmental Policy (Oct. 1983), p. 9.

[264] FHWA, *Mitigation Options Related to Historic and Archeological Properties* (Oct. 1983) p. 28.

[265] Spero, *Trial Guidelines for the Conservation of Virginia's Historic Bridges,* VHTRC 87-85 (Sept. 1986) 10.

[266] Chamberlain, "Historic Bridges—Criteria for Decision-Making," *NCHRP Synthesis of Highway Practice 101* (1983) pp. 30–35.

[267] Zuk, et al., *Methods of Modifying Historic Bridges for Contemporary Use,* VHTRC 80-R48 (June 1980), condensed in Zuk and McKeel, "Adaptive Use of Historic Metal Truss Bridges," *Transportation Research Record 834* (1981); FHWA, *Mitigation Options Related to Historic and Archeological Properties* (Oct. 1983) p. 31.

[268] Chamberlain, "Historic Bridges—Criteria for Decision-Making," *NCHRP Synthesis of Highway Practice 101* (Oct. 1983)" 32, citing examples.

[269] FHWA, *Mitigation Options Related to Historic and Archeological Properties* (Oct. 1983) 29.

[270] *Id.*, 36–41.

[271] Chamberlain, "Historic Bridges—Criteria for Decision-Making, *NCHRP Synthesis of Highway Practice 101* (Oct. 1983), p. 37.

[272] 23 C.F.R. 620.201–620.203; 713.301–713.308 (1990).

[273] Memorandum, Director, FHWA Office of Environmental Policy to FHWA Regional Administrators, "Review of Efforts to Market Historic Highway Bridges" (June 27, 1986).

[274] An FHWA survey of efforts to market historic bridges reported in 1986 commented:

> The present marketing effort is considerable, widespread, aggressive and well coordinated. It is unlikely that merely enlarging the length of the effort or increasing the area of notification would result in the discovery of serious and willing recipients. Lengthy efforts of marketing and remarketing over a 2- to 4-year period have not resulted in any viable candidates to take the bridges. *Id.*, 6.

[275] The FHWA historic bridge marketing survey in 1986 noted that numerous highway engineers, planners, and environmental managers have estimated that to improve the condition of deficient, obsolete, or deteriorated historic bridges to the degree that they become marketable would increase project costs from 30 to 50 percent more than is currently expended. *Id.*, 7.

[276] 3 Sands & Libonati, Local Government Law §§ 13.04, 13.05; McQuillan, Municipal Corporations (3d ed.) §§ 10.18a, 10.21; Rhyne, Municipal Law, 76.

[277] 3 Sands & Libonati § 13.05.

[278] Interview with John Beall, Assistant Attorney General, Virginia, in Richmond, Virginia, June 6, 1990. *But see,* County Board of Arlington County v. Brown, 229 Va. 341, 329 S.E.2d 468 (1985), where county's authority to lease "unused public land" was construed not to authorize lease of land currently used as parking lot.

[279] E. Kussy, Acting Chief Counsel, FHWA, "Recent Developments in Transportation Law," Transportation Research Board Workshop on Transportation Law, July 23, 1990.

[280] Transcript, Statements of Edward V. A. Kussy, Asst. Chief Counsel, FHWA, and William Cohen, Chief, General Litigation Section, Land and Natural Resources Division, U.S. Dept. of Justice, at meeting of Transportation Research Board, January 11, 1987, 8–9, 23–25.

[281] See remarks of J. Sneed, *concurring in* Adler v. Lewis, 675 F.2d 1085, 1100 (9 Cir. 1982) and *compare with favorable comments in* Ashwood Manor Civic Ass'n. v. Dole, 619 F.Supp. 52, 87 (D.C. Cir. 1985).

[282] Transcript, Remarks of William Cohen, meeting of Transportation Research Board, January 11, 1987, 8–9.

[283] Nashvillians Against I-440 v. Lewis, 524 F.Supp. 962, 998 (M.D. Pa., 1981), *commenting:* "Plaintiffs have carefully watched over and indeed participated to some extent in the administrative process that yielded a decision to complete the I-440 project. When governmental agencies, individual citizens, or groups of citizens made suggestions or voiced concerns . . . the responsible officials listened and responded appropriately. Plaintiffs have raised no relevant consideration that did not enter into the decision-making process.... [T]he administrative process has functioned properly. The system has worked."

[284] Comment, *Department of Transportation's Section 4(f): Paving the Way Toward Preservation,* 36 Am. U. L. Rev. 633, 661 (1987).

[285] 701 F.2d 764, 791 (9 Cir. 1983).

[286] Adler v. Lewis, 675 F.2d 1085, 1096 (9 Cir. 1982), stating, "In the case of historic buildings, each statute mandates separate and distinct procedures, both of which must be complied with.... [A] finding of compliance or noncompliance with Sec. 4(f) of the Department of Transportation Act does not mandate the identical conclusion as to NEPA provisions."

[287] 826 F.2d 60, 72 (D.C. Cir. 1981).

[288] E.O. 11593, 36 F.R. 8921 (May 13, 1971) (reprinted in 16 U.S.C. 470).

[289] Romero-Barcelo v. Brown, 643 F.2d 835, 860 (1 Cir. 1981) stating: "Far from suggesting that the Navy must perform the impossible, we conclude only that it must follow up the leads produced by the survey it commissioned. Our conclusion does not require the Navy to undertake a 100% survey . . . [but] it is not possible to ascertain from the present record which areas do require more investigation."

[290] 708 F.2d 735 (D.C. Cir.) *cert. den.* 464 U.S. 956, 1056 (1983).

[291] 619 F.Supp. 52, 86–87 (E.D. Pa. 1985). *See also:* Druid Hills Civic Ass'n v. Fed. Highway Adm'n, 772 F.2d 700, 713 (11 Cir. 1985), stating that the EIS in that case "should 'go beyond mere assertions' by providing sufficient information and reasoning to enable readers to consider and evaluate the comparative merits of the alternatives on their own and comment on the EIS. Federal regulations require that the agency devote 'substantial treatment' to and 'rigorously explore and objectively evaluate all reasonable alternatives,' and briefly discuss the reasons for the exclusion of alternatives eliminated from detailed study. 40 C.F.R. 1502.14(a), (b)."

[292] Kussy, *Presenting and Defending Administrative Records,* Dynamics of Environmental Law, Legal Education Institute, U.S. Department of Justice (Nov. 1988) 462–467.

[293] J. Fitzpatrick, M. Sohn, T. Silfen & R. Wood, *The Law and Roadside Hazards,* ¶ 7-1(b) (2) (1974), hereafter cited as Fitzpatrick; W. Haddon, *Why the Issue is Loss Reduction Rather Than Only Crash Prevention* (1970).

[294] AASHTO, *A Policy on Geometric Design of Highways and Streets,* (1984); J. Blaschke & J. Mason, *Impact of the AASHTO "Green Book" on Highway Tort Liability,* Annual Meeting of Transportation Research Board, January 1986.

[295] AASHTO, *A Policy on Geometric Design of Highways and Streets,* (1984).

[296] Daye v. Commonwealth of Pennsylvania, 344 F.Supp. 1337, *aff'd* 483 F.2d 294 (3 Cir. 1973), *cert. den.* 416 U.S. 946 (1974).

[297] Francesco v. White Tiger Transp. Co., Inc., 679 F.Supp. 485 (M.D. Pa. 1988).

[298] Restatement of Torts, Second (1965 ed.), ¶ 286, Comment d.

[299] *Id.*, ¶ 288, Comment on Clause a and b.

ACKNOWLEDGMENTS

This legal study was performed under the overall guidance of NCHRP Project Advisory Committee SP20-6. The Committee is chaired by Nolan H. Rogers, Maryland Office of the Attorney General. Members are: Watson C. Arnold, Austin, Texas (formerly with Texas Office of the Attorney General); Ruth J. Anders, Melbourne, Florida (formerly with Federal Highway Administration); James M. Brown, George Washington University; Robert F. Carlson, Carmichael, California (formerly with California Department of Transportation); Kingsley T. Hoegstedt, Sacramento, California; Delbert W. Johnson, Office of the Attorney General, State of Washington; Michael E. Libonati, Temple University School of Law; Spencer A. Manthorpe, Pennsylvania Department of Transportation; Walter A. McFarlane, Office of the Governor, State of Virginia; Joseph M. Montano, Denver, Colorado (formerly with Colorado Department of Highways); Lynn B. Obernyer, Colorado Department of Law; Jean G. Rogers, Federal Highway Administration; James S. Thiel, Wisconsin Department of Transportation; and Richard L. Tiemeyer, Missouri Highway and Transportation Commission. Edward V.A. Kussy provides liaison with the Federal Highway Administration, and Crawford F. Jencks represents the NCHRP staff.