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RESEARCH RESULTS DIGEST

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Federal Environmental Legislation and Regulations as Affecting Highways

A report submitted under ongoing NCHRP Project 20-6, "Right-of-Way and Legal Problems Arising Out of Highway Programs," for which the Highway Research Board is the agency conducting the research. The report was prepared by John C. Vance, HRB Counsel for Legal Research, principal investigator, and David C. Oliver, Research Attorney, serving under the Special Projects Area of the Board.

THE PROBLEM AND ITS SOLUTION

State highway and transportation departments have a continuing need to keep abreast of national legal requirements affecting the administration and operation of state agencies. The Federal Government has in the recent past taken the lead in the field of environmental legislation. This legislation, together with the regulations promulgated thereunder, will affect current administrative procedures. The report considers exclusively the provisions of Federal statute law that relate directly to environmental effects of highway planning, right-of-way acquisition, design, and construction.

A careful review of the research reported herein should help highway officials to achieve a better understanding of the many ramifications of national environmental legislation and how such legislation and regulations affect the administration of the state highway program. Early recognition and understanding of Federal requirements should ease the problems inherent in the transitional period brought about by the attempt to implement new environmental standards.

RESEARCH FINDINGS

Research findings are not to be confused with findings of the law. The monograph that follows constitutes the research findings from this study. *Because it is also the full text of the agency report, the above statement concerning loans of uncorrected draft copies of agency reports does not apply.*

I. INTRODUCTION

The upsurge of interest in the relation of man to his environment has in the recent past approached the proportions of a phenomenon. Such heightened interest has spilled over into governmental action directed on a broad front to the preservation, protection, and enhancement of the environment. True, environmental legislation has always been with us. One may harken back, for example, to

13th century England, where the environmental effect of the burning of coal fires in London called for no less than the death penalty for violation of laws regulating the same. However, environmental legislation over the long span of years has pursued at best a chequered and fitful course. The present intensive concern is the direct result of recent scientific findings pointing to the conclusion that nature's recuperative powers are being outdistanced by the onslaught of man's technology. Serious studies indicate that man may now be engaged in a race to preserve his environment from quite literal destruction.

The Federal Government has properly taken the lead in the field of environmental legislation, the most significant recent action being the passage of the National Environmental Policy Act of 1969, which spells out policies to be pursued and goals to be achieved in a redirection of national purpose to preserve and restore ecological and environmental balance.

The purpose of this paper is to review Federal environmental legislation, and regulations promulgated thereunder, as affecting highways. The scope of this paper is hence quite limited; as the title indicates, its concern is exclusively with provisions of Federal statute law that relate directly to the environmental effects of highway right-of-way acquisition and construction. This leaves the bulk of Federal environmental legislation outside the scope of this report.

The case law construing Federal statutes dealing with the environmental effects of highways is to date quite limited. The same is true of administrative regulations adopted in implementation of such statutes. Hence, this paper constitutes, necessarily, a synoptic review of such material as is presently available. Tentative rather than definitive answers must be supplied to certain significant questions which are the subject of discussion herein. This paper is, then, in the nature of an interim or interlocutory environmental report, to be supplemented in the future as developments in this rapidly growing and changing field may warrant and require.

II. THE NATIONAL ENVIRONMENTAL POLICY ACT OF 1969

The National Environmental Policy Act of 1969, Pub. L. 91-190, 83 Stat. 852, 42 U.S.C. §§4321-47, became effective on January 1, 1970. The Act was by no means the first Federal legislation directed to environmental considerations. By way of illustration, the control of air and water pollution was dealt with in the Clean Air Act of 1963, Pub. L. 89-675, 80 Stat. 954, 42 U.S.C. §§1857-571(1964); the Air Quality Act of 1967, Pub. L. 90-148, 81 Stat. 485, 42 U.S.C. §§1857-571 (Supp. IV, 1965-1968); the Federal Water Pollution Control Act, ch. 758, 62 Stat. 1155 (1948), as amended; the Water Pollution Control Act Amendments of 1956, Ch. 518, 70 Stat. 498, as amended; the Federal Water Pollution Control Act Amendments of 1961, Pub. L. 87-88, 75 Stat. 204, as amended; the Water Quality Act of 1965, Pub. L. 89-234, 79 Stat. 903, as amended; the Clean Water Restoration Act of 1966, Pub. L. 89-753, 80 Stat. 1246, 33 U.S.C. §§466-66K(1964), as amended, 33 U.S.C. §§466-66n (Supp. IV, 1965-68), as amended. Other prior Federal environmental legislation includes, but is not limited to, the Land and Water Conservation Fund Act of 1965, Pub. L. 88-578, 78 Stat. 897, 16 U.S.C. §§460d, 4601-4 to 4601-11 (1964); the Wilderness Act, Pub. L. 88-577, 78 Stat. 890, 16 U.S.C. §§1131-36(1964); the National Historic Preservation Act, Pub. L. 89-665, 80 Stat. 915, 16 U.S.C. §470(1966); the Open Space and Green Span programs, Housing Act of 1961, Pub. L. 87-70, 78 Stat. 890, 42 U.S.C. §§1500-00e(Supp. IV, 1965-68); the Highway Beautification Act, Pub. L. 89-285, 79 Stat. 1028, 23 U.S.C. §§131, 136, 319 (1965). Prior statutes specifically relating to highways and the environment include §4(f) of the Department of Transportation Act, Pub. L. 89-670, 80 Stat. 934, as amended by §18(b) of the Federal-Aid Highway Act of 1968, Pub. L. 90-945, 82 Stat. 824, 49 U.S.C. §1653(f), duplicated in 23 U.S.C. §138, relating to the preservation of parklands, recreational areas, wildlife refuges, and historic sites, and §116(c) of the Federal-Aid Highway Act of 1956, Pub. L. 627, 70 Stat. 374, as amended by Pub. L. 85-767, 72 Stat. 885, and Pub. L. 90-495, 82 Stat. 828, 23 U.S.C. §128, relating to public hearings, both of which are more fully considered later herein.

The Congress had clearly shown its concern with environmental matters prior to the enactment of the National Environmental Policy Act of 1969. However, this Act represents a significant departure from all prior legislation, in that the Congress enunciated for the first time a broad national policy in respect to the environment.

It is important to note that although denominated a "policy" statute, the 1969 Act in fact goes beyond the articulation of policy, since it makes provision for the implementation thereof by and on the part of Federal administrative agencies. It specifies certain affirmative actions to be taken by Federal agencies and officials in carrying out the provisions of announced policy. The language of the Congress in this respect is clearly mandatory and not directory. Hence, as a practical matter, although no sanctions are provided, the Act cannot be said to be wholly lacking in teeth. It hardly needs statement that the administrative arm of the Federal Government will

seek to carry out the duties and responsibilities imposed upon it by the Congress. And insofar as State and local governments are concerned, it is to be expected that in so doing Federal agencies will promulgate whatever rules and regulations, within the compass of their authority to adopt, and affecting governmental activities at the State and local level, as are deemed by such agencies to be necessary and required to enable them to discharge the duties and meet the responsibilities imposed upon them by the Act. Hence, it is idle to suppose that the impact of the Act will fall on Federal agencies alone. In fact, the contrary is fully to be expected, as is discussed later herein.

The Policy Act of 1969, although enacted subsequent to other Federal legislation dealing with the environment, because of its broad thrust is taken as the starting point of this paper.

The Act is divided into two major parts. Title I sets forth a declaration of national policy in respect to the environment and a statement of goals to be obtained, together with provisions relating to the implementation of such policy and the achievement of such goals. Title II creates in the Executive Office of the President of the United States a three-man Council on Environmental Quality, and specifies the powers, functions, and duties of the Council members.

[a] Title I of the Act

Sec. 101 of Title I, 42 U.S.C. §4331, provides in part as follows:

> (a) The Congress, recognizing the profound impact of man's activity on the interrelations of all components of the natural environment, particularly the profound influences of population growth, high-density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances and recognizing further the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man, declares that it is the continuing policy of the Federal Government, in cooperation with State and local governments, and other concerned public and private organizations to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.
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> (b) In order to carry out the policy set forth in this chapter, it is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may -
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> (1) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;
> (2) assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings;
> (3) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;
> (4) preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity and variety of individual choice;
> (5) achieve a balance between population and resource use which will permit high standards of living and wide sharing of life's amenities; and
> (6) enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.
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> (c) The Congress recognizes that each person should enjoy a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment.

It is to be noted that the preservation and protection of the environment are equated with the general welfare in subsection (a); that the pursuit of six broad national goals is designated the continuing responsibility of the Federal Government in subsection (b); and that in subsection (c) the Congress recognizes the right of each individual to enjoy a healthful environment and declares it to be the responsibility of each individual to contribute to the preservation and enhancement of the environment.

Sec. 102 of Title I, 42 U.S.C. §4332, requires certain specific actions on the part of all Federal agencies. It provides in part as follows:

> The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all agencies of the Federal Government shall -
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> (A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment;
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> (B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by subchapter II of this chapter, which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations;
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> (C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on-
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> (i) the environmental impact of the proposed action,
> (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
> (iii) alternatives to the proposed action,
> (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
> (v) any irreversible and irretrievable commitments of resources which would be involved if the proposed action should be implemented.
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> Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of Title 5, and shall accompany the proposal through the existing agency review processes.

This language would seem to make it clear that the Policy Act of 1969 goes beyond the bare enunciation of policy. It "directs" that specific and definitive courses of action be taken by Federal agencies. Those spelled out in subsections (A) and (B) are general in scope and do not appear to require comment. However, it is evident that the language of subsection (C) presents difficulty. The provisions thereof requiring a detailed statement on five aspects of proposals for "major Federal actions significantly affecting the quality of the human environment" pose a critical question of construction. The question presented is whether the phrase "major Federal actions" comprehends and includes all Federal-aid highway projects, and, if not, what Federal-aid highway projects are included within the meaning of the language. This question is examined in detail in §III[b], infra.

Title I further provides as follows:

§102, 42 U.S.C. §4332(D), directs responsible Federal officials to study and develop appropriate alternatives to courses of action recommended in any proposal.

§102(E), 42 U.S.C. §4332(E) (which appears unrelated to highway programs), is directed to the maximization of international cooperation in anticipating and preventing a decline in the quality of mankind's world environment.

§102(F), 42 U.S.C. §4332(F), requires Federal officials to make available to States, counties and municipalities advice and information useful in restoring, maintaining and enhancing the quality of the environment.

§102(G), 42 U.S.C. §4332(G), directs Federal agencies to utilize ecological information in the planning and development of resource-oriented projects.

§102(H), 42 U.S.C. §4332(H), imposes the duty to render assistance to the Council on Environmental Quality.

§103, 42 U.S.C. §4333, requires Federal agencies to review current regulations, policies, and procedures to determine if they are in accordance with the Act, and to report to the President not later than July 1, 1971, proposals to correct any dificiencies which may be found.

§104, 42 U.S.C. §4334, provides that the Act shall not be construed to relieve Federal agencies of existing statutory obligations.

§105, 42 U.S.C. §4335, specifies that the provisions of the Act are supplementary to existing obligations of Federal agencies.

§§102(D) and 102(G) are of particular interest to State highway departments. The impact thereof on activities at the State level is discussed more fully later herein.

[b] Title II of the Act

Next for consideration are the provisions of Title II of the Act, 42 U.S.C. §4341 et seq. The material portions thereof may be summarized briefly as follows:

There is created in the Executive Office of the President of the United States a Council on Environmental Quality, to be composed of three members appointed by the President. The duties and functions of the Council include, but are not limited to, assisting the President in the preparation of an Environmental Quality Report, to be submitted to the Congress annually beginning July 1, 1970, which report shall include a review of the programs and activities of the Federal, State and local governments, and an evaluation of the effect and impact thereof on the environment. Further duties include the assembling of timely and authoritative information concerning the conditions and trends in the quality of the environment and documentation of changes therein, the conduct of investigations and studies of ecological systems, and the development of environmental policies and programs and recommendations as to legislation.

At this point attention is directed to the subsequently enacted Environmental Quality Improvement Act of 1970, hereinafter called the "Improvement Act of 1970," which squarely affects the activities of the Council on Environmental Quality. The Policy Act of 1969 and the Improvement Act of 1970 were before the Congress at the same time. They constitute package legislation relating to the environment, and must be read in tandem.

III. THE ENVIRONMENTAL QUALITY IMPROVEMENT ACT OF 1970

The Environmental Quality Improvement Act of 1970 was enacted as Title II of the Water and Environmental Quality Improvement Act of 1970, Public Law 91-224, 84 Stat. 91, __ U.S.C. ___.[1/]

The Improvement Act of 1970, like the Policy Act of 1969, deals with over-all environmental protection, rather than specifically with water pollution, air pollution, etc. It contains in §202 a statement of national policy and a declaration of legislative purpose, as follows:

> (b) (1) The Congress declares that there is a national policy for the environment which provides for the enhancement of environmental quality.

1/ Title I of the Act, designated the Water Quality Improvement Act of 1970, deals specifically with water pollution. It contains more stringent provisions in respect to water pollution control than had appeared in prior Federal legislation. It relates, *inter alia*, to the control of pollution by oil, sewage from vessels, mine water and other deleterious substances, and contains sanctions may affect the operations of contractors working in or about navigable waters.

This policy is evidenced by statutes heretofore enacted relating to the prevention, abatement, and control of environmental pollution, water and land resources, transportation and economic and regional development.

(2) The primary responsibility for implementing this policy rests with State and local governments.

(3) The Federal Government encourages and supports implementation of this policy through appropriate regional organizations established under existing law.

(c) The purposes of this title are --

(1) to assure that each Federal Department and agency conducting or supporting public works activities which affect the environment shall implement the policies established under existing law; and

(2) to authorize an Office of Environmental Quality, which notwithstanding any other provision of law, shall provide the professional and administrative staff for the Council on Environmental Quality established by Public Law 91-190.

§203(a) creates in the Executive Office of the President the Office of Environmental Quality. The chairman of the three-man Council on Environmental Quality is designated the Director of the Office of Environmental Quality. The functions of the Office of Environmental Quality are specified in §203(d), as follows:

In carrying out his functions the Director shall assist and advise the President on policies and programs of the Federal Government affecting environmental quality by --

(1) providing the professional and administrative staff and support for the Council on Environmental Quality established by Public Law 91-190;

(2) assisting the Federal agencies and departments in appraising the effectiveness of existing and proposed facilities, programs, policies, and activities of the Federal Government, and those specific major projects designated by the President which do not require individual project authorization by Congress, which affect environmental quality;

(3) reviewing the adequacy of existing systems for monitoring and predicting environmental changes in order to achieve effective coverage and efficient use of research facilities and other resources;

(4) promoting the advancement of scientific knowledge of the effects of actions and technology on the environment and encourage the development of the means to prevent or reduce adverse effects that endanger the health and well-being of man;

(5) assisting in coordinating among the Federal departments and agencies those programs and activities which affect, protect, and improve environmental quality;

(6) assisting the Federal departments and agencies in the development and interrelationship of environmental quality criteria and standards established through the Federal Government;

(7) collecting, collating, analyzing, and interpreting data and information on environmental quality, ecological research, and evaluation.

It is seen that pursuant to the provisions of subsection (1), the Office of Environmental Quality is to provide the professional and administrative staff support for the Council on Environ-

mental Quality, or, in other words, to serve as the working arm of the Council. The further functions and duties of the Office of Environmental Quality, specified in subsections (2) - (7), are wholly consistent with and complementary to the functions and duties of the Council on Environmental Quality as set forth in Title II of the Policy Act of 1969 (supra). The two agencies were thus created by the Congress to perform interlocking and conjoined functions in the Executive Office of the President, in implementation of the broad national policy for comprehensive protection, preservation, restoration, and enhancement of the environment, announced by the Congress in both the Policy Act of 1969, and the companion Improvement Act of 1970.

Regulatory actions promulgated by the Council on Environmental Quality are considered next.

IV. INTERIM GUIDELINES OF THE COUNCIL ON ENVIRONMENTAL QUALITY

On April 30, 1970, the Council on Environmental Quality issued a memorandum designated "Interim Guidelines", appearing in the *Federal Register*, Vol. 35, No. 92, May 12, 1970, pp. 7390-7393, the stated purpose of which are as follows:

> 1. Purpose. This memorandum provides interim guidelines to Federal departments, agencies and establishments for preparing detailed environmental statements on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, as required by section 102(2) (C) of the National Environmental Policy Act....

In addition to the authority of the Policy Act of 1969, the Guidelines were issued pursuant to the mandate of §3(h) of the President's Executive Order No. 11514, March 5, 1970, 35 C.F.R. 4247, United States Code Congressional and Administrative News, No. 3, April 5, 1970, p. 444, which specifically directed the Council on Environmental Quality to issue "guidelines" to Federal agencies for use in preparing environmental statements.[2/]

[a] Consultation with State and local agencies required in preparation of environmental statements

Section 2 of the Guidelines required Federal agencies to consult with State and local agencies in preparing environmental statements. It provides as follows:

> Before undertaking major action or recommending or making a favorable report on legislation that significantly affects the environment, Federal agencies will, in consultation with other appropriate Federal, *State and local agencies*, assess in detail the potential environmental impact in order that adverse effects are avoided, and environmental quality is restored or enhanced, to the fullest extent practicable. In particular, alternative actions that will minimize adverse impact should be explored and both the long- and short-range implications to man, his physical and social surroundings, and to nature, should be evaluated in order to avoid to the fullest extent practicable undesirable consequences for the environment.... It is imperative that existing mechanisms for obtaining the views of Federal, *State and local agencies* on proposed Federal actions be utilized to the extent practicable in dealing with environmental matters. (Italics supplied).

Thus, the Guidelines emphasize that State and local governmental units are to be drawn into

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2/ See the following further actions of the President relating to the environment: Executive Order No 11472, June 3, 1969, 34 C.F.R. 8693, United States Code Congressional and Administrative News, Vol. 2, 91st Congress, 1st Session, p. 2886, creating the Environmental Quality Council before the Council on Environmental Quality was established by Congress in the Policy Act of 1969; special message to Congress on the environment, submitted February 10, 1970, 116 Congressional Record H. 743, United States Code Congressional and Administrative News, No. 2, March 5, 1970, p. 112, in which the President took a strong stand in respect to environmental protection; and Reorganization Plans Nos. 3 and 4, submitted to the Congress on July 9, 1970, 116 Congressional Record H. 6523, United States Code Congressional and Administrative News, No. 8, August 20, 1970, p. 2996. Reorganization Plan No. 3 creates in the Executive Office of the President the Environmental Protection Agency, to which are transferred certain functions vested in other agencies of the Federal government, and Reorganization Plan No. 4 creates in the Department of Commerce the National Oceanic and Atmosphere Administration. The functions of the EPA and NOAA do not require discussion here.

the decisionmaking process by the Federal agencies charged with the responsibility of implementing and carrying out the provisions of the Policy Act of 1969. That is to say, before preparing the environmental statement required by the Act to be included in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the environment, Federal agencies are to consult with appropriate State and local agencies, as well as appropriate agencies of the Federal Government.

[b] When environmental statement is required; meaning of term "major Federal actions"

The next question for consideration is as to when an environmental statement is required. The answer to this question must turn largely on the construction given the phrase "major Federal actions," appearing in §102(C) of Title I of the Policy Act of 1969, 42 U.S.C. §4332(C). As previously noted, said section provides that all Federal agencies shall include in every recommendation or report on proposals for legislation and other *major Federal actions* significantly affecting the environment, a detailed statement in respect to: (a) the environmental impact of the proposed action; (b) any adverse environmental effect which cannot be avoided should the project be implemented; (c) alternatives to the proposed action; (d) the relationship between local short-term uses of the environment and the maintenance and enhancement of long-term productivity; and (e) any irreversible and irretrievable commitments of resources which would be involved if the proposed action were carried out.

The Interim Guidelines of the Council on Environmental Quality contain provisions relating to to construction of the term "major Federal actions."

Section 5(a) of the Guidelines defines the word "actions" to include projects supported in whole or in part through Federal contracts and grants, and hence clearly encompasses Federal-aid highway projects.3/ Section 5(a) constitutes a workable definition of the word "actions." However, §5(b), dealing with the qualifying word "major," seems patently "guideline" in character, rather than an attempt to supply a firm and precise definition of the word "major." It provides as follows:

> (b) The statutory clause "major Federal actions significantly affecting the quality of the human environment" is to be construed by agencies with a view to the over-all, cumulative actions contemplated). Such actions may be localized in their impact, but if there is potential that the environment may be significantly affected, the statement is to be prepared. Proposed actions the environmental impact of which is likely to be highly controversial should be covered in all cases. In considering what constitutes major action significantly affecting the environment, agencies should bear in mind that the effect of many Federal decisions about a project or complex of projects can be individually limited but cumulatively considerable. This can occur when one or more agencies over a period of years puts into a project individually minor but collectively major resources, when one decision involving a limited amount of money is a precedent for action in much larger cases or represents a decision in principle about a future major course of action, or when several Government agencies individually make decisions about partial aspects of a major action. The lead agency should prepare an environmental statement if it is reasonable to anticipate a cumulatively significant impact on the environment from the Federal action.

Thus, §5(b) provides that: (a) although the environmental effect of a project is localized, a statement should be prepared if the environment is "significantly affected"; (b) an environmental statement should be prepared where the environmental effect of the project is "highly controversial"; (c) in determining what constitutes a major action the project is not to be considered by

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3/ The argument may, of course, be advanced that the word "actions" does not include Federal-aid projects, or in the alternative that even if it does the word "proposals" does not relate to proposals made by a State for a Federal-aid highway project, because the Policy Act undertakes to regulate Federal activities only. Either construction would eliminate the entire Federal-aid highway program from coverage of the Act. If the Congress had intended such sweeping exclusion it seems reasonable to conclude that it could and would have chosen a more direct and explicit means of accomplishing the result. The interpretation placed on the word "actions" by the Council on Environmental Quality appears, it is submitted, wholly permissible as a matter of statutory construction, and consistent with the broad purpose of the Act to provide over-all environmental protection.

itself, but consideration should be given to the role it plays in bringing about a "cumulatively significant impact" on the environment. It is apparent that the key words "significantly affected", "highly contorversial", and "cumulatively significant impact" are latitudinous in meaning. They are lacking in the exactitude of words employed for purposes of definition. It seems evident that they were intended as "guidelines" only, for use by Federal agencies charged with the responsibility of interpreting statutory language and implementing the provisions thereof. Hence, it must be concluded that the Interim Guidelines do not furnish a definitive, working answer to the question of what Federal-aid highway projects are to be considered "major Federal actions" requiring an environmental statement.

At the time of writing this report there is no case law that yields useful instruction, nor have any clarifying regulations been issued by the United States Department of Transportation or the Federal Highway Administration. It is, hence, necessary to consider the meaning of the word "major" in terms of ordinary usage, and in the particular context in which it is used in the Policy Act of 1969.

The word "major" is defined in Webster's 3rd Unabridged International Dictionary to mean "greater in number, quantity, or extent". Such definition as applied to a highway project could be construed to mean a project which is substantial in terms of money expenditures, amount of land acquired for right-of-way, and numbers of persons, businesses, and industries affected. However, as used in a statute dealing with environmental effect, it would seem clear that it would also have reference to a project, which, although insubstantial in the foregoing terms, was substantial in terms of environmental impact. Consider, for example, a project involving a disfiguring cut in a landscape widely known for exceptional scenic beauty. Other examples could be multiplied. It might be observed in passing that it seems difficult to separate almost any highway construction from environmental effect of some kind or nature. This much seems clear. The word "major," as used in the Policy Act of 1969, must be construed to have referenct to the *quantum* of environmental effect of a highway project, regardless of the size of the project.

There appears to be a very real possibility that the phrase "major Federal actions" may be interpreted by the United States Department of Transportation and the Federal Highway Administration to include *all* Federal-aid highway projects. However, even if this does not prove to be the case, it would appear that an environmental report of some kind may be required by the Federal Highway Administration in connection with *all* Federal-aid highway projects. A negative determination—i.e., that a project does not have "major" environmental effect—inevitably must be based on supportive evidence. In the absence of a study of all relevant facts and an evaluation of all pertinent factors, it is difficult to see how an administrative determination could be made which would withstand a charge of being arbitrary or capricious.

If all Federal-aid highway projects are not to be blanketed within the phrase "major Federal actions," the determination of which projects are to be included will fall upon the Federal Highway Administration. It may be accepted as a fact that the Federal Highway Administration is not presently staffed and equipped to make nationwide field investigations on the basis of which to prepare approximately eight thousand environmental statements annually. It has been seen that the Policy Act of 1969 and the Interim Guidelines require consultation with State and local agencies in making determination as to environmental matters. It seems reasonable to suppose that the Federal Highway Administration, as a condition precedent to making environmental determinations, would place the burden of preparing environmental reports on the States. As a practical matter this would seem necessary. As a matter of complying effectively with the mandate of statute law, such action would seem required. It is to be expected that the Federal Highway Administration would review environmental statements prepared at the State level and either adopt the statement as its own or modify or reject the same as the individual case might in its judgment necessitate. Such procedure would seem justified from an administrative standpoint, and fully within the legal authority of the Federal Highway Administration to order and require.

It is, therefore, suggested that State highway departments might well consider the possibility that an environmental statement of some kind or nature will be required in the foreseeable future in connection with all Federal-aid highway projects, and to prepare for the additional duties and increased volume of work attendant upon the preparation of such statements.

V. RELATION OF THE POLICY ACT TO OTHER FEDERAL LEGISLATION

The Policy Act of 1969 must, in accordance with established canons of statutory construction, be read *in pari materia* with other Federal statutes touching the same subject matter. As stated in 50 Am. Jur., Statutes, §349:

> Under the rule of statutory construction of statutes *in pari materia*, statutes are not to be construed as isolated fragments of law, but as a whole, or as parts of a great, connected, homogeneous system, or a single and complete statutory arrangement. Such statutes are considered as if they constituted but one act, so that sections of one act may be consedered as though they were parts of the other act, as far as this can reasonably be done.

More significantly, the Act itself provides (§102 of Title I, 42 U.S.C. §4332) that "to the fullest extent possible the . . . public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter."

In reviewing other Federal legislation dealing with the impact of highways on the environment, it is thus necessary to read the same in the light of the statutory mandate that they be "interpreted and administered in accordance with the policies" enunciated in the Policy Act of 1969.

Bearing this in mind, attention is now turned to the provisions of 23 U.S.C. §128 and the regulations promulgated thereunder in P.P.M. 20-8, relating to public hearings on route location and design, and §4(f) of the Department of Transportation Act of 1966, as amended, duplicated in 23 U.S.C. §138, relating to the preservation of parklands, recreational areas, wildlife refuges, and historic sites.

[a] 23 U.S.C. §128 and P.P.M. 20-8

Section 128 of Title 23, United States Code, provides as follows:

> (a) Any State highway department which submits plans for a Federal-aid highway project involving the bypassing of, or going through, any city, town, or village, either incorporated or unincorporated, shall certify to the Secretary that it has had public hearings, or has afforded the opportunity for such hearings, and has considered the economic and social effects of such a location, its impact on the environment, and its consistency with the goals and objectives of such urban planning as has been promulgated by the community. Any State highway department which submits plans for an Interstate System project shall certify to the Secretary that it has had public hearings at a convenient location, or has afforded the opportunity for such hearings, for the purpose of enabling persons in rural areas through or contiguous to whose property the highway will pass to express any objections they may have to the proposed location of such highway.

Section 128 thus provides that public hearings be held, or an opportunity for such hearings accorded, by State highway departments prior to submitting plans for a Federal-aid highway project involving passing through or bypassing any city, town or village, and prior to submitting plans for an Interstate highway traversing rural areas. The State highway department is required to certify to the Secretary of Transportation of the United States that is has considered the "impact on the environment" of the proposed highway project.

The requirements of §128 were implemented by the former Bureau of Public Roads in the provisions of P.P.M. 20-8, appearing in the *Federal Register*, Vol. 34, No. 12, January 17, 1969, at pp. 728-730.4/ Section 9 of P.P.M. 20-8, relating to environmental effects, provides as follows:

> State highway departments shall consider social, economic, and environmental effects before submission of requests for location or design approval, whether or not a public hearing has been held. Consideration of social, economic, and environmental effects shall include an analysis of information submitted to the State highway department in connection with public hearings or in response to the notice of the location or design for which a State highway department intends to request approval. It shall also include consideration of information developed by the State highway department or gained from other contacts with interested persons or groups.

4/ Other regulatory material of the Federal Highway Administration relating to environmental matters, and not specifically covered and considered herein, includes but is not limited to that appearing in P.P.M. 21-17; P.P.M. 21-19; P.P.M. 30-4-1; I.M. 20-6-67; I.M. 21-2-69; I.M. 21-5-63.

In defining the phrase "social, economic, and environmental effects," 23 factors are specified as being relevant and to be taken into consideration. Section 4 (c) provides:

> "Social, economic, and environmental effects" means the direct and indirect benefits or losses to the community and to highway users. It includes all such effects that are relevant and applicable to the particular location or design under consideration such as:
>
> (1) Fast, safe and efficient transportation.
> (2) National defense.
> (3) Economic activity.
> (4) Employment.
> (5) Recreation and parks.
> (6) Fire protection.
> (7) Aesthetics.
> (8) Public utilities.
> (9) Public health and safety.
> (10) Residential and neighborhood character and location.
> (11) Religious institutions and practices.
> (12) Conduct and financing of Government (including effect on local tax base and social service costs).
> (13) Conservation (including erosion, sedimentation, wildlife and general ecology of the area).
> (14) Natural and historic landmarks.
> (15) Noise, and air and water pollution.
> (16) Property values.
> (17) Multiple use of space.
> (18) Replacement housing.
> (19) Education (including disruption of school district operations).
> (20) Displacement of families and businesses.
> (21) Engineering, right-of-way and construction costs of the project and related facilities.
> (22) Maintenance and operating costs of the project and related facilities.
> (23) Operation and use of existing highway facilities and other transportation facilities during construction and after completion.
>
> This list of effects is not meant to be exclusive, nor does it mean that each effect considered must be given equal weight in making a determination upon a particular highway location or design.

A considerable number of the 23 factors might be included within the meaning of the term "environmental effects." However, particular attention is called to the following numbered subsections: (5) recreation and parks; (7) aesthetics; (13) conservation, including erosion, sedimentation, wildlife and general ecology; (14) natural and historic landmarks; and (15) noise, air and water pollution.

As is seen immediately following, exactly the same factors are relevant considerations in construing and applying the provisions of §4(f) of the Department of Transportation Act.

[b] 23 U.S.C. §138

Section 4(f) of the Department of Transportation Act of 1966 was amended by §18(b) of the Federal-Aid Highway Act of 1968, and codified in 49 U.S.C. §1653(f). Section 18(a) of the Highway Act of 1968 employs precisely the same language as §18(b), but amends §138 of Title 23 of the United States Code. Thus, §§18(a) and 18(b) constitute duplicate legislation. The provisions thereof read as follows:

> It is hereby declared to be the national policy that special effort should be made to preserve the natural beauty of the countryside and public park and recreation lands, wildlife and waterfowl refuges,

> and historic sites. The Secretary of Transportation shall cooperate and consult with the Secretaries of the Interior, Housing and Urban Development, and Agriculture, and with the States in developing transportation plans and programs that include measures to maintain or enhance the natural beauty of the lands traversed. After the effective date of the Federal-Aid Highway Act of 1968, the Secretary shall not approve any program or project which requires the use of any publicly owned land from a public park, recreation area, or wildlife and waterfowl refuge of national, State or local significance as determined by the Federal, State, or local officials having jurisdiction thereof, or any land from an historic site of national, State, or local significancesas so determined by such officials unless (1) there is no feasible and prudent alternative to the use of such land, and (2) such program includes all possible planning to minimize harm to such park, recreational area, wildlife and waterfowl refuge, or historic site resulting form such use.

Thus, Section 4(f), as amended, (23 U.S.C. §138) requires the Secretary of Transportation to cooperate and consult with the Secretaries of the Interior, Housing and Urban Development, and Agriculture, before approving any project which requires the use of (a) public parks; (b) recreational areas; (c) wildlife and waterfowl refuges of national, State, or local significance; or (d) historic sites of national, State, or local significance. The statute provides that the Secretary of Transportation shall not approve any such project unless (1) no feasible and prudent alternative exists, and (2) the program includes all possible planning to minimize harm to the affected area.

Although no formal memorandum of agreement has been entered into by and between the Secretaries of Transportation, Interior, Housing and Urban Development, and Agriculture, respecting Cooperative and consultative procedures to be followed in connection with a project falling within the ambit of Section 4(f), certain operative procedures have been established. These include the submission by the Secretary of Transportation to the Secretaries of the other Departments of his conclusions as to feasible and prudent alternatives, and whether planning reflects minimization of harm to the affected area. Response and recommendations are made by Interior, Housing and Urban Development, and Agriculture, taking into account the monitoring of 4(f) projects conducted by such Departments at the regional or local level. The final decision as to approval rests with the Secretary of Transportation.

By letter memorandum of the Deputy Director of the Bureau of Public Roads, 34-30, dated January 20, 1970, all Regional Administrators of the Federal Highway Administration were directed to investigate and study the 4(f) aspects of highway projects. The States were duly advised to furnish pertinent information in respect thereto, and hence the 4(f) aspects of highway projects are monitored and reported on at the local level by both the Federal Highway Administration and the State highway departments.

It is to be noted that 49 U.S.C. §1653(f) and 23 U.S.C. §138 do not require a public hearing on the question of whether a feasible and prudent alternative exists to the use of publicly owned parklands, recreational areas, wildlife refuges, and historic sites for highway purposes. However, a public hearing on this question, taking into consideration the related question of whether planning reflects minimization of harm to the affected area, does seem to be required by the provisions of P.P.M. 20-8. Section 8(b)(3) provides that at each corridor hearing "pertinent information about location alternatives studied by the State highway departments shall be made available." As has been seen, among the 23 factors to be weighed and considered in determining the social, economic, and environmental impact of a highway project (and determination in respect thereto presented for public hearing) are the effects of the project on (a) recreation and parks, (b) wildlife and general ecology, and (c) natural historic landmarks. (See supra, subsections (5), (13) and (14)). These taken together constitute the fourfold scope of §4(f). There may also be noted, although not by way of exclusion of other factors, the provisions of subsections (7) and (15) (supra), relating to aesthetics, and to noise and air and water pollution. It is difficult to visualize any 4(f) project which would not be included within the scope of the above-designated factors specifically enumerated by the provisions of P.P.M. 20-8.

Thus, State highway departments are under a double-barreled injunction to make 4(f) studies; i.e., as a result of the aforementioned letter memorandum of January 20, 1970, and as a result of the provisions of P.P.M. 20-8 specifically directed to 4(f) considerations.

[c] Effect of the Policy Act on construction and administration of §23 U.S.C. §§128 and 138

The question now for consideration is whether 23 U.S.C. §128 and 23 U.S.C. §138 are being "interpreted and administered in accordance with the plicies" announced in the Policy Act of 1969, or whether a change appears required which would affect State highway departments.

It is immediately apparent that no categorical answer can be given to this question. Quite obviously both §128 and §138 are being administered with attention to the environmental effects of highway right-of-way acquisition and construction. As has been seen, the public hearing requirements of P.P.M. 20-8 encompass all Federal-aid highway projects, and the provisions thereof specifically directed to environmental considerations apply with equal force to 4(f) proceedings. However, the administrative procedures set in motion to implement the provisions of both §128 and §138 were adopted *prior* to the enactment of the Policy Act of 1969. If they happen fully to conform with the mandate of the 1969 Act, it would indeed be fortuitous.

It would seem reasonable to suppose that in the foreseeable future regulations will be promulgated by the Federal Highway Administration affecting State highway departments, which will zero in on carrying out the intent, purpose, and policies of the Policy Act of 1969. Speculation in respect thereto will serve no useful purpose, but it seems safe to presume that they will contain a bill of particulars in respect to environmental effects, and that the burden of satisfying the demands thereof will be placed and fall squarely on State highway departments.

VI. STANDING TO SUE ON GROUNDS OF INTEREST IN ENVIRONMENT

A word now appears in order in respect to case law relating to the critical matter of standing to sue on grounds of interest in the environment.5/

Discussion of the broad problem of standing to sue is, of course, beyond the scope of this paper. (See for a more comprehensive treatment of the subject the prior paper entitled "Standing to Sue for Purposes of Securing Judicial Review of Exercise of Administrative Discretion in Route Location," published in NCHRP Research Results Digest No. 6 (Apr. 1969). Attention herein is centered on the recent significant decision in *Citizens Committee for the Hudson Valley v. Volpe,* 425 F. 2d 97 (C.C.A. 2, 1970) wherein interest in the environment was held ground for standing to sue.

The facts in *Citizens Committee* were as follows:

The New York State Department of Transportation undertook the construction of a six-lane arterial highway along a ten mile stretch of the Hudson River, between Tarrytown and Crotonville. No Federal-aid highway funds were involved. The plans called for placing approximately 9,500,000 cubic yards of fill, bound by a rock wall, along a portion of the river bank. At its widest point the fill was to extend approximately 1,300 feet into the Hudson River. The State of New York applied to and received from the United States Army Corp of Engineers a permit authorizing the dredge-and-fill operations in the Hudson River, a navigable waterway under Federal jurisdiction. Plaintiffs, the Citizens Committee for the Hudson Valley, the Sierra Club, and the Village of Tarrytown, brought suit for injunctive relief against the issuance of the permit. The named de-

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5/ The case law generally relating to the construction and interpretation of the Policy Act of 1969, 23 U.S.C. §128, and 23 U.S.C. §138, is as yet in the development stage. As might be expected, there are at present not any instructive decided cases dealing with the interpretation of the Policy Act. However, a number of cases have been instituted, largely in the Federal courts, involving the public hearing requirements of 23 U.S.C. §128, or the "feasible and prudent alternative" provisions of 23 U. U.S.C. §138, or both. The majority of these cases are either pending, at the trial stage, or on appeal. There is little in the way of significant decision which can be reported at the time of this writing. For information purposes, there is listed immediately following, with such citations as are presently available, a number of these cases, the results in which when adjudicated may yield useful instruction. See: *Fayetteville Area Chamber of Commerce v. Volpe,* D.D.C., Civil No. 1402-68, filed June 7, 1968; *Lukowski v. Volpe,* D. Md., Civil No. 20634, filed March 7, 1969; *San Antonio Conservation Society v. Texas Highway Department,* W.D. Tex., Civil No. 67-72A, filed November 21, 1967; *Citizens to preserve Overton Park v. Volpe,* ____F.2d____(C.C.A.6, September 29, 1970); *Concerned Citizens of Clarksville, et al v. Volpe, et al,* W.D. Tex., Civil No. A-70-CA-27, filed March 23, 1970, *Lathan et al v. Volpe, et al,* W.D. Wash., Civil N. 8986, filed May 28, 1970; *Wildlife Preserves, Inc. v. Volpe,* D.N.J., Civil No. 9-70, filed January 6, 1970; *District of Columbia Federation of Civic Associations v. Volpe,* ____F2d ____; *Pennsylvania Environmental Council, et al v. Bartlett, Volpe, et al,* ____F. Supp. ____; *Township of Radnor v. Volpe,* E.D. Pa., Civil No. 70-282, filed January 28, 1970; *Stewart v. Resor, Volpe, et al,* E.D. Pa., Civil No. 70-551.

fendants were John Volpe, Individually and as Secretary of Transportation, Walter J. Hickel, Individually and as Secretary of the Interior, Stanley S. Resor, Individually and as Secretary of the Army, William F. Cassidy, Individually and as Chief of Engineers, Corps of Engineers, and J. Burch McMorran, Individually and as Commissioner of the New York Department of Transportation.

The District Court found that the proposed rock wall jutting into the river would constitute a "dike," within the meaning of that word as used in the Rivers and Harbors Act of 1899, 33 U.S.C. §401, and that the consent of Congress to the construction of such dike, which was not obtained by the Corps, was necessary under said Rivers and Harbors Act. The District Court further found that the proposed construction would constitute a "causeway," within the meaning of that word as used in the Department of Transportation Act, 49 U.S.C. §1655(g), and that the consent of the Secretary of Transportation to the construction of such causeway, which was not obtained by the Corps, was necessary under the Department of Transportation Act. The District Court ruled that the Corps of Engineers had breached a nondiscretionary duty to secure the consent of both Congress and the Secretary of Transportation, declared the issuance of the permit void, and granted a permanent injunction against the issuance of the permit, without first obtaining the consent of Congress and the Secretary of Transportation.

The District Court rested its jurisdiction on the provisions of the Administrative Procedure Act, 5 U.S.C. §§701 et seq. Section 702 provides as follows:

> A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.

On appeal, at the threshhold of the question of standing to sue, the Court of Appeals for the Second Circuit had the following to say in respect to the status of plaintiffs, the Citizens Committee, and the Sierra Club:

> Two of the plaintiffs (the Citizens Committee and the Sierra Club) made no claim that the proposed Expressway or the issuance of the dredge-and-fill permit threatened any direct personal or economic harm to them. Instead they asserted the interest of the public in the natural resources, scenic beauty and historical value of the area immediately threatened with drastic alteration, claiming that they were "aggrieved" when the Corps acted adversely to the public interest. They are, as the federal defendants observe, serving as "private Attorney Generals" to protect the public interest.

In affirming the ruling of the District Court, the Court of Appeals stated:

> We have already described the situation confronting the plaintiffs--the prospect of massive alteration of the Hudson River shoreline and of the physical environment for some ten miles along the river's bank. The Citizens Committee for the Hudson Valley (Citizens Committee) is an unincorporated association of citizens who reside near the proposed Expressway. The Sierra Club is a national conservation organization with substantial membership also in the area of the Expressway, and a history of involvement in the preservation of national scenic and recreational resources. ...All plaintiffs made a vigorous effort to present their views to the New York Department of Transportation and to the federal officials responsible for granting the disputed permit. They have evidenced the seriousness of their concern with local natural resources by organizing for the purpose of cogently expressing it, and the intensity of their concern is apparent from the considerable expense and effort they have undertaken in order to protect the public interest which they believe is threatened by official action of the federal and state governments. In short, they have proved the genuineness of their concern by demonstrating that they are "willing to shoulder the burdensome and costly processes of intervention" in an administrative proceeding. ...They have "by their activities and conduct... exhibited a special interest in" the preservation of the natural resources of the Hudson Valley. ...It remains for us to examine whether there is legal justifi-

cation for their intervention--whether there is a "legally protected interest" at stake which they can assert because of their special concern.

In Scenic Hudson [354 F.2d 608, (C.C.A. 2, 1965)] we set aside an order of the Federal Power Commission granting a license to Consolidated Edison Company of New York to construct a hydroelectric project on the west side of the Hudson River at Storm King Mountain. Finding that the Federal Power Act required the Commission to consider as a factor in granting such a licence "recreational purposes" of waterway development, we held that persons asserting an interest in that factor were "aggrieved" within the meaning of that statute's review provisions when the Commission decided adversely with respect to their claims. The expression by Congress in the Federal Power Act of a concern for the environmental effect which the agency's action could be expected to exert was interpreted to create express statutory protection for the public's interest in conservation of environmental resources, and organizations with a demonstrated concern for those resources could claim that statutory protection for the public.

The Rivers and Harbors Act has no review provisions corresponding to those in the Federal Power Act. Nevertheless, persons "aggrieved" by agency action pursuant to that statute are entitled to review on similar terms by the Administrative Procedure Act. We agree with the conclusion of Judge McLean in *Road Review League v. Boyd*, 270 F. Supp. 650, 661 (S.D.N.Y. 1967) that the meaning of "aggrieved" in one act is not different from its meaning in the other. Section 702 of the Administrative Procedure Act provides that a person "aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." These plaintiffs, alleging that the Corps and the Secretary of the Army ignored their environmental concerns, are "aggrieved" within the meaning of at least three "relevant statute[s]." The Department of Transportation Act declares "the national policy that special effort should be made to preserve the natural beauty of the countryside...," and requires consideration of recreational resources and historical values before the Secretary can approve projects under its jurisdiction. The Hudson River Basin Compact Act, P.L. 89-605, 80 Stat. 847 (1966) embodies the conclusion of Congress that the Hudson River basin contains resources of "immense economic, natural scenic, historic and recreational value to all the citizens of the United States," and instructs all agencies to consider those resources in planning or approving activities affecting the area. One of the regulations under which the Corps of Engineers issued the present permit provides the following:

> "...the decision as to whether a permit will be issued must rest on an evaluation of all relevant factors, including the effect of the proposed work on navigation, fish, and wildlife, conservation, pollution, aesthetics, ecology, and the general public interest." 33 CFR 209. 120(d).

Thus, administrative as well as congressional concern for natural resources in the present exercise of federal authority is evident. We hold, therefore, that the public interest in environmental resources--an interest created by statutes affecting the issuance of this permit--is a legally protected interest affording these plaintiffs, as responsible representatives of the public, standing to obtain judicial review of agency action alleged to be in contravention of that public interest. (Underscoring supplied).

The Court thus held that an "interest in environmental resources" was a "legally protected interest", that such interest was a "public interest", and that the plaintiffs as "representatives of the public" had standing to sue. The Court expressly noted that the plaintiffs "made no claim that the proposed Expressway ... threatened any direct personal or economic harm to them. Instead they asserted the interest of the public in the natural resources, scenic beauty and historical value of the area...." The plaintiffs served, in bringing suit, in the capacity of "private Attorney Generals"6/ acting to "protect the public interest."

In holding that the action was within the scope of the Administrative Procedure Act--i.e., that the plaintiffs were "aggrieved ... within the meaning of a relevant statute"--the Court pointed to the language of the Department of Transportation Act declaring "the national policy that special effort should be made to preserve the natural beauty of the countryside...." This language appears in the first sentence of 49 U.S.C. §1653(f) and 23 U.S.C. §138, as follows:

> It is hereby declared to be the national policy that special effort should be made to preserve the natural beauty of the countryside and public park and recreation lands, wildlife and wildfowl refuges, and historic sites.

It is but a short step to a square holding that standing to sue exists on 4(f) grounds. It is but a further short step to a holding that standing exists under the environmental provisions of 23 U.S.C. §128, and the provisions of Title I of the Policy Act of 1969 establishing national policies and goals respecting the environment.

Hence, in the light of the holding of the Second Circuit in *Citizens Committee*, it seems likely that standing to sue will constitute in the future a minimal hurdle to review of agency action, Federal or State, involving administrative determination as to the environmental effect of a highway project. It is submitted that it is illusory to seek to construe the holding in *Citizens Committee* as having limited scope and application. The broad sweep of the language used by the Court cannot be read as other than wholly purposeful and deliberate.

VII. CONCLUSION

Although §128 and §138 of Title 23 of the United States Code became effective on August 23, 1968, and the Policy Act of 1969 became law on January 1, 1970, there is as yet little in the way of decided case law construing these statutes. This situation can be expected to change rapidly. P.P.M. 20-8 appeared in the *Federal Register* January 17, 1969 (prior to enactment of the Policy Act), and the Interim Guidelines were published April 30, 1970. It has been suggested herein that administrative regulations may also be expected to change in the near future, in order to provide a more specific bill of particulars in respect to environmental findings required of State highway departments. Although State highway departments are necessarily in a stand-and-wait position insofar as complying with more specific administrative regulations is concerned, it is well to remember that *Citizens Committee* indicates that judicial review of administrative determinations respecting environmental effects of highways may in the future be far more easily obtainable than in the past. Hence, it would seem that State highway departments would be well advised to make preparations for indepth studies of environmental effects, in order to meet possible future increased demands flowing from changed administrative regulations, and also to make a record that would withstand court challenge as to the exercise of administrative discretion in decisions involving the environmental effects of highways. Howsoever taken, increased attention to the environmental impact of highway right-of-way acquisition and construction would seem to lie in the future for all State highway departments.

6/ See *Sierra Club v. Hickel* _____ F.2d _____, (C.C.A. 9, September 16, 1970), which questions the ruling in *Citizens Committee* as to the standing of the Sierra Club within the "private Attorney Generals" rule. The Second Circuit's holding as to the standing of the Citizens Committee for the Hudson Valley is, however, not questioned by the decision of the Ninth Circuit in *Sierra Club v. Hickel*, supra.

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APPLICATION

The foregoing research should prove helpful to highway administrators, highway planners and engineers, legal counsel concerned with the highway program, and other highway officials who will be required to adjust their procedures to provide for full consideration of all legal environmental provisions. Highway officials are urged to review their agency procedures as they relate to environmental considerations. This research paper, together with other recently completed reports, such as "The First Annual Report of the Council on Environmental Quality" and "The President's Message to Congress," transmitted to the Congress in August 1970, will help highway officials to reorient their procedures to incorporate new requirements in a meaningful way.

APPENDIX

Since this paper was completed the United States Department of Transportation issued Order No. 5610.1, relating, *inter alia*, to implementation of Section 102(2)(C) of the National Environmental Policy Act of 1969. Subsequent to the issuance of this Order the Federal Highway Administration, by Draft Instructional Memorandum dated November 24, 1970, issued "Interim Guidelines for Implementation of Section 102(2)(C) of the National Environmental Policy Act of 1969." The full texts of both DOT Order No. 5610.1 and the FHWA Draft Interim Guidelines follow.

Department of Transportation
Office of the Secretary
Washington, D.C.

ORDER

DOT 5610.1

10/7/70

SUBJECT: IMPLEMENTATION OF SECTION 102(2)(C) OF THE NATIONAL ENVIRONMENTAL POLICY ACT OF 1969, SECTION 4(F) OF THE DOT ACT, AND PORTIONS OF SECTION 16 OF THE AIRPORT AND AIRWAY DEVELOPMENT ACT OF 1970

1. PURPOSE. This order outlines procedures for the Department of Transportation regarding the preparation of detailed environmental statements on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, as required by Section 102(2)(C) of the National Environmental Policy Act of 1969 (P.L. 91-190) (hereafter "the NEP Act"). It also sets forth procedures for implementation of Section 4(f) of the Department of Transportation Act of 1966 (P.L. 89-670) (hereafter "the DOT Act") and Section 16(c)(4), 16(d) and 16(e) of the Airport and Airway Development Act of 1970 (P.L. 91-258) (hereafter "the Airport Act"). It is the intent of this order that Section 102(2)(C) statements should serve as the vehicle for all environmental findings, determinations and clearances required under any legislation applicable to the Department of Transportation.

2. BACKGROUND AND AUTHORITY.

a. The National Environmental Policy Act of 1969 establishes a broad national policy to promote efforts to improve the relationship between man and his environment, and provides for the creation of a Council on Environmental Quality (CEQ). The NEP Act sets out certain policies and goals concerning the environment, and requires that, to the fullest extent possible, the policies, regulations, and public laws of the U.S. shall be interpreted and administered in accordance with those policies and goals.

b. Section 102(2)(C) of the NEP Act is designed to ensure that environmental considerations are given careful attention and appropriate weight in all decisions of the Federal Government. This Section requires that all agencies of the Federal Government shall

> "include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on --
>
> "(i) the environmental impact of the proposed action,
>
> "(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
>
> "(iii) alternatives to the proposed action,
>
> "(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
>
> "(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.
>
> "Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies

of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality, and the public as provided by Section 552 of Title 5, United States Code, and shall accompany the proposal through the existing agency review processes."

c. Executive Order 11514, dated March 5, 1970, orders all Federal agencies to initiate procedures needed to direct their policies, plans, and programs so as to meet national environmental goals.

d. A memorandum from the Secretary, dated February 26, 1970, provided general guidelines for the DOT response to the NEP Act. The memorandum also assigned the responsibility to oversee the Department's response to the NEP Act, in terms of both policies and procedures, to the Assistant Secretary for Environment and Urban Systems (TEU), in cooperation with the General Counsel.

e. Interim Guidelines from the President's Council on Environmental Quality, dated April 30, 1970, set forth broad guidelines on implementation of the NEP Act.

f. Section 4(f) of the DOT Act directs that "the Secretary shall not approve any program or project which requires the use of any publicly owned land from a public park, recreation area, or wildlife and waterfowl refuge of national, State, or local significance as determined by the Federal, State, or local officials having jurisdiction thereof, or any land from an historic site of national, State, or local significance as so determined by such officials unless (1) there is no feasible and prudent alternative to the use of such land, and (2) such program includes all possible planning to minimize harm to such park, recreational area, wildlife and waterfowl refuge, or historic site resulting from such use."

g. Section 16(c)(3) of the Airport Act requires consideration of the interests of communities in or near which airport development projects are proposed.

h. Section 16(c)(4) of the Airport Act directs that no major airport development project shall be authorized for receipt of Federal financial aid unless that project provides for the protection and enhancement of the natural resources and the quality of environment of the Nation; and further, that no project found to have an adverse effect shall be authorized unless the Secretary finds in writing, after full and complete review, that no feasible and prudent alternative exists and that all possible steps have been taken to minimize such adverse effect.

i. Section 16(d) of the Airport Act establishes a requirement for public hearings for consideration of economic, social and environmental effects of airport projects, and for certain other purposes, and Section 16(e) of the Airport Act establishes criteria and procedures for protection of air and water quality in connection with airport development.

3. POINT OF CONTACT. All Secretarial Officers, Operating Administrations, and the Directors of the Office of SST Development, of Public Affairs and of Congressional Relations will designate a primary point of contact for environmental matters. This point of contact should be reported to TEU within one week after the effective date of this order.

4. APPLICABILITY.

a. The requirements in this order (paragraph 7 below) calling for either a negative declaration or a statement pursuant to Section 102(2)(C) of the NEP Act apply to, but are not limited to, the

following, except as noted below: all grants, loans, contracts, purchases, leases, construction, research and development, rule-making and regulatory actions, certifications, licensing, plans (both internal DOT plans and external plans, such as the annual work programs submitted to NHSB), formal approvals (e.g., of non-Federal work plans), legislative proposals, program or budget proposals or actions (except for continuation of existing programs at approximately current levels, i.e., plus or minus 25 percent); and any renewals or reapprovals of the foregoing. Exceptions to the foregoing are:

(1) administrative procurements (e.g., general supplies) and contracts for personal services;

(2) normal personnel actions (e.g., promotions, hirings);

(3) project amendments (e.g., increases in costs) which do not alter the environmental impact of the action;

(4) legislative proposals not originating in DOT and relating to matters not the primary responsibility of DOT. (Note that procedures for coordinating environmental statements on legislation differ from coordination of environmental statements on other matters. See subparagraphs 7e and 7f below.)

b. In addition to the exceptions noted in sub-paragraphs 4a (1) to (4) above, the implementing instructions called for by paragraph 6 below may provide for additional exceptions.

c. A general class of actions may be covered by a single statement when the environmental impacts (and alternatives thereto) of all such actions are substantially similar. This provision does not apply to actions requiring construction or the taking of land.

5. DEFINITIONAL GUIDELINES. These are set forth in Attachment 1. Operating Administrations may wish to set forth more explicit definitions with respect to their programs in their implementing instructions.

6. IMPLEMENTING INSTRUCTIONS.

a. Within two weeks after the effective date of this order, each Operating Administration will submit for review to TEU draft internal instructions or other appropriate regulations to implement this order.

b. These internal instructions will incorporate the main points in this order (or include it as an attachment), and provide for further specificity and applicability to the programs of the Operating Administration, including identification of what should be considered "programs", "projects", or "actions" for purposes of 102(2)(C) statements.

c. Following TEU concurrence in the draft internal instructions of each Operating Administration, the Operating Administrations will take any steps necessary to comply with applicable requirements of the Administrative Procedure Act (5 U.S.C., Sections 551 et seq.) and Bureau of the Budget Circular No. A-85.

d. Pending finalization of the implementing instructions, the Operating Administrations will begin implementation of the procedures in this order to the extent possible.

7. PREPARATION AND PROCESSING OF SECTION 102(2)(C) STATEMENTS.

a. Negative Declaration. Any proposal for an action to which this order is applicable (in accordance with paragraph 4a above) will include either a statement as required by Section 102(2)(C)

of the NEP Act or a declaration that the proposed action will not have a significant impact on the environment. Negative declarations need not be coordinated outside the originating agency.

b. Applications. Each applicant for a grant, loan, permit or other DOT approval covered by paragraph 4 above will be required to submit, together with the original application, either a draft 102(2)(C) statement or a negative declaration, as appropriate.

c. Actions Originating within DOT. In the case of proposals originating within DOT for an action to which this order is applicable, the originator of the proposal will state in the proposal whether, in his judgment, the action will or will not require a 102(2)(C) statement.

d. Draft of Statement. Draft statements shall be prepared at the earliest practicable point in time. They should be prepared early enough in the process so that the analysis of the environmental effects and the exploration of alternatives with respect thereto are significant inputs to the decision-making process. The implementing instructions (called for by paragraph 6 above) will specify the appropriate point at which draft statements should be prepared for each type of action in the administration to which this order is applicable.

e. Comments of Federal Agencies. On actions requiring a 102(2)(C) statement, except for those relating to legislative proposals, the originating Operating Administration (or TEU for actions originating in the Office of the Secretary) shall circulate for comment the draft environmental statement called for by sub-paragraph 7d above to all Federal agencies which have jurisdiction by law or special expertise with respect to the environmental impact involved, and to the CEQ and TEU, as well as other elements of DOT where appropriate. At Attachment 2 to this order is a list of Federal agencies with their area of expertise, prepared by the CEQ. This list should not be presumed to be all-inclusive. Implementing instructions (called for by paragraph 6 above) will set forth the procedure for obtaining such comments. A time period for comment may be specified, but not less than 30 days. Where comments of other Federal agencies have been obtained by the applicant, comments need not be solicited again from same agencies, unless there are pertinent changes in the project proposal.

Draft environmental statements on legislative proposals will be submitted to the Office of Management and Budget (OMB) together with legislative proposals through the normal DOT legislative process, for coordination by OMB with other interested agencies.

f. State or Local Review. Where no public hearing has been held on the proposed action at which the appropriate State and local review has been invited, and where review of the proposed action by State and local agencies authorized to develop and enforce environmental standards is relevant, such State and local review shall be provided for as follows:

(1) Project applicant may obtain comments from appropriate State and local agencies.

(2) Otherwise, for direct Federal development projects and projects assisted under programs listed in Attachment D of OMB (issued as BOB) Circular No. A-95, review by State and local governments will be through procedures set forth under Part I of Circular No. A-95.

(3) State and local review of agency procedures, regulations, and policies for the administration of Federal programs of assistance to State and local governments will be conducted

pursuant to procedures established by OMB (issued as BOB) Circular No. A-85.

(4) Where these procedures are not appropriate and where the proposed action affects matters within their jurisdiction, review of the proposed action by State and local agencies authorized to develop and enforce environmental standards and their comments on the draft environmental statement may be obtained directly or by publication of a summary notice in the Federal Register (with a copy of the environmental statement and comments of Federal agencies thereon to be supplied on request). The notice in the Federal Register may specify that comments of the relevant State and local agencies must be submitted within a specified period of time from the date of publication of the notice, but not less than sixty days.

Environmental statements on legislative proposals are not subject to State and local review. Similarly, budget proposals or other internal agency proposals may be excluded from such review.

g. Utilization of Comments. Comments received under sub-paragraphs 7e and 7f shall accompany the draft environmental statement through the normal internal project or program review process.

h. Final Statements. Draft statements shall be revised, as appropriate, to reflect comments received or other considerations before being put into final form for approval of the responsible official. Final statements will then be submitted to TEU for concurrence, together with 12 copies (including 10 for forwarding to the CEQ), with the following exception: Final statements need not be submitted to TEU with respect to highway projects when such statements were required solely because the action involves Section 4(f), and the 4(f) approval authority for such action has been delegated to FHWA. The statement will be considered concurred in by TEU unless other notification is provided within two weeks, except as to statements, projects or actions as to which final approval authority is reserved to the Secretary, as discussed in paragraph 9 below.

i. Content of Statement. The following points will be covered in the statement:

(1) A description of the proposed action and its purpose.

(2) The probable impact of the proposed action on the environment.

(3) Any probable adverse environmental effects which cannot be avoided should the proposal be implemented.

(4) Alternatives to the proposed action. (Section 102(2)(D) of the NEP Act requires the responsible agency to "study, develop and describe appropriate alternatives to recommend courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources." Alternative actions that might avoid some or all of the adverse environmental effects or increase beneficial effects should be set forth and analyzed.)

(5) The relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity. This in essence requires the agency to assess the action for cumulative and long-term effects from the perspective that each generation is trustee of the environment for succeeding generations.

(6) Any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented. This requires the agency to identify the extent

to which the action curtails the range of beneficial uses of the environment.

(7) Where appropriate, a discussion of problems and objections raised by other Federal agencies, State and local entities, and citizens in the review process, and the disposition of the issues involved. (This section may be added at the end of the review process in the final text of the environmental statement.)

j. Form of Statement.

(1) Each statement will be headed as follows:

Department of Transportation

(Operating Administration)

(Draft) Environmental Impact Statement
Pursuant to Section 102(2)(C), P.L. 91-190

(2) Each statement will, as a minimum, contain sections corresponding to sub-paragraphs (1)-(6) of paragraph 7i above, appropriately headed.

k. Availability of Statements to the President, the CEQ, and the Public. TEU is responsible for transmitting 10 copies of each final statement to the CEQ, which transmittal shall be deemed transmittal to the President. The agency which prepared the environmental statement is responsible for making the final version of such statement and the comments received available to the public pursuant to the provisions of the Freedom of Information Act (5 U.S.C. Section 552).

8. PREPARATION AND PROCESSING OF STATEMENTS UNDER SECTION 4(f) OF THE DOT ACT AND SECTIONS 16(c)(3), 16(c)(4), 16(d) and 16(e) OF THE AIRPORT ACT.

a. Inclusion in 102(2)(C) Statement. As indicated in paragraph 1 of this order, it is the intent of this order that the Section 102(2)(C) statement described above should serve as the vehicle for all environmental findings, determinations and clearances required under any legislation applicable to the Department. Any project, proposal or action to which Section 4(f) of the DOT Act and/or Sections 16(c)(3), 16(c)(4), 16(d), and 16(e) of the Airport Act is applicable will require a 102(2)(C) statement. Such 102(2)(C) statements should be prepared, therefore, in such a manner as to also meet the requirements of the cited sections of the DOT Act and/or the Airport Act.

b. Applications. Each applicant for a grant, loan, permit or other DOT approval covered by paragraph 8a above will be required to submit a draft 102(2)(C) statement which also meets the requirements of Section 8 of this order.

c. Content of Statements Under Section 4(f) of the DOT Act. In addition to the information required under paragraph 7i above, the following information must be included in statements covered by this paragraph:

(1) Description of "any publicly owned land from a public park, recreation area or wildlife and waterfowl refuge" or "any land from an historic site" affected or taken by the project, including its size, available activities, use, patronage, relationship to other similarly used lands in the vicinity of the project, maps, plans and drawings showing in sufficient scale and detail the project and its impact on park, recreation, wildlife, or historic areas, and slides, photographs, etc., as appropriate.

(2) Statement of the "national, State or local significance" of the area "as determined by the Federal, State or local officials having jurisdiction thereof."

(3) Similar data, as appropriate, for alternative designs and locations, including cost estimates and technical feasibility, and appropriate analysis of the alternatives.

(4) If there is no feasible and prudent alternative, description of all planning undertaken to minimize harm to the protected area and statement of actions taken or to be taken to implement this planning.

(5) A specific statement that there is no feasible and prudent alternative and that the proposal includes all possible planning to minimize harm to the "4(f) area" involved.

d. Content of Statements on Projects Subject to Section 16(c)(3), 16(c)(4), and 16(d) of the Airport Act. In addition to the information required under paragraph 7i above, the following information will be included:

(1) Identification of communities in or near which the project is located.

(2) Identification of steps taken by the applicant to determine the interests of those communities, including economic, environmental, and social interests, as well as transportation interests.

(3) Statement of the specific actions taken in planning the project to recognize and to meet the communities' interests.

(4) For identified community interests which are in conflict with the project, a statement explaining why the interests have not been met, what alternatives have been investigated to meet the community interests, estimated costs of the alternatives and the reasons for not adopting the alternatives.

(5) For any project found to have an adverse effect on the environment, and for which no feasible and prudent alternative exists, identify all steps taken to minimize such adverse effect.

(6) For any project found to have an adverse effect on the environment, and for which all possible steps have been taken to minimize such effects, a request that the Secretary render the appropriate findings, in writing.

(7) Statement that the public hearings required by Section 16(d) of the Airport Act have been held.

(8) Statement by appropriate local planning officials that the project is consistent with the goals and objectives of such urban planning as has been carried out by the community.

e. Form of Statement.

(1) The heading specified in paragraph 7g(1) above shall be modified to indicate that the statement also covers Section 4(f) and/or Section 16(c)(3), 16(c)(4) and 16(d) requirements, as appropriate.

(2) Appropriate paragraphs and headings will be added to 102(2)(C) statements to cover the points in paragraphs 8c and d above, as appropriate.

f. Comments and Processing. The instructions set forth in paragraph 7 above with respect to obtaining comments and concurrence shall also apply to statements prepared pursuant to paragraph 8.

g. Certification of Compliance with Air and Water Quality Statements Pursuant to Section 16(e) of the Airport Act. This certification shall be required only at the time an applicant submits an application for financial assistance.

h. Follow Through on Decisions of the Secretary in Cases Involving Section 4(f) and/or Sections 16(c)(3), 16(c)(4), 16(d) and 16(e). Following a decision with respect to the final statements as described in paragraph 7h above (which statements shall contain the necessary findings under Section 4(f) and Section 16(c)(3), 16(c)(4), 16(d) and 16(e), as appropriate), TEU will transmit the Secretary's decision to the originating administration. The administration will take the necessary steps, through its funding agreements and other contacts with the applicant, to assure that the actions to minimize adverse environmental effects, as spelled out in the statement or in the Secretary's approval (to the extent that it differs from the statement as proposed), will be carried out. Proposals to deviate from these actions as approved should be cleared with TEU.

In cases where the Secretary's approval differs from the applicant's proposal, the Administrator will advise the applicant of the details of the decision, and obtain the concurrence in writing from the applicant before permitting the project to proceed.

The operating instructions called for by paragraph 6 of this order shall include procedures for monitoring these projects so as to assure that the Secretary's decisions are executed. The administrations will provide TEU with copies of the appropriate correspondence, agreements, statements of compliance and progress reports for this purpose.

9. DECISIONS RESERVED TO THE SECRETARY. In the case of any action requiring personal approval of the Secretary pursuant to a specific reservation of authority (including an ad hoc reservation), the final statement submitted pursuant to paragraph 7h above shall be accompanied by a brief cover memorandum requesting the Secretary's approval. The memorandum shall include signature lines for the concurrence of the Assistant Secretary for Environment and Urban Systems, the General Counsel, and the Under Secretary. A signature line for the Secretary's approval shall also be included.

10. ANNOUNCEMENT OF DECISIONS. The Assistant Secretary for Environment and Urban Systems will be responsible for informing the Office of Congressional Relations and the Office of Public Affairs of the Secretary's decisions so that they may inform their contacts and take other appropriate actions.

John A. Volpe
Secretary of Transportation

ATTACHMENT 1

DEFINITIONAL GUIDELINES

1. General. When there is doubt whether or not to prepare a statement it should be prepared. Where the environmental consequences of a proposed action are unclear but potentially significant, a statement should be prepared. It should be noted that the effect of many Federal decisions can be individually limited but cumulatively considerable. It should also be noted that the NEP Act does not restrict itself to adverse effects, and any significant effect positive or negative requires a statement. Moreover, opportunities foreclosed, future implications and indirect effects should be taken into consideration.

2. "Major". Any Federal action significantly affecting the environment is deemed to be "major" and a statement shall be prepared.

3. "Federal Actions". This term includes the entire range of activity undertaken by the DOT. Actions include but are not limited to:

   a. Direct Federal programs, projects and administrative activities, such as:

      (1) research, development, and demonstration projects
      (2) rulemaking and regulations
      (3) construction of and operation of Federal facilities
      (4) waste disposal
      (5) transportation of dangerous or contaminated commodities
      (6) making of treaties or agreements (international, or with other Federal or State governments)
      (7) development of plans

   b. Federal grants, loans, or other financial assistance.

   c. Federal permits, licenses, certifications, approvals, leases, or any entitlements for use, such as:

      (1) aircraft certification
      (2) approval for use and integration into the NAS of privately financed air navigation equipment
      (3) approval of State highway programs and plans prior to grant of money

   As stated in paragraph 6b of this Order, the implementing instructions of each operating administration should specify what is to be considered an "action" for the various programs of that administration for purposes of 102(2)(C) statements.

4. "Significantly Affecting" Environment.

   a. Any of the following actions should be considered significant and a statement should be prepared:

      (1) any action that is likely to be highly controversial on environmental grounds
      (2) any matter falling under Section 4(f) of the DOT Act or Section 16 (c)(3), 16(c)(4), 16(d), or 16(e) of the Airport Act

   b. Actions that have the following effects are likely to be significant:

      (1) lead to a noticeable change in the ambient noise level for a substantial number of people
      (2) displace significant numbers of people
      (3) divide or disrupt an established community, divide

existing uses, e.g., cutting off residential areas from recreation areas or shopping areas, or disrupt orderly, planned development

(4) have a significant aesthetic or visual effect
(5) have any effect on areas of unique interest or scenic beauty
(6) destroy or derrogate from important recreational areas not covered by Section 4(f) of the DOT Act
(7) substantially alter the pattern of behavior for a species
(8) interfere with important breeding, nesting or feeding grounds
(9) lead to significantly increased air or water pollution in a given area
(10) adversely affect the water table of an area
(11) disturb the ecological balance of a land or water area
(12) involve a reasonable possibility of contamination of a public water supply source, treatment facility, or distribution system

ATTACHMENT 2

Federal Agencies with Jurisdiction by Law or Special Expertise to Comment on Various Types of Environmental Impact

Air quality and air pollution control --
National Air Pollution Control Administration, National Institute of Environmental Health Sciences, and Health Services and Mental Health Administration, of the Department of Health, Education and Welfare
Environmental Sciences Services Administration, and National Bureau of Standards, of the Department of Commerce (atmospheric pollution measurement)
Bureau of Mines (fossil fuel combustion), Department of the Interior
Assistant Secretary for Systems Development and Technology (auto emissions), and Federal Aviation Administration (aircraft emissions), of the Department of Transportation

Chemical contamination and food products --
Food and Drug Administration, Department of Health, Education and Welfare

Coastal areas, wetlands, estuaries, waterfowl refuges, and beaches --
Coast Guard, Department of Transportation
Corps of Engineers, Department of Defense
Federal Water Quality Administration, Bureau of Sport Fisheries and Wildlife, and Bureau of Commercial Fisheries, of the Department of the Interior
Soil Conservation Service, Department of Agriculture
Department of Housing and Urban Development (urban aspects)

Congestion in urban areas, housing and building displacement --
Urban Mass Transportation Administration, and Federal Highway Administration, of the Department of Transportation
Health Services and Mental Health Administration, and Environmental Health Service, of the Department of Health, Education and Welfare
Department of Housing and Urban Development

Disease control --
Health Services and Mental Health Administration, Department of Health, Education and Welfare

Electric energy generation and supply --
Rural Electrification Administration (rural areas), Department of Agriculture
Federal Power Commission
Department of Housing and Urban Development (urban areas)

Environmental effects with special impact in low-income neighborhoods --
Office of Economic Opportunity
Department of Housing and Urban Development (urban areas)
Flood plains and watersheds --
Agricultural Stabilization and Research Service, Soil Conservation Service, and Forest Service, of the Department of Agriculture
Bureau of Reclamation, and U.S. Geological Survey, of the Department of the Interior
Department of Housing and Urban Development (urban areas)
Corps of Engineers, Department of Defense
Food additives and food sanitation --
Food and Drug Administration, Department of Health, Education and Welfare
Consumer Marketing Service (meat and poultry products), Department of Agriculture
Herbicides --
Agricultural Research Service, Forest Service, and Soil Conservation Service, of the Department of Agriculture
Historic and archeological sites --
National Park Service, Department of the Interior
Department of Housing and Urban Development (urban areas)
Human ecology --
Environmental Health Service, and National Institute of Environmental Health Sciences, of the Department of Health, Education and Welfare
Department of Housing and Urban Development (urban areas)
Microbiological contamination --
Food and Drug Administration, Department of Health, Education and Welfare
Mineral land reclamation --
Bureau of Mines, Department of the Interior
Forest Service, Department of Agriculture
Natural gas energy development generation and supply --
Federal Power Commission
Navigable airways --
Federal Aviation Administration, Department of Transportation
Navigable waterways --
Bureau of Outdoor Recreation, Bureau of Sport Fisheries and Wildlife, and Bureau of Commercial Fisheries, of the Department of the Interior
Corps of Engineers, Department of Defense
Coast Guard, Department of Transportation
Noise control and abatement --
Federal Aviation Administration, Office of Noise Abatement, Assistant Secretary for Systems Development and Technology, Office of Noise Abatement and Office of Pipeline Safety, of the Department of Transportation
Environmental Control Administration, and Environmental Health Service, of the Department of Health, Education and Welfare
Department of Housing and Urban Development (urban land use aspects, building materials standards)
Parks, forests, trees and outdoor recreation areas --
Bureau of Land Management, National Park Service, Bureau of Outdoor Recreation, and Bureau of Sport Fisheries and Wildlife, of the Department of the Interior
Forest Service, Department of Agriculture
Department of Housing and Urban Development (urban areas)
Pesticides --
Food and Drug Administration, Department of Health, Education and Welfare
Pesticides Regulations Division, Department of Agriculture
Bureau of Sport Fisheries and Wildlife (effects on fish and wildlife), and Bureau of Commercial Fisheries, of the Department of the Interior
Radiation and radiological health --
Atomic Energy Commission
Environmental Health Service, and National Institute of Environmental Health Sciences, of the Department of Health, Education and Welfare
Regional comprehensive planning --
Economic Development Administration, Department of Commerce
Department of Housing and Urban Development

Rodent control --
Health Services and Mental Health Administration, and Environmental Health Service, of the Department of Health, Education and Welfare
Department of Housing and Urban Development (urban areas)
Bureau of Sport Fisheries and Wildlife, Department of the Interior

Situation and waste systems --
Environmental Health Service, National Institute of Environmental Health Sciences, Health Services and Mental Health Administration, and Consumer Protection and Environmental Health Service (solid waste), of the Department of Health, Education and Welfare
U.S. Coast Guard (ship sanitation), Department of Transportation
Bureau of Mines (mineral waste), and Federal Water Quality Administration, of the Department of the Interior

Shellfish sanitation --
Bureau of Commercial Fisheries, Department of the Interior
Food and Drug Administration, and Environmental Health Service, of the Department of Health, Education and Welfare

Soil and plant life, sedimentation, erosion and hydrologic conditions --
Soil Conservation Service, Agricultural Research Service, and Forest Service, of the Department of Agriculture
Corps of Engineers (dredging, aquatic plants), Department of Defense
U.S. Geological Survey, Department of the Interior

Toxic materials --
Food and Drug Administration, and National Institutes of Health, of the Department of Health, Education and Welfare
Pesticides Regulation Division, Department of Agriculture
Air Force, Department of Defense

Transportation and handling of hazardous materials --
Interstate Commerce Commission
Armed Services Explosive Safety Board, Department of Defense
Federal Highway Administration, Bureau of Motor Carrier Safety, Federal Railroad Administration, Federal Aviation Administration, Assistant Secretary for Systems Development and Technology, Office of Hazardous Materials and Office of Pipeline Safety, of the Department of Transportation
Environmental Health Service, Health Services and Mental Health Administration, and Food and Drug Administration, of the Department of Health, Education and Welfare
Federal Water Quality Administration, Department of the Interior
Atomic Energy Commission

Water quality and water pollution control --
Federal Water Quality Administration, and U.S. Geological Survey, of the Department of the Interior
Navy (ship pollution control), Department of Defense
Coast Guard (oil spills, ship sanitation), Department of Transportation

Wildlife --
Bureau of Sport Fisheries and Wildlife, Department of the Interior

Activities with special impact on regional jurisdictions --
Appalachian Regional Commission
Tennessee Valley Authority (Tennessee River Basin)
Economic Development Administration, Department of Commerce
National Capital Planning Commission

Activities with international implications
Department of State

U.S. DEPARTMENT OF TRANSPORTATION

FEDERAL HIGHWAY ADMINISTRATION

SUBJECT National Environmental Policy Act Guidelines for implementation proposed by FHWA	FHWA NOTICE

November 30, 1970

DRAFT INSTRUCTIONAL MEMORANDUM
November 24, 1970

SUBJECT: Interim Guidelines for Implementation of Section 102(2)(C) of the National Environmental Policy Act of 1969

1. PURPOSE

This section outlines the procedures of the Federal Highway Administration (FHWA) regarding the preparation of detailed environmental statements for projects that significantly affect the quality of the environment as required by Section 102(2)(C) of the National Environmental Policy Act of 1969 (P.L. 91-190) (hereafter "the NEP Act").

2. DEFINITIONS

a. Project as used herein refers to the planning and/or construction of a length of highway (route segment) between logical termini such as major crossroads, population centers, major traffic generators, or similar major highway control elements, that is normally included in a location study. The route segment may be broken into several smaller proposals for design and/or construction purposes. The term project will also refer to demonstration studies and undertakings for planning and research.

b. Negative Declarations - a written statement indicating that the project will have no significant affect upon the quality of human environment. (Appendix G)

c. Environmental Statements - a written statement assessing in detail the potential environmental impact which the project or alternatives thereto may have upon the quality of human environment.

3. BACKGROUND AND AUTHORITY

a. The National Environmental Policy Act of 1969 establishes a broad national policy to promote efforts to improve the relationship between man and his environment, and provides for the creation of a Council on Environmental Quality (CEQ). The NEP Act sets out certain policies and goals concerning the environment, and requires that, to the fullest extent possible, the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with those policies and goals.

b. Section 102(2)(C) of the NEP Act is designed to ensure that environmental considerations are given careful attention and appropriate weight in decisions of the Federal Government. This section requires that agencies of the Federal Government shall "Include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on --

"(i) the environmental impact of the proposed action,

"(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

"(iii) alternatives to the proposed action,

"(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

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

"Prior to making any detailed statement, the responsible Federal officials shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality, and the public as provided by Section 552 of Title 5, United States Code, and shall accompany the proposal through the existing agency review processes."

c. Interim Guidelines from the President's Council on Environmental Quality, dated April 30, 1970, Vol. 35, Federal Register, 7890, set forth broad guidelines on implementation of the NEP Act. (Appendix A)

d. The DOT Interim Order 5610.1 outlines procedures for the DOT regarding the preparation of detailed environmental statements (Appendix B)

4. APPLICATION

a. The State highway department (SHD)1/ shall evaluate the environmental consequences of all direct Federal, Federal-aid, Public Lands, Regional Development including Appalachia, Defense Access, Forest Highway, planning, research, and demonstration projects except those cited in paragraph 4b and make a determination in consultation with the division engineer (1) that a negative declaration is applicable because the project will have no significant affect upon the quality of human environment, or (2) that an environmental statement is necessary because the project will have or is likely to have a significant affect upon the quality of human environment.

b. The provisions of this memorandum do not apply to projects that received or receive design approval before February 1, 1971. Design approval may be established and documented in one of the following three ways, depending on when such design approvals were or are given. (1) Prior to issuance of revised PPM 20-8 in January of 1969, procedures of the Bureau of Public Roads (BPR) did not require a SHD to receive design approval from the BPR before undertaking preparation of the plans, specifications and estimate (PS&E). Therefore, design approval was that action or series of actions by the BPR which indicated to the SHD that the essential elements of the highway (paragraph 10 of PPM 20-8) were satisfactory or acceptable for preparation of the PS&E. Such actions may have consisted of review and comments upon preliminary plans, schematic drawings, design studies, layouts, or reports. The SHD shall identify those projects (both Federal-aid and non Federal-aid) in the above category which it anticipates Federal-aid funds will be

1/The term State highway department means the agency with primary responsibility for initiating and carrying forward the planning and construction of the project.

requested for a subsequent stage and furnish the division engineer for his concurrence a letter similar to Appendix D of this memorandum citing the document(s) which constitute the design approval. The division engineer's concurrence in the State's determination will serve as verification of previous design approval. (2) Written approval by the BPR of the design study report submitted in accordance with paragraph 10 of PPM 20-8 revised January 14, 1969. (3) For those projects which the SHD is presently preparing the construction PS&E and there is not documentary evidence that the BPR indicated its acceptance of the essential design elements prior to the SHD undertaking preparation of the PS&E, the SHD may furnish the FHWA copies of drawings, plans, or other material showing the present status of the plan preparation. The SHD shall submit such material and the FHWA division engineer shall advise the State in writing, prior to February 1, 1971, that the design for a project or for a proposal is approved if he determines that the present status of the design or plan preparation meets the requirements for design approval outlined in paragraph 10 of PPM 20-8.

c. However, the following two types of projects must be reevaluated by the SHD even though such projects received design approval before February 1, 1971:

(1) projects on new location, and

(2) major reconstruction projects which will require additional right-of-way over at least 50 percent or more of its length.

The SHD's reassessment, which shall be done in consultation with the division engineer, shall be made to determine if such projects were developed in such a manner as to minimize adverse environmental consequences. Such projects, to the extent practicable, should be modified to incorporate additional elements of features identified and considered prudent to minimize harm. No environmental statement need be submitted, however, unless requested by the division engineer.

d. Statements may be prepared for planning and research projects on the basis of the annual work program.

e. The provisions of this memorandum shall not apply to projects or programs of projects where the Federal Highway Administrator has made a formal determination that the project is urgently needed because of a national emergency, a natural disaster, a catastrophic failure, or for similar reasons of great urgency.

f. In those instances where a highway is being jointly planned by two or more agencies, or is one element of a jointly planned undertaking, only a single environmental determination and/or statement shall be made. The highway proposal submitted to the FHWA for approval (location, design, etc.) shall include a copy of the statement prepared and processed by another Federal agency or reference to such a statement previously furnished to FHWA. Highway projects in this catagory could include forest highways (where forest service handles the Environmental Policy Act requirements), defense access roads planned in conjunction with a defense installation and similar joint efforts.

5. PROCEDURES

a. Negative declarations generally will be appropriate for such projects as resurfacing, widening existing lanes, adding auxillary lanes, replacing existing grade separation structures, signing and marking, spot safety improvements, TOPICS, beautification, and demonstration unless the project requires the acquisition of substantial amounts of

additional right-of-way, substantially increases traffic volumes, or otherwise causes or is likely to cause a significant affect upon the quality of human environment.

b. Negative declarations shall receive the concurrance of the division engineer and should be included in the material furnished for comment to clearinghouses and areawide agencies (BOB Circular A-95), and Federal agencies normally contacted during the planning, locations, and design of a proposed project.

c. The negative declaration or final environmental statement and accompaning information, if required by this memorandum, shall be included with the SHD's request for location approval. If location approval was given prior to the date of this memorandum, the negative statement or final environmental statement and accompanying information for the proposed design, if required by this memorandum, shall be included with the SHD's request for design approval.

d. Proposals providing for design, right-of-way acquisition, construction, etc., within a project environmental statement shall make reference to the previous environmental statement (or negative declaration). If a proposal within a project environmental statement processed in accordance within this memorandum is determined to introduce new effects of significance to the quality of human environment or to substantially change the effects as recognized in the previous statement, a statement for that proposal shall be prepared and processed as required by this memorandum.

e. Where a SHD or urban transportation study group prepares an analytical report of the proposed transportation system plan together with a system planning report, the report should include an environmental analysis as a section of that report following the outline of paragraph 6e.

6. PREPARATION AND PROCESSING OF SECTION 102(2)(C) STATEMENTS

a. The SHD shall prepare a draft statement following the format outlined in paragraph 6f and include the information required by paragraph 6e.

b. The SHD shall furnish a copy of the draft statement clearly marked DRAFT to the appropriate clearinghouses and areawide agencies (Circular BOB A-95) and to those Federal agencies (in all cases to HUD) with jurisdiction by law or special expertise (Appendix E) on an environmental impact for comment. In addition, the SHD shall furnish the division engineer 16 copies. The division engineer shall distribute the copies as follows:

Division office	1
Regional office	1
Washington office	1
[to the Associate Administrator for ROW and Environment]	
DOT's Office of Environment & Urban Systems	13
[includes 10 copies for the President's Council on Environmental Policy]	

The SHD may specify that comments must be received within a specified period of time but not less than 45 days from date of transmittal.

c. The SHD shall prepare a summary of the environmental comments included in the record of the public hearing(s). This summary, together with the comments received on the draft environmental statement, shall be considered by the SHD in preparing the proposed design and in developing the final environmental statement. The final environmental statement shall be prepared in the format

outlined in paragraph 6f and include as a minimum the information required by paragraph 6e.

The SHD shall furnish the division engineer 16 copies of:

(1) the final environmental statement, clearly marked FINAL,

(2) the summary of the public hearing environmental comments,

(3) the comments received on the draft statements, and

(4) The SHD's evaluation and disposition of each comment.

The division engineer shall review the environmental statement and attach with his comments and recommendations. He shall forward 15 copies through channels to the Associate Administrator of ROW and Environment.

d. The division engineer may advance the project in a normal manner when so notified by the Associate Administrator of ROW and Environment.

e. Contents of Statement

(1) A description of the proposed project and its purpose consisting of a narrative description accompanied by a map showing the location of the project. Parks, recreational areas, wildlife, and water fowl refuges, and historic sites should be described (size, use, significance, etc.) if a Section 4(f) determination is included. If there are isolated locations where more detail is helpful, sketches and/or pictures may be included. The purposes should identify the reason for building the project.

(2) The probable impact of the proposed project on the environment Both positive and negative impacts should be identified.

(3) Any probable adverse environmental effects which cannot be avoided should the proposal be implemented.

(4) Alternatives to the proposed project should be described and the probable adverse environmental effects identified. The reason for selecting the proposed project rather than the alternatives should be presented. Such reasons need not be addressed strictly to environmental issues if other factors contributed to the selection of the recommended highway location and/or design such as costs, construction problems, traffic service, etc.

(5) The relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity. This in essence requires the State to assess the action for cumulative and long-term effects from the perspective that each generation is trustee of the environment for succeeding generations.

(6) Any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented. This requires the State to identify the extent to which the action curtails the range of beneficial uses of the environment.

(7) Where appropriate, a discussion of problems and objections raised by other Federal agencies, State, and local entities, and citizens in the review process, and the disposition of the issues involved. (This section may be added at the end of the review process in the final text of the environmental statement.)

(8) Where unavoidable adverse environmental effects are encountered, steps taken to minimize harm should be identified.

f. Form of Statement

(1) Each Statement will be headed as follows:

DEPARTMENT OF TRANSPORTATION
FEDERAL HIGHWAY ADMINISTRATION

DRAFT - FINAL (whichever is appropriate)

ENVIRONMENTAL IMPACT STATEMENT

PURSUANT TO SECTION 102(2)(C), P.L. 91-190

(2) Each statement will, as a minimum, contain sections corresponding to subparagraphs (1)-(8) of paragraph 6e above, appropriately headed.

g. Availability of Statements

The SHD shall make the final version of the statement and the comments received available to the public pursuant to the provisions of the Freedom of Interformation Act (f, U.S.C., Section 552).