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ENVIRONMENTAL IMPACT STATEMENTS: A VIEW IN THREE DIMENSIONS

A panel discussion of provisions of the National Environmental Policy Act of 1969 relating to preparation and review of statements of environmental effects of highway transportation projects.

Sponsored by the Highway Research Board's Committee on Environmental Issues in Transportation Law

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THE ENVIRONMENTAL IMPACT STATEMENT: A VIEW IN THREE DIMENSIONS

This circular reprints the transcript of a discussion held at the meeting of the Committee on Environmental Issues in Transportation Law, on January 21, 1971. The focal point of this discussion was the provision of the National Environmental Policy Act of 1969 which requires that statements of environmental impacts must be prepared for all major Federal projects which have significant effects on the environment. The purpose of this discussion was to describe the role which these statements play in the overall strategy of protecting environmental values, and identify and examine the major problems which Federal agencies may encounter in implementing this law.

Participants in this discussion presented three viewpoints, each reflecting somewhat different responsibility for the general mission of environmental protection. William Reilly, of the staff of the Council on Environmental Quality, reflected the view of overall coordination of the implementation of the National Environmental Policy Act under the Office of the President. Michael Lash, Director, Office of Environmental Policy, Federal Highway Administration, reflected the responsibility for administering highway transportation programs. Joseph Fromme, Outdoor Recreation Resource Specialist, Bureau of Outdoor Recreation, Department of the Interior, reflected the background of a reviewing agency oriented to natural resources management, and Richard Broun, Director, Environmental Planning Division, U.S. Department of Housing and Urban Development, reflected the background of an urban-oriented reviewing agency. Moderator of this panel discussion was Ross D. Netherton, Chief, Division of Research and Education, Bureau of Outdoor Recreation, U.S. Department of the Interior.

In this discussion, the participants spoke as individuals, and their statements are not intended to represent official positions of the public agencies with which they are associated.

Ross D. Netherton
Chairman, Committee on
Environmental Issues in
Transportation Law

REMARKS OF WILLIAM REILLY

MR. REILLY: I would like to begin with a description of the functions and philosophy of the National Environmental Policy Act as we at the Council on Environmental Quality see them.

The National Environmental Policy Act (NEPA) was the first law signed in 1970 and the new decade, and the President took note of the symbolic primacy of environmental policy when he signed the law in San Clemente on January 1, 1970. In March 1970, the President issued Executive Order 11514, giving to the Council on Environmental Quality the authority to prepare and issue guidelines for the Federal agencies in implementing Sec. 102(2)(C). In this order he expanded somewhat on the requirements in the language of the National Environmental Policy Act, particularly with respect to public participation and disclosure.

The guidelines that the Council published in May 1970, (35 Fed. Reg. 7391-93) were interim, and the Council is now about to issue permanent guidelines for implementation of Sec. 102(2)(C). These will broaden the public participatory and public disclosure aspects of the environmental impact statement procedure.

It is useful to take a brief look at the legislative history that engendered Sec. 102(2)(C). This Section came out of the Senate Interior and Insular Affairs Committee where an interesting colloquy took place between Senator Jackson and Professor Lynton Caldwell of Indiana University in hearings on Sec. 101. At that time, what is now Sec. 101, which is the Section articulating the policy--of achieving and maintaining a balance between population and resource use, etcetera--already was in the act, and there was an equivalent section in a House version of the bill. In his testimony, Professor Caldwell commented on this provision, and said it made good sense to have a national policy and to publicly articulate these desirable objectives which Federal agencies henceforth should pursue; but, he suggested that we needed something more--something which he called an "action-forcing mechanism"--which the Office of Management and Budget and the other Federal agencies would be required to look to in order to make sure that the policy portion of the act (Sec. 101) is respected. Senator Jackson was interested by this comment, and after further conversation, he directed the committee staff to see what language could be prepared to reflect this idea.

What resulted was Sec. 102(2)(C). It calls for every recommendation or report on proposals for legislation and other major Federal action significantly affecting the environment to be accompanied by a detailed five-point statement. This statement is to cover (1) the environmental impact, (2) specific adverse effects, (3) alternatives, (4) the relationship between short term uses of the environment and enhancement of long term productivity, and (5) any irreversible commitments that might be made if the proposal is carried out.

It does not say what is to be done if any one of these points reveals a significant environmental problem, but it does require that Federal agencies with expertise or jurisdiction with respect to the environmental matter concerned be consulted and given the opportunity to comment on it, and that State and local agencies authorized to develop and enforce environmental standards also be given the opportunity to comment. The law provides that the statement then is to be made available to the public in accordance with the Freedom of Information Act, and is to be furnished to the Council on Environmental Quality and to the President. The President, by Executive Order 11514, made the Council the receiving agency for him.

There are a great many ambiguities in the National Environmental Policy Act. The "detailed statement" is required by the law to accompany a proposal through the agency review processes. When you look back at what the "detailed statement" refers to, it is the agency's statement with the comments that Federal, State and local agencies have made on it. But query what was commented on at that early stage of the proceeding? It could not have been a "detailed statement" because comments were not yet obtained, and the act says that "prior to making any detailed statement" comments are to be obtained. Query about what stage a statement should be sent out for comment? If a statement is to accompany a proposal through the decision-making review processes, it apparently has to be prepared at a fairly early stage when an agency is normally prepared to take a stand one way or another. Yet, it is clear from the act that there has to be some kind of proposed action--some activity which government tentatively has determined it will take--with respect to which the proposer wants to have comments from other agencies.

Working within these ambiguities, the Council drafted guidelines which called for a two-part statement. It called for preparation of a draft statement on the environmental impact, and asked that it be circulated to the Federal, State and local agencies for the purpose of obtaining the comments required by the act. There is no specific mention in the act of this draft statement, but the Council felt it was necessary to make the act work.

The environmental statement has these three essential functions. First, it is an "action-forcing" mechanism, whereby the President, the Congress, and the courts are put in a position to scrutinize the attention given to environmental aspects of Federal agency decision-making. The legislative history strongly suggests that something will be done with the information provided by a Sec. 102 statement if it is not satisfactory to those receiving it. Executive Order 11514 adds the public as another element to contend with as far as review forcing is concerned. Judging from the past year, environmental public interest groups are going to play an active role in further expanding the provisions of this statute.

Second, we would like to think that a statement is an option-defining instrument for the Federal agency itself. It is not only useful to an environmental public interest group which may be trying to redirect a governmental decision according to the way it thinks it should be made;

but it is useful to the decision-maker himself. Where, in the past, we were used to giving a great deal of attention to the technical and economic aspects of decision-making, now we are charged with detailing impacts on the environment in a way that not only shows that the environment was considered, but specifically sets out the impact the proposing agency and commenting agencies expect the proposed action to have on the environment.

Some of us at the Council are more pessimistic than others about just how well the act has functioned in this respect during its first year. Many statements--and we have received about 375 thus far--appear to be retrospective justifications of decisions made some time ago. This probably should not be surprizing since a great many activities were underway when the act went into effect, and many others were contemplated. It could not realistically be expected that all of these projects would be looked at as altogether new proposals. I would hope, however, that this will change as time goes on. In the case of some agencies, performance under Sec. 102 has substantially improved during the past few months.

The third function which we see the statement serving is a policy guidance function. Senator Jackson did not want to go through all of the procedures and authorizing statutes of the Federal agencies in order to put into each one the appropriate requirements for environmental considerations. Thus, NEPA provided an "across-the-board" requirement for agencies. Agencies were further directed by Sec. 103 to examine their statutory authority and report by a certain date--originally July 1, 1971, but changed by the Executive Order to September 1, 1970--whether they had statutory limitations or deficiencies which affected their compliance with the Act. No agency having asserted any such barriers, we are assuming that the act will apply and the policy will be fully implemented.

When an action is taken which appears to us not to be sufficiently sensitive to environmental considerations, we tend to flag it, and I think that there is some indication that committees of Congress are doing the same thing. We try to extract from what we see just what the weaknesses or deficiencies of existing procedures and regulations may be. In the course of developing the President's legislative program for the environment, we drew upon what specific environmental statements may have taught us about the need for new laws, programs, etcetera.

I think it is fair to say that we see Sec. 102(2)(C) as werving us more in this capacity, and the Council playing more this kind of role, than we see the Council playing the role of commentator on particular public works proposals. Our theory of this act is that we are primarily a receiving, a policy-making, Presidential advisory agency. If the Sec. 102 procedures function effectively to require that the expert Federal, State and local agencies provide their comments, it should not often be necessary for the Council on Environmental Quality to make additional comments on a particular project or action. With that in mind, we tend to comment on about one in ten or twelve statements that we see. As the number of statements goes up, and as they get better, I imagine that we will comment on an even smaller proportion of them.

As they have emerged in 1970, I believe the main issues which relate to the National Environmental Policy Act are as follows:

First, the issue of retroactivity. To what extent does the National Environmental Policy Act apply to actions conceived prior to passage of the act? The cases go both ways on this question. One that you may be familiar with is the Federal District Court's decision in Pennsylvania Environmental Council v Bartlett, (315 F.Supp. 238, April 30, 1970), which I consider to be a bit muddled, and which was rendered before the Council's guidelines were available, and before the Department of Transportation had prepared its own excellent guidelines. This decision held that actions could not be reconsidered and need not be reported on in environmental statements where they had been decided on prior to the passage of the National Environmental Policy Act.

In the other case, Texas Natural Resources Committee v. U.S. (-- F. Supp.--), a proposed loan by the Farmers Home Administration, to finance the conversion of a wildlife habitat to a golf course was involved. The loan was enjoined because of the Federal agency's failure to prepare an environmental impact statement, even though the loan transaction, except for the transmittal of funds, had been completed prior to the passage of NEPA.

A third case, Zabel v Tabb (296 F. Supp. 764,(-- F. Supp. --) did not specifically involve Sec. 102, but rather a Corps of Engineers' dredge and fill permit, seemed to go further than any so far in holding that the actions proposed or even tentatively decided on prior to the act must be judged in the light of the policy now in effect. In this case the Corps of Engineers was sustained in its refusal to grant a permit where the navigational impact of a proposed project was not involved but purely environmental issues were raised.

A second issue that has received considerable attention recently concerns who must draft the statement. Conservation groups have become quite exercised that the Federal Power Commission and Atomic Energy Commission have adopted the practice of having applicants for licenses prepare draft environmental statements, which then are circulated by the FPC or AEC for Federal agency comment. The Council's original and revised guidelines do not deal directly with this matter. Special considerations apply to the programs of those kinds of agencies which tend to be reactive in their relationships with private applicants, and with State and local governments. The success of the programs of the Departments of Transportation and HUD, for example, depend on their not involving themselves very intimately in the day-to-day work of decision-making on specific projects. Users of these programs are State and local governments which apply to the Federal agencies for assistance. In these cases, we have not excepted to a procedure whereby a draft prepared by an applicant under the Federal agency's procedures and rules has thereafter been adopted by the Federal agency and published over the signature of the responsible Federal official. I do not see any problems with that because later we would expect a final statement to be prepared by the agency itself, based on what it has learned from the comments and reflecting its own decision regarding the action.

The third issue, which we heard a great deal about in the first few months, but which we have heard less about recently, is that of the "paperwork jungle." Deputy Under Secretary Orlebeke of the Department of Housing & Urban Development spoke of his concern lest Sec. 102(2)(C) create a "paper tiger" when he testified in Congress a few weeks ago. We have been very sensitive to this problem. When we wrote our guidelines, there were some suggestions that we set dollar thresholds which would trigger Sec. 102(2)(C), or indicate certain types of impacts on wildlife or people as prerequisites for the requirement of a statement. We decided that this was impossible, particularly when preparing guidelines for 40 or 50 agencies of government, all of which did different things. We thought it better to set general guidelines and call upon the agencies themselves, to select whatever specific requirements or thresholds at which they would automatically prepare environmental statements. Up to the present time, no agency has set about proposing thresholds. There is some indication that HUD may, but they have not done so yet. The Department of Transportation did not elect to go this route in its guidelines.

Let me say something about this paperwork issue as far as agencies' discretion is concerned. When we first began considering the way in which Sec. 102(2)(C) would apply to transportation projects there was talk that perhaps 8,000 to 10,000 highway projects per year would be involved. It is now conceded that through consolidation and a winnowing process which does not assume a major environmental impact for most highway projects, nothing like this will be involved. In hearings we held in December 1970 for Federal agencies on the implementation of NEPA, Acting Assistant Secretary Cafferty of DOT said that he thought we would be getting from 1,500 to 2,000 environmental impact statements per year from DOT. I expect this is a manageable number from their point of view and ours.

A fourth issue, which has received a great deal of attention in the press, deals with public availability of draft statements. In the course of coordinating our proposed new guidelines with the Congressional staffs who had a part in writing the NEPA, it has been interesting to learn of their surprize over the outcry that arose on account of the failure of the interim guidelines to require that Federal agencies make draft statements available to the public. We have been criticized for not requiring that drafts were to be treated just like the detailed five-point statements mentioned in the statute, and that they be made public upon submission to the Council. We intend to rectify this in the new revised guidelines by requiring that draft statements be made public as they are circulated to the Council, with the exceptions that are provided in the Freedom of Information Act, minus the exception for interagency memoranda, and for one additional exception in cases where advance public disclosure would significantly increase the costs of procurement to the government. We are thinking here primarily of purchases of land for national parks, seashores, refuges, and the like. The law, we have argued, does not require public availability of drafts, since public disclosure is to take place in accordance with the Freedom of Information Act. The provisions of that act are retrospective, providing that once a Federal agency has taken some action, the public has a right to see certain categories of documents which illuminate the decision.

Then, if the action is reviewable, one can go to court about it. Since the Freedom of Information Act controlled public availability of statements in NEPA, we did not require any but final, completed Sec. 102 statements to be made public. Conservation groups did not see it that way at all, but rather as a public participatory mechanism. I think the President's Executive Order 11514 possibly added to this impression by encouraging more public participation than had been contemplated in the act. In any case, disclosure of draft statements on administrative actions is now to be provided for in our new guidelines.

I will only add that the Council on Environmental Quality does not see itself as standing astride history shouting "stop." It fully recognizes that decisions are made by people who take into account much more than the environment. In our view, the National Environmental Policy Act calls for appropriate consideration of environmental aspects, along with other economic and technical considerations which, prior to NEPA, have tended to take precedence. The Council is prepared to play the role that the President assigned to it, which, as he put it, is to be "the environmental consceince of the Nation."

DISCUSSION

MR. NETHERTON: The Interim Guidelines (Sec. 10) say that agencies will need to identify at what stages or actions connected with a project the procedures regarding environmental impact statements will apply. They go on to relate this to the types of projects involved. You have already indicated that this possibility was considered in connection with possible setting of thresholds, and the like. The guidelines also deal with the time of filing by specifying that the statements will be prepared at the "earliest possible time in the development of its program."

Does this mean environmental impact statements are to be prepared early enough in the planning of a project so that it could result in rejecting the project altogether? Or does it assume that the environmental impact statement will come only after the decision has been made to perform a project and therefore restrict the options of the decision-maker to accommodating environmental considerations as best he can?

This question has been at the root of many route location controversies, where opposition was directed at the project as a whole, rather than any objectionable aspects of the project which itself was accepted as necessary. The trouble has been that this issue generally is faced at some point in time after there has been a good deal of planning and other expense on the assumption that the proposed project should be built. Does the National Environmental Policy Act deal with this issue?

MR. REILLY: Our theory is that the statements called for in the act are "option-defining" instruments, and before any final decision is made by the agency, it will have detailed environmental impact statement in its hands. Obviously, we are not going to get statements done before it has entered someone's mind to go ahead with some particular action. If this idea is held at a fairly low level in the agency, one might argue that it is not even tentatively an "action" or decision. If, on the other hand, the proposal in question reaches the Secretary's desk for his determination, clearly it has passed a lot of hurdles, and there should be an environmental impact statement accompanying it.

As a practical matter, therefore, the answer to your question is somewhere in the middle of this spectrum. Before an environmental statement is called for, there should be a tentative decision to do something, or to consider doing something. We don't like to get statements setting out numerous options, without making it clear whether the agency has a preference for any of them. It is the proposition which forms the core of practical reality in the entire process.

MR. NETHERTON: This is probably a sound practice for dealing with the real world. Public improvements proceed through a series of decisions, moving the project from one plateau to another. The two-hearing procedure in the highway program is an example of separating the design and location decisions. But, basically, every project has a time for deciding whether to "go" or not. Some people have felt the environmental impact statement came too late to influence the decision on this question.

MR. REILLY: On that point I might add that the new proposed guidelines will require that where a public hearing is held in connection with a proposal a draft environmental impact statement must be available to the public 15 days prior to the hearing. That gives you some idea of how we think this problem can be dealt with.

MR. NETHERTON: Something else about the interim guidelines: In Sec. 4, the guidelines make the environmental impact statement provisions applicable to Federal agencies "to the fullest extent possible," and go on to explain that this means it shall apply unless existing law makes it impossible. What would be an example of this kind of situation?

MR. REILLY: Sec. 102(2)(C) is subject to a qualification "to the fullest extent possible." However, Sec. 103 of NEPA is designed to flush out by a date certain any statutory deficiencies or limitations which prevent compliance with NEPA. The date set for this review was July 1, 1971, in the Act, moved up by the President to September 1, 1970. If, for example, the Atomic Energy Commission had concluded that it did not have environmental jurisdiction, and therefore was not subject to the act in its licensing actions, we would have viewed this as a clear deficiency, and we or the AEC would have been expected to propose the necessary legislation to add that jurisdiction. The AEC, however, decided it had sufficient authority, and so did not report this as a deficiency last September. The section (103) functioned as a kind of statute of limitations for asserting statutory obstacles to compliance.

MR. NETHERTON: One more question: Sec. 102(2)(C) requires a consultation process in connection with preparation of statements. Some experience with consultation between departments has been acquired under Sec. 4(f) of the Department of Transportation Act, but has merely emphasized how difficult it is to achieve really effective consultation. What did you think was possible, and what was the most desirable way to proceed under this provision of the act and guidelines?

MR. REILLY: The various consultation approaches that agencies have taken tend to be mixed. William Van Ness, of the staff of the Senate Interior Committee, says the Committee's main concern was to get the agencies talking to one another, to make sure that concerned bureaus consult with each other in the field. The strategy was to involve these bureaus at a time and in a way where they could reduce the adverse effects of the environmental impacts of another agency's proposals before it got too far along to do anything to correct it. In some cases we see one regional office contacting another regional office for expertise; and in other cases the regional office which is preparing the draft is required by the expert or committee agency to come to Washington for any official comment. The procedures we have seen are not very clear on how consultation is being performed, and this is one thing that may develop as time goes on.

MR. NETHERTON: If you have consultation at the time the environmental statement is initially being prepared, then what is left for a review or exchange of further comments, perhaps by these same agencies. Are they retreading the same ground here?

MR. REILLY: I suppose that an agency which is very concerned about a project might, in the absence of the National Environmental Policy Act, make a point of soliciting comments from other agencies, regardless of whether they were favorable or not, in order to better formulate a proposal. If something like this occurs prior to preparation of a draft, we think it is an appropriate way to do it. In fact, there is some language in the proposed new guidelines on that point. When the expert agency is later approached officially for comment, and sees that its earlier suggestions were accommodated in the plan, I suppose they would say they considered the proposal sensible and unexceptionable.

MR. NETHERTON: Or, I presume, if they did not see it reflected in the draft statement, they could file additional, perhaps stronger, views and comments.

MR. BROUN: How does the A-95 procedure relate to the public information issue you mentioned earlier?

MR. REILLY: Some Governors have written to us to argue for having only one Federal coordinative mechanism. We now have provided that copies of Sec. 102 statements be provided to State, regional and metropolitan regional clearinghouses and that comment can be solicited in this way.

At least two Governors have asked that these statements be addressed to their offices when they deal with certain kinds of matters. We have tended to send memoranda to Federal agencies asking them to comply with requests. Our position is that unless a Governor prefers that such agency comment be obtained in an additional way, the A-95 procedure alone will be used.

MR. BROUN: What about the role of the A-95 agencies?

MR. REILLY: They would probably have the primary role in facilitating the collection of comments by the expert State and local agencies. In the legislative history there was some expectation that a list of Federal agencies with environmental expertise or jurisdiction would be prepared, and we issued such a list last spring. We would like to issue a similar list on State and local agencies. This might set some minds to rest. But it is an almost impossible task to determine who in each State and locality is "authorized to develop and enforce environmental standards." I think that the A-95 clearinghouses will come as close to obtaining this as one may expect.

MR. LASH: I would like to follow up on this question of consultation. I think the requirement for an environmental statement and review by various agencies, and, in our case, submitting the statement to Washington for final concurrence certainly blurs decision-making authority of the State highway departments.

There also is the problem of the reviewing agency that just will never let go of a project. They will send back comments with all sorts of qualifications, or perhaps will not respond within the 30 or 45 day limit, but instead will advise on the 44th day that they have not had an opportunity to complete comments and that they will send some comments as soon as they can. Or, perhaps the agency will qualify its comments by saying it approves this project on condition that certain things are done. Projects like this are like a piece of gum which you never can get off your fingers. State highway departments are naturally concerned about this. From your viewpoint, where do the State highway departments' responsibilities lie? How far must they go to satisfy these kinds of requests?

MR. REILLY: Well, in regard to Federal agency comments we say it is fair for the agency seeking comment to state that if it does not hear anything within 30 days it will assume other agencies have no comments to make, and they may go ahead with the project. Where an agency indicates it does have comments to make, but it cannot make them within 30 days, then I think the rule of reason should apply. If there is some reason why a project will have to go forward after 30 days even though comment has not been obtained, I think it is fair in concluding it can go ahead.

On the other hand, the Department of the Interior's regional offices have had some difficulty, since they are asked for so many comments, in getting their comments back within 30 days. Since there is a 60 day requirement for State and local government comment, it probably does not inconvenience one Federal agency to allow another Federal agency at least that long to comment.

Generally, if you have waited 30 days and not been asked to wait for more, you may go ahead. If you have waited 30 days, have been asked to wait, say, two weeks more, you should attempt to comply with the request. You cannot be expected to hold up a project forever, or include comments which are submitted long after the period provided for in the guidelines.

MR. LASH: To what extent do you understand that a State highway department is bound to respond to suggestions and comments? Our position has been that the final decision-making authority is the State highway department. Very often, however, conflicting comments are received. If they are reasonable comments, and the highway departments can adopt them, they do. But we have taken the position that this is as far as they need to go. They are the final decision-making authority. Do you have any comments about that?

MR. REILLY: If the State highway departments truly had that kind of authority, without reference to any other, there would be no need for any statement at all, or for any Federal reviews or approvals. It is the Federal action that requires the statement, and the Federal act in this case is the Federal grant-in-aid. The agency preparing the statement should respond to the comments and make some reference to what they consider are the more serious criticisms, but would presumably take an action after it concluded from a careful review of what was received what was the most appropriate action. The decision-making authority is not divided by the act; it rests upon the Federal agency taking the action, making the grant. Practically, where comments raise serious issues and show important unresolved conflicts--where an expert agency has revealed a very adverse environmental impact--those who review the proposed action at the end of the process should have something to say if there appears to be no accommodation to very severe and informed comments. Generally, however, your concern seems to be whether the decision-making authority still rests with the agency proposing to take the action, with the Federal Highway Administration. Of course, it does; it has not in any way been changed by the National Environmental Policy Act.

QUESTION FROM AUDIENCE: Mr. Reilly, would you elaborate on your statement of the kind of action the Council on Environmental Quality is likely to take on environmental statements. You mentioned that you expected to sample the statements and give a reaction to this sample. What sort of reaction? And would they come at a time when the project involved is still in a sufficiently plastic state so you would expect some response? Or, would you expect the statement to guide future activities of the agency?

MR. REILLY: We will generally comment within the same time frame that everyone else uses to make their comments. If an agency with a project has not heard from us within the time specified for the other comments, it may draw the same conclusiosn about the Council's position as it would about the position of any other agency under the same circumstances. We tend to make comments after seeing a certain pattern of what we consider inadequacy about an agency's environmental sensitivity. Last summer there was a series of public works porjects which caught our attention,

and in our comments to the agency we went through about 12 projects, showing there were certain kinds of repetitious exclusions of environmental considerations. We met with the agency and tried to correct the problem.

We do not try to get into every project that is forwarded to us. In fact there is language in our legislative history that ways we should not involve ourselves too much in the day-to-day business of government. Where we do comment on a specific project, therefore, you may conclude that we have pretty serious problems with it.

QUESTION FROM THE AUDIENCE: Did you say that under your new (forthcoming) guidelines environmental statements would have to be filed in advance of every public hearing?

MR. REILLY: Where, in already existing requirements for a particular program, a public hearing is provided for, a draft environmental statement will be required to be available 15 days prior to the conduct of the public hearing. Where more than one public hearing is required, we are not specific about which public hearing should be the one for which the statement should be submitted.

Recently, the Corps of Engineers submitted a group of 56 water resource project proposals to Congress, and the Public Works Committee sent them back prior to hearing on the grounds that there were no Sec. 102 statements attached. When hearings were held on the SST, there was criticism that no environmental impact statement accompanied them.

QUESTION FROM THE AUDIENCE: How do you square that statement with the statement that you expect only about 1,500 environmental statements a year?

MR. REILLY: I may not have been completely clear. The hearings which I have in mind were those held with respect to the projects significant impact on the environment. In other words, the other provisions of the act continue to apply. Merely because there is a public hearing on a highway proposal an environmental statement is not necessarily required. To require one, it is first necessary to conclude that there is a major action significantly affecting the quality of the human environment. In that case a statement would be required and made available 15 days in advance of the hearing. We do not imagine that all highway projects on which hearings are held are significant in this respect.

QUESTION FROM THE AUDIENCE: Before the location hearing, then, you would have to have a negative report that there was no adverse effect on the environment.

MR. REILLY: At least a tentative one, yes.

QUESTION FROM THE AUDIENCE: In other words, you would have made some sort of investigation, and offered some sort of environmental statement at the hearing.

MR. REILLY: It would not have to be more than a statement that you did not perceive any adverse environmental impact was involved in this case.

QUESTION FROM THE AUDIENCE: Do you have any definitions in mind for the word "significant" as it is used in the guidelines?

MR. REILLY: What we say in the guidelines is as far as we think we can go. Some agencies did ask that we set some specific threshold guidance--for example, where a certain amount of wildlife was involved, or population displacement, or effect on the watertable was involved. We really do not think we can do that. We are going to have to leave specifics in these matters up to the various agencies who all have legal counsel and are more familiar with their own programs than we are.

REMARKS OF MICHAEL LASH

MR. LASH: The Federal Highway Administration issued a draft of their guidelines to the State highway departments on November 30, 1970. This was a rough draft, and we requested the States for comments, which we received early in January. Accordingly, we have a pretty good idea of the kinds of problems the States anticipate, and I will be summarizing their views.

There were three broad categories of reactions. The question about the paperwork jungle is certainly not dead with the highway departments. This is something that appeared in most of the comments we received. They are worried about it, and the ones that seemed most worried were the ones that have been most concerned about doing something to bring environmental considerations into highway planning and design. What they fear is that the procedure is so cumbersome, and involves so much paperwork, that the real attention to environmental questions will be drowned out by the hum of the xerox machine running late into the night.

Another general concern of many States is with the further concentration of decision-making authority in the Federal government. This is not something that was build into the role of the Council on Environmental Quality by the law, but the effect is the same since the State highway departments must submit their statements to Washington for final concurrence. They feel this is inconsistent with the Federal policies about decentralizing authority and responsibility to the States. Under this program, they feel, the reverse is happening.

A third general concern the States have, and one close to the activities of this committee, is about the boon these very elaborate procedural requirements and very vague instructions about the content of the environmental statement may provide to groups that simply want to obstruct public works programs, such as highways. The States feel that these procedures and vague instructions are just loaded with legal booby traps that will be very troublesome, and ultimately defeat the real purpose of the act.

As to some specific problems that illustrate the vagueness of the instructions, I think you all probably appreciate the difficulty of making a really

good environmental study of a public works project. We do not have basic information, for example, on all kinds of questions relating to air pollution. We do not yet know the tolerable levels of air pollution, the kinds of air pollution effects that will be produced by various volumes of traffic under various conditions. We do not yet have these answers; but that does not excuse us from worrying about the question and looking for the answers. The pressure of such questions forces people to devote real effort to solving them. The point I am making is that, besides these very legitimate and difficult questions, there is much vagueness about things that perhaps should have been left till later.

Let me read you some of these points which I feel will be troublesome because we just do not understand what is wanted. Referring to the Council on Environmental Quality's Interim Guidelines as published in the Federal Register, in Sec. 7, dealing with the content of the environmental statement, I would call attention to the following:

> "Both primary and secondary consequences for the environment should be included in the analysis."

I am not sure I know what that means, and no explanatory information is provided. It is encouraging to learn from Mr. Reilly that more detail may be provided when the final guidelines are published.

> "Implications, if any, of the action for population distribution or concentration should be estimated, and an assessment made of the effect of any possible change in population patterns on the resource base, including land use, water, and public services of the area in question."

When you get to this question it is a really tough one, very difficult to know how to handle. Or take these:

> "The relationship between local short-term uses of man's environment and the maintenance or enhancement of long term productivity."

> "Any irreversible or irretrievable resources which would be involved in the project's action.

These are some of the ambiguities that State highway departments are troubled by, and which we all need help in understanding. It is possible that a good deal can be done to cure this by things we can do within the Department of Transportation.

Another problem the State highway departments have is determining what agencies to send their statements to. At the present time the tendency is to instruct them to send draft statements to the entire list of 500 more agencies provided by CEQ, because if you do not you are open to suit. This may be exaggerated, but it illustrates the States' concern over this problem. We have sent to the States a list of about 50 or more Federal agencies that could be concerned

with various types of Federal projects, and, really, you could find reasons why each of them could, under certain circumstances, have an interest in a highway project. But it seems farfetched that we should send them to all these agencies, and the States are very uneasy about their authority to limit this list, or their ability to defend in court their judgment as to which agencies could reasonably be expected to be interested in a proposal. Also, the list includes several subdivisions of some Federal departments. It would be desirable to send only one statement to a single point in each governmental department, leaving it to the Department to distribute and coordinate it within the units of the department. Certainly this would make the job much easier for the highway departments. We need to have this procedure clarified.

The last point I wish to make concerns the agency that just never lets go. I've mentioned this already. We had problems with this type of situation in connection with Sec. 4(f) of the Department of Transportation Act, and I suppose we will just have to keep working at it under the procedure of the Environmental Policy Act. This may be more difficult, since the scope is wider and number of projects is greater, but there comes a time in each project when the agency responsible for it has to cut the cord and proceed, regardless of whether others are as ready as they would like to be.

In conclusion, I want to describe the way many of us feel about Sec. 102(2)(C) in terms of the story about the frog and the squirrel who lived in the same forest. The frog lived in the mud in the dank, dark lower end of the forest; and he used to watch the squirrel skipping and leaping in the treetops where the sun shone. Watching the squirrel, the frog's expectations rose, and he could think of nothing he wanted more than to become a squirrel. So he went to see the Chief Forester, and asked his help. He recalled how long he had been living in the mud, and how much he wanted to get out, and the Chief Forester was sympathetic. After some thought the Forester acknowledged that the frog had a good case, and told him his request was approved. The frog was delighted. He returned to his part of the forest and each day kept trying to jump up into the treetops. But, each day he failed, and sank back into the mud. Finally he returned to the Chief Forester, and said: "Sir, I came to you with my case; you heard it; you approved my becoming a flying squirrel; but here I am, still a frog. How come?" Whereupon, the Forester answered: "You've got to understand, Mr. Frog, that all I do is set policy; you work out the details."

REMARKS OF JOSEPH FROMME

MR. FROMME: Since mid-1968 the Department of the Interior has coordinated with the Department of Transportation in dealing with environmental impacts of highways, airports, and the Coast Guard's bridge permits. Our involvement was based on the Department of Transportation Act, which states, in Sec. 2(b)(2), that it is the national policy to make special effort to preserve the natural beauty of the countryside, and it specially mentioned public parks and recreation lands, fish and wildlife refuges, and historic sites. Later

on, in Sec. 4(f) the Act states that the Secretary of Transportation shall not approve any project which requires the use of any publicly owned land from a park, recreation area, wildlife and waterfowl refuges, or historic site, unless he determines (1) there is no feasible and prudent alternative to the use of such land, and (2) such project includes all possible planning to minimize harm to the park, recreation area, wildlife and waterfowl refuge or historic site.

Implementation of this act was slow in starting, but, by April 1970, the Interior Department was being asked to comment on every Section 4(f) case that occurred. To date, we have commented on some 96 cases, coming from almost every State. In these cases, we have not objected unconditionally to any transportation project. After discussing the projects in the field, we have gone along with the Transportation Department's judgment that there was in fact no feasible and prudent alternative. We have found in many cases, however, that there was not adequate environmental planning on the part of the highway planning agency, and, equally frequently, on the part of the park and recreation planners.

In looking at the environmental impacts we try to insure that the agency which is going to lose public park or recreation land is made whole to the greatest extent possible. Thus we have recommended replacement of the land or payment for the land taken. For example, I recall one case in which a city recreation commission received a little over $2 million from the highway agency for about 23 acres of land which was to be needed for the project. We suggested that this money be spent by the city for expansion of its own capital investment in parks and recreation land. We think that the city's interests are served best by either replacing the lost land with new parks or recreation facilities where the city's current and foreseeable needs dictate, or by investing in the development of the remainder of the park left after the taking in order to increase its productivity as a public recreation service.

In reviewing environmental impacts, we also look carefully at water resources, which are particularly sensitive to many impacts of highway or airport development. For example, runoff from a bridge into a stream that leads to a pond which, in turn, is used for fishing and swimming, might be particularly damaging to this water resource.

We examine the landscaping plans. It is surprizing how many park and recreation officials do not ask that when a major 4 or 6 lane highway is planned alongside their park the construction plan should include screening the road from the park. Fences and landscaping can do a great deal to enhance both facilities, visually and through noise abatement.

Safety is a feature which we find needs to be regularly reviewed in transportation projects. The access of children to a recreation area may be drastically affected by the widening of an existing road from 2 to 4 lanes. Conversion of regular land-service roads into controlled-access highway calls for special safety measures, such as installation of traffic lights or other controlled or protected road crossings for the safety of park users.

These are a few of the areas that we review with special care in the Sec. 4(f) cases. In many of these instances we are also commenting on environmental impact statements, since the Federal Highway Administration has seen fit to combine the statements for Sec. 4(f) of the Department of Transportation Act and Sec. 102(2)(C) of the Environmental Policy Act. I believe this is a sound and efficient procedure for handling these required statements. As a rule our comments are not directed at pointing out inadequacies in the environmental statement. More often our comments include suggestions, which, when implemented, would require modification of the environmental statement.

The Department of the Interior's policy has been to neither approve or object to a Sec. 102(2)(C) statement. We do, however, review them very carefully, and comment on the facets of the project for which we have some expertise. Within the Interior Department, the Secretary has delegated to the Bureau of Outdoor Recreation the responsibility for handling the Sec. 4(f) statements. In this role we serve as a coordinating agency. Where a statement indicates that fish and wildlife values are involved, we submit it to the Bureau of Sport Fisheries and Wildlife for their comment. Where National Parks or Bureau of Land Management property are involved, we submit the material to the appropriate one of those agencies for comment.

In discussing the handling of environmental impact statements at our regional level, we found that these offices were apprehensive about the volume of work in prospect. In Michigan, for example, the State originally estimated it would have about 600 statements per year. Multiplied on a nationwide basis, this could soon become overwhelming. Mr. Reilly's remarks indicate that some selectivity may be introduced which will keep this number in manageable limits. We believe that in addition to this type of screening, we should develop criteria for quick evaluation of a project's statement to reveal the extent to which Interior's jurisdiction or expertise can be of any assistance by a more lengthy review.

MR. NETHERTON: In connection with your remark that Interior had never objected to a highway project, I take it you meant that you did not object to its location, but that you did have definite, and sometimes extensive, comments on the design and construction of the facility in order to minimize its adverse effects on the environment.

MR. FROMME: That is right.

MR. NETHERTON: And, you believed this was the proper role of a reviewing agency. So, you conducted your review not as an adversary, but as a "watchdog" or prompter, in which your department's expertise in natural resources management was used to supplement the matters considered in the original planning.

MR. FROMME: That is right. We have found that our contacts with the field in many instances reveal new information, or place the Sec. 4(f) or Sec. 102 (d)(C) statements in a different light.

For example, the statement may recite that the Mayor of the city has agreed to the use of certain park land for a highway project, and it may indicate he wishes the project to go forward as soon as possible. This may indeed be the official position of the city, but upon inquiry among the various municipal departments, commissions and citizen organizations, it may be found that they had opposed this position, and that its adoption raised major problems in their areas of responsibility. Then you ask: "Where would you put the highway, rather than go through the park?" They do not know. They have no alternative to the park because they are not in the transportation planning business. They merely know that they do not want it to go through the park because they feel it will destroy the amenities, and sometimes the functional integrity of the park unit. Furthermore, they feel that when park lands are taken out of park-use in the cities, they are lost to the community permanently unless they are promptly replaced before the neighborhood's pattern of life settles down again. In some neighborhoods the pressure on living space means that these parks may be irreplaceable.

When these people who are closest to the actual management of recreational resources are asked about measures to minimize harmful impacts of a public works project, they may be also caught between official positions of local government and the practical possibilities for alleviating environmental impacts. An example of imaginative and resourceful approaches to environmental protection is provided in Baltimore where a proposed highway relocation was to cut through the middle of Leekin and Gwynn's Falls Parks. Here an urban design concept team did a lot of fine planning, both with the local people and State and other agencies involved in the city. The net result of their work will be an enhancement of the environmental amenities of this project well beyond what originally existed.

REMARKS OF RICHARD BROUN

MR. BROUN: I would like to begin by describing some of the general goals and objectives that HUD is pursuing in the environmental area. We are, of course, concerned with the general reduction of pollution, and, from the viewpoint of planner, this gets into many transportation planning issues, for example, the issue of land-use generators, densities, balances between generators and carrying capacities, the general issues of providing infra-structure balance in advance of need, and the whole concept of defining standards.

Secondly, we are very concerned with the quality of the "built environment," the socio-physical relationships, problems of design, and the possibilities of joint development.

Thirdly, the issue of social aspects and the differential impacts of adverse environments on selected population groups are important to us. Conversely, the question of access to environmental amenities involves both urban and transportation planning problems.

Finally, the general issue of responsiveness of man-made projects to human needs cannot be overlooked.

These become the general framework within which we examine environmental impact statements when they are submitted for review.

Speaking briefly about our experiences with Sec. 4(f), my own division was formed on February 2, 1970, and that morning the Department of Transportation was on the telephone saying they had a few problems for us. This turned out to be ten Sec. 4(f) projects. This was our first day in business, and we have been at it ever since with a steady stream of statements and correspondence on cases and situations involving environmental matters. These have presented both substantive and procedural problems.

I will mention just a few specifics which our reviews encounter. One is the question of what constitutes a "meaningful alternative" in the sense of feasibility. There is a classic, but admittedly unfair, case in which the review was not asked for until the site had been paved over with concrete construction. Of course, there was no alternative. Fortunately, this is not a typical case.

What is a "prudent alternative?" Here we get into the issue of compensation. What kind of compensation is both appropriate and capable of benefiting the city? When is replacement of land by other land in another location the most appropriate alternative? What are the prudent alternatives for the taking of land in a community where there is no more vacant land left? Does this mean funds should be provided for acquisition of existing developed land in order to provide replacement recreation facilities? Obviously this would be extremely expensive. But it is also an extremely important consideration in determining what is the most prudent solution. If that kind of question is not in the economic equation, then the solution is skewed to begin with.

We are concerned specifically about the provision of replacement services for neighborhoods. Where highways take a neighborhood facility there is sometimes the question of access to the remainder of that facility, and the question of providing a suitable replacement within a reasonable proximity of that neighborhood.

Lastly under substantive problems there is the matter of minimizing harm. We find very often this is not dealt with at all. Or if it is dealt with, we are not given sufficient information.

On the procedural aspects, we have a basic problem with the package of information that is provided. We have made a request to the Department of Transportation for a standarized information package. This will become increasingly important as the volume of these statements rise, and there will be more difficulty in going back for more information if it is not initially provided.

Also, we frequently have encountered questions of how a particular project relates to the transportation system as a whole, and how that system relates to the comprehensively planned development of the area. That kind of framework is often needed to make the kinds of judgments involved in evaluating feasibility, prudence and desirability in route location.

Going from Sec. 4(f) to the Sec. 102(2)(C) statements, I view the impact of Sec. 102 as having several consequences: One has to do with the analysis of

alternatives. A typical Sec. 4(f) statement says the alternatives are not feasible or prudent. In reviewing this, we would like to see an analysis of this proposition. We think the Sec. 102(2)(C) procedure will require that the statement explain what costs were involved in certain alternatives, and why certain alternatives were rejected. Conceivably that could even include the question of whether to build a highway at all, but that would mean getting into the project very early in the process.

Earlier I raised with Mr. Reilly the question of integrating this statement review procedure into the A-95 review processing. Here we see close ties with the comprehensive planning process as supported by the Department of Housing and Urban Development in its 701 Planning Assistance Program. In most cases the A-95 agencies are our client 701 agencies.

I am very concerned about what the volume of these statements will be. Estimates of anything from 1,500 to 2,000 per year have been offered for transportation projects alone. HUD has already declared as a matter of policy that we are decentralizing the process. We have so advised the Council on Environmental Quality, and it is the addresses of our regional offices (rather than our central office) that are provided in the CEQ guidelines. In order to decentralize, a standardized information package is going to be very important, mainly because our regional offices are not going to have access to the central Highway Administration files.

I would hope we also could do something toward classifying the definitions of the major impacts. The draft guidelines circulated by Mr. Lash's office deal with this in some degree. It may be we are going to need more of this, or are going to need classifications within major impact types. Thus, a reviewing agency might look at the primary impact information if it does not have time to review all of the secondary level impacts.

Lastly, I think the Sec. 102(2)(C) process is going to have a very beneficial effect in its feedback into the comprehensive planning process. Substantively and institutionally I would see the transportation and comprehensive planning processes much more closely entwined, and perhaps being merged with environmental and areawide planning. I think this would benefit both DOT and HUD.

MR. NETHERTON: Let me see if I am clear about what you two people who are speaking from the review agency's viewpoint have said. Neither one of you seems to view your role as one of an adversary to the agency proposing a project, but rather as the role of a consultant with particular types of expertise. Is that correct?

MR. BROUN: Yes, we certainly concur in the need for highways in the urban scene. The question is how best to fit them into the urban areas, and how to accommodate and utilize them. We see our consultant role as applying to individual projects and to consulting with DOT on the formulation of policy so that the major concerns can be worked at from the commencement of planning.

MR. NETHERTON: Mr. Fromme indicated that he felt the reviewer could and should go out and investigate the factual aspects of the statement submitted to it--sometimes checking submitted data, and sometimes adding new data of its own.

MR. FROMME: Yes, but our regional offices frequently schedule meetings with State and local officials who are responsible for the land and programs involved.

MR. NETHERTON: Would that be a fact-finding meeting?

MR. FROMME: Well, I was thinking of a case where we have two parks, a public school and playgrounds involved. We have final project plans, and we have some questions about possible minor modifications to take less land. We do not pretend to have the expertise in the engineering field, so we are going to raise questions as to what measures might be taken to minimize the impact on those areas. This particular case involves a ramp to an interstate highway, and we are questioning whether some modifications can be made.

MR. NETHERTON: What is the basis for raising these questions? Do you stick to the facts given in the statement? Or, do you feel the reviewing agency should make further investigations on its own?

Take a simple statement that the land in question is vacant. Do you accept that statement, or do you check it as part of your review? I think that whether a reviewing agency considers its role as including investigations of the facts will have a bearing on how it handles the volume of its review work.

MR. FROMME: Let me answer you this way. Recently I reviewed a statement that indicated the land involved was a "so-called recreation area," and it was recognized as a park. It was well that it did because in checking with the city parks department we found they had in fact designated this area as a park, that an access road had been put in and recreation facilities had been developed, a pond had been cleaned out and stocked with sport fish, and picnic equipment had been placed there. Yet the State's environmental impact statement did not reveal any of this recreation investment by referring to it as a "so-called recreation area." Cases of this sort illustrate how field investigations in conjunction with a statement review can reveal facts that will have significance in the review.

One thing we particularly look at when we deal with wildlife areas is whether these lands were originally acquired with assistance from the Pitman-Robertson Act. This is something like HUD's Open Space program which requires that if lands which are acquired under this law are ever used for anything but open space they will be replaced. In the same way, Federal surplus property that is turned over to the States for park and recreation purposes, fish and wildlife lands, and the like, are granted on condition that they will continue to be used for the purposes specified in the grant.

When we uncover a situation of this sort in our Sec. 4(f) reviews, we sometimes have to ask that a project be held up until arrangements can be made for replacement of these lands.

These are some of the things we uncover in our reviews.

MR. NETHERTON: So you think it is a proper function of review to add fact-finding, selectively, to supplement the factual record. Does HUD do this in its review?

MR. BROUN: Yes, we do it more through the local comprehensive planning agency. Frequently we talk to these people by telephone when a review is being made. We have not generally gone into the field, although we have on a few occasions, and as we decentralize our operations I would expect it to happen more often.

MR. NETHERTON: Bringing this back to the agency that initiates the statement, what are its sources of information? Referring to Sec. 7 of the interim Guidelines Mr. Lash earlier suggested that they asked for some things which, at first glance, seemed to get into areas which necessarily had to be very speculative. For example, what are the implications of population distribution and the consequential demand for services? Is this going to force the one who prepares the statement into speculative judgments? I presume that the transportation agencies' information has to come from its planners. If so, what is the state of their readiness to provide this information?

MR. LASH: That will be our primary source of information, and the State highway departments will no doubt depend on the comprehensive planning surveys for a good deal of the basic information for the statements. However, obviously, we are going to have to expand our information base greatly to handle the questions called for in the environmental law. As a matter of fact, toward that end we are planning a series of workshops here in Washington in April or May, and we will bring together people from the States who have had some experience and expertise in such areas as air pollution, noise, employment, and the like. The mission of these workshop groups will be to come up with guidelines to be used by the States in comparing these kinds of analyses in preparing environmental impact statements. We are going to have to do a great deal from scratch in this field.

MR. NETHERTON: Do you people at the reviewing level feel that you face a similar problem?

MR. BROUN: I think it would facilitate our reviews if we had this kind of planning framework. I think this is exactly what is needed. As a matter of fact I wanted to ask a question on this. In the draft guidelines there is a statement that struck me as being very useful in this regard. It is:

> "Where a State highway department or urban trasnsportation study group prepares an analytic report of a proposed transportation system plan, together with a system planning report, the report should include an environmental analysis... following the standard outline."

Does that mean, in effect, that in every metropolitan area we will have an environmental framework analysis? Is this what the Federal Highway Administration sees as ultimately coming out of this effort?

MR. LASH: Ultimately, yes. And that is really a first step toward something that we hope to do in the next year or two. As you know, at this moment we have no requirement that there needs to be a plan or planning report as a product of the urban transportation planning process. I believe that in the next year or two our Office of Highway Planning will probably have to make such a requirement. When they do, then this environmental statement will be part of it. Currently preparation of an environmental statement is a requirement only where

the transportation study at its own option chooses to prepare such a report. This is as far as we can go at the present time.

I would like to add something else to the point about expanding the information base needed to prepare environmental analyses. I think this means that the State Highway Departments are going to have to employ staffs comprised of various disciplines which highway departments now do not have. Highway engineers alone cannot perform these environmental analyses. Ecology and other areas will remain outside the expertise of the engineers.

MR. NETHERTON: Do you feel that the law intends that the agency preparing the statement should bring this information all together for final casting into the environmental analysis before the project proposal is finalized? Is this one of the purposes of encouraging the advance consultation between the State highway department and, say, the State fish and game commission.

MR. LASH: I am sure we can depend on those agencies for some help, but I am also sure they will expect the highway agencies to develop competent staffs of our own in all of the basic disciplines that are involved. And, I think this also will be necessary to put the State highway departments in a position to defend their positions at public hearings and perhaps in court.

MR. NETHERTON: Let me ask a question to all three of you. The Interim Guidelines, Sec. 7, deal with the part of the environmental statement covering adverse environmental effects, particularly the probable effects which cannot be avoided. It gives a number of examples, including damage to life systems. Obviously this may get into speculative matters, but don't the agencies preparing and reviewing environmental statements have to make some assumptions about the way environments will be affected?

MR. LASH: Do you mean how life systems will be affected?

MR. NETHERTON: Yes. Recently I heard of an instance where a railroad ran for some 26 miles in a straight line, and the question of fencing this right-of-way came up. This happened to be in the Plains States where antelope were found, and the ecologists pointed out that antelopes will not jump fences. Thus the question had to be faced: should a fence be built which would serve as a Chinese Wall preventing the antelope from migrating across the open country in search of food. A fence of this length could threaten the existence of the antelope.

Here is a predicted environmental impact which would affect a life system. It raises a question about which a person preparing a statement and a person reviewing it must make some assumptions. How should it be handled?

MR. LASH: The way things are today, people are getting smarter all the time about the habits of wildlife and the patterns which they follow. And the highway departments are taking this information into consideration. Right now Arizona has a highway proposal which is going to affect the migratory habits of mountain lions. The department has hired a team from the University of Arizona to study mountain lions, and it will not even draw a line on a map until it finds out how those mountain lions live.

In another recent instance, eagles were studied, and it was found that eagles will not breed if their nests are within a certain distance of a highway. Bit by bit we are beginning to learn about these things. Ten years ago a swamp was an ideal place for a highway since there was no one living there. But today we treat swamps as holy ground.

QUESTION FROM THE AUDIENCE: Mr. Fromme mentioned the suggestion of replacement of land taken from parks or other recreation areas. Certainly this seems desirable as a practice, or even, perhaps, as a constitutional requirement. I wonder if you have experienced any situations in which the part taken was so unique in character that replacement was out of the question.

MR. FROMME: There have been several parks which I personally would classify as unique. But here, again, you have to exercise your judgment in the light of alternatives and their costs.

In Vermont, the Green Mountain National Forest included Franconia Notch, and was the suggested site for a highway. There the Secretary of Transportation decided that, at least for the present time, the highway should not go through Franconia Notch, but should be placed on an alternative route.

MR. REIS: The statute does not say that you will determine whether there is a feasible and prudent alternative. Under Sec. 4(f) the question is whether the highway should be built at all once a transportation need has been shown. I think the question may have been misdirected, in the sense that it presumed there might be parkland that was so valuable that there is no feasible and prudent alternative. Congress can, of course, change the guidelines, but as they now read, in Sec. 4(f), the question is whether there is any feasible and prudent alternative; it is not whether you should not build the highway because the park is unique. This is a matter for administrative discretion.

In New Orleans, Franconia Notch, and other places, the Secretary used his authority to say that notwithstanding the transportation need, we will not build this highway because the other values are so great. Such a determination by the Secretary, however, would not be a statutory matter.

MR. NETHERTON: This particular type of question comes into sharest focus, I suppose, when you are dealing with an historic site or very important cultural landmark, which cannot be replaced. There are a good many places where historic buildings can be moved, and put to very beneficial and interesting adaptive uses on new sites. But I agree with Mr. Reis that evaluation of the transportation need in comparison with other values rests with the Secretary, and he must make the decision.

QUESTION FROM THE AUDIENCE: I am surprized to hear that the Interior Department does not take a position for or against these cases. I thought that in the Historic Preservation Act there was a provision that any project which impinged, even visually, on an historic site, should not be pushed forward.

MR. FROMME: Regarding the historic site provisions of Sec. 4(f), responsibility for reviewing cases and statements has been delegated to the National Park Service, which has an Office of Archeology and Historic Preservation. They

review cases involving sites listed in the National Register of Historic Places. The National Historic Preservation Act also created the President's Council on Historic Preservation. Under this Act the Council has the opportunity to comment on any or all projects involving such sites. The Council on Historic Preservation makes specific recommendations, for or against a project which it is asked to review.

MR. NETHERTON: In the historic preservation field, this council may well be doing something that eventually will have to be done in the field of environmental quality. In a number of instances the Council on Historic Preservation has functioned as a mediator to bring about a compromise which has been agreeable to all sides. It has a right to be consulted on every instance where nationally registered sites are involved, and its advisory role has been respected. And, in those instances where it has not succeeded in achieving a reconciliations of conflicting views, its action has served to bring the matter to the Secretary of Transportation, so the decision was made at his level.

I wonder if the work of the Council on Historic Preservation runs parallel to that of the Council on Environmental Quality, and if the CEQ will develop the same type of role as mediator of conflicts in major projects.

MR. REIS: I do not think so. The Council on Historic Preservation is totally different than the Council on Environmental Quality. The former is composed of 11 members, all of whom are skilled and experienced professionals in their field. CEQ does not have the function the way this other council does. It reviews the records of findings and conclusions submitted by other agencies, but it does not go out into the field to hold hearings and gather facts. It is limited in this respect by its law, whereas the Council on Historic Preservation does this regularly. In the case of New Orleans' French Quarter, the whole Council visited the project and said that if it was built at all it should be depressed. The Secretary decided that under these conditions the highway project could not be justified.

MR. BROUN: On the other hand, there have been a number of bills submitted this year to amend the Environmental Policy Act, and one of these would have set up an ombudsman function.

MR. NETHERTON: I think that if we were addressing the institutional side of the environmental quality question today this would be an interesting comparison. But let me make one last comment about the role of review agencies.

As we have discussed this matter of reviewing the environmental quality statements, it seems to me we have agreed that the role of the commenting agency is really most valuable when it concentrates on suggesting supplements or alternatives to the proposal action. If this is so, then perhaps the experience which reviewers have been getting in looking at the cases under Sec. 4(f), which deal with "feasible and prudent" alternatives, and measures to minimize harmful effects, may have real relevance to the role they should perform in connection with Sec. 102(2)(C) of the National Environmental Policy Act.

MR. FROMME: Sec. 4(f) and Sec. 102(2)(C) deal specifically with Interior on a consultative role basis. The Department of Transportation Act states that the

Secretary of Transportation shall consult with certain other secretaries. I think that the same intent underlies the provisions of Sec. 102(2)(C)--a consultative process should be developed under which the Interior Department's expertise in natural resources fields can be used as a basis for commenting on proposals so the responsible agency can make a decision as to what they should do.

MR. NETHERTON: Thank you, and thanks to all of the other panelists for a most interesting discussion.