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ENVIRONMENTAL LEGISLATION MEMORANDUM

Legal Resources Group, Highway Research Board
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The following transcribed discussion was part of a meeting of the Committee on Environmental Issues in Transportation Law at the Annual Meeting of the Highway Research Board in Washington, D.C., January 19, 1972. Participating in the discussion are Steven Jellinek, Staff Member, Council on Environmental Quality, Nolan H. Rogers, Special Assistant Attorney General, Maryland, and Robert Kennan, Counsel, National Wildlife Federation. Ross Netherton, Chairman, Committee on Environmental Issues in Transportation Law, served as moderator of the discussion.

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

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MR. NETHERTON: With this panel we are continuing to explore a subject which we opened up last year when the Committee's meeting dealt with the processes of assessing environmental impacts, and their reflection in the statements called for in Sec. 102 (2)(C) of the National Environmental Policy Act of 1969. This section of the law states that every recommendation for legislation and every other major Federal action which significantly affects the environment must be accompanied by a detailed statement which describes the environmental impact, specific adverse effects, alternatives, the relationship between short-term uses of the environment and enhancement of long-term productivity, and, last, any irreversible commitments that may be made if the proposal is carried out.

Last year one of our panelists characterized this section as "an action-forcing mechanism" by which Congress, the President, the Council on Environmental Quality, and the public could scrutinize the manner in which consideration was being given to environmental factors in administrative decisions. It was also expected that administrators would find in these statements a new way of identifying and analyzing the options available to them in light of the estimated effects of their programs. Finally, it was suggested that these statements might be helpful to public interest groups seeking to redirect agency decisions which they considered wrong.

Taken altogether, these objectives provided a sort of grand strategy for achieving a reconciliation of differences in environmental values and program priorities. In addition, NEPA and the Federal agencies have provided a legal framework for implementing this strategy by promulgating standards.

In returning to this subject again this year, we are asking our panelists to discuss the effectiveness of the 102 Statements as they have watched the implementation of NEPA during the past year. And in order to give this discussion a starting point, I invite your attention to this statement in the second annual Report of the Council on Environmental Quality:

> Yet much more remains to be done to assure that all agencies fully and objectively consider the environment in their actions, not just in conjunction with specific projects, but also in relation to the basic policies and program structures. Lack of environmentally trained personnel and the difficulty of changing established decision-making patterns are still problems. Too often the environmental statement is written to justify decisions already made instead of to provide a mechanism for critical review. Consideration of alternatives often is inadequate, and the ultimate agency alternative--that is, taking no action at all because of the environment--has rarely been considered. Some agencies or their components define their mission in a narrow sense which excludes adequate consideration of environmental protection. NEPA has intended to elevate environmental to full partnership with technological and economic factors in government decision-making, but it is still not working entirely that way.

Let me ask the panel: Is that a fair assessment of where we stand today as you see the state of the art of preparing 102 Statements?

MR. JELLINEK: That statement was written in July 1971, and I cannot say much has changed since then in terms of the overall Federal agency commitment and approach. There have been some very notable exceptions to this, generated, I think, by some of the court decisions of the past year.

The title of this panel could be construed to have some interesting implications. It could mean that present efforts are questionable because agencies already consider environmental factors in their decision-making processes so that there is no need for environmental impact statements. I would have to say that these statements definitely are worth the effort, for without them I seriously doubt that agencies would take the environment

into consideration on the level that really influences their programs. If, however, the title is meant to ask whether environmental impact statements really are making a difference in agency decisions, then I would have to say that probably they are not, or that they have not so far. Agency performance is spotty, and many of the deficiencies mentioned in the quotation just read still occur.

But the question is what can one do about this. How can environmental statements be handled so as to really make a difference? Certainly not by doing away with them. Clearly, I think, agencies have to want to have these statements make a difference.

One of the prime means of making agencies want to change their policies and procedures comes from the courts. Some of the court decisions we have just heard about will have a very direct influence on inducing agencies to be more responsive in assessing environmental impacts.

Another influence being felt is supplied by the public and public interest groups who are taking advantage of the fact that administrative decision-making is becoming opened up to a much greater extent than it ever was before.

A third major supporting element of the framework is the fact that the law exists, the system has been institutionalized, and the bureaucracies are moving to implement it. Federal agencies are commenting on other agencies' projects. Out of it all decision-makers are slowly but surely being forced to face and consider environmental issues.

There are still many problems, particularly, in terms of our reference here today, with the highway program. Basically PPM 90-1 is a good procedure. The evidence indicates, however, that to date it has not been wholeheartedly or completely implemented. It was published in August

1971, but today we are still receiving impact statements which suffer from some of the deficiencies of the past which this new procedure was designed to eliminate.

Most of these deficiencies are familiar to you if you have read even a small number of highway impact statements. Too many times they amount to justifications after the fact. Too many fail to give adequate consideration to alternative courses of action. Too often straw men are set up. Very rarely do you see evaluation given to the alternative of not going ahead with a proposed project. Too few statements give an in-depth analysis to the environmental impacts that are identified. In some cases there even is failure to recognize certain effects of the proposed action as environmental impacts. For example, economic growth and development is routinely considered as a "plus" in assessing the value of a project, with rarely any consideration of whether that growth will have an adverse impact on land use or create air and water pollution problems. Minimizing these effects via alternative transportation decisions, or a decision not to build a project is rarely considered.

In terms of the spirit of NEPA and the goals of the guidelines, we still are getting too much of what PPM 90-1 has called "piecemeal" projects, short segments rather than comprehensive evaluations of total highway projects.

Generally, environmental statements have failed to concentrate on environmental costs in an organized and quantitative way that would facilitate comparing one alternative with another. This could mean assessing the impact of the alternative highway locations on changes in uses of property. It could mean measuring the impact of various locations vis-a-vis the amount, dispersal and effects of air pollutants. Such comparisons might be based on a qualitative assessment of the benefits of one alternative

versus another alternative, and a calculation of the additional financial costs of carrying out the environmentally more desirable alternative. For example, if it will cost so-many hundreds of thousands of dollars more to take an action which is judged to be environmentally more desirable, that represents one measure of the cost of avoiding a given level of environmental impact.

I think the process envisioned by NEPA will take hold, and things will turn for the better. We are seeing more examples of better impact statements, and we have every reason to expect things will continue to get better. It will always be difficult to get uniform high quality in the statements since so many diverse individual agencies are involved in their preparation.

If the overall quality level of the environmental statements is not raised administratively then agencies will simply find themselves in court more frequently. The requirements of NEPA will not go away, and as agencies continue to work with them I look for continued improvement.

MR. NETHERTON: Do you agree that the lack of environmentally trained personnel is a critical shortage? This seemed to be indicated by the statement in the annual report of CEQ.

MR. JELLINEK: I did not mean to indicate by what I said that the deficiencies I mentioned were the result of bad faith. I think that in many respects they are related to lack of trained personnel, just as part of it is due to the great volume of highway projects that are in the pipeline and the inherent difficulties of getting things done in large organizations.

MR. NETHERTON: I have also seen it said in hearings that there are some environmental issues for which we simply do not have factual data at the present time. We need more scientific information and more experience

in monitoring environmental effects. Would you agree that we suffer from a lack of data or a sufficient data base on which to base predictions of environmental impacts?

MR. JELLINEK: I am not sure exactly what types of data you are referring to, but I assume that there probably are some fields in which this is true. But I believe we have enough data now to do a much better job of judging environmental impacts than we have done in the past.

MEMBER OF THE AUDIENCE: There is no basis that I know of at the present time for rigorously determining the impact on the air quality of a given region due to development of a highway through that area. Some statements have been made about such impacts, but, for example, there are no models now based upon actual measurements made in the vicinity of highways. There is a project to do this in Los Angeles now, and there also are emission models in existence, but in the absence of any testing of those models their adequacy to provide data is naturally questioned.

MR. JELLINEK: There is data available to do a lot more analysis than the all-too-frequent assertion in 102 statements that since the Clean Air Act will require cars to meet emission standards by 1975 this aspect ceases to be a problem.

MEMBER OF THE AUDIENCE: I am not suggesting that there is not a necessity to make greater analysis of the impact of transportation system plans on the air quality of urban areas as required by the Clean Air Act. I am only saying that the point is a valid one, that part of the delay involved is simply the result of a lack of tools to work with, and lack of knowledge in the State highway departments. I have heard, for example, that some

departments do not have the personnel who are conversant with the terminology of air quality or familar with the pollutants they should deal with or the units of measurement. They lack the equipment needed for testing in many cases.

I do not think this undercuts the necessity for doing the analysis, but I think it helps explain part of the reason why some of the statements may not be as good as they should be.

MR. NETHERTON: We are talking about something here that rests squarely on the doorstep of those agencies which have responsibility for developing the initial statements of the environmental impact of a project. The experience and viewpoint of those agencies is represented on this panel by Nolan Rogers, Special Assistant Attorney General of Maryland. I am wondering whether he would agree with what has just been said.

MR. ROGERS: Let me preface my remarks with a general and personal observation that the problems of processing environmental statements in the State highway departments have reached a critical state, and unless something is done to reduce the red tape which they involve, and to expedite the whole process, I believe the deadlines imposed by the Federal-Aid Highway Act of 1970 may result in losing a number of projects.

I apologize for using my own State as a frame of reference, but I suspect that some of our problems may have applications in other jurisdictions. The examples I offer are not intended by reflect criticism, but only to illustrate and highlight problem areas.

PROBLEMS IN ADMINISTRATIVE PROCESSING AND REVIEW OF ENVIRONMENTAL IMPACT STATEMENTS

1) Inability to ascertain adequacy of statement by comments received from reviewing agencies.

As an example, the Draft Environmental Statement for I-70N in Baltimore City was distributed for comments in April, 1971. After receiving no response from the Federal agency, we placed a long distance telephone call to the regional office to ascertain if they were going to comment (this particular project involved I-70 through Leakin Park, a 1500 acre park in Baltimore City). The regional office informed us that since the statement involved an area of high controversy (Leakin Park) their final response would come from the Washington Office. However, the regional office informed us that their recommendation to their Washington Office was that the statement was "inadequate" and should be "entirely rewritten and resubmitted."

Several days later we received a phone call from the Washington Office of the agency praising the statement. The final response received from the Washington Office said, "We consider this environmental statement to be one of the best that has come to this Department for review."

A critical problem exists when there is this type of conflict at different levels of a single agency over the adequacy of a statement.

Recently, we submitted a statement for review to a Federal agency that involved a non-federal aid project which was totally financed by toll revenue. Approval of the statement was delayed extensively because the agency insisted that we submit a 4(f) statement notwithstanding the fact that the agency was cognizant of the toll project.

Other statements have received responses ranging from "excellent" to

"rewrite the whole thing - it is entirely inadequate." It is frustrating and difficult with a range of comments such as these, to prepare a final statement which you are sure will be adequate and meet all points of concern.

2) Reviewing time by agencies.

Although the PPM and CEQ guidelines give time limits that can be imposed on reviewing agencies there are serious problems in this area. We forwarded one statement and set a 45-day time review period. On the I-70 project, we received one written and two telephone requests asking for an extension of time. The 45-day review time ended at over 90 days. Other statements have extended over 100 days' review time. We are aware that the PPM allows the state to refuse time extensions after a certain point but it is also required that these same agencies must review all future statements and an amicable working atmosphere is essential. Refusal to extend raises the anxiety that the state would be nit-picked with minor comments, requiring response in the final statement.

3) Time of preparation affects quality of draft and final statements.

Requiring preparation of statements prior to and after location hearing naturally makes much of the information sketchy and speculative. When these statements are reviewed we are criticized for not expanding on details which normally are not reached until later stages of design.

Appendix F of PPM 90-1, paragraph 1(a) requires that draft and final environmental statements should be planned and processed for planned highway sections where organized opposition has occurred or is anticipated to occur. We would need a crystal ball to anticipate all of the problems to be resolved in the statements or the fact that throughout the United States there are more than 40 cases pending in the courts attacking highway projects. Recent court decisions have clearly demonstrated the attitude of

the courts, and the environmental statements have been vulnerable to attack, particularly when the location and design approval was received prior to NEPA.

Depositions of plaintiffs in our I-70 environmental cases which we are presently trying, disclosed their intention to raise issues relating to flooding and drainage problems, tree disease, etc. which will occur in Leakin Park. These issues were not covered in detail in the earlier statements submitted after location approval, nor discussed at the public hearing. I suggest that these problems could be resolved at the design stage and covered in an impact statement at that stage.

If one goes back six or seven years, and looks at the transcripts of our highway hearings, there is little input from the environmentalists. If we had had more input we might have been better able to anticipate their problems. But this situation continues today, and it is very difficult for someone who has to prepare an environmental statement to anticipate all of the problems of the environment after the fact. I am sure this is one of the reasons why we have so many court cases on highway environmental issues.

A proposed solution appears to be the filing of environmental statements at several stages of design, e.g., preparing a preliminary design on all routes under consideration prior to the location stage. Maryland is now doing this to some extent.

I feel--and I believe environmentalists would agree with me--that the environmentalists get only one shot at a project, aside from litigation. Within our procedures they have one opportunity to see the draft statement, and this is a sort of built-in discovery process for them. From this they have to make their input into the location hearing.

I do not know what it will be like in the future when one has a brand

new project and is not concerned with going back to exhume previous location hearing records, but it seems to me that if an environmental statement could be prepared after the design hearing, it would alleviate many of the problems that we now have in trying to meet all objections.

It was interesting to me to note that many of the objections raised by the Sierra Club to our I-70 case in Baltimore involved issues which pertained to the design process. For example, flooding, drainage, problems of the Dutch Elm disease, and reduction of parkland space all were cited. Their position was against putting the road through the park, but I believe that all of the environmental problems cited in their deposition could have been resolved at the design stage. At present, however, the PPM's prevent postponement of these issues until the design stage.

So, my advice to highway department lawyers who are faced with the necessity of working with an environmental statement which is sketchy and inadequate is to proceed immediately with their own discovery process and determine exactly what are the objections of the environmental groups. Many of these objections may be procedual, relating to the location hearings. But eventually I think it is clear that they must get into the substance of the environmental statement, and the adequacy of the environmental statement will be judged by the courts.

I predict, also, that the mass transit programs which are starting all across the country, will be subjected to the same type of litigation and the same problems with environmental statements that have been experienced by highway departments.

We have had occasion to look into the motivation of some of the environmental objectors. The Sierra Clubs, for example, hires excellent attorneys, who do a workmanlike job and have our complete respect. On the

other hand, we find other groups who merely want to stop the highway program and do not seem to be very concerned about the welfare of the environment. And, there are individual plaintiffs who, when their interest is fully explored, are obviously politically motivated in filing their suit. I believe it is important to the court to know where the interests of the parties lie, and this is a fair subject both for discovery and cross-examination in court.

4) Delay in Federal clearance of final environmental statements and 4(f) reports.

As of January 10, 1972, on Interstate projects in Baltimore City, we have received approval of the 4(f) document (Leakin Park) and no Final Environmental Statements. Four 4(f) reports have been filed. One as long ago as December, 1970, (Canton Playground) without response.

On the aforesaid projects three Final Environmental Statements have been submitted. One as long ago as July, 1971. The one 4(f) approved took 7 months.

It appears that if clearance of Final Environmental Statements on <u>non-controversial</u> projects can take as long as 6-9 months, approval of statements for complex projects could take a year or longer. This necessitates delays in advertising projects as well as delays in all phases of projects since FHWA will not allow us to proceed to the next phase whether it be design, PS&E, or whatever, until the Final Statement is approved.

A most critical situation exists in that from the beginning of preparation to final approval, the Environmental Statement requirement as presently constituted and administered can easily delay a project one year to 18 months in a non-controversial area without considering potential litigation delay thereafter.

I have heard statements from staff people to the effect that it would be just as well to submit a negative statement in order to expedite the review process. I have assured them that such action will not meet FHWA approval and will certainly be contested in court and later necessitate a greater amount of work and make the highway department look bad in the eyes of the court.

5) Scope of review by agencies.

Federal agencies reviewing environmental statements will often request certain items be made a part of the project or construction will not be allowed to proceed. They may request certain joint development projects or acoustic barriers be incorporated with the contingency that the project is unacceptable to them without same.

In most cases there are no provisions for obtaining Federal funds for these additions required and this creates additional hardship and delay. Reviewing agencies are quick to point out what they think the project may need to make it enhance the environment but few are willing to offer financial assistance or even suggest a source.

ENVIRONMENTAL STATEMENTS AND JUDICIAL REVIEW

Notwithstanding all of the procedures and guidelines for the administrative review of environmental statements, the courts are conducting the final review of these statements in a number of cases involving critical projects. It is clear that the courts will delay right-of-way acquisition, design and construction, until environmental requirements are satisfied, in some cases, retroactively. A perplexing situation thus develops, particularly where the location and design hearings were held and approvals given prior to the 4(f) and NEPA requirements.

Our present experience in the I-70 case in Baltimore City has led us to

draw certain conclusions, to wit:

1. It is the strategy of the plaintiffs to attack the validity of the location hearings in 1962 and 1967 and then attack, if necessary, the environmental procedures and statements and consequently delay and defeat the Interstate project in Leakin Park.

2. The group and individual plaintiffs in the case have different motivations in bringing the suit. The environmental groups appear to be sincerely interested in protecting the environment. One individual desires to stop the Interstate project and hopefully divert funds to mass transit, and another individual plaintiff obviously is in the case to further his political ambitions. I predict the day will come when these motives will be in conflict with each other over the impact and purpose to be served by mass transit.

3. The majority of the plaintiffs, group and individual, have made little or no input relative to the environmental questions at earlier public hearings, and there is absolutely no way in which their specific allegations in the law suit relating to the environment could have been anticipated. Generally, the well-organized and concise arguments offered by the plaintiffs, through their excellent counsel, are never reflected in the transcript of the location hearings or covered adequately in the draft or final environmental statement required in PPM 90-1. It should be noted that this PPM further provides in Paragraph 6(g) that the public must have available to them the Draft Environmental Statement, and this built-in discovery process affords the project opponents an excellent opportunity to review our preliminary environmental position and prepare to attack it. On occasion, the position of the opponents may be learned at the public hearing. However, their position is often disorganized and vague at that stage and not clarified

until a later court suit. Further, if there is a failure to make environmental objections to a project at a public hearing 10 years earlier, the courts will not bar the plaintiffs on the ground of laches.

4. I am of the opinion that it is absolutely imperative in the trail of environmental cases that counsel for the State avail himself of all means of Discovery. The case should be aggressively tried and plaintiffs and their environmental witnesses, etc. should be subjected to extensive interrogatories and depositions and for the first time their motives and specific environmental objections will come to light.

I speculate that the mass transit systems planned throughout the country will be subjected to future litigation, and it will also be important in those cases to quickly get to the heart of the controversy and expedite the trail of same to avoid costly delays.

PROPOSED ENVIRONMENTAL GUIDELINES - SECTION 136 (b) OF THE FEDERAL-AID HIGHWAY ACT OF 1970

It is generally agreed that environmental considerations must be dealt with early in the planning processes, and the States are now faced with a new proposed procedure that could very well eliminate many projects because the States may never meet the time deadlines set out in the Federal-aid Highway Act of 1970. I refer to the proposed environmental guidelines pursuant to Section 136 (b) of the 1970 Highway Act. Of primary importance to the State highway departments is the stipulation by this proposed PPM that an Action Plan be developed which has the approval and endorsement of the Governor. This Action Plan requires a high degree of interagency and intergovernmental coordination which will be time-consuming and when added to the usual delays in promulgating PPM's the problems of the States will be compounded.

The proposed PPM indicates that the environmental considerations should begin in the Systems Planning Stage for all modes of transportation and carry through to the final design stage. In Maryland, this would involve the State's Secretary of the Department of Transportation down through all of the divisions and bureaus of the State Highway Administration.

It is further stipulated that the Plan must be submitted by April 1, 1973, to the Federal Highway Administration for approval to become effective on October 1, 1973. Without such approval, no location approvals will be forthcoming from the FHWA. These environmental guidelines state that the National Environmental Policy Act of 1969 requires that agencies use a systematic interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and decision making which may have an impact on man's environment. I suggest that this broad new requirement will be very difficult to implement unless the Federal Government pays the full cost of the additional expense to meet their requirements. Upon the issuance of this proposed PPM, the State must review its present organization to ascertain the availability of personnel necessary to comply with the provisions as set forth. Many States have been unable to increase the personnel to accomplish the existing Federal Environmental Policy and as a matter of fact, many States have lost personnel.

The full coordination with local, State, and Federal clearing houses, and the public comment which is required by Section 5 (c) of the proposed guidelines will be difficult to handle and will create additional red tape. It was anticipated that the Federal Highway Administration was going to simplify their procedures and streamline the PPM and guidelines. If the Action Plan is implemented without provision for Federal funding of the

States' additional cost, and procedures are not streamlined, it appears that we are headed in the opposite direction.

Under the 136(b) guidelines, noise and air pollution standards will be forthcoming and will also create additional problems. A preliminary estimate to staff a 25-man Action Plan Environmental Group with salaries ranging from $10,000 per year upward would be approximately three-quarters of a million dollars a year. The critical question is whether the Action Plan can be implemented and funded satisfactorily to enable a highway department to meet the deadlines set forth by the Federal Highway Act of 1970. Under existing Maryland law, additional staff and money must be approved and budgeted by legislative act. Endorsement by the Governor does not guarantee legislative approval as evidenced by the fact that our Legislature last week overrode 3 vetoes by the Governor. We are already burdened by environmental procedures which cause delay and I am certain that these new proposed guidelines will provide opponents of the highway system with an additional area to attack. In the event the courts apply the Action Plan requirements, retroactively, I foresee additional delay which we can ill afford.

Moreover, all this merely clears the way to proceed in recruiting professionals with a number of skills that are in very short supply, particularly at the salaries which State government can afford to pay in competition with other employers.

I think that the additional delay occasioned by these new procedures of Section 136 (b) of the 1970 Federal-aid Highway Act, the built-in problems of administration which relate to the preparation and review of environmental impact statements, and the complex matter of adapting to a new set of rules for programming and building highways all are very serious.

In the future if the courts rule that the State highway department prepare the environmental statement and FHWA must also participate, the program will face a critical situation.

MR. NETHERTON: Thank you Mr. Rogers. I think your point about using the discovery process is very important. I am wondering, however, whether information concerning the environmentalists' position and the feasibility of adapting highway plans to accommodate it really is something that can or should be supplied by the Sec. 102 statement?

This probably is a question which concerns lawyers for environmental groups as much as lawyers for highway departments, and so I will use it as an opportunity to invite Robert Kennan, Counsel for the National Wildlife Federation, to offer his comments.

MR. KENNAN: Let me give a perspective for my remarks by quoting something Frank Turner said at the recent annual meeting of the American Association of State Highway Officials in Miami. He said:

> "It is a fact that in many of the legal actions being pressed in courts around the nation, it is charged that there have been inadequacies in highway planning. These critics are either misinformed or uninformed. To put it bluntly, they do not know what they are talking about."

I think it only fair to repeat that before discussing the administration of the National Environmental Policy Act from the point of view of the National Wildlife Federaiton, for I have some criticisms to express.

First, let me say that I have not seen many 102 statements prepared under NEPA. For one thing, it is very difficult for the public to obtain copies of them. If you order them at the FHWA's regional offices you are charged 50 cents a page. If you write to the Environmental Law Institute in Washington, D. C., and wait for two weeks you can get them for 10 cents

a page. The National Technical Information Service has final statements only at a charge of $3.00 up to 300 pages and $6.00 over 300 pages, with two or three weeks time to wait for them. There is no single, central repository for environmental statements in the regions, or Washington, and no public duplicating facilities in any of the FHWA regional offices.

As to the 102 statements I have seen, they can be summed up by the word "appalling." In my view FHWA has, from the day NEPA was enacted, been inviting litigation. Ed Reis tells me there now are some 50 environmental cases pending involving FHWA, and I predict this is only the beginning.

One reason for this, I think, is that there was no opportunity for public comment on PPM 90-1 before it was adopted. There was no way that FHWA or the Council on Environmental Quality or any State highway department could know what objections plain citizens and environmental organizations might have to those procedures. They were circulated in draft form to State highway departments through the FHWA Division Engineers. The draft that I was able to see during this process was incomplete, and the final draft that was issued by FHWA was a substantial departure from it.

There is no procedure in FHWA for a member of the public such as myself to obtain copies of PPM's, IM's, or any other FHWA orders on a regular basis. Although I am involved in several highway cases, I did not know personally that a certain document affecting these cases had been issued until two months after it appeared.

These are indicative of some of the problems that we on the outside face in dealing with the highway departments and the Federal Highway Administration.

As to PPM 90-1 itself, I would cite two or three minor matters and then discuss several major ones. First, the provision for public distribution

of environmental statements are entirely inadequate. Provision is made for distribution at the location hearings themselves. This is the kind of procedure that builds in litigation because if you are given a draft environmental statement at the location hearing, and you know that a final statement is prepared after the location hearing, where are you going to make your input?

Obviously you want to make your input at a hearing. This is the most effective way to do it. This is the time when the highway department personnel are present and supposed to be receptive to public contributions. But if you are given these statements at the hearing, how can you participate meaningfully in the process?

Second, PPM 90-1 is tied completely to PPM 20-8 procedures. Because of that fact and because PPM 20-8 is ambiguous and unclear one can anticipate that the problems of retroactivity, and disputes over the interpretation of PPM 90-1 will have to be referred to the courts in the same manner that they have been with PPM 20-8. For example, PPM 90-1 defines a new term in the lexicon of highway builders when it uses the word "highway section." Is that term the same as "project" as used in PPM 20-8? If so, why doesn't PPM 90-1 say so? If it isn't, why isn't it? And how is it different?

Third, PPM 20-8 presents particular problems with respect to location and design approval. PPM 90-1 acknowledges that prior to the time PPM 20-8 was issued there was no such thing as formal design approval. It does not indicate that in most States there was no such thing as formal route location approval, particularly with respect to primary system highways. PPM 90-1 contains a "bootstrap" amendment to PPM 20-8 which calls for the State highway department to decide when design approval occurred. This is subject to attack under the Overton Park decision and more recent cases as

being in the nature of after-the-fact argument or, as the courts put it post hoc rationalization. The criteria set out in PPM 90-1 for deciding when design approval took place are not completely consistent with the criteria in PPM 20-8. For example, PPM 90-1 states that one criterion for design approval is the granting of unconditional right-of-way acquisition approval. But if you look at PPM 20-8, Section 10 (d)(2) says clearly that right-of-way acquisition takes place after design approval is given. This is the kind of internal inconsistency that invites litigation.

I say all this because I have given PPM 90-1 some ten hours of review since it was issued. Had it been submitted for public comment, those ten hours would have been spent before it was put in final form. I suggest that a good part of the delay you are going to be seeing as a result of litigation over that PPM is attributable to FHWA's attitude reflected in the remarks of the Administrator that common, plain, ordinary people and representatives of environmental organizations who have the temerity to criticize the highway program do not know what they are talking about.

The more serious problems under PPM 90-1 seem to me to be, first, the implications of the February 1, 1971, cut-off date. I won't take time to go into the details of the PPM as it relates to February 1, 1971, but I recommend that everyone read the Calvert Cliffs case in which a similar type of cut-off date was rejected by the D.C. Circuit Court of Appeals as being inconsistent with NEPA. I suggest that cut-off date is going to lead to some litigation.

More seriously, there is a problem of the delegation of NEPA responsibilities to the States. First, in the Federal-aid highway program the States are applicants for Federal grants-in-aid. They are in precisely the same posture as the applicants for Federal permits or licenses or

approvals which are brought before other ogencies. Frankly, it does not make much difference to me what the practical problems of administering NEPA present to the Department of Transportation. It is perfectly clear from the legislative history of this act that it was intended to be an "action-forcing" mechanism for Federal officials. The act itself clearly says that it is Federal officials who have the responsibility to do the work under NEPA.

Second, if the States are responsible for preparing these documents you cannot expect an impartial environmental evaluation. You cannot expect reasonable that the States will examine the alternative of taking no action. It just does not work that way. How can you expect a State that is asking for 90:10 reimbursement or 50:50 reimbursement, and looking to these Federal sources of revenue as important factors in its own programs to evaluate impartially the alternative of not doing what it proposes to do? This is an internal inconsistency in the procedure that leads one to conclude that FHWA has got to do its own analysis and evaluation if it is to implement the policies of NEPA.

Fourth, if the States undertake the responsibility of preparing the environmental statement, there may be very little way in which members of the public may become informed and active participants in the process before a draft is completed. This is a very serious matter. If the State in undertaking its environmental evaluation subcontracts that responsibility to an independent consultant, and pays that consultant, say, $200,000 to come up with an environmental statement to be used by the State in obtaining the blessing of FHWA, how is the public to participate in the environmental evaluation? How is the public to know what the environmental problems are? If you don't involve the public, you don't know what it is thinking until you

get into court.

I cannot believe that the States' use of consultants is the way to introduce impartiality. Suppose someone goes to the consultants and asks: What are your traffic projections? And what computer programs did you use; and why? He will, in all likelihood, be told to wait until the draft environmental statement is issued. If the FHWA were responsible for preparing these statements, it might be possible under the Freedom of Information Act to require the Federal officials to be more responsive.

MR. NETHERTON: I think it was predictable that this discussion would bring forth critisisms of the highway program. How we listen to these criticisms is the important thing.

In the overview, as Mr. Jellineck stated, progress is being made, and this time next year it will be possible to say that the 102 statements are more sophisticated and constructive than they now are. But, aside from that, I am interested in these criticisms in order to find out what it bothering people who are responsible for preparing and reviewing these statements.

I am also interested in why these shortcomings occur. Is it because we have misconstrued the purpose or mission of the 102 statement? Frequently we hear it said--as Judge Train stated to Congress in the recent "Red Tape Hearings"--that the strategy of NEPA is to disclose on the public record the effects of public works proposals on the environment. This does not say, or mean, that anything necessarily will be <u>done</u> about these effects. Those questions arise later.

If, on the other hand, this recital of shortcomings indicates that governmental agencies are reluctant to change old policies and ways doing their work, this also is important to recognize. Here, again, in the second annual report of the Council on Environmental Quality it was noted that:

> Federal agencies accustomed to the role of advocacy of behalf of their activities are now required by law to engage in public self-criticism. They must detail adverse impacts and candidly assess alternatives.

This, it has been pointed out, is not an easy role for agencies to assume.

It may also be that we are expecting too much from the environmental impact statements, and the results they bring. Here it is interesting to consider following quotation from Federal HIghway Administrator Turner in the Red Tape Hearings:

> The point at issue is related to the requirement that if you make a finding that you must take some land, then you must design the facility in such a way that you minimize any damage or impact on the area....The point is whether or not you <u>can</u> minimize the damage with the interchange at the location in the park. This is a question of difference of values. We in the transportation business and the State departments of transportation think that we are building highways to provide transportation. In so doing we want to minimize the adverse impact on other things. Environmentalists, however, are looking at it from a part standpoint, not worried much about transportation. They say preserve the park first, and then take care of the transportation at the same time. So we have a conflict of philosophies and values here which eventually we have to resolve.

In discussing the state-of-the-art regarding 102 statements, I hope we do not fall into the trap of expecting the procedure under Section 102 (2)(C) to solve these conflicts of philosophy which persist even after the responsible public agencies have the facts and have weighed their significance, insofar as it is predictable. We should not expect this procedure to do more than its designers intended it to do. To err in this respect will, I suggest, lead to the situation that prompted one member of Congress to ask the witness in a recent hearing on environmental matters: "Do you sometimes feel we are setting up adversary proceedings in which the government is fighting itself constantly?"

QUESTIONS FROM THE AUDIENCE

QUESTION: Mr. Rogers, you indicated you had found that some of the objections raised by environmental groups related more to elements of design than to location. And, it seemed to me, you implied that you would like to see the environmental impact statements propared after the location hearing and prior to the design hearing. Is this your suggestion for improving the relevance of the environmentalists' objections?

MR. ROGERS: The final impact statements are prepared after the location hearings under the present procedure. I was talking about the particular situation where you have gone to location approval, and in some other States you also have had design approval, and then are faced with litigation where the problem turns out to be to determine what really are the environmental objections. This is a problem because the record you have before you up to that point does not make it clear what, if any, objections these groups have. They have not made enough of an input up to that point to show what they object to.

Our experience has been that in the location hearings we get very little input from environmental groups. This has come later in the form of a more sophisticated and systematic attack on the project. I think the point I tried to make was the same that was in the quotation from Frank Turner that was read earlier. The philosophy of environmentalists concerning parks, which now has been raised by the Overton Park decision is almost to the level of a commandment, that "Thou Shall Not Go Through a Park." They do not want the highway project under any circumstances. They have many motives for this: They claim parks are not replaceable; they hope highway funds can be used for mass transit; they seek political advantages. In

our depositions of the environmentalists and their witnesses we found them bringing up areas of objection which indicates not so much that they were not as against going through the park as they were concerned about drainage, flooding, and other things that could be handled at a design or construction stage. If the State highway department had these inputs at, or right after the location hearing, it could direct its attention to doing something about them by the time the design hearing was held.

In our case in Baltimore, we never got to the design stage and yet these are the objections being raised.

QUESTION: Do I understand that you feel the environmental impact statement should be prepared prior to the location hearing?

MR. ROGERS: The preliminary draft of the statement is prepared prior to the location hearing under our procedure now. Under the procedure PPM 20-8 this draft is available at the hearings, and presumably there will be some input. After the hearing the final environmental statement is written, and the project is ready for location approval. Now, Mr. Kennan's point is that many environmentalists feel their next step has got to be to go into court; my point is that if we got maximum participation in the location hearings by the environmental groups the highway departments could remove many of their objections, and by the time the project got up to design approval stage there would be a full picture of exactly what remaining environmental issues were irreconcilable. In fact, it is my understand that even at the stage of the design hearings it still is possible to consider changing a route location.

QUESTION: Then you would like to see a more extensive environmental impact statement and more extensive involvement of environmental groups in the preparation of that statement from its earliest possible time.

MR. ROGERS: Yes, of course, and in all candor I say that this has not been reflected in our experience with the environmental groups.

QUESTION: The reason I am pursuing this point is that there have been repeated suggestions that if we could push the environmental assessment process as far back as possible toward the beginning of a project it would be easier to raise fundamental questions about the allocation of public resources and the system plan of the highway program. I expect that in theory this is true, but, on the other hand, it very likely would introduce controversial issues and negotiations into the process of highway planning from an earlier stage.

MR. ROGERS: From a conceptual viewpoint I believe there is a good deal of merit in what you say. Realistically, however, we are not dealing with those kinds of situations. Today we are having to go to court on projects which had their location approval six or seven years ago. Some other jurisdictions are defending cases where the design and construction approval occurred that long ago. In such situations, everyone has to go back and try to reconstruct an environmental statement. The trial of such a case is also more difficult, and under those circumstances we feel we are acting quite properly by resorting to discovery procedures. These steps inconvenience the plaintiffs, and they also now have started to use discovery proceedings with the State highway department. But, at least it is helping us clear up the issues and letting us see where we both are heading.

MR. KENNAN: May I add something to that? With all due respect for your experience in the Leakin Park case, there have been a number of cases around the country where location approval has occurred several years ago and the process is now at the point where construction is imminent. These are surely

the most troublesome cases. But it seems to me the most sensible solution to those problems is a flexible one. It requires good faith and understanding on both sides. It seems to me that it makes no sense to set up arbitrary time criteria as PPM 90-1 and PPM 20-8 do. These old cases are mainly in urban areas and very controversial, and probably they are best handled on an ad hoc basis. With respect to NEPA compliance, the question must be in each case: Has the State highway department committed sufficient resources of all kinds before NEPA's effective date to the location and/or design of the project to make it impossible as a matter of public policy as well as impracticable to go back and comply with the Act? You should not become preoccupied with dates; you should be coping with problems as they come up on an individual basis. In order to do this, from the highway department's point of view, there must be a willingness to adopt a policy of self-effacing honesty about its past actions. Speaking as one who sits on the other side of the table in these cases, I do not find that this attitude has been very much in evidence. Moreover, once the parties go to court everything takes on an adversary character. Unless there is a genuine willingness to back up and take a hard look at the need for and consequences of a project it is inevitable that many of these controversies will wind up in court.

So far as the motivation of environmental organizations is concerned, I can only speak for my own and assure you that a decision to litigate a controversy is made only after the soberest thought. We know how much time and effort is needed to try a case of this type. Generally my experience has been that there is at least one organization in the picture that has sincere motives, and is not out for a show to the grandstands, or to advance its own selfish interests.

QUESTION: Mr. Jellinek, in order to get an idea of the magnitude of the efforts involved in preparation and review of impact statements, what is CEQ's present estimate of the number of statements to be prepared each year for highway projects?

MR. JELLINEK: I cannot give you a firm figure for what the annual average number is going to be, but most of the figure I just gave you were highway project statements. And most of the highway statements were for very small segments of highway. CEQ is concerned about this trend, and has been trying to work with FHWA to see if there is a mechanism for handling highway projects in larger stretches and so reduce the number of statements.

QUESTION: Nationally there are about 8,000 to 10,000 highway projects undertaken each year.

May I turn to another matter: As I read the CEQ guidelines you require an impact statement on each departmental report, at least by the agency having principal responsibility for a departmental administration of the bill introduced in Congress for that agency when it submits a report on the legislation to submit an environmental statement. Are you actually enforcing that?

MR. JELLINEK: That is handled in conjunction with OMB's Circular 72-6.

QUESTION: The reason I am asking is because about 12,000 bills are introduced in the House of Representatives each year. It is the practice of the House Public Works Committee, and the practice of most of the Committees, to automatically refer each bill that comes to it over to the interested and affected executive agencies for a report on it. If we get a bill and determine that there is an interest in it in the Federal Power Commission, Corps

of Engineers, Department of the Interior and AEC, we would send it to all of them.

As I understand your guidelines, the agency that would have the principal responsibility with respect to whatever that bill pertains to will also have the responsibility of submitting with its report on the legislation an environmental impact statement. If that be the case, and if some 12,000 statements are required just for that type of thing, enforcement of the guideline would assume a sizeable program. I have read literally thousands of departmental reports, and I have yet to see an environmental statement filed with one.

MR. JELLINEK: I am sure the entire 12,000 bills would not be considered "major actions with significant impacts on the environment." Also, CEQ does not enforce that requirement per se.

QUESTION: I do not think your guidelines require an impact statement on every piece of legislation proposed or reported upon. I don't think "significant impact" is a criterion in that case.

MR. JELLINEK: Only if the agency itself is the proposer of the legislation does it have responsibility for preparing a statement. As to enforcement, CEQ interpretes the law as saying that this is the agency's responsibility, not the Council's. We feel the act makes these requirements on the Federal agencies, and so the Council does not enforce per se.

QUESTION: The reason I asked is because in the context of what I understood the guidelines to be I felt that instead of talking about several thousand statements we might be talking about 40,000 or 50,000 statements per year. I wonder if CEQ or OMB has made any projections of what will be involved in

the way of staffing the agencies for this work and the cost that will be involved.

MR. JELLINEK: I think your figures are high; I don't think the number of statements will be that many. As to staffing, I think this is probably a question that all agencies face equally. We know that in the strictest meaning of the act statements may not be prepared where they should be or they may not be of the quality they should be. But we hope that agencies will get themselves in a position to begin to meet the requirements of the act--at least in the instances where the most important impacts on the environment are involved.

MR. NETHERTON: At that point I am going to call a halt to this session, and extend to the panelists my own personal thanks and the thanks of the Committee for a very interesting and informative discussion.