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ENVIRONMENTAL LITIGATION IN 1971 *

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ENVIRONMENTAL LITIGATION IN 1971

Before I learned how many of you are attorneys, I had intended to begin my discussion by examining in some detail the issue of standing to sue. I had intended to discuss cases like Scenic Hudson[1] and United Church of Christ,[2] which held that it is no longer necessary to be threatened with some sort of direct tangible harm, economic or otherwise, to have standing to participate in proceedings before regulatory agencies like the Federal Power Commission and the Federal Communications Commission. According to the courts, you are "aggrieved", and therefore have standing if you are able to demonstrate through your activities and conduct a special interest in the subject matter of the proceeding in question.[3] Since those cases were decided, many others have adopted a similar line of reasoning with respect to standing to sue the Government in court.[4] I am certain that most of you are familiar with this line of decisions, and so I won't take any time now to discuss them. I will say only that the most important test of that principle is pending right now in the Supreme Court of the United States in the Mineral King case,[5] involving a Sierra Club challenge to a Department of the Interior road permit. It was argued some time ago, and should be decided imminently. I think that until we get that decision, we are not likely to know precisely what the law of standing in this country is.

Nevertheless, I think that the courts have said enough to enable us to anticipate what the law of standing is likely to be. I suggest that a bona fide environmental group, with no other interest -- no economic interest and no other kind of harm flowing to it as a result of proposed governmental action -- does have standing to contest that action. That has been the trend of the cases, and, based on my reading of the transcript of the argument in Mineral King,[6] that is where I think the Supreme Court will come out. I do not think it will be as broad a decision as environmental groups might like to see. I am sure there will be some limitation. The Sierra Club's lawyer wisely confined his argument to the facts of that case, and stressed that the Sierra Club was uniquely interested in the geographical area affected by the road permit in question -- that it had played a special role in the founding of the Sierra Club -- and so he avoided the kind of overbroad argument that might have produced a result unfavorable to the Club. At the same time, however, he furnished the Court with a basis upon which to qualify its recognition of environmental groups' standing to sue. So, I think the Supreme Court will back up those Circuit Courts that have up to now affirmed the standing of environmental groups and other public interest plaintiffs, but that their

standing will not be without limits.

The reason I think it is important to spend some time on the question of standing is that I think this trend toward liberalization of the rule of standing to sue is probably the single most important development in our environmental jurisprudence. I think that you will have to agree that, nowithstanding a number of very important legislative developments, the environmental movement would be a much less visible force in the shaping of our national environmental policy if it were not for its access to the courts.

Furthermore, I think that the liberalization of the rule of standing is evidence of a much broader trend discernible in recent court decisions. The Government attorney used to have a lot of arrows in his quiver that are pretty well blunted at this late date. The reason this arsenal is so much less powerful than it used to be is that the courts have decided that there is a need for an increased accountability on the part of Government officials. That is, I believe that Government officials are now considered by the courts to be answerable for their actions in a way that the courts heretofore have not required.

It is useful to review, without indulging in a long discussion of the cases, what some of those old, now obsolescent, weapons are. Typically, the Government used to argue that you had no right to sue the Government unless it agreed to be sued. We received this doctrine of "sovereign immunity" from the common law of England, where it flowed, presumably, from the principle that "the king can do no wrong". Today the courts are not responding to that argument as they once did, and they have found ways of getting around it even while still paying lip service to it. For example, they have said it only applies when a plaintiff is challenging Federal action taken within the scope of Federal authority. Now, faced with a challenge to Federal action, a court will say that the plaintiff really is claiming that the action was outside the scope of Federal authority. Thus, the court will hold that the suit may be brought, even though the Government hasn't consented to it.[7]

Just as sovereign immunity, in my judgment, is all but a dead letter, the doctrine of "non-reviewability" is sinking fast. We used to hear it argued -- and we still do -- that the Government cannot be called to account in court for its discretionary decisions. But the courts are increasingly loathe to treat administrative decisions as beyond judicial reach.[8] Similarly, the old notion that courts must confine their review of administrative actions to

a narrow scope of inquiry is one which is now observed often in the breach. Courts still say that their inquiry begins with a presumption of regularity in administrative actions, and that only if the administrator has abused his discretion or was arbitrary or capricious in what he did will the court overturn his decision. But as I discuss some of the more recent developments in detail, I think you will see that this is often little more than a ritualistic recital, and that, by and large, these doctrines retain little of their earlier viability.

With that as background, let me turn to the first case I want to discuss -- one already regarded as the most important Department of Transportation case, although it is less than a year old -- the Overton Park decision.[9]

The first Secretary of Transportation, Alan Boyd, had approved the location of Interstate Route 40 im Memphis along a 26-acre strip of land in a major downtown public park. The second Secretary of Transportation, John Volpe, reviewed this location when he assumed office, confirmed his predecessor's location decision, and approved the design. This constituted final approval of the project. At that point, however, the Department was sued. It prevailed in the District Court and in the Court of Appeals; then the Supreme Court, by a unanimous decision, remanded the case to the District Court for reexamination of the administrative decision.

The case turned on the Department's implementation of Section 4(f) of the Department of Transportation Act,[10] which provides that the Secretary of Transportation may not approve any transportation project which requires the use of parkland unless he finds that (1) there is no feasible and prudent alternative to the use of that parkland, and (2) unless all possible planning to minimize harm to the park is included in the project.

I think the decision is notable in two important respects: First of all, the Court interpreted some of the language of Section 4(f), and gave it its first authoritative interpretation since it was enacted in 1966.

It is important to recognize why the Court addressed Section 4(f). The Government had argued that the decision locating I-40 on an alignment which went through Overton Park was not a reviewable decision. It was necessary, therefore, for the Court to determine whether that was or was not a completely discretionary decision -- one committed to the agency's discretion under the Administrative Procedure Act -- or whether there was some law to apply to the decision in order to determine whether or not it was

lawful. The Court therefore went through a detailed exegesis of the language of Section 4(f) in order to determine whether there were objective criteria by which the Secretary's decision could be evaluated. The Court found that in saying that the Secretary could not permit the use of parkland for a highway unless he found that there was no feasible and prudent alternative, and that all possible planning had been done, Congress had meant that highways should not go through parks except in the "most unusual situations", "when truly unusual factors were present or the cost or community disruption resulting from alternative routes reached extraordinary magnitude", and only when alternative routes present "unique problems".[11]

Those are pretty strong words. They enunciate the standards that now govern highways that are proposed to go through parks in cities. The Court's reference to "green havens"[12] in downtown areas suggests that the case probably has to be limited to its facts in some respects. Query whether the same standards should be applied to highways proposed for rural areas or in open country. But I believe the Court was really tipping the Federal Government off to a view that I think will continue to be reflected in judicial decisions involving Section 4(f) -- that is, when Congress said that highways should not be put through parks except in very unusual circumstances it meant what it said, and it is no longer correct to assume that the Secretary has broad, unreviewable discretion in making such decisions.

Second, I think the most important part of the Overton Park decision is its discussion of the way that district courts now must review administrative determinations. Again, the old standard was to ask whether the decision was arbitrary or capricious -- whether the decision-maker's discretion was so abused as to overcome the presumption of regularity that attached to it. The Court referred to this rule, but said that this presumption does not shield the Secretary's action from a "thorough, probing, in-depth review".[13] I suggest to you that that is entirely inconsistent with what we used to think of as appropriate in judicial review of administrative action. The inquiry into the facts, the Court said, must be "searching and careful".[14] It must now be based on the "full administrative record that was before the Secretary" when he made his decision.[15]

This is really brand new law. The suggestion that, almost as though a case were being litigated before the Secretary, we have to produce an "administrative record" represents a substantial departure from past practice. As a result of that holding, now we are being very careful about documenting all decisions in a way

that facilitates judicial review. The Court made it clear that, unless such documentation is available, decisions are going to be remanded to us for the preparation of a record.

I think that the Court amended the "arbitrary or capricious" standard by adding one more factor. That is, where a court finds that an administrator made a "clear error of judgment",[16] that decision can be held not to have been lawful. I think we've all read cases where a court said, in effect, "Well, we might not have come out this way ourselves, but we nevertheless find no basis upon which to reverse the administrator's decision."[17] I submit that now, with a "clear-error-of-judgment" standard built into the law, it is possible for such a court to reverse and remand for reconsideration. In other words, if a court finds that it would not have come out the same way the administrator did, the court might now decide that the administrator was guilty of a clear error of judgment. Now, there is going to be a lot more judicial exfoliation of this embryonic principle, and such predictions may be premature. But I do think that the Supreme Court has invited the judiciary to review administrative actions in ways that had previously been thought beyond the courts' legitimate province.

Again, what the Supreme Court was talking about, I think, is accountability. In the past, for example, it was almost unheard of for a cabinet official to be subpoenaed -- to be asked to come to court and testify about his official action. The Supreme Court said very clearly that that is now a very real possibility where that administrative action is not backed up by an administrative record. Without such a record, the only way a court may be able to facilitate meaningful review of the action is to bring the administrator in and ask him what he did, and ask him to give the basis for what he did.

What this means is that even though you probably can read the Overton Park decision as not strictly requiring an administrative record -- because the Court said that the Government either should have an administrative record or have the officer come in and testify -- as long as Government officials don't want to come in and testify, there is now a practical requirement that every administrative decision be supported by a thorough-going administrative record.

I think the most important application we have yet seen of the Overton Park approach to judicial review is evident in the recent Three Sisters Bridge case[18] here in Washington. As you know, since its approval by Secretary Volpe in 1969, the Three Sisters Bridge has been the subject of an interminable spate of litigation. The most recent decision was handed down by the Court of Appeals

last October. Notwithstanding a forty page decision by the District Court,[19] written after a lengthy trial, the Court of Appeals overturned every point that was found in favor of the Government. The District Court had held the trial prior to the Overton Park decision, but it nevertheless, with some prescience, required the Secretary to come in and for five hours testify about his decision to approve the bridge. The Court of Appeals was unimpressed.

Without going into any great detail about this case, I submit that you cannot read that decision without feeling that the Court of Appeals was in effect substituting its judgment for that of the Secretary. That is, the District Court went through a very long and careful fact-finding process, and made specific findings based precisely on what it found in the record. The Court of Appeals nevertheless overturned every one of those findings. We do not know the final outcome of this case; only a few days ago we filed in the Supreme Court for a writ of certiorari. Whether that petition is granted or not, I think the Court of Appeals here has already told us something more about the direction in which the courts are heading. The trend clearly is toward a very thorough review, toward complete accountability on the part of the Executive Branch, and a departure from many if not all of the standards that limited judicial review of administrative action in the past.

While I am on the subject of Section 4(f), I want to digress for a moment and discuss two other cases which raise another important 4(f) issue. First, however, let me say a few words about the legislative history of Section 4(f). The language we now have in Section 4(f) was originally proposed as an amendment to the Federal-Aid Highway Act of 1966.[20] The section was watered down in the version that finally was adopted in that Act, and it become Section 138,of Title 23, U.S. Code. That section provided that the Secretary could not approve a highway that used parkland, a recreation area, or certain other protected lands unless that project included all possible planning to minimize harm to the affected land, including consideration of alternatives. The practical effect of that wording, as opposed to the wording of Section 4(f) as we now know it, is extremely important. What Section 4(f) says now is that the Secretary shall not approve a highway through a park "unless there is no feasible and prudent alternative". It thus contains an objective, "external" criterion. The Secretary can be reviewed by a court in terms of his compliance with that standard. Under the original language of Section 138, all Congress requires is that he review a proposed highway project in order to determine whether or not a State has considered alternatives. Were that still the operative standard, it seems to me that Secretarial decisions would be much less vulnerable to judicial reversal than they are now.

Section 4(f) as we now know it was enacted later that same year in the Department of Transportation Act of 1966.[21] At that time Congress went back and picked up the language originally proposed for Section 138, and made it Section 4(f). For a while, therefore, we had two conflicting sections affecting highway programs -- one, Section 138 of Title 23, being less stringent than the other, Section 4(f) of the DOT Act.

During its deliberations on the 1968 Federal-Aid Highway, Act,[22] Congress decided to resolve that anomaly. The House proposed the adoption of the language of Section 138 -- the less restrictive language -- for both provisions. The Senate disagreed. It concurred in the House view that both sections ought to be consistent, but proposed that Section 138 be amended so as to render it identical to Section 4(f), which gave the Secretary less discretion. In the final accommodation, the Senate prevailed, except to the extent that Section 4(f) was amended to include language referring to the "significance" of the protected land.[23] What Section 4(f) now protects is public parks, recreation areas, wildlife and waterfowl refuges, and historic sites "of significance", as determined by the officials that have jurisdiction over the land in question.

When that amendment was enacted, we didn't know precisely what to do with it. Were we supposed to require that public officials having jurisdiction over protected land submit a statement as to its "significance" before applying Section 4(f)? Ultimately, we decided to let the public officials themselves bear the burden of showing us why something was not significant. We proceeded that way for some time, and it is safe to say that Section 4(f) operated pretty much on a "business-as-usual" basis until a new highway was proposed for Harrisburg, Pennsylvania.

In that case, the Harrisburg City Countil submitted a finding that Wildwood Park, a large tract of open space in Harrisburg, was not significant for recreational purposes. The Secretary of Transportation looked at that finding and concluded that it did not rise to the level of a finding of "significance" for the purposes of the statute. There was some uncertain language in the resolution that embodied the finding, and, because we really did not know precisely how to handle it, the safe procedure seemed to be to treat it as a Section 4(f) case.

The Department was sued by an environmental group for approving that highway project, called the River Relief Route, and we went to trial. The court concluded that because the City Council appeared to have found Wildwood Park insignificant, and because the Secretary may or may not have applied Section 4(f) -- it really was

not sure -- it would remand the entire project to the Secretary for a clear determination as to whether Section 4(f) applied.[24] The court would then know what standard to apply to the Secretary's decision -- whether to apply Overton Park tests applicable to Section 4(f) cases or the more orthodox criteria governing judicial review of administrative action.

After the remand, the Secretary asked the City of Harrisburg to prepare a statement of significance or non-significance that we could rely upon. They took that request under advisement for several months, and came back to us with a concrete, thoroughly documented finding that Wildwood Park was not of significance for recreational purposes in Harrisburg, as determined by the officials having jurisdiction over it. The Secretary, charged by the court to review that finding and not simply accept it at face value, did so, and concluded about a month later that he had no basis upon which to overturn the finding of the City that the park was not significant. As a result, the River Relief Route is not now a Section 4(f) project. There has been no final administrative decision on that project as yet because the environmental statement has not been completed. Once it is completed, if the decision is to let the highway go forward, we will be back in court again, testing the propriety of the Secretary's determination. This, then, is the first case in which the phrase "of significance" has had an impact on a Federal highway decision. And I suspect it is going to continue to have an impact.

A few weeks ago a case entitled Pennsylvania Environmental Council v. Bartlett[25] was decided in the Third Circuit, affirming a District Court finding in favor of the Federal Government. It was based in part on the determination of local officials that the resource in question, a trout stream, was not "of significance" within the meaning of Section 4(f). The Third Circuit went further than the District Court in the Harrisburg case in saying that the Secretary has no choice except to acquiesce in the finding of the local officials. In other words, the Secretary has no responsibility to review the determination of the local officials; indeed, he has no power to do so. Thus, the term "of significance" in Section 4(f) appears to be growing in its importance, and it might ultimately diminish the importance of the section to conservationists.

Let me turn from Section 4(f) to the National Environmental Policy Act, or NEPA. We have come to recognize that this act has had more to do with the changing nature of decision-making at the Federal level than virtually anything else. And, I expect, it has had more to do with the impact of the courts on these decisions than anything else. I think that in the legislative history of NEPA

there was, in one of the earliest drafts of the bill, language creating a new personal right to environmental quality, which would have been a right upon which anyone could bring suit. Congress dropped this out of the final version of the act, thinking, perhaps, that it went too far.[26] But it would appear that it does not now make much difference whether it is in the act or not. People have been using NEPA to great advantage in suing the Federal Government, and it is clearly the most important single source of environmental litigation today. NEPA is really the predicate for what I am suggesting in the infinitely expanded role of the Federal judiciary in environmental decision-making at the present time.

I would like to talk about a number of issues that have been raised in connection with this statute. The first one is its retroactivity. The question is, of course, whether NEPA applies to Federal projects approved but not completed prior to its effective date. The most important case we have had to date on that question is Calvert Cliffs' Coordinating Committee v. AEC.[27] The AEC has a kind of two-pronged approval process for atomic energy plants. It first approves the construction of a plant; then it licenses the plant's operation. The AEC rules exempted from NEPA any atomic energy plant which had received construction approval prior to the effective date of NEPA, whether or not the plant had received an operating license after the effective date of NEPA.

The Court of Appeals for the D.C. Circuit declared that procedure unlawful. The court's holding, reduced to its simplest terms, is that, if some Federal action is required before a project can reach its final stage, and if that action did not take place prior to the passage of NEPA, then NEPA applies to that project. Conversely -- and this may surprise you -- I believe that, where all Federal action with respect to a project took place before the effective date of NEPA, NEPA does not now apply to the project, even if the project has not yet been completed.

There have been a number of cases involving the Corps of Engineers which have held that, although actual construction was already underway, NEPA applied to the projects in question.[28] In a case involving the Florida Barge Canal,[29] the President stopped the project, but only after a preliminary injunction had been issued and was pending. I think that the fact that these projects were approved and underway prior to the passage of NEPA does not alter my conclusion about the Calvert Cliffs' case, because the courts were dealing there with projects actually being built by the Federal Government. It is necessary to distinguish between direct Federal construction and projects undertaken by the States or other sponsors with Federal approval or funding. Where a project is

sponsored by the Federal government itself, I think it is entirely consistent with my reading of Calvert Cliffs' for that project to be stopped if there is a lot more that has to be done, as there was in the case of the Florida Barge Canal, in order to facilitate the filing of an environmental statement.

The Bartlett case,[30] to which I referred a few moments ago, is of special interest in this regard. That case involved a highway which received construction approval on December 29, 1969 -- two days before the President signed NEPA into law. The Third Circuit held that NEPA did not apply to that highway notwithstanding the fact that the actual construction was not yet completed. That is because construction approval was the last thing the Federal government had to do with respect to that highway. After construction approval had been given, the State was not obliged by law to come back to the Federal Government again except for an audit; and the Federal Government would not intervene unless the State deviated radically from the approved plan.

In sum, then, I think the law governing projects approved by the Department of Transportation may turn out to be that, if there is some significant Federal approval which remains to be given before a sponsor becomes free to proceed with the construction of a project, and no environmental statement has yet been filed, a court can enjoin that project pending the preparation of such a statement.

In the highway area, as most of you probably know, we have operated on the theory that "design approval" is the last significant approval that the Federal Government gives to a highway. Any highway which received design approval prior to NEPA, therefore, does not have to be treated in an environmental impact statement. I think that represents a sound implementation of the Act. But, to the extent it can be argued that the Federal Government isn't legally committed to a highway project until sometime after design approval, some courts may conclude that our interpretation doesn't entirely square with the statute. I hope not, but that's something that remains to be seen.

The second issue is one which only recently has arisen in environmental litigation. One way to state it is in the form of a riddle: When is a Federal-aid project not a Federal-aid project? This is particularly significant in the highway area because the Federal Highway Administration has traditionally worked in close partnership with the States. The States plan and build the highways, and apply for Federal approval and financial contributions to their projects. In a very important case in California, called La Raza

Unida v. Volpe,[31] brought to enjoin construction of a freeway in Alameda County, the Government argued that Federal relocation and environmental standards need not be applied to a highway project before the State applies to the Federal Government for financial aid for the highway. That is to say, until there is such an application for money, notwithstanding certain interim approvals granted by the Federal Government along the way, the sovereign State of California could continue to regard the project as a non-Federal project, and construction ought not to be enjoined on the basis of a failure to comply with Federal requirements. We also pointed out, of course, that if the State, when if finally applies for Federal aid, is deemed not to be in compliance with Federal law, it will get no Federal money for that project. The court didn't buy that argument, and I suspect it was because the court perceived that someone living in a slum due to the failure of a State to provide him with decent, safe, and sanitary housing gets little solace from learning, months or years later that the highway which displaced him has been declared ineligible for Federal aid. The La Raza court was saying that if Federal standards are to have any effect at all, they are going to have to be applied in a timely way. I think it is safe to say that, if a State chooses to leave open the option of applying for Federal aid in connection with a highway project, then its failure to comply in a timely fashion with Federal relocation and environmental requirements will be held grounds for an injunction.

Two days after the District Court in California handed down the La Raza decision, the Ninth Circuit -- to which the La Raza case would be appealed -- handed down a remarkably similar decision in a case called Lathan v. Volpe.[32] Thus it seems pretty clear that, in the Ninth Circuit at least, a project is treated as a Federal project as long as the State preserves the option of obtaining Federal participation in it.

If the courts will enjoin a project for failure to comply with Federal requirements because it might someday be a Federal-aid project, what will they do to a project as to which the State, after once seeking Federal aid, withdraws its application for Federal money and vows never to renew it? The Fifth Circuit has given us an answer to that question in a case involving a highway in San Antonio, Texas.[33] There the Department had been considering a project known as the North Expressway since 1967 or 1968. The project would require the use of parkland from a sinuous complex of parks called Brackenridge Park and Olmos Basin Park in San Antonio, and Section 4(f) therefore applies. The Fifth Circuit enjoined construction of that highway notwithstanding an argument by the State that it would build the highway with its own money whether

it got Federal approval or not, and that its alledged failure to comply with Federal law was therefore no basis for an injunction. The court held, as in La Raza and Lathan, that the State could not proceed on its own without Federal approval because as long as the option of Federal participation remained open, Federal standards had to be complied with before any work was done. Confronted with that decision, the State went back to court to say that it had withdrawn its application for Federal funding, that it no longer had any intention of applying for Federal funds, and that it therefore moved that the injunction be vacated. The District Court denied the motion and permitted the Government to attempt an interlocutory appeal to the Court of Appeals. The Court of Appeals refused to hear the question, saying in effect, "You have been in the Federal ball park so long that you can't now pull out." [34] It therefore declined to remove the injunction. The law of that case at the moment is, therefore, that the State cannot build the highway as a State-funded project and it has no application pending for Federal approval. Needless to say, if someone does not break the logjam there will be no North Expressway.

One other development, not in the highway area but worth examining briefly from this standpoint, is in a case called Town of New Windsor v. Ronan.[35] In New York, the Metropolitan Transportation Authority used a quick-taking statute to condemn for future airport purposes 9,000 acres of land on a tract some 60 miles north of Manhattan. The Town of New Windsor, located near this tract, sued the Authority claiming that it had not complied with any of the Federal requirements applying to Federal-aid airports. There was no doubt the Authority would eventually have to apply for Federal aid to build a new airport, the plaintiff said, and therefore it ought to be enjoined from taking the 9,000 acres.

The U.S. District Court for the Southern District of New York, Judge Frankel, held that the transportation authority had specific legislative authority to do precisely what it did, and that, as an arm of a sovereign State operating pursuant to duly authorized powers it could do whatever it wanted within the boundaries of the State. Although that opinion would appear to be inconsistent with La Raza and Lathan, I think that there are a number of ways in which New Windsor is distinguishable from those decisions - mainly on the basis of differences between the airport and highway statutes, It remains to be seen, however, whether the courts will find those distinctions compelling. If not, we may be proceeding toward either a conflict between the circuits or a reversal of Judge Frankel's position. This will be an interesting development to watch.

The third important issue in connection with NEPA which I would like to address is whether or not it is permissible for a sponsor -- let us say, a State highway department or an airport authority authorized to apply for aid from the Department of Transportation -- to prepare the environmental statement that ultimately is to be issued as a Federal statement. Policy and Procedure Memorandum 90-1,[36] which implements NEPA for the Federal Highway Administration, and the DOT Order 5610.1A[37] which implements NEPA for the entire Department, specifically authorize the preparation of a draft environmental statement by the sponsor. That was done, very simply, because NEPA did not include an appropriation for hundreds of new environmental statement writers, and there was no other way of complying with the law. Everything would grind to a halt very quickly if the Federal Highway Administration itself were required to produce in-house the environmental statement for every highway project that is proposed.

This issue is now at stake in at least two cases. One, an airport case involving the City of Boston -- City of Boston v. Volpe[38] -- and a highway case very recently filed in California -- Environmental Law Fund v. Volpe.[39] In this latter case I believe the issue is whether the DOT Order and PPM 90-1 comply with the guidelines of the Council on Environmental Quality. At present we have no judicial guidance at all on this point. If the question is decided against the Department, something will have to be done very quickly to prevent everything from shutting down.

MR. KENNAN: May I add something to that? The Federal Power Commission has adopted a regulation implementing NEPA which has this same general character. Those regulations, insofar as they permit an applicant to prepare a draft statement, have been challenged indirectly in a case called Green County Planning Board v. Federal Power Commission.[40] The Second Circuit decided that case on January 17, 1972, and my understanding of this opinion is that serious doubt was cast on FPC's regulation delegating NEPA responsibility to the applicant. The principle of implementing NEPA would seem to be identical with that applied in transportation projects.

MR. SHANE: There is also a decision involving the Atomic Energy Commission which, according to a newspaper account, seems to have gone pretty much the same way. Are you familiar with that one?

MR. KENNAN: Yes, but I think the newspaper account was overdrawn.

MEMBER OF AUDIENCE: My understanding of that FPC decision is that it required the FPC to prepare their own statement prior to their APA hearing, or to hold a hearing on environmental issues, then

file an environmental statement and hold their APA hearing. As I got it, the gist was that in one way or another the agency would have to take full responsibility for the environmental statement.

MR. SHANE: Well, I don't think any purpose is served by speculating about what it may or may not have said. It's certainly, though, an issue that bears watching.

MR. BROUN: I'd like to comment also. I think the question of appropriations and costs is an interesting one. I am with HUD, and I note that the General Accounting Office is doing a study now, at the suggestion of Congressman Dingell, which, among other things, goes into the costs, and the costs are quite high. Our department is spending on the order of one million dollars a year preparing and processing environmental statements. HUD does not produce the volume of statements that DOT is producing, but it illustrates a problem which is common to all Federal agencies.

MR. SHANE: I think it is fair to say that Congress had no idea what it was doing when it passed NEPA. Nobody could have foreseen the impact it was to have on all Federal activities. We have been talking about the activities of the Department of Transportation and the Corps of Engineers which have uniquely important impacts on the quality of life everywhere, but even in agencies which were not thought before to have any environmental impacts at all -- such as the Law Enforcement Assistance Administration in the Department of Justice, which helps build prisons -- environmental statements have had an effect.[41]

The last issue I would throw out for consideration is the extent to which the courts are moving toward a substantive review of the merits of administrative decisions. I taught a seminar in environmental law about a year ago, and was talking about the National Environmental Policy Act. I posed to the class a hypothetical case, as follows: Suppose the Secretary of Transportation circulated an environmental statement on a proposed supersonic transport, and got nothing but adverse comments on that statement. Everybody who reviewed that statement said it was a terrible idea from an environmental standpoint -- a disaster. But the Secretary nevertheless approved the project. I then asked the class whether that approval could be overturned in court.

My view then was that it probably could not be overturned, assuming that the Secretary properly followed all applicable procedures. NEPA is an informational device, and requires certain procedures designed to apprise people of the facts, and to facilitate a thorough consideration of the environmental effects of a project.

But if a decision-maker decides, notwithstanding a project's adverse environmental effects, to go ahead with the project, that is a decision the courts would be stuck with, assuming, again, that the decision-maker followed all of the procedural rules.

I think I managed to persuade my class that I was right. But I am not so sure I was right anymore. I think that the courts are moving in the direction of a substantive review of administrative decisions, whether they call it that or something else. And at that point I think there will be no other way of looking at things than to consider the courts a full partner in the business of administrative decision-making.

MEMBER OF AUDIENCE: Did not Calvert Cliffs' contain a statement that you must look at the substance, and if necessary plants must be retrofitted before a license is issued?

MR. SHANE: Yes, that's quite right; but I think that a court's holding that an agency must look at the substance is still one step away from a holding that: "You have looked at the substance, and we have looked at the substance, and we think your decision was wrong so we are reversing it." I don't think that has happened yet.

MEMBER OF AUDIENCE: But one has come pretty close to that. I think it is in Natural Resources Defense Council v. Morton,[42] involving off-shore oil drilling off the East Coast, that the court came awfully close to substantively reviewing an action. They were concerned with the fact that the decision was phrased in terms of not citing enough alternatives. Some of the alternatives set out were not ones that agencies ordinarily look at. Like the relationship between strip mining and oil reserves, and general pollution throughout the U.S. if you increase the oil supply, and that sort of thing.

MR. NETHERTON: On that last point, I was interested recently to note the following statement in the second annual report of the Council on Environmental Quality:

> "The courts do not hesitate to review questions of law decided by Federal agencies. But traditionally they have deferred to the agency for determinations of fact. ... Interpreting facts is a subjective process, however. And an agency's 'factual' conclusions may involve weighing environmental values against other policies important to the agency. Recognizig this, the

> courts have recently begun to broaden the meaning of 'arbitrary or capricious'. It now includes agency decisions that disregard the policies of environmental laws."

For what it is worth this statement speaks directly to this question which at the present time is unsolved and arises out the line of cases Mr. Shane has discussed.

FOOTNOTES

1. Scenic Hudson Preservation Conf. v. FPC, 354 F.2d 608, 1 ERC 1084 (2d Cir. 1965), cert. denied, 384 U.S. 941 (1966).

2. Office of Communication of United Church of Christ v. FCC, 359 F.2d 994 (D.C. Cir. 1966).

3. Scenic Hudson, supra note 1, 354 F.2d at 616, 1 ERC at 1089.

4. See, e.g., Association of Data Processing Service Organizations, Inc. v. Camp, 397 U.S. 150 (1970); Hardin v. Kentucky Util. Co., 390 U.S. 1 (1968); Environmental Defense Fund v. Hardin, 428 F.2d 1093, 1 ERC 1347 (D.C. Cir. 1970); Citizens Committee for the Hudson Valley v. Volpe, 425 F.2d 97, 1 ERC 1237 (2d Cir.), cert. denied, 400 U.S. 949 (1970); Road Review League, Town of Bedford v. Boyd, 270 F.Supp. 650 (S.D.N.Y. 1967).

5. Sierra Club v. Morton, 433 F.2d 24, 1 ERC 1669 (9th Cir. 1970), cert. granted, 401 U.S. 907 (1971) (No. 939, 1970-71 docket; renumbered No. 70-34, 1971-72 docket).

6. 2 Environment Reporter 848 (1971).

7. E.g., Arlington Coalition on Transportation v. Volpe, __F.Supp. __, 3 ERC 1138 (E.D. Va. 1971); Environmental Defense Fund v. Corps of Engineers, 325 F.Supp. 728, 2 ERC 1260 (E.D. Ark. 1971); Environmental Defense Fund v. Corps of Engineers, 324 F.Supp. 878, 2 ERC 1173 (D.D.C. 1971); Kalur v. Resor, __F.Supp.__, 3 ERC 1458 (D.D.C. 1971); La Raza Unida v. Volpe, __F.Supp.__, 3 ERC 1306 (N.D. Cal. 1971); Izaak Walton League v. Hardin, __F.Supp.__, 1 ERC 1401 (D. Minn. 1970). For a decision which avoids completely the "officer suit" fiction and rejects the sovereign immunity defense as simply not in keeping with the "modern trend", see Izaak Walton League v. Macchia, __F.Supp. __, 2 ERC 1661 (D.N.J. 1971). Commentators regard the current case law on sovereign immunity as confused. See, e.g., Sovereign Immunity and Nonstatutory Review of Federal Administrative Action, 68 Mich. L. Rev. 867 (1970); Cramton, Nonstatutory Review of Federal Administrative Action, 68 Mich. L. Rev. 387 (1970).

8. See, e.g., Abbott Laboratories v. Gardner, 387 U.S. 136 (1967); Rusk v. Cort, 369 U.S. 367 (1962); Shaughnessy v. Pedreiro, 349 U.S. 48 (1955); Cappadora v. Celebrezze, 356 F.2d 1 (2d Cir. 1966).

FOOTNOTES -

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

10. P.L. 89-670, 80 Stat. 934, 49 U.S.C. §1653(f).

11. 401 U.S. at 411-13, 416.

12. Id. at 413.

13. Id. at 415.

14. Id. at 416.

15. Id. at 420.

16. Id. at 416.

17. See, e.g., Road Review League, Town of Bedford v. Boyd, 270 F.Supp. 650 (S.D.N.Y. 1967).

18. D.C. Fed'n of Civic Ass'ns v. Volpe, __F.2d__, 3 ERC 1143 (D.C. Cir. 1971), petition for cert. filed, 40 U.S.L.W. 3375 (U.S. Jan. 17, 1972) (No. 71-931).

19. D.C. Fed'n of Civic Ass'ns v. Volpe, 316 F.Supp. 754, 1 ERC 1484 (D.D.C. 1970).

20. §15, P.L. 89-574, 80 Stat. 771.

21. See note 10, supra.

22. P. L. 90-495, 82 Stat. 815.

23. Id., §18.

24. Harrisburg Coalition Against Ruining the Environment v. Volpe, 330 F.Supp. 918, 2 ERC 1671 (M.D. Pa. 1971).

25. __F.2d__, 3 ERC 1421 (3rd Cir. 1971).

26. See H.R. Rep. No. 91-765, 91st Cong., 1st Sess. at 8 (1969).

27. 449 F.2d 1109, 2 ERC 1779 (D.C. Cir. 1971).

28. Environmental Defense Fund v. Corps of Engineers, 331 F. Supp. 925, 3 ERC 1085 (D.D.C. 1971) (Tennessee-Tombigbee Waterway); Environmental Defense Fund v. Corps of Engineers, 325 F.Supp. 728, 2 ERC 1260 (E.D. Ark. 1971) (Gillham Dam); Environmental Defense Fund v. Corps of Engineers, 324 F. Supp. 878, 2 ERC 1173 (D.D.C. 1971) (Florida Barge Canal).

29. Note 28, supra.

30. Note 25, supra, and accompanying text.

31. __F.Supp.__, 3 ERC 1306 (N.D. Cal. 1971).

32. __F.Supp.__, 3 ERC 1362 (9th Cir. 1971).

33. Named Individual Members of the San Antonio Conservation Society v. Texas Highway Department, 446 F.2d 1013, 2 ERC 1871 (5th Cir. 1971).

34. Order of Dec. 20, 1971 (unreported).

35. __F.Supp.__, 3 ERC 1023 (S.D.N.Y. 1971).

36. 36 Fed. Reg. 23696

37. 36 Fed. Reg. 23679 (1971).

38. Civil Action No. 71-2090-M (D. Mass., filed Oct. 1, 1971).

39. No. C-72-95 LHB (N.D. Cal., filed Jan. 14, 1972).

40. __F.2d__, 3 ERC 1595 (2d Cir. 1972).

41. Ely v. Velde, __F.2d__, #ERC 1280 (4th Cir. 1971).

42. __F.2d__, 3 ERC 1558 (D.C. Cir. 1972).