HIGHWAY RESEARCH
CIRCULAR

Number 150 | Subject Classification | Legal Studies
Roadside Development
Land Acquisition | November 1973

RECENT DEVELOPMENTS IN ENVIRONMENTAL LAW

S. Reid Alsop
Office of the Chief Counsel
Federal Highway Administration

The following remarks were presented at the Highway Research Board's 12th Annual Workshop on Highway Law held at the University of Colorado, July 29-August 3, 1973.

In the last few years there have been major developments in what is considered the area of "environmental" law. Generally, as concerns construction projects such as highways, this involves formulation of, and compliance with requirements and procedures that relate to the impact of the project on its surroundings.

As you know the National Environmental Policy Act[1] (NEPA) has had a greater impact on the Federal-aid highway program than any other environmental requirement. The major requirement of NEPA is that an environmental impact statement (EIS) be prepared with regard to every "major Federal action." In addition, during the past year other Federal laws have been implemented, enacted, or proposed that will have a significant impact on the highway program.

I will discuss recent developments relating to the administration and interpretation of NEPA and will mention some of the other Acts, primarily the Clean Air Act, that can be expected to have major impacts on the highway program.

I. NATIONAL ENVIRONMENTAL POLICY ACT

There is now a substantial body of law dealing with NEPA. Most of the cases have concerned either its application and procedural compliance or the adequacy of environmental impact statements that have been prepared.

HIGHWAY RESEARCH BOARD
NATIONAL RESEARCH COUNCIL NATIONAL ACADEMY OF SCIENCES - NATIONAL ACADEMY OF ENGINEERING
2101 CONSTITUTION AVENUE, N.W. WASHINGTON, D.C. 20418

1. APPLICABILITY

A. Major Federal Actions.

NEPA provides that an environmental impact statement must be prepared for "major Federal actions significantly affecting the quality of the human environment;" the question of what constitutes such a "major Federal action has been litigated on a number of occasions. For example, recent cases have held that an Interstate Commerce Commission proceeding on a proposed railroad line abandonment may constitute a major Federal action[2] significantly affecting the environment, and that a HUD mortgage guarantee can be a major Federal action.[3] However, approval of a bank charter by the Comptroller of Currency was held not to be a major action that would significantly affect the environment.[4]

The fact that the bank could make loans for projects that might adversely affect the environment was considered too speculative and indirect a result of the Federal action involved.

In a case involving a highway project, it was held in Citizens Organized to Defend the Environment v. Volpe,[5] that a single crossing of an Interstate highway by a mining shovel is not a major Federal action. The court stated that: "A major Federal action is one that requires substantial planning, time, resources, or expenditure. Clearly, NEPA contemplates some Federal actions which are minor, or have so little environmental impact as to fall outside its scope." An action significantly effecting the environment is one that "has an important or meaningful effect, directly or indirectly, upon any of the many facets of man's environment."

In another highway case, Julis v. Cedar Rapids,[6] the court held that a TOPICS project that involved improvement of an existing road and required acquisition of only a small amount of right-of-way, was not a major Federal action for purposes of NEPA.

FHWA procedures, contained in PPM 90-1, paragraph 2, Appendix F, also provide guidance as to what constitutes a major Federal action.

B. Application to On-going Projects.

One of the primary legal problems involved in the implementation of NEPA has been its application to on-going projects. When NEPA was enacted many Federal-aid highway and other projects were at various stages of development. Section 102 of NEPA stated that it should be applied "to the fullest extent possible."

Much of the litigation involving NEPA concerns its applicability to projects that were initiated prior to January 1, 1970, NEPA's date of enactment. The method of applying NEPA to on-going projects has been a subject of continuing concern and controversy.

As regards highway projects, PPM 90-1 established design approval as the key event to be used in applying NEPA to on-going projects. It was felt that design approval was a logical event in project development to use in applying NEPA. Location approval and design approval are the two major Federal approval actions that establish the exact location and design of the highway facility. Since enactment of NEPA there has been a considerable amount of litigation concerning on-going highway projects. Some cases have held that preparation of an EIS is not required if Federal location and design approval was given prior to enactment of NEPA.[7]

However, a number of Court decisions have taken the position that if there is a significant amount of construction remaining uncompleted, an EIS is required. Decisions of 10 of the 11 Circuit Courts of Appeals indicate that an EIS would be required prior to approval of plans, specifications and estimates for a highway construction project, regardless of the dates of Federal location and design approval.[8]

Partially in response to these developments, FHWA is now proposing a change to PPM 90-1 that would require preparation of environmental impact statements on projects which have not yet received either approval of plans specifications and estimates (PS&E), or approval of advertisements for bids, regardless of the dates of location or design approvals. The most important consideration in implementing this proposal is the date that it becomes effective.

This proposal has been made the subject of a formal rulemaking procedure. A Notice of Proposed Rulemaking, outlining the proposed action and soliciting comments, was published in the June 27, 1973, Federal Register (38 F.R. 16915). This information was also promulgated in a June 18, 1973, FHWA Notice. All comments received prior to August 11, 1973, will be considered. The proposed action could delay as many as 875 projects, until an EIS is prepared.

It should be noted that the National Wildlife Federation brought an action in the District Court for the District of Columbia[9] seeking to enjoin the Federal Highway Administration from approving PS&E or advertisement for bids on any of these projects and to require preparation of an EIS for each project.

A settlement of this action has been reached with the National Wildlife Federation. The settlement provides that, after August 15, 1973, action

will be halted on on-going projects which have received design approval, but for which an EIS has not been prepared. These projects will undergo a re-assessment which will consider the status of the projects and the relative benefits to be derived from an EIS, and will include solicitations of public comments. If there is any doubt, an EIS is to be prepared. On the basis of this reassessment each project will then either be halted until an EIS is prepared, or will be allowed to proceed.

II. ADEQUACY OF THE ENVIRONMENTAL IMPACT STATEMENT

With regard to projects where the applicability of NEPA is not an issue and there has been full compliance with procedural requirement, plaintiffs have challanged the adequacy of environmental impact statements prepared by Federal agencies. The major issue in such cases is whether a Federal court can engage in substantive review of an EIS that has been prepared in accordance with proper procedures.

Some courts have held that NEPA is only procedural in nature and establishes no substantive rights.[10] However, in reviewing an EIS it is often difficult for courts to separate the procedural and substantive matters. For example, it would be difficult for a court to determine whether an EIS has fully considered "alternatives to the proposed action," as required by Section 102(c)(iii) of NEPA, from a procedural point of view, without giving some consideration to substantive factors that determine the types of alternatives that should be considered.

Several recent cases have focused directly on the scope of a court's review of an EIS. In EDF v. Corps of Engineers (Gillham Dam)[11] the Eighth Circuit Court of Appeals held that NEPA was intended to cause agencies to consider and give effect to environmental goals, rather than to merely file detailed impact studies, and that courts have an obligation to make a substantive review of agency findings and determinations. The standards of review to be used is that set forth in Citizens to Preserve Overton Park v. Volpe[12]. This was amplified in EDF v. Froehlke,[13] which held "that District Courts have an obligation to review substantive agency decisions on the merits to determine if they are in accord with NEPA. The review is a limited one for the purpose of determining whether the agency reached its decision after a full, good faith consideration of environmental factors made under. . . NEPA; and whether the actual balance of costs and benefits struck by the agency according to these standards was arbitrary or clearly gave insufficient weight to environmental factors."

This view was subsequently endorsed by the Fourth Circuit in Conservation Council of North Carolina v. Froehlke,[14] which stated: "We think that the District Court must engage in a 'substantial inquiry' to determine

'whether there has been a clear error of judgment.' " This view has been accepted by some District Courts in other circuits.[15] Accordingly, it appears that in cases where Federal and State agencies fully comply with all procedural requirements of NEPA some courts will examine the substantive content of the EIS.

III. OTHER ENVIRONMENTAL REQUIREMENTS

During the past year or so a number of new environmental requirements that will have a significant effect on the Federal-aid highway program have been proposed or put into effect.

1. CLEAN AIR ACT

The most significant of these are requirements imposed pursuant to the Clean Air Amendments of 1970.[16] The Clean Air Act as amended authorizes the Environmental Protection Agency (EPA) to identify harmful air pollutants and to establish national ambient air quality standards. Pursuant to the requirements of the Act the nation has been divided into 247 air quality control regions. Each region must attain the national air quality standards by May 31, 1975, except that in certain circumstances the Administrator of EPA may grant a region a 2 year extension, until 1977. Section 101 of the Act provides that each State must submit an implementation plan for each region or part of a region in the State describing exactly how the national air quality standards are to be achieved, maintained and enforced. In many cases this goal will require changes in State laws.

The Administrator of EPA reviews each implementation plan. If a State fails to submit a plan or if EPA finds that all or part of a plan fails to meet the requirements of the Act, EPA is authorized to modify the plan or promulgate its own plan.

During the last few months EPA has been receiving and reviewing implementation plans, and in some cases the plans have received substantial publicity.

In areas where air quality must be improved in order to meet the national standards the primary technique proposed in implementation plans has been the reduction of emissions from stationary sources, such as factories, power plants and incinerators. However, in some urban areas controls on these stationary sources will not be sufficient to achieve the air quality standards. In such areas various controls also are to be imposed on mobile (i.e. transportation) sources of pollution through adoption of transportation control strategies. Approximately 38 urbanized air quality control regions, containing 43 percent of the nation's people and 42 percent of its motor vehicles will be forced to adopt some type of transportation control strategies to achieve the air quality standards.

The Federal Highway Administration and Urban Mass Transit Administration have reviewed some of these proposed transportation controls and have submitted comments to EPA.

Most of the proposed transportation control strategies are designed to reduce total vehicle miles traveled (VMT), and thus reduce the amount of air pollution generated by automobiles. Some of the proposed strategies include refitting older vehicles with pollution control devices, imposing parking restrictions, providing public transportation, encouraging car pooling, establishing exclusive bus lanes, undertaking TOPICS projects to improve traffic flow, and rationing gasoline.

The transportation control strategies do not specifically discuss the construction of highway facilities. However, in areas where VMT must be reduced the justification for major highway construction projects, especially those serving commuters, will be weakened.

However, another section of each implementation plan, relating to maintenance of air quality, will have a much more direct effect on highway construction.

The main reason for imposing controls on stationary and mobile sources is to attain the clean air standards. However, the Act requires not only that the standards be attained, but also that they be maintained thereafter. Natural Resources Defense Council v. EPA[17] emphasized the fact that State implementation plans must provide for maintenance of air quality standards. As a result of this decision EPA, on March 8, 1973, issued a proposal to require maintenance of air standards (38 F.R. 6279). It issued a Notice of Proposed Rulemaking on April 18, 1973, (38 F.R. 9599).

The introduction to the April 18, 1973, Notice states:

> ". . . the term "stationary sources" generally has been interpreted to mean facilities that affect or may affect air quality primarily because of their own air pollutant emissions. It is generally recognized, however, that not only the types of facilities commonly known as stationary sources but also facilities such as airports, amusement parks, highways, shopping centers, and sport complexes also affect or may affect air quality by indirect means, primarily by means of the mobile sources activity associated with them. Such indirect effects on air quality may also have an impact on maintenance of the national ambient air quality standards. Accordingly, the proposal set forth below would require, with respect to not only "stationary sources", in the traditional sense,

> but also certain other types of facilities, an assessment of their construction or modification and a determination as to whether there would be interference with maintenance of any national standard. In the Administrator's judgment, this amplification of the requirements of 40 C.F.R. 51.18 is a step necessary to ensure the maintenance of the national ambient air quality standards, particularly for mobile source-related air pollutants beyond 1975."

The April 18 Notice proposes that State or local governments be required to review and approve all such facilities, including highways, to insure that they will not result in a violation of air quality standards after May 31, 1975. The proposal was adopted in regulations promulgated by EPA on June 18, 1973, (38 C.F.R. 15834) as an amendment to 40 C.F.R. Part 51.

The final EPA regulations also require that each plan have a procedure for identifying areas of projected growth in which air standards may be exceeded within the next 10 years.

This regulation would establish controls on growth and a system of land use controls as a part of each implementation plan, for the purpose of insuring continuing compliance with air quality standards.

Thus, key decisions concerning the location and construction of highways and other major facilities will be subject to review and approval by the State or local governmental agency charged with implementing the Clean Air Act. EPA's regulations require that such agencies must have authority to prevent or modify any such project.

This requirement, that highway projects be made consistent with the provisions of approved State implementation plans, is also contained in Section 109(j) of Title 23, which was added by the 1970 Highway Act. That section provides that, after consultation with EPA, FHWA shall issue guidelines to assure highways constructed under Title 23 are consistent with any approved State implementation plan.

It is probable that the consistency of highway projects with the requirements of State implementation plans will be the subject of litigation. It should be noted that Section 304 of the Clean Air Act specifically authorizes citizen suits to enforce the provisions of a State implementation plan.

2. LAND USE POLICY AND PLANNING ASSISTANCE ACT

I have mentioned that EPA regulations relating to maintenance of air quality would establish a system of land use controls. It should also be mentioned that a bill entitled the Land Use Policy and Planning Assistance

Act appears likely to be enacted either this year or in 1974. It has already passed the Senate.

The purpose of this proposed Act is to encourage States to establish a comprehensive Statewide land use program, including a system of land use controls. Federal grants would be available to assist States in developing such a program and the program would have to conform with certain broad Federal guidelines. In any State electing to proceed under the proposed Act, State land use controls would have a major impact on the planning of highways.

In addition, some previous versions of this proposal provided for sanctions against States that failed to establish a State land use program. These sanctions were in the form of a reduction of Federal funds available to such States from the highway trust fund, airport construction fund, and land and water conservation fund. Such a provision could still be added to the bill prior to its enactment.

3. OTHER ENVIRONMENTAL REQUIREMENTS

Other important environmental requirements are contained in Sections 109(h) and 109(i) of Title 23. Section 109(h) is designed to insure that adverse economic, social, and environmental factors have been considered in developing highway projects. Accordingly, States are now preparing Action Plans which are intended to insure such consideration. (This general subject will be discussed in the Thursday morning session.)

Section 109(i) directs FHWA to promulgate standards for highway noise levels that would be applicable to projects that receive location approval after July 1, 1972. Standards are now contained in 23 C.F.R. Part 772 (38 F.R. 15953). Generally, these establish design noise levels for various types of adjacent land uses.

In conclusion, the best preparation for suits that are based on environmental factors is to have a sound administrative record that can demonstrate procedural compliance and support any findings or determinations made.

FOOTNOTES

1. Pub. Law 91-190, 83 Stat. 852, 42 U.S.C. 4321 et seq.

2. Harlem Valley v. Stafford, ___ F. Supp. ___, 5 ERC 1503 (S.D. N.Y. 1973).

3. Silvo v. Romney, ___ F. 2d ___, 4 ERC 1948 (1st Cir. 1973).

4. First National Bank of Homestead v. Watson, ___ F. Supp. ___, 5 ERC 1497 (D. D.C. 1973).

5. Citizens Organized to Defend the Environment v. Volpe, ___ F. Supp. ___, 4 ERC 1952 (S.D. Ohio 1972).

6. Julis v. Cedar Rapids, ___ F. Supp. ___, 4 ERC 1862 (N.D. Iowa 1972).

7. Pennsylvania Environmental Council v. Bartlett, 315 F. Supp. 238 (M.D. Pa. 1970), aff'd 454 F. 2d 613 (3rd Cir. 1971).

8. Jones v. Lynn, ___ F. 2d 5 ERC 1169 (1st Cir. 1973).

   Monroe County Conservation Society v. Volpe, 472 F. 2d 693 (2d Cir. 1972).

   Arlington Coalition on Transportation v. Volpe, 458 F. 2d 1323 (4th Cir. 1972).

   Named Individual Members of the San Antonio Conservation Society v. Volpe, 446 F. 2d 1013 (5th Cir. 1971).

   Environmental Defense Fund v. Tennessee Valley Authority, 468 F. 2d 1164 (6th Cir. 1972).

   Scherr v. Volpe, 466 F. 2d 289 (8th Cir. 1972).

   Environmental Defense Fund v. Corps of Engineers, 470 F. 2d 289 (8th Cir. 1972).

   Lathan v. Volpe, 455 F. 2d 1111 (9th Cir. 1972).

   National Helium Co. v. Morton, 455 F. 2d 650 (10th Cir. 1971).

   Calvert Cliffs Coordinating Comm. v. A.E.C., 449 F. 2d 1109 (D.C. Cir. 1971).

9. National Wildlife Federation v. Brinegar, Civil Action No. 1318-73 (D. D.C. filed June 29, 1973).

10. Upper Pecos Association v. Stans, 452 F. 2d 1233 (10th Cir. 1971) vacated, remanded to determine mootness ___ U.S. ___, 41 U.S. L.W. 3287; EDF v. Corps of Engineers (Tennessee-Tombigbee) 348 F. Supp. 916 (N.D. Miss. 1972) 470 F. 2d 289 (8th Cir. 1972).

11. 470 F. 2d 289 (8th Cir. 1972).

12. 401 U.S. 402 (1971).

13. ___ F. 2d ___, 4 ERC 1829 (8th Cir. 1972).

14. 473 F. 2d 664 (4th Cir. 1973).

15. Sierra Club v. Froehlke, (Trinity River Project), ___ F. Supp. ___, 5 ERC 1033 (S.D. Texas 1973); EDF v. TVA, ___ F. Supp. ___, 5 ERC 1183, (E.D. Tenn. 1973).

16. Pub. Law 91-604, 84 Stat. 1676, 42 U.S.C. 1857 et seq.

17. ___ F. 2d ___, 4 ERC 1945 (D.C. Cir. 1973).

18. S. 268, 93rd Cong., 1st Sess.: Passed by the Senate June 21, 1973.

SPONSORS OF THIS CIRCULAR

LEGAL RESOURCES GROUP
Joseph M. Montano, Colorado Department of Highways, chairman

Committee on Environmental Issues in Transportation Law
Ross D. Netherton, Commission on Highway Beautification, chairman
Morris M. Abrams, Richard H. Broun, Robert F. Carlson, Michael R. Deckman, Joseph T. Fromme, Oscar S. Gray, Ruth R. Johnson, Robert M. Kennan, Jr., Victor J. Perini, Jr., Edwin J. Reis, Nolan H. Rogers

John C. Vance, Highway Research Board staff