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Enforcement of Environmental Mitigation Commitments in Transportation Projects: A Survey of Federal and State Practice

This report was prepared under NCHRP Project 20-6, "Legal Problems Arising out of Highway Programs," for which the Transportation Research Board is the agency coordinating the research. The report was prepared by Richard A. Christopher and Margaret L. Hines. James B. McDaniel, TRB Counsel for Legal Research Projects, was the principal investigator and content editor.

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 is a new paper, which continues NCHRP's policy of keeping departments up-to-date on laws that will affect their operations.

In the past, papers such as this were published in addenda to *Selected Studies in Highway Law* (*SSHL*). Volumes 1 and 2 of *SSHL* dealt primarily with the law of eminent domain and the planning and regulation of land use. Volume 3 covered government contracts. Volume 4 covered environmental and tort law, inter-governmental relations, and motor carrier law. Between addenda, legal research digests were issued to report completed research. The text of *SSHL* totals over 4,000 pages comprising 75 papers. Presently, there is a major rewrite and update of *SSHL* underway. Legal research digests will be incorporated in the rewrite where appropriate.

Copies of *SSHL* have been sent, without charge, to NCHRP sponsors, certain other agencies, and selected university and state law libraries. The officials receiving complimentary copies in each state are the Attorney General and the Chief Counsel of the highway agency. The intended distribution of the updated *SSHL* will be the same.

APPLICATION

There are now a host of federal statutes to control the use and preservation of parklands, wetlands, and floodplains in highway construction, as well as the governance of clean air, clean water, fish and wildlife, endangered species, and scenic views. The purpose of these acts is to protect a designated land use or specie (wetland, parkland, spotted owl, etc.). But this mass array of statutory enactments, administered by seven governmental departments and agencies, places important constraints on highway construction and maintenance projects. Rather than impose an outright ban on highway construction when an environmental infringement is likely, mitigation of impact has been allowed.

Generally, mitigation commitments are made through agreements with the federal agencies, state and local governments, and interested community groups. Questions have been raised as to the effectiveness and enforceability of such commitments. This research examines these issues. The results, contained in this report, should be useful to attorneys, administrators, right-of-way specialists, planners, engineers, and members of the general public who have an interest in highway construction and environmental law compliance.

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ENFORCEMENT OF ENVIRONMENTAL MITIGATION COMMITMENTS IN TRANSPORTATION PROJECTS: A SURVEY OF FEDERAL AND STATE PRACTICE

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I. INTRODUCTION

Projects that improve, extend, or replace surface transportation systems often cause adverse environmental impacts. These impacts may be summarized and addressed in environmental impact statements (EISs) that are required by federal and state laws. The laws requiring preparation of EISs may or may not require mitigation of the adverse impacts, but they do require that the impacts be recognized, summarized, and, where applicable, monitored. Such monitoring efforts can result in a finding that mitigation has not been as successful as anticipated or has not been undertaken at all. In these cases, the agency responsible for approving, permitting, funding, or commenting on the project or a third party who is adversely affected by the project may undertake enforcement of the mitigation requirements. This report will address the mitigation enforcement methods that are available to these agencies and parties.

The report will first summarize techniques or methods for mitigating the adverse environmental effects of transportation projects, and briefly describe ways in which mitigation requirements may arise. Next, the results of a survey of state agencies as to their experience in enforcing mitigation requirements will be described. Finally, specific methods to enforce mitigation commitments through court action will be examined.

A. What Is Mitigation?

The Council on Environmental Quality (CEQ) regulations define mitigation as including actions that (a) avoid, (b) minimize, (c) rectify, (d) reduce, or (e) compensate for the undesirable impacts of development activities.[1] With regard to transportation projects, there are essentially five methods that may be used to avoid, reduce, or compensate for the effects of the location, construction, or operation of highways, transit facilities, or other types of development. These are: location modification, design modification, construction measures, operational conditions, and right-of-way measures and replacement land.[2] For example, if construction of a highway is the transportation project, the location of a bridge or road may be changed to avoid altogether or impinge less on a wetland; a roadway may be elevated on piers or other design changes made; construction periods may be limited to avoid breeding seasons of wildlife; trucks and other heavy vehicles may be prohibited from using a roadway; or replacement wetlands may be purchased or created to compensate for those affected or destroyed by a transportation project. Most often, more than one of these techniques will be employed in a single project to meet mitigation requirements.

B. How Mitigation Requirements Arise in Transportation Projects

During the development of a transportation improvement, requirements to mitigate adverse environmental impacts can come from many sources, including federal law and regulations, state laws, or agreements between transportation agencies and private citizens or environmental groups.

The location of the improvement and its proximity to protected resources like parks, wildlife refuges, and historic sites can trigger statutory or regulatory requirements to address mitigation under Section 4(f) of the Department of Transportation (DOT) Act, which requires specific mitigation findings.[3] Where historic sites are affected, a memorandum of agreement required by the National Historic Preservation Act (NHPA) and its regulations[4] may embody mitigation measures. They may arise as conditions for the issuance of a permit under the Clean Water Act (CWA) and its implementing regulations.[5] Occasionally, a project can be required to incorporate mitigation because of impacts on regional resources, such as air quality, in conjunction with other transportation improvements. In that case, Clean Air Act (CAA) provisions may be implicated.[6]

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[1] *See* 40 C.F.R. § 1508.20 (1997).

[2] Michael Blumm, HIGHWAYS AND THE ENVIRONMENT: RESOURCE PROTECTION AND THE FEDERAL HIGHWAY PROGRAM (Legal Research Digest No. 29, 1994, Transportation Research Board, National Research Council) (crediting Edward V.A. Kussy, *Wetland and Floodplain Protection and the Federal-Aid Highway Program*, 13 ENVTL. L. 161 (1982)). The Blumm report contains a good description of mitigation efforts for highway projects.

[3] 49 U.S.C. § 303. Section 4(f) (1994) provides that before any transportation project can be approved by the Secretary of Transportation, there must be findings that there is no feasible and prudent alternative to the use of publicly owned parkland, wildlife or waterfowl refuges, or historic sites, and that the project includes all possible planning to minimize harm.

[4] 16 U.S.C. § 470(f) and 36 C.F.R. § 800.1 *et seq.* (1998).

[5] 33 U.S.C. §§ 1342 and 1344 (1994) and 40 C.F.R. § 230.1(d) (1998).

[6] Section 110 of the Clean Air Act (42 U.S.C. § 7410) (1994) requires each state to develop a state implementation plan

The CEQ regulations that govern the preparation of EISs provide that "appropriate mitigation measures" and "means to mitigate adverse environmental impacts" be disclosed.[7] In the agency's record of decision following the completion of the impact statement, the agency must state whether all practicable means to mitigate harm have been adopted and how they will be monitored when appropriate.[8] Since the National Environmental Policy Act (NEPA)[9] requires an EIS for most federally funded transportation projects, the NEPA process is probably the most usual identifier of mitigation measures.

The requirement to mitigate undesirable effects of a transportation project sometimes arises as a result of an agreement between a private group and a transportation agency. The private group could be an environmental interest group or a citizens group that objects to a particular project because members of the group will be adversely affected (for example, people who live near an airport that is to be enlarged). Such an agreement may be developed before a project begins or as a result of litigation to halt a project. Other agreements involving mitigation efforts may involve federal and state government agencies as parties.

The mitigation efforts, or mitigation commitments as they are often called, can be embodied in construction specifications for things like noise walls and soil erosion controls, memoranda of agreement that prescribe archeological salvage methods, agreements to purchase land to replace land taken from a park or wetlands, and conditions attached to permits and grants associated with the construction project. The commitments are often summarized in EISs and then implemented through the appropriate construction contract, agreement, or permit.

By their nature, efforts to mitigate adverse environmental impacts are often not the primary mission of the agency carrying out the transportation improvement. The project is usually intended to address a specific transportation need by a proposed date. The mitigation efforts may not be treated with the same sense of urgency. Commentators on mitigation monitoring and enforcement efforts in the United States have noted that little has been observed or written on this subject for various reasons.[10] The next sections of this report will examine the means of seeking enforcement of mitigation requirements, chiefly through legal remedies that have been accepted or rejected by the courts.

C. FHWA's Study of Mitigation Commitments

In 1993 the Federal Highway Administration (FHWA) completed a study to determine how mitigation measures were being implemented and whether the mitigation was effective.[11] The study looked at nine states, three regional FHWA offices, and typical Records of Decision (RODs) from all of the FHWA regional offices. The study concluded that environmental mitigation commitments were being implemented in due course or after revision to project plans. The resource and regulatory agencies were "...confident that mitigation measures agreed upon were being implemented." This last conclusion carried the caveat that these agencies do not have formal follow-up procedures. Their confidence was based on occasional informal field visits and meetings. The study found that there were no documented procedures to track these commitments and that incorporation of the mitigation measures had generally been delegated to the states who were not auditing this procedure. Only one of the two FHWA audits had actually looked at whether the commitments had been implemented. That review looked at seven projects and concluded that 58 (85 percent) of the construction specification commitments had been included in the project plans along with 63 (92 percent) of the design commitments. Practice among the surveyed states varied with some summary tracking of commitments through the preparation of plans and construction. The most frequently tracked mitigation measure was wetland creation/upgrading due to increased requirements from the Army Corps of Engineers. The Corps had been requiring evaluation of wetland mitigation sites for 3 to 5 years. The states utilizing wetland banking believed it had served well in obtaining effective mitigation. It appeared to the study team that some form of tracking system was desirable, particularly in light of the increasing role of the states. In spite of this recommendation, the study added the following proviso:

> The presence or lack of documented environmental coordination procedures is not a key issue in assuring implementation of mitigation measures. The key issue is the environmental consciousness and commitment, on the part of those involved in project development, design, and construction. Such commitment precipitates the use of good communication and coordination practices to help assure that mitigation measures are implemented.[12]

The study recommended seven areas where improvements were needed:

1. Development of a model procedure for tracking mitigation measures

(SIP), which must lead to attainment of air quality standards. Any transportation project must contribute to improved air quality to "conform" to an approved plan and to receive federal funding (42 U.S.C. § 7506) (1994).

[7] 40 C.F.R. § 1502.14(f) and § 1502.16(h) (1998).

[8] 40 C.F.R. § 1505.2 (1998).

[9] National Environmental Policy Act of 1969, §§ 2-109, as amended, 42 U.S.C. § 4321 *et seq.* (1994).

[10] One author and noted commentator believes that most attention in the United States has focused on getting a project approved. The monitoring or enforcement of mitigation is left up to the regulatory agencies. CANTER, LARRY W., ENVIRONMENTAL IMPACT ASSESSMENT, pp. 638-9 (2d ed. 1996).

[11] FEDERAL HIGHWAY ADMINISTRATION, OPR T93-01, A REVIEW REPORT ON EVALUATION OF ENVIRONMENTAL MITIGATION MEASURES, August 1993.

[12] *Id.* at 16.

2. Use of a mitigation summary sheet to follow each project through design and construction
3. Inclusion of the subject of mitigation implementation in FHWA audits
4. Periodic interagency meetings with resource and regulatory agencies
5. Environmental sensitivity training for State construction and maintenance personnel
6. Audit and environmental training for FHWA staff
7. The use of interdisciplinary staffs by the state environmental sections, including giving this staff a prominent role in project development

II. EXPERIENCE OF THE AGENCIES: SURVEY RESULTS

A. Development and Dissemination of Survey

An extensive literature search on the general topic of environmental mitigation and enforcement was conducted at three major university libraries and three large law libraries. Published works were consulted to determine what areas should be explored to cover the topic sufficiently. These papers and the authors' own experiences were used to devise a written survey document.

The survey to determine experiences with mitigation enforcement was mailed to the state transportation agencies, state aeronautics agencies where this function is not handled by the state DOT, state natural resource preservation agencies, state historic preservation officers, and state environmental protection agencies. In addition, 34 representatives of the largest transit agencies in the United States were surveyed. By the nature of the questions asked in the survey,[13] it was anticipated that many state DOTs and aeronautics agencies might not be forthcoming in describing actions taken to enforce mitigation commitments on recalcitrant project sponsors. By including the historic, natural resource, and antipollution agencies, it was hoped that the data would not be biased. Specific inquiries were addressed to the appropriate federal agencies that approve transportation improvements and to the federal agencies that most frequently get involved in requiring and enforcing mitigation commitments. In addition to asking specific questions, each agency surveyed was asked to provide copies of or citations to relevant judgments, opinions, or analyses that illustrated the answers that were given.

Initial intentions to survey local environmental agencies, park and outdoor recreation departments, and law enforcement agencies were abandoned when a random sampling determined that almost no data would be forthcoming and that it would be quite costly to survey all of them.

Forty-three different states (86 percent) are represented in the responses by at least one agency. Responses were received from 32 state DOTs (64 percent), nine state aeronautic agencies (64 percent), and 12 transit agencies (35 percent). Citations to relevant authorities that were provided by the survey respondents were followed up with additional research. The survey was conducted in a nonscientific manner and therefore does not provide precise projections. However, the results do show the present state of how the issue of enforcement of mitigation requirements is perceived by transportation agencies.

B. Survey Results

The "No Problem" Response—Out of 43 states that had at least one agency responding, 27 reported that there had been no experience forcing a recalcitrant transportation project sponsor to follow through with mitigation. A similar response was received from all but 1 of the 12 transit agencies who responded. In only a few instances, the response from a particular state's natural resource or pollution control agency indicated a slight problem, while the state DOT reported no enforcement actions. Only one state (Pennsylvania) reported on a systematic approach to tracking mitigation, and it was one of the ones with no significant problems to report. It is not clear from the responses whether most of the states are not having problems because they are not monitoring, or because there is widespread compliance with mitigation requirements in these states.

The "Minor Negotiations" Response—Six states reported that there was occasional need for negotiations or "gentle prodding" to see to it that mitigation commitments were carried out. Three of these states cited a memorandum of agreement between the state DOT and one or more of the resource agencies as examples of good practice, but a review of two of these agreements showed no required monitoring. The agreements appear to be geared toward getting projects approved, but based on the responses they may very well be creating an atmosphere where the required mitigation is being carried out.

Permit Conditions and Grant Withholding—Four transportation agencies reported that they obtain compliance with mitigation by withholding funds from grantees. Three of these reported this technique had to be used to get archeological salvage completed. The Federal Transit Agency (FTA) uses this approach, inserting mitigation into its full funding agreements,[14] but reported no problems getting compliance. One state reported that it had to sue a permittee doing work on a state highway for failure to complete some traffic mitigation. An appeal resulted with a ruling favorable to

[13] A copy of the survey is included in the appendix.

[14] FTA requires implementation of mitigation measures at 23 C.F.R. § 771.109 (1998). Subsection (b) states the FHWA will assure that the commitments are carried out as part of its program of oversight of federal-aid agreements. Subsection (d) provides that the state highway agency has responsibility to "ensure that the project is constructed in accordance with and incorporates all committed environmental impact mitigation measures" unless FHWA approves modification or deletion of the measures.

the state.[15] It is common practice for highway permits to require performance bonds, which may keep instances of noncompliance at a minimum.

Administrative Citations and Litigation—In spite of the general trend towards compliance within the system, some states reported the need to resort to proceedings before a state pollution control agency or formal action initiated by a district office of the Army Corps of Engineers. Five states, Puerto Rico, and one transit agency reported that some form of citation had to be issued against agencies constructing transportation projects, but compliance was achieved without further formal proceedings. These agencies reported the use of alternative mitigation, permit modifications and variances, and quick responses to notices of violation. In Washington, the Department of Ecology has formally granted temporary variances subject to conditions to Washington State DOT for water quality violations during construction.[16] One of Wisconsin DOT's contractors was prosecuted for criminal violations for dumping paint chips into a river.

Clean Water Act—The Section 404 program that protects wetlands[17] has generated attention involving transportation agencies. Enforcement duties are shared by the Army Corps of Engineers and the U.S. Environmental Protection Agency (EPA) under a memorandum of agreement.[18] The Corps also has regulations that prescribe a step-by-step approach to enforcement, with greater consequences to violators at each step.[19] Most of the situations involving transportation agencies, at least those noted in survey responses, concerned failure to follow through with conditions on permits to fill wetlands. Over the past 5 years, approximately 10 percent of the Corps' enforcement activity has involved actions to enforce permit conditions against all permittees in the United States.[20] Compliance is achieved by modifying the permit (from 114 to 371 times per year), voluntary restoration (from 130 to 259 times per year), and simple administrative follow-up (from 222 to 359 times per year) in almost all cases. No more than five lawsuits have been filed in any 1 year, with only one in fiscal year 1993. Actions to recover penalties have ranged from two or three each year to a maximum of eight. Although survey respondents did not report a significant amount of enforcement activity in this area, there was more here than in any other area. The survey data are consistent with the FHWA report, which noted increased activity involving the Corps, and with the Corps enforcement data, which show that permit violations are usually resolved without litigation or penalties.

The Clean Air Act—Eight of the 43 states responding to the survey reported that their implementation plans contained transportation control measures (TCMs). Eight of the 12 responding transit agencies reported some of their projects were included as TCMs. While this represents a significant number of respondents participating in the use of this mitigation measure, none reported any enforcement actions being taken for failure to follow through with or carry out a TCM that had been promised.

Another transportation mitigation measure that may turn out to be useful for remedying violations of air quality standards is the conformity process. States with implementation plans to remedy violations of the standards must show that their transportation plans conform to their state implementation plans (SIPs), else FHWA and FTA cannot approve them.[21] These states must show that transportation plans and programs will not cause any new violations of the air quality standards or make it any more difficult for the state to achieve compliance.[22] Complex air quality models are used to calculate emissions (exhaust) from all mobile sources to determine their effects on air quality with and without planned transportation improvement. These levels of emissions are then factored into the levels the states are projecting to show compliance with the air quality standards.[23] Some states are expected to need to insert mitigation into some of their projects, presumably in the form of TCMs that would not be formally designated as such in their SIPs, so that their transportation plans can be found to conform to the SIPs. The regulations governing conformity call for these mitigation measures to be processed as specific revisions to the SIP and to be enforceable like other elements of the SIP.[24] Only one state reported the use of transportation project mitigation to help in a finding of conformity. It remains to be seen whether many others will follow.

III. MONITORING MITIGATION COMMITMENTS—PROPOSED ADMINISTRATIVE SOLUTIONS

The following three reports are illustrative of the previous efforts to address the state of mitigation enforcement, both in terms of whether it was being done and how.

The first, *Enforcing the 'Commitments' Made in Impact Statements: A Proposed Passage Through a Ticket of Case Law*, appeared as a note in the *Environmental*

[15] White v. Westgate Dev. Group, 191 A.2d 687, 595 N.Y.S. 2d 507 (2d Dept. 1993); *leave to appeal dismissed*, 82 N.Y.2d 706, 619 N.E.2d 663.

[16] Three of these variances were issued from 1986 to 1996.

[17] 33 U.S.C. § 1344 (1994) requires a permit before discharging dredged or fill material into navigable waters, which include most wetlands.

[18] *See* note 121.

[19] 33 C.F.R. Part 326 (1998).

[20] This conclusion and the following analysis of data are based on annual enforcement workload printouts provided to the author by the Office of the Chief Engineer, U.S. Army Corps of Engineers.

[21] 42 U.S.C. § 7506(c) (1994).

[22] *Id.*

[23] 40 C.F.R. Part 51, Subpart T and Part 93, Subpart A (1998).

[24] 40 C.F.R. § 51.458 and § 93.133 (1998).

Law Reporter.[25] The author analyzed all of the judicial decisions known at the time, most of which involved transportation projects. (Those cases that are pertinent to our present inquiry are discussed below in the section on enforcement of mitigation through the court.) The author concluded that agencies generally follow the commitments made in impact statements but that "...on occasion extreme malfunctions have occurred, giving rise to speculation that similar, though less egregious difficulties might have occurred in a large number of cases."[26] In order to provide a remedy for those "extreme malfunctions" and the other assumed violations, the author argued in favor of injunctive relief in Federal Court when the federal agency's actions were arbitrary and capricious.

The next analysis on a somewhat broader scale not limited to legal considerations was put forth by Professor Culane at a 1987 conference on the preparation and review of EISs.[27] He examined the practice of post-project monitoring and presented four models to frame the methods and justifications for monitoring. His "managerial model" would place the responsibility on the project manager, who is responsible for getting the improvement completed. The manager would start with carefully defined project objectives, mandatory mitigations, and an established monitoring program to measure progress. The manager's performance would be measured by determining whether his/her project actually brings about the outcomes predicted in the EIS. His "adversarial/litigation" model was based on the analysis from the *Environmental Law Reporter* discussed above. His "corporate environmental audit model" was based on the practices of corporations and consulting firms to assemble systems to measure compliance with environmental regulatory programs in order to avoid enforcement action and adverse publicity. His "scientific model" was based on theories that test predicted impacts in EISs to see if they were accurate. An audit under this approach determines whether the process that led to the decision was valid.

Professor Culane's empirical evidence supported an undefined "invincible ignorance model" that he explained by citing five barriers to post-project environmental audits. These were listed as the agencies' general reluctance to collect information on actual consequences of their projects, their reluctance to sponsor audits, the lack of significant audit data collected by anyone other than the project sponsor, and the agencies' view that an EIS is simply "prediction paperwork" and not a post-decision management tool. He could find no post-1980 court decision supporting the position taken in the *Environmental Law Reporter* note and suspected this was because most project opponents who go to court generally are trying to stop a project from being built. If they were to prevail on a suit for post-project monitoring, the project is not likely to be "de-constructed" by a reviewing court. Since he believed that auditing was a sound practice and that it was not going to proceed on its own merits, he advocated creation of a national environmental-assessment oversight office.

In 1990 the United Nations reported on the use of post-project analysis (PPA) as a tool for improving environmental impact assessment.[28] The report examined 11 case studies and concluded that PPA was very effective and necessary for five purposes: first, to monitor compliance with conditions agreed on in permits and licenses; second, to review predicted impacts for proper management of risks and uncertainties; third, to modify the activity or develop mitigation measures in case of unpredicted harmful effects on the environment; fourth, to determine the accuracy of past impact predictions and the effectiveness of mitigation measures in order to transfer this experience to future activities of the same type; and fifth, to review the effectiveness of environmental management for the activity. The report noted that there was no overall requirement in the United States for undertaking PPAs at the federal level but that they occurred on an *ad hoc* basis. One of the federal agencies noted as using the practice as a means of performance reviews was FHWA.

The most persuasive (and persistent) argument against establishing a systemic monitoring process is to question the need for such bureaucratic intrusion. Under either the FHWA findings or the survey responses submitted to this project, the failure to abide by mitigation commitments does not appear widespread. The key questions are whether extensive tracking systems are necessary, or whether all interested parties can rely upon court enforcement of mitigation commitments. Toward the end of assessing this issue, a discussion of remedies available through the courts is appropriate.

IV. ENFORCEMENT MECHANISMS AVAILABLE THROUGH THE COURTS

A. Under Federal Environmental Protection Laws

1. Enforcement Under Provisions of NEPA

The provisions of NEPA and its implementing regulations[29] require preparation of an EIS that includes identification and discussion of "means to mitigate adverse environmental impacts."[30] Because of this re-

[25] *See* note 36 *supra* and accompanying text.

[26] 10 Envtl. L. Rep. 10158.

[27] CULANE, PAUL J. *Environmental Impact Statements and Postdecision Management: Theory and Practice*, in WORKING PAPERS, THE PREPARATION AND REVIEW OF ENVIRONMENTAL IMPACT STATEMENTS, 305 (1987). A similar presentation is contained in CULANE, *Post-EIS Environmental Auditing: A First Step to Making Rational Environmental Assessment a Reality*, 15 THE ENVIRONMENTAL PROFESSIONAL 66-75 (1993).

[28] ECONOMIC COMMISSION FOR EUROPE, UNITED NATIONS, 3 ENVIRONMENTAL SERIES, POST PROJECT ANALYSIS IN ENVIRONMENTAL IMPACT ASSESSMENT (1990).

[29] National Environmental Policy Act of 1969, § 102, 42 U.S.C. § 4332; 40 C.F.R. Part 1500 (1998).

[30] 40 C.F.R. § 1502.16(h) (1998).

quirement that the agency preparing the EIS and a supplemental EIS (SEIS) include " appropriate mitigation measures,"[31] there have been efforts, especially by interest groups, to use NEPA as a basis to enforce the means of mitigation through the courts. These efforts have met with little success. Courts have consistently held that NEPA is a procedural law and provides no private right of action to enforce substantive requirements.[32] Therefore, there is no legal remedy available to attempt to enforce the mitigation measures set forth in an EIS or an SEIS under provisions of NEPA.[33] Rather, remedies available under NEPA must depend on procedural error and can involve only procedural relief. The court will review agency action under the Administrative Procedures Act[34] (APA) standard of "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[35]

Some of the earlier cases are discussed in a report that appeared in 1980 as a note in the *Environmental Law Reporter*.[36] In *Mountainbrook Homeowners Association v. Adams*,[37] for example, a highway case in which excavation waste was not disposed of in the manner represented in the EIS, the court held that NEPA simply did not provide a cause of action to any plaintiff, either private or governmental, to enforce its provisions. A similar result was reached in *City of Blue Ash v. McLucas*,[38] where the court rejected the argument that the representation in the EIS that jet aircraft would not be allowed to use an airport constituted an implied enforceable commitment. Another case involved a plaintiff who tried to sue for damages, as well as injunctive relief, against Atlanta's rapid transit system.[39] Her claim was based on the failure of the rail system to stay within noise levels set out in the EIS. The court found, after an analysis of the legislative intent, that NEPA does not provide for a private remedy.[40]

In 1988, the Supreme Court held, in *Robertson v. Methow Valley Citizens Council*,[41] "NEPA does not require a fully developed plan detailing what steps *will* be taken to mitigate adverse environmental impacts" since "[o]ther statutes may impose substantive environmental obligations on federal agencies," but NEPA merely prescribes the necessary process.[42] Among more recent decisions following *Robertson* is *Northern Crawfish v. Fed. Hwy Admin.*,[43] where the district court stated unequivocally that NEPA does not "impose any substantive requirement that mitigation measures be implemented."[44] In that case, action was brought on behalf of a species of frog, challenging a highway project. The FHWA's motion for summary judgment was granted. The court quoted from *Citizens Against Burlington, Inc. v. Busey*[45]: "NEPA not only does not require agencies to discuss any particular mitigation plans that they might put in place, it does not require agencies—or third parties—to effect any."[46]

West Branch Valley Flood Protection Ass'n. v. Stone[47] was an attempt by a nonprofit group in Pennsylvania to halt construction by the Army Corps of Engineers of dikes and levees to control flooding around the city of Lock Haven. After preparation of the EIS, the Corps altered the mitigation plan. The district court held that this change did not require the Corps to reopen the EIS and was not a procedural violation of NEPA: "As long as the mitigation measures discussed in the EIS are sufficient to demonstrate a realistic look by the agency at the adverse impacts of the project, the agency is free to finally adopt a modified mitigation plan."[48]

One other case should be mentioned with regard to enforcement of provisions of the EIS, in particular mitigation measures. *Hart and Miller etc. v. Corps of Engineers*[49] was a lawsuit by environmental groups and other interested persons challenging the planned construction of a diked dredge disposal facility at islands in the Chesapeake Bay. The court distinguished the *Mountainbrook* case (for the holding that no private cause of action exists under NEPA) and seems to suggest that there can be a private right of action under NEPA. However, the court then decided the NEPA-based claims on an "abuse of discretion" standard, stating "the court is not empowered to substitute its judgment for that of the agency" and that the court's "task is merely 'to determine whether the EIS was

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[31] *See* 40 C.F.R. 1502.14(f) (1998)

[32] Sierra Club v. Pena, 915 F. Supp. 1381 (N.D. Ohio 1996), *aff'd*. 102 F. 3d 623; Hart and Miller v. Corps of Eng'rs, 505 Supp. 732 (1980).

[33] *See*, for example, Robertson v. Methow Valley Citizens Council, 490 U.S. 332 (1988) ; Northern Crawfish v. Fed. Hwy. Admin., 858 F. Supp. 1503 (D. Kan. 1994); Coeur D'Alene Lake v. Kiebert, 790 F. Supp. 998 (D. Idaho 1992).

[34] 5 U.S.C. § 706(2) (A) (1994).

[35] Sierra Club v. Pena, 915 F. Supp. 1381 (N.D. Ohio 1996), *aff'd*., 120 F. 3d 623; this case also holds that only federal defendants may be sued under NEPA (at 1393) and that ISTEA provides no private cause of action (at 1391).

[36] *Enforcing the 'Commitments' Made in Impact Statements; A Proposed Passage Through a Thicket of Case Law*, 10 Envtl. L. Rep. 10153 (1980).

[37] 492 F. Supp. 521 (D.N.C. 1979), *aff'd*. 620 F.2d 294 (4th Cir. 1980).

[38] 596 F.2d 709 (6th Cir. 1979).

[39] Noe v. Metro. Atlanta Rapid Transit Auth., 644 F.2d 434 (5th Cir. 1981).

[40] *Id*. at 438. Another case discussed in the ENVTL. L. Note (*see* note 36 *supra*) that may be of interest is Ogunquit Village Corp. v. Davis, 553 F.2d 243 (1st. Cir. 1977).

[41] 490 U.S. 332, at 359 (1988), emphasis in original.

[42] *Id*. at 350, 351.

[43] 858 F. Supp. 1053 (D. Kan. 1994).

[44] *Id*. at 1525.

[45] 938 F.2d 190, 206 (D.C. Cir.), *cert. denied* 112 S. Ct. 616, 116 L. Ed. 2d 638 (1991).

[46] 858 F. Supp. at 1525.

[47] 820 F. Supp. 1 (D.D.C. 1993).

[48] *Id*. at 8, citing Robertson v. Methow Valley Citizens Council, 490 U.S. 332 (1988).

[49] 505 F. Supp. 732 (1980) (citations omitted).

complied with in objective good faith...."[50] Since the court found that the Corps had given sufficient consideration to environmental consequences, summary judgment was granted for the Corps. This is a 1980 case, and subsequent court decisions, including the *Robertson* decision, should have removed any confusion as to whether mitigation measures and other provisions of the EIS are subject to enforcement by private parties under NEPA.

Professor Thomas McGarity, writing in 1990, suggested that judicial remedies should be available for enforcement of the environmentally protective measures prescribed by an EIS.[51] He concedes that "courts have not been especially receptive" to such efforts.[52] Pointing out that the CEQ regulations require an SEIS if "[t]he agency makes substantial changes in the proposed action that are relevant to environmental concerns,"[53] he argues that "there may be persuasive procedural grounds for enjoining the project pending the preparation of a supplemental EIS."[54] If a project is substantially completed when claims of inconsistency with the EIS are raised, Professor McGarity suggests the court should order preparation of an SEIS that would contain mitigation measures to reduce the project's environmental impact.[55] In considering such cases, the courts have applied a deferential attitude to the agency's decision as to whether to prepare an SEIS, and have found such a need only where there are "substantial" changes resulting in a "significant" impact on the environment.[56] In deciding whether the changes are substantial and the impacts are significant, the courts apply a "rule of reason," articulated in *Marsh v. Oregon Natural Resources Council*,[57] which will be fact based.[58] Applying the APA's "arbitrary and capricious" standard of review to the agency's decision making, courts have generally not required an additional EIS where the agency has determined there is no need for one.[59]

One situation in which mitigation means set out in the EIS would most likely be enforceable in a court action is where the court action resulted in a court-approved consent decree or settlement agreement that incorporated the mitigation requirements. Settlement agreements entered into by public agencies are generally viewed as binding.[60] Even here, however, courts seem reluctant to enforce provision of the EIS. In *Keith v. Volpe*,[61] the district court was willing to enforce a consent decree entered by the court that incorporated terms of a settlement agreement. The consent decree required construction of a freeway "as proposed in the Final Environmental Impact Statement." The court also pointed out that the decree provided for continuing jurisdiction in the court for enforcement purposes.[62] Both these factors are important for the court to act to enforce provisions of the EIS.[63] On appeal, however, the circuit court found that the relevant provision of the final EIS (prohibiting billboards along the freeway) was a violation of California state law and reversed the lower court decision.[64] So for a consent decree to serve as a useful means to enforce mitigation requirements of an EIS, the decree would need to specifically provide that the requirements are incorporated in the decree, the decree should provide for continuing jurisdiction by the court, and the mitigation requirements must not contravene other valid laws.

In summary, NEPA requires the identification and consideration of mitigation means in the EIS, and an EIS is required for most federally-funded projects. However, as a means for state agencies or private parties to enforce mitigation requirements through court action, NEPA is ineffective because it is a procedural law. One final point should be made as to enforcement *against* state agencies: As a procedural law, "NEPA, by its own terms, applies only to federal agencies [and] no claim under NEPA can be brought against non-Federal Defendants."[65]

2. Enforcement Under Section 4(f) of the DOT Act[66]

All transportation projects that receive any form of federal approval or funding must comply with Section 4(f) of the DOT Act, which requires specific mitigation findings before publicly owned parkland, recreation areas, wildlife refuges, or historic sites can be used.[67]

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[50] *Id.* at 754, 755 (citations omitted).

[51] Thomas O. McGarity, *Judicial Enforcement of NEPA-Inspired Promises*, 20 ENVTL. L. No. 3, 569 (1990) (Northwestern School of Law of Lewis and Clark College).

[52] *Id.* at 608.

[53] 40 C.F.R. § 1502.9(c) (1989).

[54] 20 ENVTL. L. 569 at 584.

[55] *Id.* at 591.

[56] Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 109 S. Ct. 1851 (1989); Sierra Club v. Pena 915 F. Supp. 1381 (N.D. Ohio 1996), *aff'd.* 120 F.3d 623; *cf.*, Dubois v. U.S. Dept. of Agriculture 102 F.3d 1273, at 1292 (1st Cir. 1996).

[57] 490 U.S. at 370-374.

[58] *See*, for example, Dubois v. U.S. Dept. of Agriculture, 102 F.3d 1273, at 1293 (1st Cir. 1996); Roosevelt Campobello, 684 F.2d at 1055; West Branch Valley Flood Protection Ass'n. v. Stone, 820 F. Supp. 1 (D.D.C. 1993).

[59] Sierra Club v. Pena, 915 F. Supp. at 1394; Marsh, note 56 *supra*.

[60] *See*, for example, Rodriguez v. VIA Metro. Transit System, 802 F.2d. 126 (5th Cir. 1996).

[61] 965 F. Supp. 1337 (C.D. Cal. 1996).

[62] *Id.* at 1347.

[63] *Id.*; Kokkonen v. Guardian Life Ins. Co. of Am. 511 U.S. 375 (1994); *See also* Sierra Club v. Penfold 857 F.2d 1307, at 1322 (9th Cir. 1988).

[64] Keith v. Volpe, 118 F.3d 1386 (9th Cir. 1997).

[65] Sierra Club v. Pena, note 56 *supra* at 1393.

[66] 49 U.S.C. § 303 (c), *see also* 23 U.S.C. § 138 (1994); an excellent description of the requirements of Section 4(f) is in Michael Blumm's report, HIGHWAYS AND THE ENVIRONMENT: RESOURCE PROTECTION AND THE FEDERAL HIGHWAY PROGRAM. (Legal Research Digest No. 29, 1994, Transportation Research Board, National Research Council.

[67] Richard A. Christopher, AUTHORITY OF STATE DEPARTMENTS OF TRANSPORTATION TO MITIGATE THE

Under 4(f)(1) the Secretary must decide that there is no "prudent and feasible alternative to using that land," and under 4(f)(2) must undertake "all possible planning to minimize harm" to a protected area "resulting from the use"[68] before a project may be approved.[69] In reviewing the Secretary's ultimate decision to fund a transportation project that comes within Section 4(f), the courts "conduct a three tiered inquiry."[70] First, the court must decide "whether the Secretary acted within his authority" under section 4(f); second, the court must decide whether the Secretary's ultimate decision was "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law"; and, third, the court must determine whether the Secretary followed the necessary procedural requirements.[71] The court's review must be "probing and thorough," but the agency decision is entitled to deference and a presumption of regularity.[72] A finding of failure to meet the requirements of Section 4(f) generally results in a remand by the court for further consideration of the impacts and further planning to minimize the impacts.[73]

In a recent Massachusetts case, the district court considered claims under both NEPA and Section 4(f) and contrasted the requirements of the two laws. In *Geer v. Federal Highway Administration*,[74] the court stated that NEPA is not concerned with substantive decisions, but simply prescribes the necessary process. With section 4(f), however, "the focus sharpens and the perspective changes considerably." And with Section 4(f), "in addition to certain procedural concerns, Congress sought to establish an important substantive goal."[75] A number of citizens, a citizens group, and the city of Cambridge challenged the design alternative selected by the Massachusetts Department of Highways (MDH) and approved by FHWA for the Charles River crossing as part of an upgrade of the Boston highway system. Claims were made that the alternative selected failed to meet requirements of Section 4(f) and that the FHWA failed to comply with NEPA in making the selection.[76] The District Court addressed the specific claim made by plaintiffs that the defendants had not "sufficiently insured that the mitigation measures will be implemented" and therefore had failed to meet the requirements of 4(f) (2).[77] There was "an extensive list" of mitigation measures identified in the final SEIS. In addition, the MDH had entered into a memorandum of agreement (MOA) with the agency responsible for parkland that incorporated a general mitigation package capped at a value of $80 million. One of the plaintiffs' major concerns was that the $80 million cap was too low and that the FHWA had agreed to it.[78] The court cited the FHWA regulations, in particular 23 C.F.R. 771.109(b), as creating "an obligation" for FHWA "to implement those mitigation measures stated as commitments in the environmental documents."[79] The court found that the MOA and the final SEIS "provide an outline of the broad mitigation measures which would need to be implemented to minimize harm to the 4(f) properties," and that all the statute requires is "adequate planning, not detailed designs or documentation or exact details of all financial commitments."[80] The court concluded that the "treatment of mitigation commitments by the defendants was neither arbitrary nor capricious"[81] and found further that since "the appropriate agencies have pursued the necessary process and have carried out all possible planning to minimize harm to [4(f) land]... the courts are obliged to defer to agency determinations."[82]

So, although the court states that Section 4(f) has a "substantive goal" and that FHWA is responsible for implementing the mitigation commitments of the EIS, the final decision rests on whether the "necessary process" has been pursued and whether the record shows the necessary planning, at least at the state of the project where the court was involved.

3. National Historic Preservation Act

Besides preparation of a Section 4(f) statement, when transportation projects affect a property included in or eligible for inclusion in the National Register,[83] transportation agencies must take part in the "Section 106 Process."[84] The NHPA and its implementing regula-

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ENVIRONMENTAL IMPACT OF TRANSPORTATION PROJECTS. (Legal Research Digest No. 22, 1992, Transportation Research Board, National Research Council).

[68] 49 U.S.C. § 303(c) (1994).

[69] *See*, for example, Citizens Against Burlington, Inc. v. Busey, 938 F.2d 190, at 202, (1991); Louisiana Envtl. Soc'y v. Coleman, 537 F.2d 79 (5th Cir. 1976).

[70] Comm. to Preserve Boomer Lake Park v. DOT, 4 F.3d 1543, at 1549 (10th Cir. 1993); Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971).

[71] *Id.*

[72] *Id.*; *see also* Citizens Against Burlington Inc. v. Busey 938 F.2d 190, at 204 (D.C. Cir. 1991).

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

[74] 975 F. Supp. 47 (D. Mass. 1997).

[75] *Id.* at 53.

[76] *Id.* at 52.

[77] *Id.* at 77, 78.

[78] 975 F. Supp. at 78.

[79] 771.109(b) provides that it "shall be the responsibility of the applicant, in cooperation with the Administration to implement those mitigation measures stated as commitments in the environmental documents...The FHWA will assure that this is accomplished...as part of its...responsibilities."

[80] 975 F. Supp. 78 citing to Ashwood Manor, 619 F. Supp. at 81.

[81] *Id.* at 79.

[82] *Id.* at 80.

[83] *See*, for example, Benton Franklin Riverfront Trailway and Bridge Comm. v. Lewis, 529 F. Supp. 101 (D.C. Wash. 1981), *aff'd in part, rev'd in part on other grounds*, 701 F.2d 784.

[84] Pub. L. 89-665, Title I, § 106, (Oct. 15, 1966); 16 U.S.C. § 470f (1994), and 36 C.F.R. Part 800, Subpart B (1998).

tions[85] require the agency, in consultation with the State Historic Preservation Officer (SHPO), to assess the effects on the property of the proposed project, giving consideration to the views of interested persons.[86] If the effect is found to be adverse, the agency and the SHPO, in consultation with the Advisory Council on Historic Preservation (Council), develop mitigation measures.[87] The agency and the SHPO then execute an MOA incorporating the agreed-upon mitigation measures, with the agreement or the concurrence of the Council. This MOA may be "concurred in" by other interested parties that the three invite to participate.[88]

Very few cases were found that deal with enforcement of the MOAs or particular mitigation measures. This may be because of the consultation and public comment that are required by the Section 106 process; that is, the parties really have reached agreement as to what mitigation will be undertaken before the MOA is executed. There are cases that hold that an environmental or other special interest group has standing to bring suit, based on a showing of "harm to the aesthetic and environmental well-being" of the group,[89] but private plaintiffs only have a right of action against federal defendants under the NHPA.[90] There is also case law holding that a property, to be protected, need not have been "officially" determined to be eligible for the Register, so long as it meets Register criteria.[91]

Only one case was found that raises issues about the provisions of the MOA. In *West Branch Valley Flood Protection Ass'n v. Stone*,[92] a citizens group challenged the MOA because it had not been amended to incorporate new data. The district court pointed out that the regulations state that they were to be implemented "in a flexible manner" and "while the Corps [of Engineers] are strongly encouraged to obtain an MOA, the regulations do not so mandate, and in fact even contemplate situations in which the SHPO and the agency are unable to reach agreement."[93]

Generally, courts have found that the federal agency has followed necessary procedures.[94] In one case, even though the Corps of Engineers has failed to prepare an MOA with the SHPO, the court found that this was a "technical violation" and not fatal to the process, since the regulations "may be implemented in a flexible manner."[95] The Corps regulations "require such agreements to be formalized either through an MOA or through permit conditioning [citing 33 C.F.R. Part 325]. The Corps and the SHPO have taken this latter path...," and therefore the failure to execute an MOA is not a violation of NHPA.[96] On the other hand, in *Vieux Carre Property Owners v. Brown*,[97] a case involving construction of a park and aquarium on the New Orleans waterfront, the Circuit Court held that even though the project was more than 80 percent completed, the Corps had to comply with the historic preservation process. The court stated, "We hold that in this case NHPA review is required as long as a federal agency has the ability, under any statute or regulation, to require changes in the federal license authorizing a project."[98]

4. Clean Water Act Provisions

The permits issued under Section 404[99] and Section 402[100] of the CWA contain conditions for mitigation that may be enforced by administrative or judicial agency action or by private citizen lawsuits.[101] Although there are numerous cases brought every year by private parties,[102] this report will be limited to recent mitigation enforcement efforts.

Section 402 Court Cases—The EPA and the state environmental control agencies who have qualified for designation under the National Pollutant Discharge Elimination System (NPDES) bring enforcement actions against dischargers who violate their NPDES permits. These violations range from exceeding effluent standards to failure to file self monitoring reports.[103]

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[85] 16 U.S.C. § 470 *et. seq.* and 36 C.F.R. Part 800 (1998).

[86] 36 C.F.R. § 800.5 (a) (1998).

[87] 36 C.F.R. § 800.5 (e) (1998).

[88] 36 C.F.R. § 800.5 (e) (4) (1998).

[89] *See*, for example, Weintraub v. Ruckleshaus, 457 F. Supp. 78, at 88 (E.D. Pa. 1978).

[90] Vieux Carre Property Owners v. Brown, 875 F.2d. 453, at 456. (5th Cir. 1989) *cert. denied* 493 U.S. 1020.

[91] *Boyd v. Roland*, 789 F.2d 347, 349 (5th Cir. 1986) and cases cited therein.

[92] 820 F. Supp. 1 (D.D.C. 1993).

[93] *Id.* at 10, citing to 36 C.F.R. § 800.3(b) & § 800.6(b) (1989).

[94] *See*, for example, Walsh v. U.S. Army Corps of Eng'rs, 757 F. Supp. 781 (W.D. Tex. 1990); Com. of Pa. v. Morton, 381 F. Supp. 74 (D.D.C. 1974).

[95] Abernaki Nation of Mississquoi v. Hughes, 805 F. Supp. 234, at 251 (D. Vt. 1992).

[96] *Id.*

[97] 948 F.2d 1436 (5th Cir. 1991).

[98] *Id.* at 1449. Note that in an earlier decision in this case, the circuit court had held that "neither the APA nor the NHPA give [sic.] a private plantiff a right of action against ...[non-federal] defendants." (Quoted language appears at 948 F.2d at 1440.)

[99] 33 U.S.C. § 1444 (1994).

[100] 33 U.S.C. § 1442 (1994).

[101] 33 U.S.C. § 1365 (1994) provides that "...any citizen may commence a civil action on his own behalf" against any person, including the United States or any other governmental agency who is in violation of "an effluent standard or limitation under this Act or ...an order issued by the [EPA] Administrator or a State with respect to such a standard or limitation."

[102] One author has suggested that at least part of the motivation for private parties to bring suits is attorneys fees. Michael S. Greve, in *The Private Enforcement of Environmental Law*, 65 TUL. L. REV. 339, 382 (1990) writes: "Enforcement proceedings brought [by private enforcers] for violations of the voluminous paperwork requirements of the Clean Water Act generate tens of thousands of dollars in attorneys fees but no discernible environmental benefits."

[103] The issuance of NPDES permits is authorized and governed by Section 402 (33 U.S.C. § 1442) (1994) and its imple-

Enforcement actions can be taken by citizens who give proper notice for violations of permit conditions.[104] This means all permit conditions, including both EPA-promulgated effluent limitations and state-established standards.[105] In *Northwest Environmental Advocates v. Portland*,[106] the circuit court said this means *all* conditions, including broad water quality standards that have not been translated into numeric effluent limitations.[107] The court relied on *PUD No. 1 of Jefferson County v. Washington Department of Ecology*,[108] where the Supreme Court held that the CWA allows states to enforce the broad narrative criteria contained in water quality standards. The circuit court held that citizens may enforce the same conditions of a certificate or permit that a state may enforce.[109] The court quoted from the legislative history of the Act to the effect that "citizens are granted authority to bring enforcement actions for violations of....any condition of any permit issued under section 402."[110] There is a lack of unanimity among courts as to whether a citizen suit may enforce provisions of a state pollutant discharge elimination system permit that mandates greater scope of coverage than is required by the Act and its implementing regulations. All but one of the recent cases reviewed hold that it may.[111]

Citizen lawsuits may not be maintained for "wholly past violations"[112] and may not be maintained where there is "diligent prosecution" of enforcement action by EPA or a state.[113] There are numerous cases defining what will be considered "commencement of diligent prosecution," but a discussion of those is beyond the scope of this report.[114]

There has been a split of decisions in the past as to whether a state could be a "citizen" for purposes of filing a suit under the citizen's suit provision.[115] Courts in Massachusetts, Illinois, and New Jersey have said in decisions that the state is a citizen for citizen suit purposes.[116] Courts in California and Virginia have held not.[117] The most recent cases have held, based on dicta in a 1992 Supreme Court case,[118] that a state may bring a citizen's suit under Section 505 of the Act.[119]

Section 404 Permits—Another program under the CWA that has garnered the attention of transportation agencies is the Section 404 program that protects wetlands.[120] Enforcement duties are shared by the Army Corps of Engineers and EPA under an MOA that gives the Corps authority to enforce permit conditions.[121]

The cases make clear that citizen suits can enforce an effluent standard or an EPA order related to a Section 404 permit.[122] There is a split in the decisions as to whether citizens can bring enforcement actions chal-

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menting regulations at 40 C.F.R. Part 122 (1998) (when administered by EPA) and Part 123 (when administered by the states). 40 C.F.R. § 123.27 (d) (1998) requires public participation and intervention in enforcement proceedings.

[104] 33 U.S.C. § 1365 (a)(1) (1994).

[105] EPA v. California, 426 U.S. 200, 224-25 (1976).

[106] 56 F.3d 979 (9th Cir. 1995).

[107] *Id.* at 986.

[108] 511 U.S. 700, 114 S. Ct. 1900 (1994).

[109] 56 F.3d at 988.

[110] *Id.* at 987, quoting from 1972 U.S. Code Cong. & Admin. News 3747.

[111] Cases holding that a citizen suit may enforce stricter limitations in a state issued permit: Upper Chattahoochee Riverkeeper v. City of Atlanta, 953 F. Supp. 1541 (1996); Northwest Env'tl. Advocates v. Portland, 56 F.3d 979, 985-90 (9th Cir. 1995) *cert. denied*, U.S., 116 S. Ct. 2550, 2550 L. Ed. 2d 1069 (1996); Culbertson v. Coats American, Inc. 913 F. Supp. 1572, 1581-82 (N.D. Ga. 1995); EPA v. Cal. 426 U.S. 200, 223-24 (1976). Holding that it may not: Atlantic States Legal Found. v. Eastman Kodak Co., 12 F.3d 353, 358-59 (2d Cir. 1993), *cert. denied*., 513 U.S. 811.

[112] Gwaltney of Smithfield v. Chesapeake Bay Found., 484 U.S. 49 (1987), *but see* Sierra Club v. Simpkins Indus., 617 F. Supp. 1120, *recon. denied, aff'd*, 847 F.2d 1109, *cert. denied*, 491 U.S. 904.

[113] 33 U.S.C. § 1365 (b) and 33 U.S.C. § 1319 (g)(6) (1994). *See* Friends of the Earth v. Laidlaw, 890 F. Supp. 470 (D.S.C. 1995); North and South Rivers Watershed Ass'n. v. Scituate, 949 F.2d 552 (1st Cir. 1991); Gwaltney *supra* at 61.

[114] *See, for example*, Williams Pipe Line Co. v. Bayer Corp., 964 F. Supp. 1300, at 1321-25 (S.D. Iowa 1997) and cases cited therein; Friends of the Earth v. Laidlaw Env'tl. Services 890 F. Supp. 470 (D.S.C. 1995).

[115] 33 U.S.C. § 1365(g) (1994) defines a "citizen" as a "person" and 33 U.S.C. § 1362(5) (1994) defines a "person" as, among other things, a "state." *See* discussion at 68 ALR Fed. 701, at 705 on difference of opinion as to whether a state is a citizen.

[116] Mass. v. U.S. Veterans Admin., 541 F.2d 119, 121 n.1 (1st. Cir. 1976); Ill. v. Outboard Marine Corp., 619 F.2d 623, 631 (dicta in both cases); Nat'l. Wildlife Fed'n v. Ruckleshaus, 99 F.R.D. 558, 560 (D. N.J. 1983).

[117] Cal. v. Dep't. of Navy, 631 F. Supp. 584, 587 (N.D. Cal. 1986); U.S. v. City of Hopewell, 508 F. Supp. 526, 528 (E.D. Va. 1980).

[118] U.S. Dept. of Energy v. Ohio, 503 U.S. 607, 112 S. Ct. 1627, 1634, 118 L. Ed. 2d. 255 (1992).

[119] U.S. v. City of Toledo, 867 F. Supp. 595 (N.D. Ohio 1994). (Section 505 of the Act is 33 U.S.C. 1365).

[120] 33 U.S.C. § 1344 (a) (1994) requires a permit before discharge of dredged or fill material into navigable waters, which includes wetlands. The permits must be evaluated by criteria set out in the "404 Guidelines," (40 C.F.R. § 230), which were promulgated by EPA in conjunction with the Corps of Engineers. An excellent discussion of Section 404 is found in Blumm, *supra*, note 2, at pp. 7-12.

[121] Memorandum of Agreement between the Department of the Army and the Environmental Protection Agency Concerning Federal Enforcement of the Section 404 Program of the Clean Water Act. (1989) This MOA makes EPA the lead agency for the most flagrant activities that occur without a permit. The Corps retains authority to prosecute violations of permit conditions.

[122] Coeur D'Alene Lake v. Kiebert, 790 F. Supp. 998, at 1008 (D. Idaho 1992), citing Sierra Club v. Lujan 931 F.2d 1421, 1429 (10th Cir. 1991). Coeur D'Alene raises, but does not answer, the question whether the FHWA can be held liable for violations of the Section 404 permit committed by the Idaho agency and its contractor, 790 F.2d at 1007.

lenging the issuance of wetlands permits. In *National Wildlife Federation v. Hanson*,[123] the court allowed a citizen suit against the Corps of Engineers that challenged a determination that affected land was not a wetland. The court held that the suit was valid because the Corps' duty is nondiscretionary and the EPA Administrator is ultimately responsible for the protection of wetlands. Although the EPA Administrator is named in Section 505 and the Secretary of the Army is not, the court said that Congress must have meant to allow suits against the Army: "Congress cannot have intended to allow citizens to challenge erroneous wetlands determinations when the EPA Administrator makes them but to prohibit such challenges when the Corps makes the determination and the EPA fails to exert its authority over the Corps."[124] A contrary ruling was handed down in *Preserve Endangered Areas of Cobbs History, Inc. v. U.S. Army Corps*[125] which concerned construction of a highway in Georgia. The court concluded that the citizen suit provision refers only to the Administrator of EPA, and therefore the United States had not waived its sovereign immunity as to the Corps of Engineers.[126] The court then pointed out that 33 U.S.C. 1365(a)(2) provides that a citizen can sue the Administrator of the EPA for failure "to perform any act or duty...which is not discretionary." The only role of the Administrator in the issuance of Section 404 permits is a discretionary decision to veto the Corps' decision to grant a permit. "Because this power is discretionary, the citizen suit provision of the Clean Water Act does not apply."[127] The same result was reached in a 1992 Idaho case, *Coeur D'Alene Lake v. Kiebert*.[128] (In that case, the court also considered whether a Section 402 permit, as well as a Section 404 permit, was required to fill a lake. The court, citing 40 C.F.R. 122.3(b),[129] found that it was not.) In *Sierra Club v. Pena*,[130] the court clarified these contrary holdings, explaining that the decision of the Administrator to *deny* a permit is unreviewable (because discretionary), and the decision to *grant* a permit is reviewable under the APA.[131]

The Secretary of the Army also enforces Section 10 of the Rivers and Harbors Act of 1899, which requires a permit for discharges into navigable water[132] and is a predecessor to the CWA. One court has held that citizens affected by the Corps' decision not to enforce a condition of a permit issued under this Act and Section 404 of the CWA may not bring a mandamus action to require enforcement.[133] In a rather unusual case involving enforcement of a Corps permit condition requiring full and free use by the public of navigable waters, the user of a personal watercraft denied access to the boat ramp authorized by the Corps permit brought suit. The court held that the user of the watercraft could enforce the permit condition against the permittee.[134]

5. The Clean Air Act

Enforcement of mitigation requirements under the CAA is more complicated than under some other environmental laws. Each state with a geographical area in violation of the air quality standards promulgated by EPA has to develop a SIP to remedy the violations.[135] Since ambient levels of ozone and carbon monoxide can be associated with transportation and the use of internal combustion engines, the states with violations are encouraged to develop TCMs to mitigate adverse effects on ambient levels of these pollutants. The TCMs consist of improved public transportation, enhanced efficiencies in highway use (such as high-occupancy vehicle lanes), facilities for use of nonmotorized forms of transportation, limitations on parking and vehicle idling, and similar measures.[136] When these TCMs are formally identified by the affected states in their SIPs, they, just as all other "emission limitations and standards" in the SIP, become enforceable by the state's environmental control agency,[137] EPA,[138] and citizens who give the proper notice.[139]

There are very few cases that have raised the issue of enforcement of mitigation measures under the CAA. This may be because the Act is, in a sense, "self-enforcing." That is, if transportation projects create more pollution than is estimated in the EISs, then the area will not achieve compliance with the National Ambient Air Quality Standards (NAAQS). Noncompliance would eventually lead to implementation of additional pollution control measures.

Citizens or interest groups may sue after giving notice, so long as the violation concerns "an emission standard or limitation,"[140] which includes "any condition or requirement under an applicable implementation

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[123] 859 F.2d 313 (4th Cir. 1988).

[124] *Id.* at 316.

[125] 87 F.3d 1242 (11th Cir. 1996).

[126] *Id.* at 1249, citing Ruckleshaus v. Sierra Club, 463 U.S. 680 (1983).

[127] *Id.*

[128] 790 F. Supp. 998 (D. Idaho 1992).

[129] This section provides in pertinent part: "The following discharges do not require NPDES permits: ....Discharges of dredged or fill material into water of the United States which are regulated under section 404 of CWA."

[130] 915 F. Supp. 1381 (1996), *aff'd*, 120 F.3d 623.

[131] Id. at 1392.

[132] 33 U.S.C. § 403 (1994).

[133] Harmon Cove Condominium Assoc. v. Marsh, 815 F.2d 949 (3rd. Cir. 1987).

[134] Steier v. Batavia Park Dist., 283 Ill. App. 3d 968 (2d. Dist. 1996).

[135] 42 U.S.C. § 7410 (1994).

[136] 42 U.S.C. § 7408(f) (1994).

[137] Under 42 U.S.C. § 7410(a) (1994) the SIP must contain the methods the state will use to enforce it.

[138] 42 U.S.C. § 7413(a) (1994).

[139] 42 U.S.C. § 7604 (1994).

[140] 42 U.S.C. § 7604(a) (1994).

plan relating to transportation control measures...which is in effect under this chapter or...an applicable implementation plan."[141] In *Coalition Against Columbus Center v. City of New York*, the court held that, while an air quality standard may not be enforced in a citizen suit, a "specific strategy to attain that standard" may be so enforced.[142] The court found that a broad statement requiring implementation of "mitigating measures," although not specifying what mitigating measures, was enforceable.[143] There are cases holding that an NAAQS may not be enforced under the citizen's suit provision,[144] and cases holding that citizen suits may not enforce "odor rules" or nuisance laws that are not "in effect under" the CAA.[145] *Cate v. Transcontinental Gas Pipe Line*[146] involved an agreement that had been entered into between the pipeline company and the State of Virginia to control emissions from the pipeline. The agreement contained an enforcement provision that authorized the state agency to levy civil fines if the pipeline company failed to submit a plan to "eliminate the exceedance" of the NAAQS for nitrogen dioxide.[147] The lawsuit attempted, among other things, to enforce this agreement under Section 7604(a) (the civil suit section). The court found that this was not an action to be used to enforce the NAAQS (citing to *Columbus Center*), but nevertheless found that the claim was prohibited under Section 7604 because the agreement had not been included in Virginia's SIP. Therefore, it was not "in effect under an applicable implementation plan."[148]

B. Other Enforcement Through the Court

1. Enforcement of Agreements by Parties to the Agreement

Under principles of general contract law, any party to an agreement to mitigate the adverse effects of a transportation project can sue for specific performance of the agreement. These agreements arise through negotiations between the parties. In *Airport Impact Relief, Inc. v. Massachusetts Port Authority*,[149] two community groups and a number of individual citizens had negotiated a mitigation agreement with the Massachusetts Port Authority (MPA) in relation to the expansion of Logan Airport. State law requires development of a Generic Environmental Impact Report (GEIR) that addresses mitigation plans to "offset the environmental impacts of airport activity." In the process of developing the GEIR, the mitigation agreement was negotiated and executed.[150] The agreement provided that in the case of a violation relating to noise, traffic, or air quality mitigation effects, the community groups are entitled to seek specific performance. The court found the agreement to constitute a valid contract, and granted the request for specific performance.[151] This again demonstrates the wisdom of providing specifically in negotiated agreements for mechanisms to enforce the agreement.[152]

2. Under Third-Party Beneficiary Law

There have been attempts to enforce obligations arising under federal laws through claims made by "third parties" to an agreement between a federal agency and another party.

In deciding whether an agreement was intended to create contractual rights in third parties, "the nature of the agreement, the identity of the alleged intended beneficiaries and the specific duty said to have been created toward them are all factors to be considered." (*Restatement of Contracts, Second*, Ch. 14, Sec. 314). Whether a contract by which a third party may be benefited was entered into for his direct benefit (as opposed to incidental benefit) depends on the intention of the parties, as judged from " a consideration of the contract and the circumstances of the parties at the time of its execution."[153] "Government contracts often benefit the public, but individual members of the public are treated as incidental beneficiaries unless a different intention is manifested."[154]

Under third-party beneficiary law, either state law or federal law would apply to the claim. Some state laws require that, in order for a third party to benefit from a contract, the contract must provide that specifically.[155] However, under federal law, the rights of the parties need not be spelled out specifically.[156] The test for which law will be applied, federal or state, has been stated as:

> [W]hen the federal government has an articulable interest in the outcome of a dispute, federal law governs. Thus, if diverse resolutions of a controversy would frustrate the operations of a federal program, conflict with a specific policy, or have some direct effect on the United States or its treasury, then federal law applies.[157]

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[141] 42 U.S.C. § 7406 (f) (1994).

[142] 967 F.2d 764, at 770 (2d. Cir. 1992).

[143] *Id.* at 771.

[144] *Id.* at 770; Cate v. Transcontinental Gas Pipe Line Corp., 904 F. Supp. 526 (W.D. Va. 1995).

[145] Cate *supra* note 144, at 533; Satterfield v. J.M. Huber Corp. 888 F. Supp. 1561 (N.D. Ga.1994).

[146] *See* note 144 *supra*.

[147] 904 F.2d at 529.

[148] *Id.* at 533.

[149] 1995 W.L. 809553 (Mass. Supp.) (3 MASS. L. REP. 653).

[150] *Id.* at 809553*1, *2.

[151] *Id.* at 9.

[152] *See* Keith v. Volpe *supra* note 61 and accompanying discussion in text.

[153] Annotation, *Contracts*, 17 Am. Jur. 2d., Sec. 443.

[154] RESTATEMENT OF CONTRACTS, SECOND, Chapter 14, Sec. 312.

[155] *In Re* Gulf Oil/Cities Service Tender Offer Lit., 725 F. Supp. 712, 733 (S.D.N.Y. 1989) (New York Law); Am. Elec. Power Co. v. Westinghouse Elec. Corp., 418 F. Supp 435 (1976) (Penn. law).

[156] *See, for example*, Taylor Woodrow Blitman Constr. Corp. v. Southfield Gardens Co., 534 F. Supp. 340 (D. Mass. 1960).

[157] Howard v. Group Hosp. Serv., 739 F.2d 1508, 1510 (10th Cir. 1984), quoted in Anderson v. Eby, 998 F.2d 858, at 864

Applying that test to federal environmental laws, it seems most likely that federal law would be applied. No cases have been identified that involve attempts by third parties to use environmental laws, agreements entered under these laws, or permits issued pursuant to these laws to claim a right to damages or injunctive relief.

There are cases in which tenants in federally subsidized housing have attempted to use third-party beneficiary law to force action by the federal government under the National Housing Act. Based on a regulatory contract between the Department of Housing and Urban Development (HUD) and the local housing authority, the tenants could require HUD to monitor compliance with removal of lead-based paint in *Ashton v. Pierce*.[158] The court found that

> mutual promises contained in the Contract were intended by the parties to benefit the [tenants] (Citations omitted). Indeed, it is difficult to imagine any purpose for the Contract other than to benefit the tenants of public housing...Thus, [the tenants] are third-party beneficiaries of the Contract and may enforce the duties arising under it.[159]

On the other hand, tenants were unsuccessful in enforcing third-party beneficiary claims against HUD under a regulatory contract in *Falzarano v. United States*.[160] There, the tenants claimed that private defendants, their landlords, were siphoning funds from the projects, resulting in higher rents and deteriorating living conditions. The court dismissed their claims, finding that the statute in question[161] prohibits mortgages in excess of the permissible limit, but does not "create federal rights in favor of any private party."[162] The court noted that a number of other cases had rejected the claim that tenants are third-party beneficiaries under the law[163] and stated:

> Our inquiry must be whether plaintiffs were intended beneficiaries under the regulatory agreement, as merely incidental beneficiaries cannot sue to enforce the contract. *Restatement of Contracts*, Sec. 145; *4 Corbin on Contracts*, Secs. 774, 775, 776, 779C (1951). The regulatory agreements at issue here do not disclose an intent to benefit the tenants, except as they might be incidental beneficiaries...There is, therefore, no basis for federal jurisdiction grounded on a third party beneficiary theory.[164]

There is no way to predict with certainty the result if a third-party claim were to be made, based on an agreement or permit[165] under environment law. It seems likely that the absence of any expressed intent to benefit particular parties would be pivotal. Where specific private parties (or "the public") are mentioned in statutory and regulatory schemes providing for agreements, such as NHPA, their role is clearly spelled out. A contract or agreement must serve as a basis for a third-party claim. Whether a grant agreement would serve is questionable, in view of the holding in *Falzarano*. Finally, at least under NEPA, a court has found, based on the legislative history, that there was a congressional intent "to deny relief to private individuals" who may be injured by a violation of NEPA.[166] This would seem to preclude any third-party beneficiary claim under NEPA, if the above analysis were made.

3. Under Nuisance Law

The same kinds of environmental impacts that result in claims of violations of environmental protection law may lead to claims based on nuisance law. These nuisance law claims are generally made by private parties, but they can be combined in the same lawsuit as claims under federal environmental statutes. Nuisance claims are not barred under these circumstances, and may be the basis of attempts to enforce mitigation agreements or permits. For example, in *Cate v. Transcontinental Gas Pipe Line Corp.*,[167] the plaintiffs were allowed to bring claims under the CAA as well as under Virginia nuisance law. Their CAA claims failed because the court found that the state had not incorporated its odor regulations into its SIP; however, plaintiffs were able to pursue their common law nuisance claims.

Under the citizen suit provision of the CWA, the savings clause preserves state law remedies, including nuisance actions.[168] In *Washington Suburban Sanitary Commission v. CAE-Link*,[169] the Maryland Court of Ap-

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(10th Cir. 1993), citing to Clearfield Trust Co. v. United States, 318 U.S. 363 (1943) & Miree v. DeKalb County, 433 U.S. 25 (1977).

[158] 716 F.2d 56 (D.C. Cir. 1983). *But see* Samuels v. D.C., 770 F.2d 184 (D.C. Cir. 1985), where the court pointedly did not decide such a third-party beneficiary claim, and noted that "courts remain divided" over whether such rights exist. The court suggested that 42 U.S.C. 1983 provides a better vehicle. 770 F.2d 201, n.14.

[159] 716 F.2d. at 66.

[160] 607 F.2d 506 (1st. Cir. 1979).

[161] 12 U.S.C. § 17151 (d) (3).

[162] 607 F.2d at 509.

[163] *Id.* at 511, citing other cases (citations omitted here).

[164] *Id.*

[165] In Anderson v. Eby, 998 F.2d 858 (10th Cir. 1993), the plaintiff made a claim that the court construed as a third-party beneficiary claim, based on a use permit issued by the federal government for National Forest Service property. The court in that case, however, applied Colorado law rather than federal law in deciding the case.

[166] Coeur D'Alene Lake v. Kiebert, 790 F. Supp. 998, at 1011 (D. Idaho 1992), quoting from Noe v. Metro. Atlanta Rapid Transit Auth., 644 F.2d 434 (5th Cir. 1981).

[167] 904 F. Supp. 526 (W.D. Va. 1995).

[168] WSSC v. CAE-Link Corp., 622 A.2d 745 (Md. 1993), Williams Pipe Line Co. v. Bayer Corp. 964 F. Supp. 1300 (S.D. Iowa 1997). *But see* Int'l Paper Co. v. Ouellette, 479 U.S. 481 (1987), where the court held that the Act preempts the common law of an affected state as it would be applied to another state. In that case, a source in New York that was in compliance with the Act could not be sued under the nuisance law of Vermont.

[169] *Id.*

peals applied the state strict liability standard in nuisance to find the defendants liable even though they were operating under federal court orders entered pursuant to the CWA. The defendants had been ordered by federal court to operate a sewage treatment plant. In *Williams Pipe Line Co. v. Bayer Corp.*,[170] the state's enforcement efforts against the pipeline company barred the landowner's citizen suit counterclaims under the CWA.[171] However, the landowner could go forward with nuisance claims under Iowa common law. And, of course, any affected private party could bring nuisance claims without making claims under federal environmental law.

V. CONCLUSIONS

Enforcement of mitigation commitments in transportation projects does not appear to be a significant problem according to survey responses by state agencies. Even though practitioners in the field of NEPA assessment and environmental law have argued for the need for affected citizens to be able to enforce violations of mitigation commitments, there are few reported attempts by any citizens to take on the enforcement role. This may be in part because the courts have consistently squelched any attempts by citizen groups to enforce the mitigation measures set out in EISs in the NEPA process. In other instances where federal laws allow (or prescribe) public involvement, such as the Section 106 process under NHPA, citizen groups have an opportunity to offer input into the agreement of mitigation measures.

There does not appear to be much use of highly structured tracking systems to monitor compliance with these commitments. As a result, the agencies entrusted with enforcement of the environmental laws, which are the source of most of the mitigation commitments, are either not concerned with compliance or do not appear to be having significant difficulty with achieving compliance for transportation projects. In particular, the large regulatory enforcement schemes under the CAA and the CWA do not appear to have revealed significant problems with transportation projects. The use of bonds and the threat of withholding of grant or contract funds along with occasional oversight appears to provide adequate incentive for compliance most of the time.

Attempts to invoke theories based on private rights of action to enforce federal environmental statutes have not shown much promise for putative plaintiffs. The most litigation has been under the CWA, which has provided private citizens with the basis for enforcing mitigation spelled out in permit conditions. Some claims have also been made under state nuisance law, which claims may be coexistent with claims under federal statutes. There are no reported cases in which private citizens have tried to raise third-party beneficiary claims to enforce environmental mitigation requirements.

At any rate, an in-depth comparison of the levels of violation and compliance found when a systematic tracking system for mitigation commitments is used and vice versa would show whether such systems are really necessary.

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[170] *Supra* note 168.

[171] 33 U.S.C. § 1319 (g) (6) (ii) (1994) bars a citizens suit if the state has commenced and is diligently prosecuting action under state law comparable to Clean Water Act provisions. This section does not require that the "action" be in court.

SURVEY

1. Has your agency ever taken action to enforce or been cited for failure to follow through on an environmental mitigation commitment?_____

2. If the answer to No. 1 is yes, did the citation come from a Federal agency, a State agency, or another quasi-governmental agency?_____

Please state the name of the agency or group._____

3. If the answer to No. 1 is yes, did the problem get resolved through negotiation?_____supplementation of prior environmental documentation? _____ or other means short of litigation?_____
Please provide some details of how the problem was resolved._____

4. Have your agency's difficulties in securing compliance with a mitigation commitment ever resulted in litigation?_____

5. If the answer to No. 4 is yes, was the litigation a new case?_____ or did it consist of reopening an old case?_____Please provide details and attach any pertinent summaries, consent decrees, judgments, etc.

6. Many transportation agencies include some of their projects in their applicable State implementation plans (SIP's) as transportation control measures (TCM's) or as mitigation measures to assist in a finding of conformity. Has your agency been a participant in any of these practices?_____. If so, has your agency ever received a 60 day notice of suit under the Clean Air Act or been named in litigation for alleged failure to carry out the project as planned or in a timely fashion?_____ _____Please provide details and attach any pertinent correspondence, pleadings, etc._____

7. Has your agency ever been involved in a proceeding to enforce a mitigation commitment brought by a State Attorney General under the *parens patriae*, public trust, or similar doctrines?_____If so, please provide details and copies of pertinent documents._____

8. Has your agency ever passed through mitigation commitments to a grantee, private contractor or permittee and then had to use some form of withholding, a claim on a performance bond, offset against other funds, or similar measures to obtain compliance?_____If so please comment._____

9. Have any of your agency's experiences with enforcing mitigation commitments involved participation by third parties such as environmental groups, neighborhood associations, or others who have asserted procedural rights to participate?_____ _____If the answer is yes, please provide details._____

10. Please offer any comments you may have on the advantages or drawbacks of any of the above methods for enforcing mitigation commitments or any other method you may have experienced._____

Please send completed surveys to:
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